



Mappinginvestmenttreaties.com: **Uncovering the secrets of the investment treaty universe**

Wolfgang Alschner and Dmitriy Skougarevskiy



The Need for a Southern Observatory on Transnational Investment

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An interview with Lauge Poulsen, author of *Bounded Rationality and Economic Diplomacy*

Also in this issue: Yukos awards set aside by Dutch court; TTIP draft to be ready by July; China–U.S. BIT: ongoing negotiations on negative lists; Three mining disputes initiated against Colombia; CETA re-opened to incorporate EU proposal for an Investment Court System; Uruguay faces second ICSID claim; SIAC releases investment arbitration rules; *Tenaris & Talta v. Venezuela*; *Gaëta v. Guinea*; *Hrvatska Elektroprivreda v. Slovenia*; *Contreras Group v. Equatorial Guinea*; *Pezold v. Zimbabwe*

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Investment Treaty News Quarterly is published by
 The International Institute for Sustainable Development
 International Environment House 2,
 9, Chemin de Balexert, 5th Floor
 1219, Chatelaine, Geneva, Switzerland

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feature 1

Mappinginvestmenttreaties.com: Uncovering the secrets of the investment treaty universe

Wolfgang Alschner and Dmitriy Skougarevskiy



One could think that the universe of international investment agreements (IIAs) has few surprises left to offer. After hundreds of investment tribunals have interpreted its obligations and thousands of scholarly contributions have analyzed its provisions the contours and content of the IIA universe should be well understood. Yet, have you heard about the revision of the Finnish model bilateral investment treaty (BIT) in the late 1990s or Japan's decision to radically redesign its investment treaty template in 2002? Did you know that the United Kingdom's treaty network is twice as consistent as that of Egypt or Pakistan? Have you noticed that Israel copied from British treaties to design its own BIT program or that 81 per cent of the Trans-Pacific Partnership's (TPP) investment chapter is the same as the investment chapter in the United States–Colombia free trade agreement (FTA), concluded ten years before, in 2006?

This is only a selection of the IIA universe's surprises that we discovered as part of our *mappinginvestmenttreaties.com* project. In that project, we treat investment treaty texts as data following an approach similar to what is employed in plagiarism detection software. Through our analysis we seek to equip policy-makers, practitioners and researchers with a more sophisticated understanding of the IIA universe and better open-access web-based tools to analyze it. In this note we explain the main concepts behind the research, outline our method and showcase the key findings.

Measuring consistency of treaty language

Countries tend to strive for consistency in their investment treaty networks. From a host country perspective, consistency facilitates compliance, as only one set of commitments has to be observed rather than a range of varying and potentially conflicting obligations with respect to investors

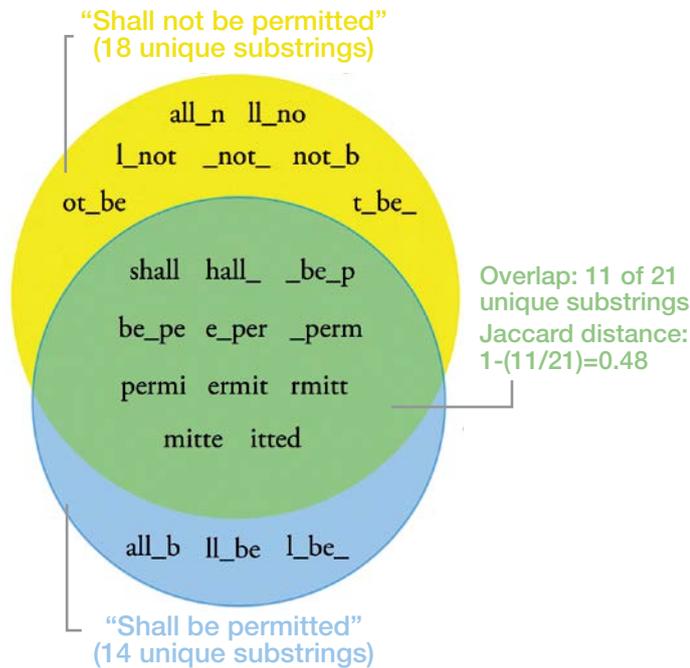
from different partner countries. From a home country perspective, a consistent treaty network offers investors with a predictable baseline of protection wherever they choose to make their investment. Frequently, states create model treaties in order to achieve such consistent treaty networks. These model agreements enshrine what a country considers to be an ideal investment treaty, making deviation from that template in negotiations generally undesirable.

“Through our analysis we seek to equip policy-makers, practitioners and researchers with a more sophisticated understanding of the IIA universe and better open-access web-based tools to analyze it.”

Consistency across treaties can be measured. When two treaties are consistent, for example, because they derive from the same model, they will employ similar or identical language. Although theoretically negotiators are free to choose different words to convey similar ideas, in practice treaty-makers rarely risk varying language merely for stylistic reasons. To ensure consistency and predictability, they instead tend to reproduce established terms and phrases, and only depart from prior formulations where they actually want to express legal differences. Hence, differences in legal language are often associated with differences in legal meaning. As a result, the textual similarity between two treaties is a good indicator of their legal consistency.

We measure the textual similarity between two treaties using the procedure set out in Figure 1. We first split each treaty into its five-character components. Second, we compute the *Jaccard* distance—a common measure of dissimilarity—between two treaties based on the five-character components that overlap between the pair. While identical treaties will have a *Jaccard* distance of 0, completely different treaties in which no textual components overlap will have a distance of 1. While the raw *Jaccard* score between a treaty pair is not very informative, comparing *Jaccard* scores across treaties yields powerful insights at the system, country and treaty level.

Figure 1: Illustration of our text-as-data procedure



System level: Rule-takers and rule-makers

A first field of application of our metric is the BIT universe as a whole. Prior empirical research suggests that developed countries have often been more successful than developing countries in influencing the outcome of investment treaty negotiations.¹ Our metric now allows us to investigate this claim quantitatively. If developed countries are the system’s rule-makers, there should be more consistency in their treaty networks than in those of developing countries.

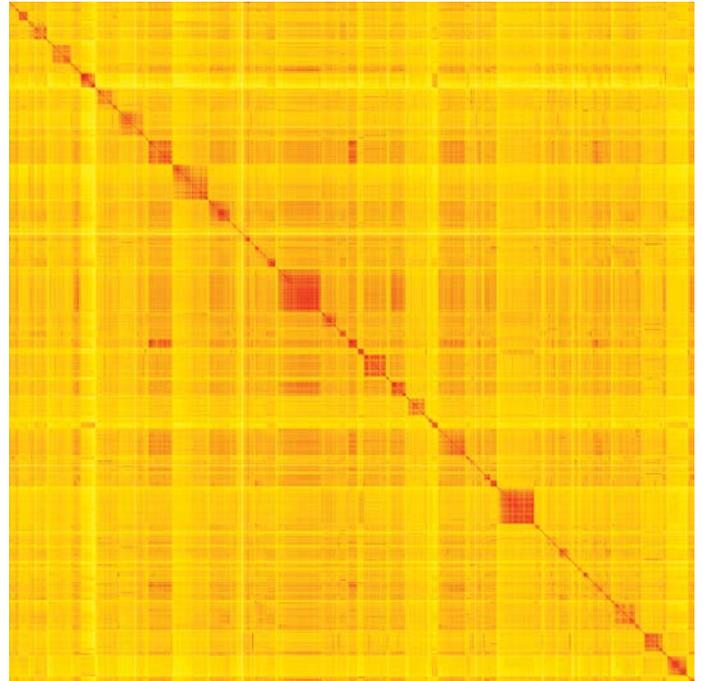
To test this claim, we have collected 1628 English-language full texts of BITs and calculated their pairwise *Jaccard* distances. We visualize the results as a 1628×1628 heat map in which high textual similarity is represented by red cells and low textual similarity by yellow cells. The diagonal line from left to right is red by default, since it compares a treaty with itself.

Two versions of this heat map are displayed: Figure 2(a) is ordered by the wealthier BIT party and Figure 2(b) is ordered by the less wealthy BIT party measured by GDP per capita in the year of treaty signature and other heuristics. While (a) shows red quadrangles that correspond to consistent individual treaty networks primarily of developed countries, (b) shows no similar patterns. Our research thus suggests that wealthier countries are the rule-makers, while less wealthy countries are the rule-takers in the BIT universe. The global champion is the United Kingdom, with an average consistency of more than 70 per cent across its vast network of over

100 BITs concluded over a span of 35 years.

Figure 2: Heat map representation of the BIT universe

(a) sorted by wealthier party in the treaty pair



(b) sorted by less wealthy party in the treaty pair

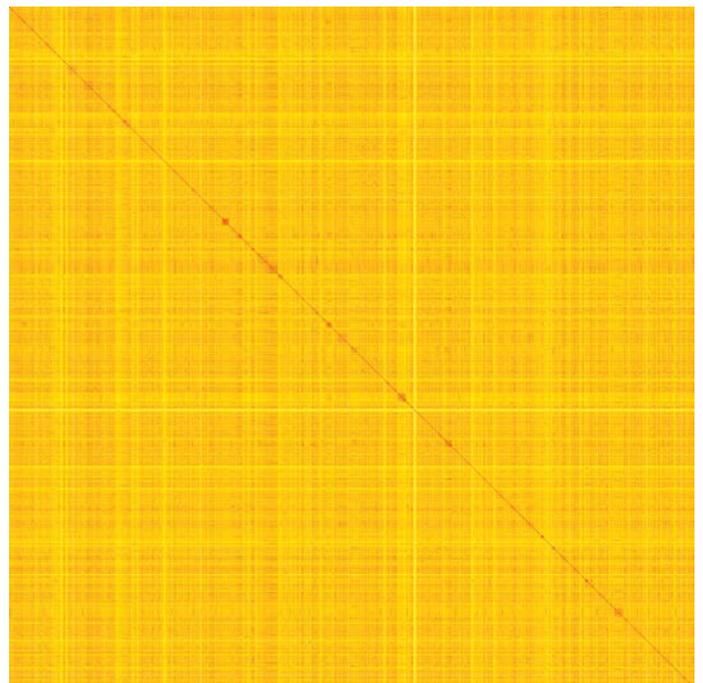
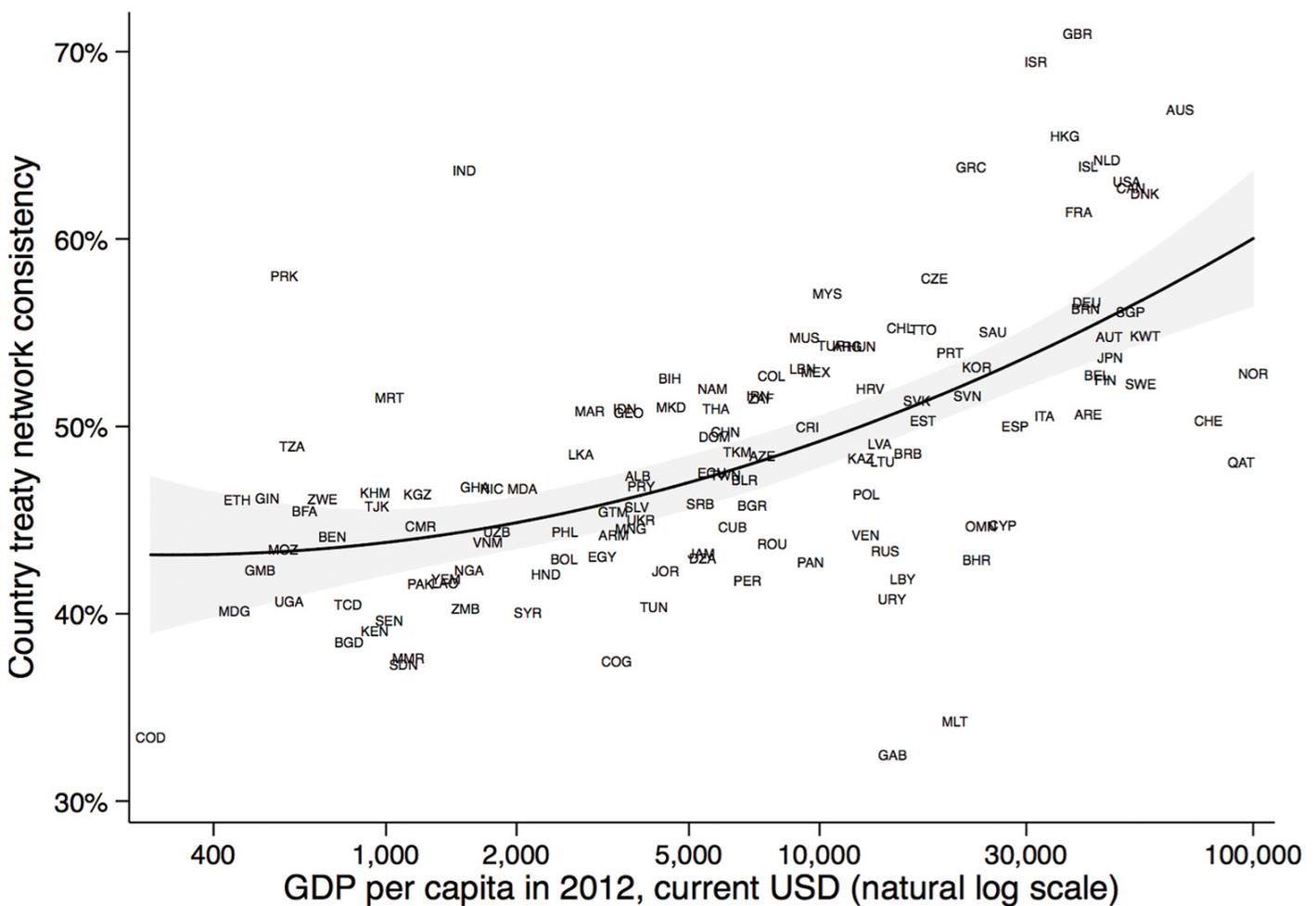


Figure 3 shows the relationship between consistency and economic power by plotting the mean *Jaccard* similarity (1 minus *Jaccard* distance)

of the treaties a country signed in relation to its GDP. In this figure we do not limit ourselves to English-language treaties, computing per-country textual similarity for French- and Spanish-language treaties as well. Then we average the per-language *Jaccard* similarities for each country that signed more than five treaties, weighting such similarities by the number of treaties signed in each language.² The quadratic trend line in black (with 95 per cent confidence intervals as shaded area) indicates a positive relationship between economic power and

consistency across the country's IIAs, but also allows us to identify two groups of countries: those positioned below the line have treaty networks that are less consistent than it is expected given their level of economic development (for example, Switzerland and Egypt). Conversely, the states above the trend line enjoy surprisingly consistent treaty networks (for example, the United Kingdom and India). Hence, economic power is not the only factor determining whether a country is the maker or taker of IIA rules.

Figure 3: Consistency across countries' IIAs and their economic development



Our research suggests, for instance, that small developing countries with a coherent investment policy and sufficient in-house expertise tend to have more success in ensuring that their preferences prevail in bilateral negotiations. Mauritius (MUS), for example, has successfully established itself as a hub for foreign investment destined for Africa and India. While Mauritius is a rule-taker in IIA negotiations with developed countries, it punches above its weight in negotiations with other developing countries: its treaties signed with India (1998), Ghana (2001) and Egypt (2003) are more

similar to Mauritian treaties than to agreements of its more powerful negotiation partners. Hence, a coherent investment strategy and technical expertise can enable even less powerful countries to affect negotiation outcomes.

Country level: Evolution in national IIA programs

A second area of application of our metric lies in the analysis of consistency and innovation in national treaty networks. While countries generally strive for consistency in treaty networks, they also want to adjust their investment policy from time

to time in response to changing circumstances. For some countries, these changes in investment treaty-making are well documented. The revisions of the U.S. model BIT, particularly the innovations introduced with the 2004 treaty template, have received considerable academic attention.³ Similarly, scholars have investigated the Canadian BIT program tracing the three-staged transition from a traditional European BIT model to the 1993 integration of North American Free Trade Agreement (NAFTA) elements to the 2004 update of the Canadian BIT template to reflect the country's experience as respondent in investment treaty arbitration.⁴ Using the *Jaccard* distance, we find these changes in investment treaty-making reflected in the heat map representations of U.S. (<http://mappinginvestmenttreaties.com/country?iso=USA>) and Canadian (<http://mappinginvestmenttreaties.com/country?iso=CAN>) treaties on our website.

The fact that our *Jaccard* distance representation of national BIT networks reveals underlying investment policy patterns can be harnessed to investigate the evolution of national BIT programs that are less well-documented than the above examples. Our analysis, for instance, shows that Japan (<http://mappinginvestmenttreaties.com/country?iso=JPN>) radically redesigned its BIT program in 2002 and that Finland (<http://mappinginvestmenttreaties.com/country?iso=FIN>) changed its model BIT in the late 1990s. Understanding patterns in national BIT networks, however, is not only important for researchers, but also for practitioners and policy-makers. Heat map representations of treaties can help identify inconsistencies in national BIT programs. Outlier treaties can become candidates for termination or renegotiation, making a BIT network progressively more consistent. Our interactive website can thus form the starting point for researchers and policy-makers alike to investigate and streamline national investment treaty networks.

Treaty level: The TPP and other copy-and-paste agreements

Finally, our metric also helps to situate individual agreements in the wider treaty universe. When a new IIA is concluded, investment lawyers and policy-makers are keen to know whether the new treaty reproduces or departs from existing practice. When the TPP was signed in February 2016, they asked: "How new is the TPP?"

Our metric allows us to provide a nuanced answer. Specifically for the TPP Investment Chapter, we found that its main text overlaps to 81 per cent with the next similar investment treaty—the 2006 United States–Colombia FTA. Moreover, our metric once applied to the article level can reveal where the 19 per cent of divergence from existing practice comes from. While some provisions, like the National Treatment

clause, have been copied and pasted into the TPP almost verbatim, other articles, such as the Minimum Standard of Treatment Clause, contain important innovations (<http://mappinginvestmenttreaties.com/specials/tpp/>). *Jaccard* distances are thus a powerful tool to quickly identify what is new and what is not in a given agreement.

The same approach can also be used to identify instances of copy and paste more generally. BITs signed by Israel, for instance, look strikingly similar to earlier British agreements, which suggests that Israel was "inspired" by the UK template to design its own BIT program. The Israel–Hungary BIT (1991), for instance, overlaps to 73 per cent with the United Kingdom–Congo BIT (1989). Copy and paste also took place in Cameroon's BIT practice when it signed almost identical agreements with Guinea, Mali and Mauritania all on the same day—May 18, 2001—during the Third UN Conference on the Least Developed Countries.⁵ Our metric can thus be used to trace normative diffusion from one treaty to another.

Conclusion

The IIA universe remains full of surprises. The examples presented here are just some of the otherwise hidden consistency trends we came across during our research. Many more of the IIA universe's secrets still remain to be discovered. We hope that our research and website can assist in that endeavour, allowing scholars to reveal hitherto unknown patterns in treaty-making and assisting policy-makers in streamlining their countries' investment commitments.

Authors

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Notes

- 1 Allee, T., & Peinhardt, C. (2010, March). Delegating differences: Bilateral investment treaties and bargaining over dispute resolution provisions. *International Studies Quarterly*, 54(1), 1–26; Poulsen, L. (2014, March). Bounded rationality and the diffusion of modern investment treaties. *International Studies Quarterly*, 58(1), 1–14.
- 2 To illustrate the approach, consider the case of France. This country has seven English-language BITs, with mean *Jaccard* distance of 0.59. However, it also has 92 French-language treaties with *Jaccard* distance of 0.37. Finally, it does not have any Spanish-language treaties. Therefore, the total coherence across 3 languages is $(0.59 \cdot 7 + 0.37 \cdot 92 + 0 \cdot 0) / (7 + 92 + 0) \approx 0.39$. So the French treaty network coherence is not 0.59 (if we took only English-language texts, as before) but rather 0.39. The resulting similarity is $1 - 0.39 = 0.61$.
- 3 Kantor, M. (2004). The new draft model U.S. BIT: Noteworthy developments. *Journal of International Arbitration*, 21(4), 383–396; Vandeveld, K. J. (2009). A comparison of the 2004 and 1994 U.S. model BITs: Rebalancing investor and host country interests. In K. P. Sauvant (Ed.), *Yearbook on International Investment Law and Policy 2008–9* (pp. 283–317). New York: Oxford University Press.
- 4 McIlroy, J. (2004). Canada's new foreign investment protection and promotion agreement. *Journal of World Investment and Trade*, 5(4), 621–646; Lévesque, C., & Newcombe, A. (2011). The evolution of IIA practice in Canada and the United States. In A. L. C. De Mestral & C. Lévesque (Eds.), *Improving international investment agreements* (pp. 25–41). New York: Routledge.
- 5 United Nations Conference on Trade and Development. (2001, May 17). 29 *Bilateral investment treaties signed by least developed countries in Brussels*. UN. Doc. LDCIII/PRESS/08/Rev.1. Retrieved from <http://unctad.org/en/pages/PressReleaseArchive.aspx?ReferenceDocId=2914>

feature 2

The Need for a Southern Observatory on Transnational Investment

Fredy Trujillo and Silvia Perugachi



During the last years, the number of cases submitted to international arbitration under investment treaties that include investor–state dispute settlement (ISDS) clauses has largely increased. According to the United Nations Conference on Trade and Development (UNCTAD),¹ an average of 54 ISDS claims has been registered annually from 2010 to 2015. In most (if not all) of these claims, investors are encouraged by the alleged loss of economic benefits as a result of public policies adopted by the host state in a legitimate and sovereign manner.

The international investment and arbitration system positions states and investors on the same level. Many arbitral tribunals, mainly under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), end up favouring investors, ordering states to pay millions of dollars for the alleged violation of bilateral investment treaty (BIT) obligations. This problem was mostly revealed at the end of the 1990s, after a massive adoption of free trade economic policies by almost all Southern countries to attract foreign direct investment (FDI) through BITs.

Many cases are being added to the large list of claims filed before ICSID, with a strong presence of Latin American countries, such as Argentina (59 known claims), Venezuela (36), Ecuador (22), and Bolivia (13).¹ Among the most notable cases, Bechtel Company filed a claim against the Bolivian State for US\$50 million as a result of the so-called “War for Water.” Public pressure led the company to withdraw the case from ICSID.² In 2006 and 2009, Chevron–Texaco sued Ecuador before a tribunal under the auspices of the Permanent Court of Arbitration at The Hague asking for US\$1.6 billion for an alleged breach of contract. In 2006, Occidental sued Ecuador for US\$1.77 billion, resulting in one of the most onerous awards issued in the history of international arbitration at that time. Moreover, the most onerous arbitration faced by Venezuela

involves a sum of US\$31 billion in compensation to ConocoPhillips. Against Uruguay, Philip Morris filed a claim challenging the adoption of public health regulations for the public good.

In other parts of the developing world, in the *Foresti v. South Africa* case of 2009, South Africa was ordered to pay over €5 million in legal costs. This country has already cancelled the BITs with its main partners—Belgium, Germany, Luxembourg, the Netherlands, Spain, and Switzerland. Moreover, at the beginning of 2016, the South African President signed the Promotion and Protection of Investment Act, which replaces existing treaties and states that investment protection claims must be submitted to domestic courts. Indonesia, on its part, decided to cancel its 67 BITs at the beginning of 2014, after facing a claim by the multinational Churchill Mining for US\$1.315 billion, without interest. This measure does not mean that Indonesia can leave the investment treaty regime, as it is bound by the Investment Agreement of the Economic Community of the Association of South East Asian Nations (ASEAN) and the ASEAN–Australia–New Zealand Free Trade Agreement (FTA). Similarly, although countries such as Bolivia, Ecuador, Indonesia, and Venezuela have denounced the ICSID Convention, they are not free from being sued because of survival clauses contained in the existing BITs. Moreover, there are BITs that allow filing claims under other international jurisdictions.

“Taking into account the increasing number of ISDS claims and the high costs of arbitration, it is necessary to create a space for multilateral–regional cooperation and advice for the defence of the interests of states in the settlement of investment disputes.”

In response to this conflict that affects states’ sovereign capacity to respond to claims filed by transnational companies, this article describes the efforts for the creation of an advisory centre to deal with ISDS. Specifically, it focuses on the intergovernmental initiative to establish the *Southern Observatory on Transnational Investment*. Among the objectives of the Observatory are providing a source

of information and generating debate, discussion, reflection and exchange of knowledge and experiences on investment and international investment arbitration, in order to promote clear and transparent rules. It is also devoted to creating equal conditions between investors and states so as to promote sustainable investment that respects state sovereignty.

1. Background on initiatives for the creation of advisory centres and exchange of knowledge in the area of investment and investment disputes

Taking into account the increasing number of ISDS claims and the high costs of arbitration, it is necessary to create a space for multilateral–regional cooperation and advice for the defence of the interests of states in the settlement of investment disputes.

“Building capacity based on the exchange of information and experience, and developing a broad platform for technical cooperation among Southern countries in the area of investment must be part of the immediate agenda.”

Among these initiatives, in 2009, UNCTAD jointly with the Inter-American Development Bank (IDB) and the Organization of American States (OAS) gave their support to Latin American countries for launching a project to create an intergovernmental advisory centre for developing countries. The initiative reached such a maturity stage that it was agreed that the forum would be established first in Washington and then in the City of Panama. However, this was never achieved, despite of the signature of an international agreement one year later. At the Union of South American Nations (UNASUR), the initial debates addressed the creation of a centre for facilitation and settlement of investment disputes, including an advisory centre for the defence of the interests of states, but finally the content of the agreement was defined as a forum for the resolution of investor–state disputes. At the Pacific Basin level, since 2008, the need for a high-quality independent advisory centre was emphasized, as well as the monitoring of multilateral negotiations. At the 2012 forum of the ASEAN–Australia–New Zealand FTA, the creation of a centre was proposed, following the guidelines of UNCTAD’s project for Latin American countries between 2008 and 2010.

This proposal was motivated by the limited resources and technical capacity of the states when they are involved in disputes with foreign investors. None of these initiatives were concluded because of a lack of political consensus.³

The concerns that give rise to the constitution of centres of this kind relate to the onerous costs of legal representation and counsel, as well as to the highly-qualified technical and human resources needed for the defence of the states. However, another important motivation is the tendency of states to rely on private law firms and consultants in all stages of the arbitration process. This dependence makes them lose control of their sovereign defence strategies and of the institutional memory in face of the dimension and implications of this type of litigation that necessarily demand policies to be adopted by the state.

Responding to such concerns by providing these services to all developing countries from a South–South cooperative approach is not merely an option but an imperative need, which requires political will of state authorities. Building capacity based on the exchange of information and experience, and developing a broad platform for technical cooperation among Southern countries in the area of investment must be part of the immediate agenda.

2. Southern Observatory on Transnational Investment

The experiences of Bolivia with Bechtel, of Ecuador with Chevron and Occidental, of Venezuela with ConocoPhillips, of Uruguay with Phillip Morris, among others, reaffirm the need for an intergovernmental institution to provide professional advice on future claims and guide states in current disputes. Likewise, this will reduce legal and representation costs as well as arbitration costs for the states; it will promote easier and more transparent arbitration proceedings, reaffirm state sovereignty, and strengthen states’ political positions. With the advice of the Observatory, states will have adequate tools to avoid high arbitration costs as well as the necessary elements to face potential penalties and awards.

The initiative for the creation of a Southern Observatory on Transnational Investment was conceived in the framework of the 1st Ministerial Conference of the Latin American States Affected by Transnational Interests, in April 22, 2013, in Guayaquil, Ecuador. The event was attended by representatives of the Bolivarian Alliance for the Peoples of Our Americas – People’s Trade Treaty (ALBA-TCP), (Bolivia, Cuba, Ecuador, Nicaragua, Saint Vincent and the Grenadines, and Venezuela), as well as the Dominican Republic. There were also countries invited to the meeting such as Argentina, El Salvador, Guatemala, Honduras, and Mexico.

The represented states declared the constitution of the Observatory as a space of convergence for the adoption of more effective measures to respond to conflicts raised by the current rules of the international investment and arbitration system. The objective of the Observatory is to become a forum for the objective settlement of investment disputes with transnational corporations, making sure that the rights recognized in the constitutions of the states prevail over the obligations contained in the treaties, and that the environmental, labour and human rights aspects are duly respected.⁴

“With the advice of the Observatory, states will have adequate tools to avoid high arbitration costs as well as the necessary elements to face potential penalties and awards.”

The 2nd Ministerial Conference was held in September 10, 2015, in Caracas, Venezuela, to define the objectives and activities that are to be developed by the Observatory, such as research, advice and capacity building of member states and other countries of the South that are willing to adhere to the Observatory. This 2nd Conference was also attended by Uruguay and other countries from Asia and Africa, with a total of 22 countries. The Executive Committee of the Ministerial Conference, composed of representatives of each member state, gives life to the institution⁴ as an intergovernmental forum for the discussion of policies of the current investment system and international arbitration regime.

It is worth noting that the Executive Committee, composed of member state representatives—Bolivia, Cuba, the Dominican Republic, Nicaragua, Venezuela, and Saint Vincent and the Grenadines, under the coordination of Ecuador—has advanced specific proposals over the last two years. These proposals must be approved by the authorities so that the Observatory may start to function after the 3rd Ministerial Conference, to be held soon.

Final Remarks

The creation of a forum of regional scope at this moment is critical as many developing and developed countries have been sued and obligated to reallocate their annual domestic budgets to pay enormous sums of compensation to transnational corporations. In the case of Ecuador, for example,

if pending awards are decided in favour of transnationals, the state would have to pay about US\$3.8 billion, which would surely affect social investment. Ecuador would have to give up building 560 schools, or financing about 585,000 homes of 40,80m² in the rural area.

“In the case of Ecuador, if pending awards are decided in favour of transnationals, the state would have to pay about US\$3.8 billion. It would have to give up building 560 schools or financing about 585,000 rural homes.”

The proposal of Latin American countries to create this Observatory, as an intergovernmental institution, will enable the monitoring of the so-called “arbitration industry,” and will bring support to states with information on alternative mechanisms to attract and ensure sustainable investments, for the mutual benefit of corporations and states.

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Notes

¹ *Investment Dispute Settlement Navigator*, available at <http://investmentpolicyhub.unctad.org/ISDS/FilterByYear>

² The Democracy Center. (n.d.). *Bechtel vs. Bolivia: Detalles del caso y la campaña*. Retrieved from <http://democracyctr.org/bechtel-vs-bolivia-detalles-del-caso-y-la-campana>

³ Joubin-Bret, A. (2015, December). *Establishing an international advisory centre on investment disputes?* The E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum. Retrieved from <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Joubin-Bret-FINAL.pdf>

⁴ Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests, April 22, 2013. Retrieved from http://www.cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_esp.pdf.

feature 3

An interview with Lauge Poulsen, author of *Bounded Rationality and Economic Diplomacy*



Lauge Poulsen is a Lecturer in International Political Economy at University College London (UCL). His recent book, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries*, explains why and how developing countries signed up to investment treaties. The volume is published by Cambridge University Press and is based on extensive archival work, statistics, as well as interviews with a large number of investment treaty negotiators from all corners of the world. Publisher's website: <http://www.cambridge.org/academic/subjects/politics-international-relations/international-relations-and-international-organisations/bounded-rationality-and-economic-diplomacy-politics-investment-treaties-developing-countries>

ITN: In a span of 30 years, there have been almost 700 known investment treaty arbitration cases. A total of 107 states—including many developing countries—have faced claims based on investment treaties, and many of them have been ordered by arbitrators to pay enormous sums in compensation to foreign investors. Why did developing countries enter into treaties carrying such great risks? Was there a problem in the cost-benefit analyses they conducted before entering into these treaties, or was this analysis simply missing?

LP: With 3,000 treaties signed over almost 60 years by almost 200 countries, it is obviously impossible to provide a single explanation for why every single treaty has been adopted. Some were signed for purely political reasons—for instance, to establish closer diplomatic links with the other party. Some were signed to show that a government adhered to the Washington Consensus and an international rule of law. Some were signed to promote domestic reforms. A few may have been signed to de-politicize investment disputes. And so on.

That said, by far the most important expected benefit was that bilateral investment treaties (BITs) would

be crucial to help attract foreign direct investment (FDI). Once large numbers of developing countries opened up to foreign investment during the 1980s and 1990s, many joined the investment treaty regime in the expectation that the treaties were very important instruments for foreign investors deciding where and how much to invest abroad.

The risks of the treaties were often entirely ignored. As there had been very few investment treaty claims during the 1980s and 1990s, the assumption was that the treaties would hardly ever be instrumental for resolving disputes in practice. A failure to appreciate the potency of investment treaty arbitration was not unique to developing countries, of course, as few could have imagined what was yet to come.

But while officials in Western states and international organizations may have underestimated the scope of the protections before arbitrators “filled in the blanks” of vague agreements, officials in many developing countries saw the treaties as little more than diplomatic tokens of goodwill, which would be important signals for foreign investors but entailed no real liabilities or legal significance.

This meant it was typically not until developing countries became subject to claims themselves that they began to realize what they had signed up to over decades. There were exceptions, as some developing country governments were very well equipped to negotiate the treaties. But by and large, the popularity of BITs in large parts of the developing world was due to a failure to appreciate their bite.

How can we understand this? Why would so many governments sign up to some of the most potent instruments in international economic law without even caring to check what the treaties meant? In my book, I argue that decision-making theories from behavioural psychology and economics go a long way to explain this puzzle. From this perspective, developing country officials and politicians cannot be assumed to be highly sophisticated utility maximizers engaging in sophisticated cost-benefit analyses. Rather, they are bounded rational—just like the rest of us. When appreciating just how little effort that typically went into analyzing the costs and benefits of the treaties, we can understand both the inflated expectations about the treaties' economic benefits and the failure to appreciate their risks.

ITN: How can developing country governments assess the risks and potential benefits of entering into an investment treaty including an investor-state arbitration provision? What factors should they take into account and what risk mitigation measures should they take?

LP: A place to start could be the informal analytical

framework that I developed together with Jason Yackee and Jonathan Bonnitcha for the British government. It is freely available online and can be applied to other cases as well, including developing countries. Here we structure the analytical task into a series of questions and sub-questions focusing on economic and political costs and benefits. We also provide suggestions for indicators and other sources of information to guide governments.

Provided a reasonable case can be made that the treaty will provide economic or political benefits, one of the practical concerns arising from my book is whether the country has sufficient capacity to comply with and internalize the various provisions of the treaty at different levels of government. If they do not, the risk of claims loom large. Moreover, with scarce bureaucratic resources and political capital a developing country government has to consider whether signing, ratifying, implementing, and internalizing an investment treaty really provides what Danni Rodrik in another context has called the biggest bang for the reform buck. If not, then scarce attention and resources could be better spend elsewhere.

“The popularity of BITs in large parts of the developing world was due to a failure to appreciate their bite.”

ITN: Based on your research, do you notice any trends in respect of cost-benefit analyses before entering into investment treaties? In particular, are developing countries more aware of the potential benefits and risks of those treaties? If so, in practice, has awareness led to better, more rational decisions in negotiations?

LP: The rise of investment treaty arbitration has significantly changed the patterns of adoption among developing countries. Combined with the efforts of organizations such as UNCTAD and IISD, the claims have often—though not always—resulted in a somewhat more careful set of negotiations. Some governments have also taken steps to towards better implementation and internalization, although this is still very rare.

By and large, however, the changes have been largely incremental. Rather than fundamentally re-thinking the content of investment treaties—for instance by including strong investor obligations or relying on inter-state dispute settlement—the basic model has remained intact in the vast majority of cases. I include reflections on this in the book, as it

fits very well with a bounded rationality framework where governments value the status quo and “default rules” much more than we would expect in traditional rational choice frameworks.

ITN: How does the cost-benefit analysis change in the context of a regional trade agreement—in which many types of economic policies are bundled together—versus a bilateral investment treaty? For instance, several developing countries are among the initial signatories of the Trans-Pacific Partnership (TPP), and others have expressed their interest in joining the agreement. How would you analyze this interest on the part of developing countries?

LP: The standard answer from political scientists would be that an expansion of the coverage of agreements allows for issue linkages to facilitate compromises through a give and take. This is undoubtedly important, but I would suggest two other factors could be equally, if not more, important for this latest wave of investment treaties.

First, there appears to be an expectation among many governments that comprehensive trade and investment agreements will have a much greater impact on FDI than stand-alone BITs. Second, a number of governments seem convinced that more careful and detailed treaty language in the style of the investment chapter of the North American Free Trade Agreement (NAFTA) will provide them much greater policy space than traditional European-style BITs.

Although I have not studied these recent negotiations in any detail, they do raise the question whether the expectations of developing country parties are now rooted in careful cost-benefit analyses. For instance, there is some preliminary evidence on the FDI question, but one could query whether we may be witnessing a new round of inflated expectations about economic benefits flowing from investment treaty protections. Equally, and as mentioned before, future studies could also query whether sticking with the basic investment treaty models already available in the status quo may occasionally be the result of a bounded rational strategy.

Author

Poulsen, L. N. S., Bonnitcha, J., & Yackee, J. W. (2013, March). *Analytical framework for assessing costs and benefits of investment protection treaties*. London: LSE Enterprise. Retrieved from http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260503/bis-13-1285-analytical-framework-for-assessment-costs-and-benefits-of-investment-protection.pdf

news in brief

US\$50 billion awards against Russia in Yukos cases are set aside by Dutch court

In a judgment dated April 20, 2016, the District Court of The Hague, in the Netherlands, set aside awards that had ordered Russia to pay US\$50 billion to the shareholders of Yukos, a bankrupt oil company. An English translation of the judgment is [available online](#), and a summary of the awards, issued in July 2014 by a tribunal at the Permanent Court of Arbitration (PCA), is available at the [ITN website](#).

The Dutch court found that the PCA tribunal lacked jurisdiction under the Energy Charter Treaty (ECT) to arbitrate the cases against Russia. In particular, it noted that Russia had signed but never ratified the ECT, and that the Russian parliament had rejected its ratification. According to the court, “based only on the signature of the ECT, the Russian Federation was not bound by the provisional application of the arbitration regulations of Article 26 ECT.”

The court also found that Russian law prohibits bringing disputes of a public law nature to international arbitration without legislative approval. As the court understood that the Yukos case centred on a challenge to tax measures imposed by Russia, and as the ECT was not ratified, the court concluded that the dispute could not have been brought to arbitration.

The decision could make it more difficult to enforce the awards in many countries. However, counsel for the Yukos shareholders, Yas Banifatemi of Shearman & Sterling, **stressed** that “enforcement courts will be at liberty to assess the award for themselves, irrespective of what the Dutch courts have to say on the matter.” There are pending enforcement proceedings in Belgium, France, Germany, the United Kingdom, and the United States.

TTIP draft to be prepared by July; ISDS being built based on both EU and U.S. proposals

Officials from the European Union and the United States gathered in Brussels for the 12th round of negotiations over the Transatlantic Trade and Investment Partnership (TTIP) from February 22 to 26

At the end of the meeting, chief EU negotiator Ignacio Bercero and chief U.S. negotiator Dan Mullaney **announced** that a consolidated draft would be prepared by July 2016, with brackets only for the “most sensitive issues.” According to Mullaney, finalizing TTIP in 2016 would allow the partners to be “the standard setters rather than the standard takers” in international trade. Two other negotiating rounds are planned before the summer break. The 13th round took place in New York, from April 25 to 29.

Among the topics discussed in February was the investor–state dispute settlement (ISDS) mechanism.

Bercero highlighted that the EU is proposing an **Investment Court System** (ICS) composed by a standing tribunal and an appeals mechanism. But the United States is not ready to abandon its **long-standing ISDS model** recently reproduced in the **TPP**. **Bercero said** the partners are “working on the basis of textual proposals from both sides” and trying to find convergence.

TTIP faces wide opposition, particularly in Europe. Over 100,000 Dutch citizens have signed a **petition demanding a referendum** on the agreement. The German Advisory Council on the Environment (SRU), which advises the federal government, **indicated** that the agreement could endanger the environment and democracy. In Spain, the deputy president of the General Council of Attorneys, Oriol Rusca, **declared** that TTIP is a threat to all citizens.

China–United States BIT: ISDS to be included; ongoing negotiations on negative lists¹

Since 2008, China and the United States have undergone 24 negotiation rounds for a bilateral investment treaty (BIT). On March 3, 2016, U.S. Trade Representative Michael Froman noted that the “high standard” BIT being negotiated is “in many respects similar to the investment chapter of TPP.”

Echoing Froman’s statement, on March 23, Chen Deming—China’s former Minister of Commerce—announced that the two countries have resolved some key roadblocks in the negotiations and agreed to rely on international arbitration to resolve investor–state disputes. However, Chen also acknowledged that some major conflicts remain, mainly over the negative list on market access.

Both parties hope to conclude negotiations before the end of President Obama’s term, and preferably in August or September, before the U.S. presidential election enters into a critical stage.

Three mining disputes: the first investment disputes against Colombia come to light²

On February 19, 2016, Cosigo Resources (Canada) and Tobie Mining and Energy (United States) submitted an arbitration request against Colombia under the Free Trade Agreements (FTAs) concluded by Colombia with the United States and Canada. The claimants argue that their investment in the mining concession of Taraira South was expropriated fraudulently and without compensation. The concession is located in the Amazon region, within the Yaigóje Apaporis Natural Park, created by the Colombian government by means of a resolution. The claimant seeks US\$16.5 billion for expropriation and US\$11 million for the costs incurred to acquire the concession.

The Canadian company Eco Oro Minerals also

announced a dispute with Colombia on its web page in March, alleging a delay in the delimitation of the Páramo de Santurbán environmental protected area, where mining activities had been prohibited, and claiming that its investments suffered from adverse effects as a result. The company warned that, if no agreement were reached during the next six months, it would submit the dispute to international arbitration under the Colombia–Canada FTAs.

Finally, on March 16, the Swiss giant Glencore **submitted a third claim** against Colombia at the International Center for Settlement of Investment Disputes (ICSID), under the 2006 Colombia–Switzerland bilateral investment treaty. The mining company claims that the Colombian government has cancelled its concession agreement that enabled the expansion of activities in the Calenturitas and La Jagua mines.

Canada–European Union CETA re-concluded in February to incorporate EU ICS proposal

Responding to EU requests, Canadian and EU officials reopened negotiations of the Comprehensive Economic and Trade Agreement (CETA) concluded in 2014 to reformulate the agreement’s investor–state dispute settlement (ISDS) clause. **Re-concluded on February 29**, the CETA now includes a standing tribunal and an appeals mechanism, in line with the EU ICS proposal, also included in the recent **EU–Vietnam free trade agreement (FTA)**. The CETA parties also state the shared objective of establishing a permanent multilateral investment court.

Second ICSID claim filed against Uruguay; Philip Morris decision still pending

On March 24, the International Centre for Settlement of Investment Disputes (ICSID) **registered** (Case No. ARB/16/9) a request for arbitration filed by U.S. telecom company Italtel against Uruguay. The company alleges that Uruguay terminated a wireless spectrum licence in violation of the fair and equitable treatment standard under the Uruguay–United States bilateral investment treaty (BIT). This is the second ICSID case against Uruguay. The first was initiated by **Philip Morris** in 2010 (Case No. ARB/10/7); a hearing on the merits was held in late October 2015.

Singapore International Arbitration Centre releases investment arbitration rules³

On February 1, 2016, the Singapore International Arbitration Centre (SIAC) released draft rules tailored to investment arbitration (Draft SIAC Rules), to be finalized in May following **public consultation**.

Similarly to the Rules on Transparency in Treaty-based Investor–State Arbitration adopted by the United Nations Commission on International Trade Law in

2013 (**UNCITRAL Transparency Rules**), Rule 28 of the Draft SIAC Rules contains specific provisions on the participation of non-disputing parties. A non-disputing party that is a party to the contract or treaty has a *prima facie* right to make certain written submissions. However, submissions by a non-disputing party that is not a party to the contract or treaty are subject to the tribunal’s approval, depending on the confidentiality of proceedings, the extent that such submissions will bring a different perspective to relevant legal or factual matters, and whether the non-disputing party has a “sufficient interest” in the proceedings.

The Draft IA Rules do not directly address the issue of transparency, however. Unlike the UNCITRAL Transparency Rules, the Draft IA Rules do not contemplate either publication of information upon commencement of arbitral proceedings or publication of arbitration-related documents. They also do not provide that arbitration proceedings be made public.

The Draft SIAC Rules mirror SIAC’s commercial arbitration procedure in certain respects, for instance: upon receipt of a notice of arbitration, the SIAC’s Court of Arbitration must appoint an arbitrator within 28 days (Rules 6 and 7); and, there are strict timelines for arbitral challenges to be made and ruled on (Rule 12). Also, upon express agreement of the parties, the Draft SIAC Rules provide for SIAC to appoint an “emergency arbitrator” to determine interim relief prior to the constitution of the main tribunal.

Finally, the Draft SIAC Rules address third-party funding: a tribunal may order disclosure of a third-party funding arrangement (Rule 23), and may consider any such arrangements in apportioning arbitration costs (Rule 32).

The Draft SIAC Rules are available at <http://www.siac.org.sg>.

The editorial team acknowledges, with many thanks, the contributions by Joe Zhang (1), Carolina Muñoz Bernal (2), and Matthew Levine (3).

awards and decisions

ICSID tribunal awards damages for Venezuela's indirect expropriation of steel industry investment *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26 Matthew Levine

An arbitration tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has issued its award on the nationalization of a foreign-owned company producing hot briquetted iron (HBI) for the steel industry in Venezuela. The sum of damages and pre-award interest awarded by the tribunal totals US\$172,801,213.70.

The tribunal found jurisdiction under the Venezuela–Luxembourg bilateral investment treaty (Luxembourg BIT) and the Venezuela–Portugal bilateral investment treaty (Portugal BIT).

On the merits, the tribunal dismissed claims that pre-expropriation interference with the investment resulted in international liability. However, it agreed that Venezuela had unlawfully nationalized the claimants' investment resulting in an indirect expropriation.

Background

The claimants are a company incorporated under the laws of the Luxembourg (Tenaris) and a company incorporated under the laws of Portugal (Talta). Talta is wholly owned by Tenaris through an intermediary company.

Through the privatization of Venezuela's steel industry in the 1990s, an affiliate of Tenaris (SIDOR) came to control that country's, and South America's, main finished steel exporter, which was a major consumer of HBI. Subsequently, Tenaris together with SIDOR incorporated a Venezuelan company known as Matesi to acquire certain HBI-production capacity (PosVen). Among the conditions precedent to this transaction was that Matesi enter into contracts for the supply of raw materials crucial to the production of HBI with a number of state-owned entities on terms no less favourable than those enjoyed by its predecessor. Tenaris' majority shareholding in Matesi was later transferred to Talta.

In 2008, Venezuelan President Hugo Chávez announced that SIDOR was to be nationalized, a decision that was subsequently ratified by parliament. In 2009, President Chávez announced an intention to nationalize Matesi and other HBI producers. Formal confirmation was set out shortly thereafter. In 2010, President Chavez announced that Matesi was to be expropriated, as it had not proved possible to reach an agreement with shareholders on the terms of nationalization. The arbitration concerns the circumstances whereby the claimants lost the use and enjoyment of their investment in Matesi.

BITs' "siège social" and "sede" require effective management, which claimants demonstrated

The primary issue for the tribunal's determination was whether the claimants had established a "siège social" and "sede" in Luxembourg and Portugal, respectively, as per the specific terms of the BITs.

Venezuela argued that the BITs required not only incorporation but also the place of effective management to be located in the home state. It also argued, based on filings with the U.S. Securities and Exchange Commission and other documents, that "Tenaris is an Argentine company, with 27,000 employees, billions of dollars of revenue and offices on the 26th and 30th floor of a 30-storey office block in Buenos Aires" (para. 120).

In order to resolve this objection, the tribunal first considered the ordinary meaning of the terms "siège social" and "sede." On the basis of the parties' submissions, the tribunal found it clear that neither term was a consistent "legal term of art" and that in fact the terms have a number of ordinary meanings.

The tribunal then considered the meaning of these terms given their context as well as the object and purpose of the BITs. It found that, placed in their context, the terms "must connote something different to, or over and above, the purely formal matter of the address of a registered office or statutory seat" (para. 150). The tribunal therefore determined that "siège social" and "sede" in the BITs in issue in this case mean the place of effective management. On the basis of the submissions and the evidence, the tribunal concluded that Tenaris and Talta had their place of effective management in Luxembourg and Portugal, respectively, and accordingly upheld its jurisdiction *ratione personae* over the claimants.

Tribunal rejects Venezuela's objection that the dispute was merely contractual

Venezuela also objected to jurisdiction on the basis that claims in respect of allegedly insufficient or discriminatory supply of inputs to Matesi gave rise to a purely contractual dispute. The claimants responded that their claims for discrimination arose solely out of breaches of the fair and equitable treatment (FET) and non-impairment clauses of the BITs. They argued that the relevant supplier was CVG FMO, a state entity with a sovereign monopoly.

The tribunal approached this second objection by distinguishing between jurisdiction to hear the claims and ultimately liability regarding those claims under the BITs. At the jurisdictional stage, the determinative question was not whether the claimants' factual allegations were true. Thus, Venezuela's argument that CVG FMO was acting in a commercial and private capacity, while a key issue in terms of ultimate liability, was not a bar to the tribunal's jurisdiction.

Unlawful nationalization results in indirect expropriation under the BITs

The tribunal addressed the claims arising from the nationalization of Matesi on the basis that "[n]o doubt about it, Venezuela nationalized Matesi" (para. 451). The issue was therefore whether Venezuela's nationalization of SIDOR in 2008 and subsequently Matesi in 2009 amounted to an indirect (and hence unlawful) expropriation, as per the claimants, or whether the nationalization had been entirely legal under Venezuelan law, such that it was only upon formal expropriation that the BITs applied.

The tribunal was persuaded that “Venezuela failed to implement the procedures that it had put in place to effect the nationalisation of SIDOR and its subsidiaries and, specifically, Matesi” (para. 493). It found that, in so doing, Venezuela manifestly failed to conform with the requirements of the “tailor made” domestic law process for nationalization, which resulted in indirect expropriation under the BITs. The tribunal went on to observe that the case is “akin to the ADC [v.] Hungary case, in that the affected investor has not had: ‘a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard’” (para. 497).

Events prior to indirect expropriation do not rise to level of treaty breach

According to the claimants, Venezuela breached the FET, non-discrimination, and non-impairment provisions of both BITs by virtue of CVG FMO’s discrimination against Matesi, that is, the claimants’ investment.

Although the claimants’ affiliate SIDOR regularly had the kind of inputs needed for production of HBI by Matesi, SIDOR was obliged to sell these inputs to CVG FMO. According to the claimants, their supply agreement with CVG FMO was “pivotal to [their] decision to invest in Matesi and was a condition precedent to [their] purchase of PosVen’s assets” (para. 322).

In terms of whether CVG FMO discriminated against Matesi, the tribunal found that the evidence pointed to certain failures. However, it then found that CVG FMO was neither an organ of the state for the purposes of Article 4 of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts nor empowered by Venezuela to exercise elements of governmental authority under ILC Article 5.

The claimants further argued that serious labour unrest, lost access to Matesi’s physical plant, and the holding against their will of some 20 members of its administrative staff resulted in a breach of Venezuela’s obligations under the security and protection standard in the BITs. The tribunal accepted the claimants’ submission that Venezuela’s obligation was not exclusively limited to physical protection from third parties but that it could also include adverse effects stemming from the host state and its organs. It then noted that the claimants were seeking merely declaratory relief for damages suffered during the nationalization process, but that the alleged failures to provide security and protection took place post-nationalization.

Tribunal departs from Discounted Cash Flow method in determining damages

Having found that expropriation occurred without prompt and adequate compensation, the tribunal set out to determine the compensation to be paid by Venezuela. Regarding the calculation of compensation, the tribunal found the relevant provisions in the BITs very similar to those contained in the ILC Articles, which it considered the most accurate reflection of customary international law.

The parties’ experts agreed that, where arm’s-length transactions are unavailable, the value of an asset generally is determined best by the Discounted Cash Flow method. However, the tribunal observed that

“the devil, alas, is in the detail” (para. 521). Whereas the claimants’ expert had pinned the value at US\$239 million, Venezuela’s expert had arrived at a value of US\$0. The tribunal concluded that there were major flaws in the approaches of both parties.

The tribunal proceeded to canvass other approaches to determining the Fair Market Value ultimately returning to the notion of agreed price in an arm’s-length transaction. In this context, the tribunal considered the 2004 acquisition of Matesi’s underlying assets by SIDOR and the claimants. This transaction provided relevant data having regard to the criteria for an arm’s-length transaction.

Ultimately, the tribunal ordered that Venezuela pay US\$87,300,000 for breaches of the BITs, as well as pre-award interest from the valuation date of April 30, 2008, at an annual rate of 9 per cent, in the sum of US\$85,501,213.70 within six months of the date of the award.

Notes: The tribunal was composed of John Beechey (President appointed by agreement of the parties, British national), Judd Kessler (claimant’s appointee, U.S. national), and Toby Landau (respondent’s appointee, British national). The final award of January 29, 2016 is available at <http://www.italaw.com/sites/default/files/case-documents/italaw7098.pdf>.

The first ICSID case against Guinea is dismissed for lack of jurisdiction

Société civile immobilière de Gaëta v. Republic of Guinea, ICSID Case No. ARB/12/36

Stefanie Schacherer

In a decision dated December 21, 2015, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) ruled that it lacked jurisdiction to hear a case brought by Société civile immobilière de Gaëta (Gaëta) against Guinea under the Guinean Investment Code.

Having built the Cité des Chemins de Fer (the Cité) in Conakry, Gaëta alleged expropriation of its investment and a violation of fair and equitable treatment (FET) by Guinea. Gaëta sought compensation of around US\$90 million. The tribunal, however, concluded that Gaëta had not succeeded in proving that it was a foreign investor within the meaning of the Investment Code. Moreover, Gaëta did not establish that it had made a protected investment within the meaning of the Investment Code and article 25 of the ICSID Convention.

Background

Gaëta is a company registered with the French Commercial Register. It is managed by its managing director, Mr. Guido Santullo. Gaëta made its investment in Guinea in 1997 through a construction lease agreement. The project comprised the construction of several buildings for commercial, administrative and banking purposes on the site of the Cité. The lease, planned to have a life of 60 years, also provided Gaëta a right to rent the buildings. The contract also provided significant exemptions on customs duties, taxes and fees as well as on state fees.

Following conclusion of the contract, Gaëta had turned

to another company, Séricom Guinée, for the planning, development and construction work. Mr. Guido Santullo is the majority shareholder of this company. After the completion of work in 1999, the buildings were leased to third parties. A second company controlled by Mr. Guido Santullo, SCI Cité des Chemins de Fer, provided security and maintenance services for the premises in the Cité and billed the tenants for its services.

In December 2008, Guinea entered an unstable period of government transition following the death of President Lansana Conté. The incoming new administration instructed an audit company to clarify the legal status of the Cité lands and the tax regime applicable to Gaëta. The audit firm concluded, first, that Gaëta had no legal existence in Guinea, and second, that the company had earned income in Guinea since 1999 and that this income had not been subjected to taxation.

Consequently, Gaëta was subjected to a tax adjustment for tax evasion in the amount of around US\$7.8 million. From 2009 until early 2012, Gaëta contested being responsible for tax fraud, through the tax exemptions that the Guinean Government had previously granted the company. In 2012, however, the new President Alpha Condé decided that the buildings in the Cité would be requisitioned for one year.

Guinea contests Gaëta's qualification as a foreign investor

The tribunal first clarified that only a foreign investor may invoke the international arbitration mechanism under the Investment Code and the ICSID Convention. Since Gaëta asserted that it was a French company, the tribunal considered its nationality under French law.

Contrary to the arguments of the claimant, the tribunal emphasized that it was empowered to engage in a thorough review of applicable national law. According to the tribunal, such an examination is only made as a preliminary step and does not involve checking the validity of a decision made by national authorities (para. 135).

In its analysis, the tribunal considered that Gaëta, headquartered in France, benefited from the presumption of French nationality. Under French law, however, this presumption may be rebutted if it is established that the company has its real headquarters in a foreign state.

To determine the actual headquarters, the tribunal took account of the place of management and administration of the company and the place of its business. Taking into account the documents submitted, the tribunal judged that it was clear that the management of the plaintiff's Guinean business took place in Guinea between 1997 and 2009. Thus, all correspondence between Guinea and the plaintiff was always addressed to Mr. Guido Santullo in Guinea. Similarly, management of rents and Gaëta's accounting had been carried out not in France but from offices the plaintiff held in Conakry. Turning lastly to commercial activity, the tribunal found a significant difference between the annual turnover generated in France, amounting to approximately US\$5,000, and that generated in Guinea, which amounted to around US\$3 million.

Taking these factors into account, the tribunal concluded that the claimant was not a French company. The

tribunal deduced from this that it had no jurisdiction *ratione personae* over the case at hand.

The existence of a protected investment

Despite its declaration of lack of jurisdiction on this case and contrary to the principle of judicial economy, the tribunal decided to also examine whether the conditions of its *ratione materiae* jurisdiction were met in this case, "to avoid any uncertainty and for exhaustiveness" (para. 183).

The tribunal discussed at length the definition of investment under international law and particularly under article 25 of the ICSID Convention. A thorough review of the *Salini* criteria was at the heart of its analysis. The criteria of this case are: (i) a certain period of investment, (ii) the taking of a risk by the investor, (iii) a substantial contribution and (iv) the contribution to the development of the host state (*Salini Costruttori v. Kingdom of Morocco*).

According to the tribunal, these criteria should not be rigidly and systematically applied (para. 208) but should be examined primarily in light of the specific circumstances of the case at hand, taking particular account of the different instruments used by the parties to express their consent to ICSID jurisdiction (*Biwater Gauff v. Tanzania*).

The Investment Code of Guinea does not contain an express definition of investment, merely stating in article 2.1 that "everyone is free to undertake in the territory of the Republic of Guinea a commercial, industrial, mining, agricultural or service activity in compliance with the laws and regulations of the Republic." According to the tribunal, Guinean Law only provides indicators. For this reason, it examined the construction lease agreement in terms of the criteria established by the *Salini* jurisdiction (para. 213).

Nevertheless, in its analysis of the elements, the tribunal primarily focused on the review of the criterion of substantial contribution (criterion (iii) above). The tribunal noted that an investor must have incurred expenses in order to pursue an economic goal. These expenses must be substantial, without there being a minimum requirement in terms of capital invested. Next, the tribunal considered that even if the origin of the funds is irrelevant, it is necessary that the claimant is indeed the maker of the expenditure made in connection with the investment (para. 231).

In this case, the tribunal concluded that the construction lease agreement constituted an investment. On the other hand, the tribunal found that Gaëta was not the real maker of this investment. After reviewing the various balance sheets of the claimant and those of other companies controlled by Mr. Guido Santullo, Séricom Guinée and SCI Cité des Chemins de Fer, the tribunal held that it was impossible to determine which of the companies had actually financed the construction works of the Cité, on the basis of incomplete and contradictory information. Given the lack of evidence, the tribunal concluded that Gaëta did not make the investment and could not benefit from the protection afforded by international law.

Costs

The tribunal considered that, because of the lack of jurisdiction and the fact that the claimant had been totally

unsuccessful, it should in principle bear all the costs of the proceedings. Nonetheless, given that Guinea had burdened the proceedings and breached certain of its obligations, the tribunal decided that it was fair to have Gaëta bear only 80 per cent of the costs of the proceedings. According to the tribunal, the most flagrant violation by Guinea was its refusal to pay its advance share to ICSID as per the rules of procedure. The tribunal found that this obligation is systematic and independent of the chances of success (para. 307). Moreover, Guinea had also burdened the proceedings by the slowness with which it had provided documents relevant to the tribunal's analysis. For these same reasons, the tribunal ordered Guinea to bear 20 per cent of its own costs and legal expenses.

Note: The ICSID tribunal was composed of Pierre Tercier (Chair, appointed by the parties, Swiss national), Laurent Lévy (claimant's appointee, Swiss national) and Horacio A. Grigera Naón (respondent's appointee, Argentinian national). The ruling of December 21, 2015 is available at: <http://www.italaw.com/sites/default/files/case-documents/italaw7038.pdf>.

Slovenia is condemned to pay €20 million in damages and US\$10 million in costs to Croatian national electric company

Hrvatska Elektroprivreda d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24

Inaê Siqueira de Oliveira

An award rendered on December 17, 2015 by an arbitral tribunal constituted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) added a new—and apparently final—chapter to a nearly 20-year-old conflict between the governments of Croatia and Slovenia over the supply of electricity generated by the Krško Nuclear Power Plant (Krško NPP), located in Slovenia.

The tribunal found that Slovenia failed to resume deliveries of electricity generated by Krško NPP to the claimant, Hrvatska Elektroprivreda d.d. (HEP), the state-owned national electric company of Croatia. Thus, the tribunal ordered Slovenia to pay HEP damages of €19,987,000 plus compound interests and reimburse US\$10 million in arbitration costs.

Facts and claims

In 1974, the national electricity companies of Slovenia and Croatia established a joint venture, Nuklearna Elektrana Krško (NEK), to build and operate Krško NPP, located in the Slovenian territory just 15 kilometers west of the border between the two countries. The financing, construction, operation, management and use of Krško NPP were regulated by four bilateral agreements, all based on the *parity principle*, according to which the co-investors were equal partners in all aspects.

Disagreements over Krško NPP began in the 1990s. HEP was convinced that some measures adopted by Slovenia were inconsistent with the parity principle embedded in the bilateral agreements. In contrast, Slovenia considered that HEP was not complying with its financial obligations towards NEK.

On July 30, 1998, NEK suspended electricity delivery to

HEP, and Slovenia issued a decree which, in HEP's view, affected its ownership rights. Over the following years, several meetings took place between the two countries in order to resolve the dispute. The negotiations led to a 2001 treaty including an investor–state dispute settlement clause (the 2001 Agreement), in which Slovenia and Croatia agreed that i) they would waive *all their past financial claims* related to Krško NPP, ii) HEP would be recognized as co-owner and co-manager of Krško NPP, and iii) the delivery of electricity to HEP would be resumed on an agreed upon date. The tribunal accepted HEP's submission that June 30, 2002 was the agreed upon date.

Ratification of the 2001 Agreement met strong parliamentary and public opposition in Slovenia. It was ratified only on February 25, 2003—nearly eight months after the agreed upon date for the resuming of electricity delivery. Throughout this period, Slovenia offered to *sell* electricity to HEP twice—in June 2002 and November 2002 (the 2002 Offers)—in lieu of the electricity that should have been supplied under the 2001 Agreement, and twice HEP refused. Electricity deliveries to HEP resumed on April 19, 2003.

The main issues before the tribunal were i) whether Slovenia met its obligations under the 2001 Agreement by making the 2002 Offers, ii) whether HEP should have accepted the 2002 Offers to mitigate its losses, iii) whether HEP passed on any additional costs to consumers and therefore suffered no loss, and iv) if HEP incurred in losses, how the tribunal could value the compensation.

Although HEP advanced two alternative legal bases for its claims—the 2001 Agreement and the Energy Charter Treaty (ECT)—the tribunal dismissed all ECT claims in the Decision on the Treaty Interpretation Issue, dated June 12, 2009. In the final award, the tribunal pointed out that the reasons for the dismissal were “necessarily implicit” (para. 580) in view of the substance of the earlier decision, but spelled them out anyway. It reasoned that, given the content of the 2009 decision, which found Slovenia liable to HEP for the claim of compensation under the 2001 Agreement—remaining for determination the issues of the 2002 Offers, mitigation, quantum of compensation, and costs—the alternative basis on which HEP had sought compensation (the ECT) “necessarily, indeed automatically, fell out of consideration” (para. 579).

The 2002 Offers and mitigation of loss

The tribunal dismissed Slovenia's submission that, by making the 2002 Offers, Slovenia had essentially complied with its obligations under the 2001 Agreement. The decision relied heavily on the opinion of the independent expert appointed to assist the tribunal in assessing the parties' position on damages. According to the expert's opinion, accepted by the tribunal, the 2002 Offers were *materially different*, from an economic perspective, to what was agreed to in the 2001 Agreement.

The tribunal also accepted HEP's position that it was reasonable to reject the 2002 Offers due to the “substantial differences between the terms of the [2002] Offers and those of the 2001 Agreement” (para.

214) and that there were non-financial matters that also reasonably influenced HEP's decision, such as the concern that accepting the offers could lead to a disincentive for Slovenia to ratify the 2001 Agreement.

Tribunal analyzes pass-on defence brought up by independent expert

The independent expert pointed out in his report that "based on his experience [...], he would expect a monopoly entity like HEP to adjust its tariffs so as to reflect its costs" (para. 220). Said differently, HEP could have passed any increase in costs onto consumers; therefore, HEP itself would not have incurred any recoverable loss. If successful, the consequences of the pass-on defence would be considerable: it would mean that HEP did not have any damages to recover.

Even though the pass-on defence was not raised by Slovenia, the tribunal decided it would analyze it. The defence is typical of competition law cases, but the tribunal saw no obstacle to consider it under international law. However, the tribunal's analysis ended up focusing on the procedural aspect of the pass-on defence. As an affirmative defence, the burden of proving that the costs had been passed onto consumers lied with Slovenia. As no evidence of this was adduced, the tribunal found it was "not in a position to conclude that no loss occurred in the present case" (para. 245).

Calculation of damages

The tribunal relied mainly on the findings of the independent expert when ruling on the valuation of damages. The parties and the expert were far from agreeing on the appropriate methodology for calculating HEP's losses, but the basic approach all of them adopted may be summarized as $X \text{ minus } Y$ —" X " being the *factual* scenario, namely, "the cost incurred by HEP in replacing the Krško electricity that should have been supplied under the 2001 Agreement" (para. 359), and " Y " being the *counterfactual*, namely, "[the cost] of the electricity that should have been supplied to HEP under the 2001 Agreement" (para. 349).

The epicenter of the disagreements was the valuation of " X ." As the non-supply prolonged a situation that had already endured four years (since July 30, 1998), the tribunal could not merely look into HEP's books to find what the company had done to replace the electricity that should have been supplied by Krško NPP from June 30, 2002 onwards. In order to solve this puzzle (how HEP replaced the Krško electricity), the tribunal relied on the evidence presented by the parties, witness' testimonies and the independent expert's opinion.

The tribunal accepted that HEP used a combination of energy that was imported and generated in national thermal power plants to replace the electricity from Krško NPP. Although the imports were cheaper than the electricity from thermal plants, and although HEP could have imported all replacement energy, as Slovenia argued, the tribunal found that HEP had valid concerns about supply security to not want to rely entirely on imports. In other words, the tribunal found that, by using the combination of imports and thermal plants, HEP acted in a reasonable manner. To rule on the

proportion of replacement energy from thermal plants versus imports, the tribunal once again preferred the methodology used by the independent expert.

To the €19,987,000 in compensation, the tribunal determined that interest, compounded at six-month intervals, should be added from the date Slovenia breached its obligations under the 2001 Agreement (July 01, 2002) until the date of payment in full.

Reimbursement of HEP's costs

The tribunal acknowledged that the prevailing trend in investment treaty arbitration is the use of the "costs follow the event" approach, according to which the successful party is entitled to recover some or all of its costs. Having considered that HEP was the successful party in this case, and that the costs claimed (US\$13,300,000) were "reasonable in the circumstances" (para. 610), the tribunal ordered Slovenia to reimburse US\$10 million to HEP for its arbitration costs and legal expenses.

Notes: The ICSID tribunal was composed of David A. R. Williams (President appointed by the co-arbitrators, New Zealand national), Charles N. Brower (claimant's appointee, U.S. national), and Jan Paulsson (respondent's appointee, Swedish national). The award is available at <http://www.italaw.com/sites/default/files/case-documents/ITA LAW 7012.pdf>. The Decision on the Treaty Interpretation Issue is available at <http://www.italaw.com/documents/Hrvatska-Interpretation.pdf>.

The only known investment treaty arbitration against Equatorial Guinea fails on jurisdictional grounds
Grupo Francisco Hernando Contreras, S.L. v. Republic of Equatorial Guinea, ICSID Case No. ARB(AF)/12/2
Martin Dietrich Brauch

A majority tribunal at the Additional Facility (AF) of the International Centre for Settlement of Investment Disputes (ICSID) dismissed the case of Spanish construction company Grupo Francisco Hernando Contreras, S.L. (Contreras Group) against Equatorial Guinea, in an award dated December 4, 2015. According to the majority, the claimant was not a protected investor under the bilateral investment treaty (BIT), as it did not make an investment in accordance with host state law.

Factual background and claims

Throughout 2008, a Contreras Group company signed several documents with Equatorial Guinea. These included a letter of intentions formalizing a proposal to build an industrial district and a self-sufficient city of 15,000 residences in Equatorial Guinea, and an agreement on the constitution of a joint-stock company to build industries in the Malabo and Bata regions. The Contreras Group subsequently constituted two companies in Equatorial Guinea: Nueva Edificación 2000, S.A. (Nueva Edificación), wholly-owned by the Contreras Group, and Industrias y Construcciones Guinea Ecuatorial, S.A. (INCOGESA), owned by the Contreras Group and Equatorial Guinea in equal parts.

Between 2008 and 2011, several steps were taken to advance the construction projects. In particular, the Contreras Group delivered projects, business plans and profitability studies for the government's review,

and acquired machinery in Spain. The government, in turn, authorized by resolution the establishment of Nueva Edificación, hired a company to evaluate the projects presented, and issued Nueva Edificación a direct award (“adjudicación directa”) to build the administrative city of Oyala.

In early 2012, however, the Contreras Group complained that Equatorial Guinea had failed to make outstanding payments and was imposing unjustified obstacles to the project, in breach of the 2003 Spain–Equatorial Guinea BIT. It initiated arbitration in March 2012 under the BIT and ICSID AF Arbitration Rules, as Equatorial Guinea is not a party to the ICSID Convention. The respondent opposed a series of objections to jurisdiction.

Law applicable to jurisdictional objections

Recalling that the ICSID AF Rules do not define the applicable law and that the ICSID Convention does not apply to cases under ICSID AF Rules, the tribunal looked to the BIT to determine the applicable law.

BIT Article 11(3) provides that the arbitration shall be governed by the provisions of the BIT, the domestic law of the host state, and applicable rules and principles of international law. Accordingly, the tribunal set out to analyze each of jurisdictional objection based on the BIT, applying the domestic law of Equatorial Guinea when BIT provisions so determined.

Tribunal succinctly dismisses three jurisdictional objections

Equatorial Guinea had originally objected that the BIT was not in force when the dispute arose. Considering that both states had deposited their instruments of ratification by 2009, that the BIT provides for its provisional application upon its signing in 2003, and that the respondent had withdrawn its objection at the hearing, the tribunal held that the BIT was in force and applied to the dispute at hand.

The respondent had also argued that it had not consented to arbitration under Article 25 of the ICSID Convention. Recalling that the ICSID Convention is not applicable to arbitrations under AF Rules, and indicating that the signing of the BIT expressed Equatorial Guinea’s consent to arbitrate, the tribunal dismissed the objection.

Equatorial Guinea also denied that there was a “legal dispute” within the meaning of Article 25(1) of the ICSID Convention. The tribunal once again rejected the application of the ICSID Convention, and held that, for purposes of determining its jurisdiction, it should assume the dispute had a legal nature, given that the investor claimed compensation for breach of investment protection standards under the BIT.

To qualify as “investor,” claimant must have made a covered investment

The respondent argued that the Contreras Group did not make an “investment” in Equatorial Guinea within the meaning of the BIT and, therefore, did not qualify as an “investor.”

Considering that the Contreras Group was both constituted and headquartered in Spain, the tribunal

held that it qualified as a “company” of Spanish nationality that owns or controls a company established in Equatorial Guinea, within the meaning of the BIT. In addition, the tribunal concluded that, to qualify as an “investor,” the claimant also needed to have made an investment in the other party in accordance with its domestic laws.

Did the Contreras Group make investments in accordance with Equatoguinean law?

BIT Article 1(2) defines “investments” by an illustrative list of assets, subject to the investor’s compliance with host state law. To determine whether there was an investment, the majority briefly referred to criteria of the *Salini* test (contribution by the investor, duration, risk). It noted that both parties agreed that the existence of an investment depended on “a contribution of the Claimant which would arise from a contractual relationship” (para. 141), but disagreed as to whether the investment complied with host state law.

Emphasizing that the contractual basis of the claims was an essential requirement for the existence of a covered investment, the tribunal set out to analyze, under Equatoguinean law, the alleged contractual relationship for the construction work in Malabo and Bata, and the supposed existence of a direct award for the construction work in Oyala.

Based on the text of the constitution agreement related to the Malabo and Bata construction work, the tribunal concluded that the existence of rights and obligations was conditioned on: (a) the conclusion of a construction agreement between INCOGESA and Equatorial Guinea; and (b) the proper constitution of the companies Nueva Edificación and INCOGESA.

There was no evidence that the Contreras Group had complied with the administrative procedure under the Equatoguinean Law on Contracts for the conclusion of a construction agreement with the state, the tribunal indicated. Furthermore, it concluded that the state’s “administrative silence” did not generate binding effects that could replace compliance with the legal procedure.

Even though Nueva Edificación was duly registered, the tribunal noted that its capital stock was later reduced significantly below the minimum required by law—which would eventually lead to the company’s dissolution. It also noted that Nueva Edificación did not begin its activities within the time limits established by law. With respect to INCOGESA, the tribunal pointed out that, although the company was formally constituted and its capital stock was allegedly paid in full, there was no proof that the capital stock had been deposited in a bank account, as required by Equatoguinean law.

Finding that neither of the companies was formed in accordance with Equatoguinean law, the tribunal concluded that they did not have legal personality to operate as vehicles for the claimant’s investments. In the majority’s analysis, “the arguments and conduct of the Claimant evidence its lack of appropriate knowledge of the domestic law applicable to its alleged investment,” a failure that “expresses negligent conduct” (para. 227).

As to the Oyala construction, the majority noted that the government resolution formalizing a direct award did not exclude the need to enter into a contract within 30 days of the award, as required by the Law on Contracts. As there was no evidence that the Contreras Group sought to conclude the contract or that Equatorial Guinea refused to conclude it, the Contreras Group abandoned its intention to invest in the country, in the majority's view.

Dismissal and costs

The majority deemed it unnecessary to examine the *Salini* criteria of duration and risk. It dismissed the case for lack of a protected investor and investment, ordering each party to bear its own expenses and an equal part of arbitration costs.

Dissent rejects Salini criteria, formalistic notion of contract, and remarks about the claimant's lack of knowledge

Arbitrator Orrego Vicuña, however, would have upheld the tribunal's jurisdiction. In his dissent, he indicated that the *Salini* criteria were not included in the BIT, and have been rendered obsolete by investment treaties and jurisprudence. Even acknowledging that there was no written contract, he disagreed with the majority's formalistic interpretation. In his view, there were sufficient elements to evidence the existence of a contract, consisting in an agreement expressed by an offer followed by acceptance.

He also opposed the majority's remarks about the investor's negligence: "if the investor is contracting with the state, it is the latter who has the obligation to require that all the steps required by its legislation are adopted" (dissent, para. 14).

Notes: The ICSID tribunal was composed of Bernardo Sepúlveda Amor (President appointed by the Chairman of the Administrative Council, Mexican national), Francisco Orrego Vicuña (claimant's appointee, Chilean national), and Raúl E. Vinuesa (respondent's appointee, Spanish and Argentine national). The award, including the dissent by Francisco Orrego Vicuña, is available in Spanish only at <http://www.italaw.com/sites/default/files/case-documents/italaw7106.pdf>.

ICSID tribunal orders Zimbabwe to return expropriated farms

Bernhard von Pezold and others v. Zimbabwe, ICSID Case No ARB/10/15

Jacob Greenberg

In a 318-page award issued July 28, 2015 but only published February 2016, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) ordered Zimbabwe to return farms it seized without compensation in 2005. The tribunal found that this seizure, along with the government's clandestine encouragement of illegal settlement of the same estates, constituted a breach of the expropriation, fair and equitable treatment (FET), and several other provisions in Zimbabwean bilateral investment treaties (BITs) with Switzerland and Germany. Restitution is rarely used as a remedy in international investment arbitration, but the tribunal agreed it was appropriate and feasible here.

Along with returning title to the farms, the ICSID

tribunal called upon Zimbabwe to pay the claimants, Bernhard von Pezold and his family, US\$65 million in compensation to account for lost value. This was the second time an arbitral tribunal found Zimbabwe violated expropriation and FET provisions in BITs. In a parallel expropriation case (*Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Developments Co (Private) Limited v. Zimbabwe* [ICSID Case No ARB/10/25]), the same tribunal ruled in favor of Border Timbers, a company majority-owned by the Pezold family, but the award remains unpublished.

Background

When Zimbabwe President Robert Mugabe first came to power in 1980, he set out to correct the state of affairs at the time, when a small number of white commercial farmers owned a large majority of the farmland. His land reform program began with voluntary sellers and buyers, but due to impatience with the slow pace of transfer and Mugabe's flagging popularity, it devolved into expropriation with compensation, and in 2005, expropriation without compensation. Beginning in 2000, black settlers began invading and occupying predominantly white-owned farms.

Bernhard von Pezold and his family, who are dual Swiss and German nationals, bought 78,275 hectares of farmland in Zimbabwe starting in 1988 under the Switzerland–Zimbabwe and Germany–Zimbabwe BITs. Their estates were heavily invaded, with settlers occupying 22 per cent of the farmland. In 2005, when the constitution was amended, the Zimbabwean state acquired title to most of the claimants' land, revoked their right to challenge the acquisition, and criminalized their continued occupancy of the land. The claimants continued to occupy the land, but argued they were reduced to "mere licensees at the will of the Respondent" (para. 159).

The new constitution enacted in 2013 provided full compensation for land seized from "indigenous Zimbabweans," which a Zimbabwe witness testified refers exclusively to black Zimbabweans. The constitution also reaffirmed the right of foreign investors to full compensation under the BITs.

Panel finds Zimbabwe's actions constituted an unlawful expropriation

Zimbabwe essentially conceded that expropriation took place, but claimed the acts were lawful and for a public purpose. The land was expropriated, it argued, because indigenous people remained disadvantaged given the slow pace of land reform. The claimants may not have received monetary compensation, but their continued, substantially unencumbered use of the land constituted prompt, adequate, and effective compensation. Moreover, if the government policed the raids, it would be turning on its people and risking a massacre.

The tribunal rejected these arguments, ruling the expropriation was unlawful and discriminatory, and lacked due process. The transfer of title was sufficient to establish expropriation, and no compensation was paid, so it was not lawful. Continued use of the land could not be considered compensation because "any income that

may have been gathered after [the government seized title] would not equate to prompt adequate and effective compensation without delay” (para. 497).

Without compensation, the expropriation is already unlawful, and thus, a violation of the BIT, the tribunal reasoned. It also addressed several other claimant arguments for unlawful expropriation, finding it lacked due process because the amendment transferring title barred the claimants from challenging the transfer in court. The action was also held racially discriminatory because the vast majority of the farms expropriated were white-owned, and the few black owners affected were compensated for the land seized. Finally, the tribunal found the expropriating acts had no public purpose because the land was never redistributed, and remained mostly in the claimants’ hands.

The actions also violated FET and were not excused by necessity

The tribunal also found a violation of FET. Zimbabwe had, on multiple occasions, assured the claimants that their investments would not be subject to expropriation. According to the tribunal, these declarations established legitimate expectations on behalf of the claimants, which were violated when their land was expropriated.

Zimbabwe asserted a customary international law defense of necessity for its actions, arguing the state of affairs in the country at the time made its actions unavoidable. This “March of History” was a spontaneous movement among the indigenous people of Zimbabwe that resulted in land raiding, and would have intensified if the government had not amended the constitution to seize the land. The government also claimed it was powerless to stop the raids. Additionally, Zimbabwe cited its economic crisis, beginning in 2006, as further evidence of a state of emergency.

The tribunal again rejected Zimbabwe’s claim, finding its arguments implausible. The settlers constituted only a minority of Zimbabwe’s population, as evidenced by the fact that the government’s attempt to amend the constitution in 2000 to allow expropriation without compensation was rejected by referendum. Thus, according to the tribunal, the government could not properly classify the situation as a “State-wide interest,” and in fact, never enacted any emergency legislation to deal with the crisis. Moreover, the tribunal found that, by discriminating along racial lines, these actions breached an essential interest of the international community as a whole, which precluded Zimbabwe from justifying them based on its own essential interest.

The tribunal additionally found that not only could the government have done more to prevent the invasions, but also it actively encouraged and aided them to boost its flagging popularity amongst its core base. The government’s true motive in expropriating the land was holding onto its power, not addressing a national crisis or remedying historical anti-indigenous land policies, the tribunal held.

The tribunal assesses unconventional remedies

In addition to expropriation and FET, the tribunal ruled Zimbabwe also breached the non-impairment, full

protection and security, and free transfer of payments provisions of the BITs. To remedy these violations, the tribunal took the unconventional step of ordering Zimbabwe to make restitution by reissuing title to the properties it seized in 2005. Restitution is rarely awarded in international investment disputes either because of material impossibilities, like irreparably damaged property, or because claimants merely prefer compensation for its simplicity and ease of enforcement, the tribunal speculated.

To warrant this unique remedy, the tribunal explained, restitution must be neither materially impossible nor disproportionate to the benefit derived; mere practical or legal difficulties do not rise to the level of material impossibility. Zimbabwe argued restitution would create chaos, but the tribunal considered that the claimants already occupied most of the land, the property damage was not irreparable, and reinstating title would be a simple administrative act. Moreover, returning title would give the claimants the ability to initiate legal action against the settlers in local courts, and any chaos resulting from their eviction would be a matter for local police. Consequently, the tribunal held that restitution was not materially impossible, and because it only applied to the claimants (rather than everyone who had their land expropriated), the burden was also not disproportionate to the benefit.

The tribunal reasoned that, if restitution were insufficient to restore the status quo ante, it could also award other forms of reparation. Holding that further compensation was necessary, it assessed US\$64 million in monetary damages to make up the difference between the properties “as is” and their condition “but for” the expropriation.

The tribunal took another rare step by assessing an additional US\$1 million in moral damages. Relying on the claimants’ mostly unchallenged testimony, the tribunal found the settlers had kidnapped, threatened, and physically attacked the claimants and their employees. It held that, even if Zimbabwe were not directly responsible for these attacks, the failure of the police to prevent them over the course of several years would fall short of a state’s obligation to provide full protection under the law.

If Zimbabwe returns the titles, it will owe US\$65 million, but if it fails, it will owe US\$196 million. In November 2015, Zimbabwe moved to annul the award.

Notes: The tribunal was composed of L. Yves Fortier (President appointed by agreement of both parties, a Canadian national), David A.R. Williams (claimant’s appointee, national of New Zealand), and Michael Hwang (Zimbabwe’s appointee, Singaporean national). The award on merits is available at http://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf.

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resources and events

Resources

Switzerland's Investment Treaties: Time for a change

By Nathalie Bernasconi-Osterwalder, Published by IISD, April 2016

Switzerland currently has signed 118 bilateral investment treaties (BITs) with countries around the world, primarily developing countries or countries in transition. Worried about the effects on democratic policy-making—particularly states' ability to protect the public interest—many governments are reviewing and revising their approach to these treaties. Despite some concerns raised by the Swiss parliament in the past years, Switzerland has so far introduced only timid changes in its recent investment treaties, and its approach to negotiations has remained in large part unchanged in the last decades. This is probably due to the fact that Switzerland has largely been untouched by disputes under these treaties. However, there is reason to expect more cases against Switzerland in the future, as capital flows from traditional investment treaty partners into Switzerland increase. This paper explains the concerns attached to traditional investment treaties—the type of treaties that Switzerland has so many of—and the various ways that countries have adapted their approach as a result. It argues that now is the time for Switzerland to begin updating its approach to investment treaties. Available at <http://www.iisd.org/topic/investment>

Investment Court System Put To The Test: New EU proposal will perpetuate investors' attacks on health and environment

By Natacha Cingotti, Pia Eberhardt, Nelly Grotefendt, Cecilia Olivet and Scott Sinclair, Published by Canadian Centre for Policy Alternatives, Friends of the Earth Europe, Corporate Europe Observatory, German NGO Forum on Environment and Development and the Transnational Institute, April 2016

The European Commission claims that its new investment proposal—the Investment Court System (ICS)—will protect governments' abilities to regulate on crucial matters such as public health and environmental protection. However, a close review of five of the most controversial arbitration cases in recent years (*Philip Morris v. Uruguay*, *TransCanada v. United States*, *Lone Pine v. Canada*, *Vattenfall v. Germany*, and *Bilcon v. Canada*) shows they could still be launched under the current proposal. Each of these cases can still prosper under ICS, because the new system still grants investors ample and ill-defined rights. When put to the test, the ICS, proposed to replace the flawed investor–state dispute settlement (ISDS) mechanism, fails to protect the right to regulate. Available at <https://www.tni.org/icstest>

Alternative Visions of the International Law on Foreign Investment: Essays in honour of Muthucumaraswamy Sornarajah

By C. L. Lim (editor), Published by Cambridge University Press, March 2016

This book discusses the forces that are reshaping the international investment law. It explains the liberal origins of contemporary investment treaties before addressing a current backlash against these treaties and the device of investment arbitration. The book describes a long-standing legal-intellectual resistance to a neo-liberal global economic agenda, and how tribunals have interpreted various treaty standards instead. Key scholars who have advocated alternative visions of international investment law introduce the changes now taking place in the design of a range of familiar treaty clauses. Finally, it explores the life, career and writings of Muthucumaraswamy Sornarajah, a scholar whose work has been dedicated to the realization of many of these changes, and his views about the hold global capital has over legal practice. Available at <http://www.cambridge.org/ro/academic/subjects/law/international-trade-law/alternative-visions-international-law-foreign-investment-essays-honour-muthucumaraswamy-sornarajah>

Rethinking Bilateral Investment Treaties: Critical issues and policy choices

By Kavaljit Singh and Burghard Ilge (editors), Published by Both ENDS, Madhyam and SOMO, March 2016

This free-to-download e-book takes stock of current developments and explores alternative approaches to reform investment treaties. The book covers a wide range of topics—from current trends in investor–state arbitration to the wider ramifications of investment treaties on sovereign debt restructuring, the extractive industry, intellectual property rights and human rights. It provides an up-to-date account of the model BIT reviews undertaken by South Africa, India and Indonesia. Some of the authors have suggested a broad gamut of useful policy solutions. The book presents a debate that is very relevant to the ongoing initiatives to reform the BITs regime. It raises some critical policy issues that are missing in the current debates. The book attempts to launch a dialogue among government officials, legal experts drawn from academia, international organizations and civil society groups to address the systemic shortcomings of the current BIT regime. Available at <http://www.madhyam.org.in/wp-content/uploads/2016/03/Rethinking-BIT-Book-PDF-15-March-2016.pdf>

The WTO and International Investment Law: Converging systems

By Jürgen Kurtz, Published by Cambridge University Press, February 2016

International law has historically regulated foreign trade and foreign investment differently. Powerful economic, legal and sociological factors are now pushing the two systems together. In this book, Jürgen Kurtz systematically explores the often complex and little-understood dynamics of this convergence phenomenon. Kurtz addresses the growing connections between international trade and investment law, proposing a theoretically grounded and doctrinally tractable framework to understand the deepening relationship between them. The book also offers reform ideas and possibilities, suggesting a set of theoretical insights and doctrinal models. Available at <http://www.cambridge.org/academic/subjects/law/international-trade-law/wto-and-international-investment-law-converging-systems>

The Trans-Pacific Partnership, Part I: A deal too far

By Howard Mann, Published by IISD, February 2016

With the release of the Trans-Pacific Partnership Agreement (TPP), a debate has been growing over the so-called “trade” agreement among twelve Pacific Rim countries.

Should governments ratify the deal? Will it expand trade in a significant way? Who will be the winners and losers? But defining winners and losers only in trade terms misses the much broader impacts of the TPP. In effect, it ignores the fact that the TPP's non-trade provisions, such as in the areas of investment and intellectual property rights, threaten to exacerbate inequality. The author argues that Canada should reject the agreement and use it as a jumping-off point to lead a new global dialogue on the right directions for trade agreements. The commentary also focuses on how trade agreements should and can be instruments to support, rather than impede, achieving the globally adopted Sustainable Development Goals. Available at <https://www.iisd.org/library/tpp-part-i-a-deal-too-far>

Sustainability Impacts of Chinese Outward Direct Investment: A review of the literature

By Yuan Wang, Simon Zadek, Kelly Yu, Mark Halle, Samuel Ortiz Velasquez, Lin Zhang, Hanjie Wang, Published by IISD, February 2016

Outward direct investment (ODI) by the People's Republic of China has grown very rapidly since 2004, and in 2014, China's ODI flows attained USD 123.1 billion. Numerous academic studies, policy papers and media reports discuss

the operations and impacts of Chinese companies overseas. This literature review develops a comprehensive understanding of the sustainable impact of Chinese ODI. It aims at providing a balanced view of the current state of knowledge of the sustainable development impact of Chinese ODI, an overview of the diverse perspectives and concerns relevant to Chinese policy-makers and companies “going out,” insights into the Chinese policy and business strategy measures that would improve outcomes and address concerns, and direction on further avenues for research and possible future collaboration. Available at <https://www.iisd.org/library/sustainability-impacts-chinese-outward-direct-investment-review-literature>

Shifting Paradigms in International Investment Law: More balanced, less isolated, increasingly diversified

By Steffen Hindelang and Markus Krajewski (editors), Published by Oxford University Press, January 2016

Whereas the prevailing mindset in international investment law always been the protection of the economic interests of individual investors, new developments have brought about a paradigm shift. There is now more than ever before an interest in a more inclusive, transparent, and public regime. The book addresses these changes against the background of the framework of the UN Conference on Trade and Development (UNCTAD) to reform investment treaties. It analyses how the investment treaty regime has changed and how it ought to be changing to reconcile private property interests and the state's duty to regulate in the public interest. In doing so, the volume tracks attempts in international investment law to recalibrate itself towards a more balanced, less isolated, and increasingly diversified regime. Individual chapters address the contents of investment agreements, the system of dispute settlement, the interrelation of investment agreements with other areas of public international law, constitutional questions, and new regional perspectives from Europe, South Africa, the Pacific Rim Region, and Latin America. Available at <https://global.oup.com/academic/product/shifting-paradigms-in-international-investment-law-9780198738428>

Events 2016

May 19

ENERGY AND ARBITRATION, Association of International Arbitration (AIA), Vienna International Arbitration Centre (VIAC) and Austrian Arbitration Association (ARBAUT), TBD, <http://www.arbitration-adr.org/activities/?p=conference&a=upcoming#85>

May 19

26TH ITF PUBLIC CONFERENCE: THE ROLE OF PROPORTIONALITY IN INTERNATIONAL INVESTMENT LAW, British Institute of International and Comparative Law, Goodenough College, London, United Kingdom, <http://www.biicl.org/event/1169>

May 19–20

2ND BIENNIAL SYMPOSIUM OF THE GLOBAL ECONOMIC LAW NETWORK, “The Age of Mega-Regionals: TPP and Regulatory Autonomy in International Economic Law”, University of Melbourne Law School, Melbourne, Australia, <http://law.unimelb.edu.au/centres/geln/futureevents/current-and-past-research-activities/the-age-of-mega-regionals>

May 23–24

IISD INTERACTIVE EXPERT MEETING “INVESTMENT-RELATED DISPUTE SETTLEMENT: A COMPREHENSIVE MULTILATERAL APPROACH,” IISD, Montreux, Switzerland, <https://www.iisd.org>

May 25–26

RESPONSIBLE INVESTMENT FORUM 2016, Principles for Responsible Investment (PRI) & Private Equity International (PEI), Marriott Grosvenor Square, London, United Kingdom, <https://www.privateequityinternational.com/responsibleinvestment/>

May 27

ARBITRATION AND EUROPEAN LAW, AIA, Vrije Universiteit Brussel, Brussels, Belgium, <http://www.arbitration-adr.org/activities/?p=conference&a=upcoming#85>

May 31–June 1

OECD FORUM, Organisation for Economic Co-operation and Development (OECD), OECD Conference Centre, Paris, France, <https://www.oecd.org/forum>

June 3

SYMPOSIUM “INTERNATIONAL INVESTMENT LAW AS A FIELD FOR SCHOLARLY RESEARCH,” Uppsala, Sweden, [http://www.jur.uu.se/Portals/2/nyheter/Symposium 3 June.pdf](http://www.jur.uu.se/Portals/2/nyheter/Symposium%203%20June.pdf)

June 8–9

2016 GLOBAL FORUM ON RESPONSIBLE BUSINESS CONDUCT, OECD Conference Centre, Paris, France, <http://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct>

June 9

THIRD PARTY FUNDING, AIA, Vrije Universiteit Brussel, Brussels, Belgium, <http://www.arbitration-adr.org/activities/?p=conference&a=upcoming#85>

June 10–11

6TH ANNUAL CONFERENCE ON WORLD TRADE ORGANIZATION (WTO) LAW, British Institute of International and Comparative Law (BIICL), Institute of International Economic Law (IIEL) at the Georgetown University Law Center, Society of International Economic Law (SIEL), Graduate Institute Geneva and WTO Headquarters, <http://www.biicl.org/event/1161>

June 14

CORRUPTION IN INTERNATIONAL ARBITRATION, Center on International Commercial Arbitration, Washington College of Law, American University, Washington, United States, <https://www.wcl.american.edu/arbitration>

June 14

EXPERT MEETING ON NON-DISCRIMINATION IN THE PRE-ESTABLISHMENT PHASE, Energy Charter Secretariat, Brussels, Belgium, <http://www.energycharter.org/media/news/article/new-date-expert-meeting-on-non-discrimination-in-the-pre-establishment-phase>

July 4–22

2016 SESSION OF THE ARBITRATION ACADEMY, International Academy for Arbitration Law, Paris, France, http://www.arbitrationacademy.org/?page_id=5764

July 17–22

14TH MINISTERIAL CONFERENCE OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD 14), UNCTAD, Kenyatta International Convention Centre, Nairobi, Kenya, <http://unctad14.org>

July 17–21

WORLD INVESTMENT FORUM 2016: INVESTING IN SUSTAINABLE DEVELOPMENT, UNCTAD, Kenyatta International Convention Centre, Nairobi, Kenya, <http://unctad-worldinvestmentforum.org>

August 1–5

EXECUTIVE TRAINING ON INVESTMENT ARBITRATION FOR GOVERNMENT OFFICIALS, Columbia Center on Sustainable Investment, Columbia University, New York, United States, <http://ccsi.columbia.edu/2016/08/01/executive-training-on-investment-arbitration-for-government-officials>

November 7–9

TENTH ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS, IISD, South Centre, Commonwealth Secretariat, & Government of Sri Lanka, Colombo, Sri Lanka, <http://www.iisd.org/project/annual-forum-developing-country-investment-negotiators>



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