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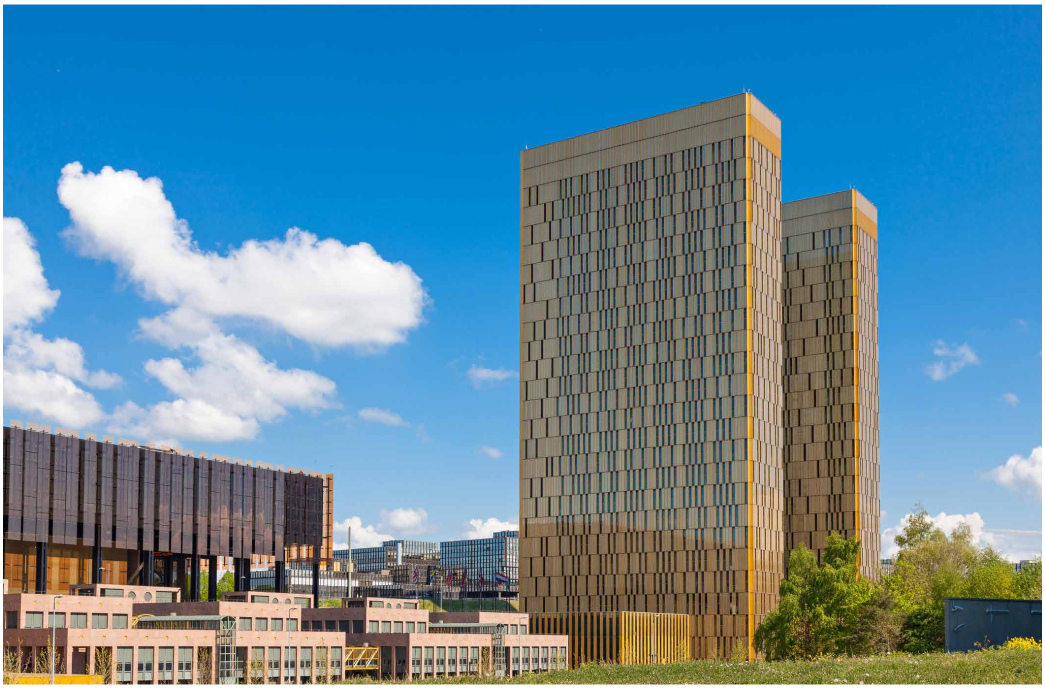
The Power to Conclude the New Generation of EU FTAs: AG Sharpston in Opinion 2/15

Laurens Ankersmit



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insight 1

The Power to Conclude the New Generation of EU FTAs: AG Sharpston in Opinion 2/15

Laurens Ankersmit

In the wake of the entry into force of the Lisbon Treaty in 2009, which gave the European Union new powers in the field of foreign direct investment (FDI),[1] the European Union started negotiating a new generation of free trade agreements (FTAs). These deals—including the Comprehensive Economic and Trade Agreement (CETA), with Canada, and the Transatlantic Trade and Investment Partnership (TTIP), with the United States—are becoming increasingly politically contentious. Going beyond mere tariff reduction and facilitating hyperglobalization, they have faced widespread criticism from civil society, trade unions and academics.

In particular, the legal issue of who is competent to conclude such agreements (the European Union alone, or together with EU member states) has received considerable public attention. In November 2015, the European Commission requested an Opinion of the European Court of Justice (ECJ) (Opinion 2/15) on the conclusion of the European Union–Singapore FTA (EUSFTA). Advocate General (AG) Eleanor Sharpston's response has made the headlines of several European newspapers. In this context, we discuss the allocation of powers between the Union and member states in the field of investment.

1. Background on EU competences and the Opinion 2/15

The European Union operates under the basic constitutional principle of conferral, which determines that the Union shall act only within the limits of the competences conferred upon it by member states in the EU Treaties to attain the objectives set out therein, and that powers not given to the Union remain with member states.[2] EU powers can be subdivided into exclusive powers,[3] powers shared with EU member states,[4] and coordinating and supportive powers.[5] The "common commercial policy," which includes FDI, is listed as an exclusive EU power.[6] Portfolio investment, however, is not, and it is legally questionable whether the European Union has any powers in this field at all.

The principle of conferral also has consequences for the ability of both the Union and its member states to conclude international agreements. Therefore, if an international agreement covers areas over which both the Union and member states exercise their respective competences, the agreement needs to be "mixed," meaning that both Union and member states will need to ratify it jointly. In relation to shared powers, the Union and member states decide who exercises their powers to conclude that part of the agreement; EU member states often insist on exercising their powers to ensure that the agreement is mixed. In practice, almost all EU agreements are mixed.

In a Union of 28 member states, this can be an elaborate and complicated affair. Perhaps because of these potential complications, the European Commission requested an Opinion of the ECJ on the scope of EU powers in relation to the envisaged EUSFTA, asking whether it fell entirely within EU exclusive competence. AG Sharpston presented her views in an Opinion (confusingly given the same name) that serves as non-binding advice to the ECJ, which will take a final and binding decision on the issue.

2. The Opinion of AG Sharpston in Opinion 2/15

The Opinion of AG Sharpston in Opinion 2/15 does not only concern EU powers in the field of investment; it also covers detailed reasoning on specific aspects of the EUSFTA, such as transport services, investment protection, procurement, sustainable development and dispute settlement. In general, the nuanced Opinion of the AG is sympathetic to some of the Commission's arguments on EU powers, but ultimately rejects the Commission's proposition that the Union has exclusive competence over all matters related to investment protection in the EUSFTA.[7]

In interpreting the notion of FDI in Article 207 TFEU, the AG took a contextual approach, using the concept of "direct investment" in ECJ case law interpreting the free movement of capital provisions, as well as definitions by the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD). Accordingly, FDI would be understood as a foreign investment "which serve[s] to establish or maintain lasting and direct links, in the form of effective participation in the company's management and control, between the person providing the investment and the company to which that investment is made available in order to carry out an economic activity."[8] The AG subsequently suggested a threshold of at least 10 per cent of the voting power as "evidentiary guidance" of effective participation in the company's management and control. Moreover, she found that the term also covered issues that regulated the post-establishment phase of investment and not merely market access of FDI.

While this was in line with what the Commission had argued, the AG did not follow the Commission's position in relation to portfolio investment and the power to terminate prior bilateral investment treaties (BITs) concluded by EU member states.[9] Particularly in relation to member state BITs, the AG could not identify sufficient support in EU and international law for the argument that the Union had succeeded EU member states in the matter of terminating prior BITs. As a result, terminating these agreements would fall entirely within the powers of EU member states.

3. Comments on AG Sharpston's opinion

In light of these developments, the ECJ will now be required to interpret the term "FDI" for the first time and clarify whether EU powers in the area of portfolio investment (as opposed to FDI) also fall within EU (implied) exclusive powers.

If the ECJ follows the AG's Opinion, the power to conclude agreements covering investment would be for all intents and purposes shared between Union and member states. This would mean that concluding investment treaties with the Union and its member states will not be smooth sailing, and one could expect ratification of these agreements to take many years. The conventional "antidote" to this ratification practice in the European Union is to apply provisionally those areas of the agreement over which the Union is exclusively competent.

> "If the ECJ follows the AG's Opinion, the power to conclude agreements covering investment would be for all intents and purposes shared between Union and member states."

However, as can be seen with CETA, this may not result in the provisional application of investment arbitration mechanisms contained in the agreement, not least because of the controversy surrounding them. This is not without good reason, as provisional application of the agreements at EU level does not necessarily result in proper democratic oversight over the agreement. Even though the EU Council generally waits with the implementation of provisional application until the European Parliament has consented to the Council's decision to conclude an agreement, the European Parliament is not formally involved in this decision.[10]

All of this may be to the dismay of proponents of agreements such CETA and TTIP, who would like to see a swift ratification process, but one may wonder whether pushing through such controversial agreements at EU level is politically desirable for the European Union in the first place. In any event, it seems plain that the issue of "mixity" should be guided by the constitutional principle of conferral and not by political expediency in the eyes of the proponents of such trade and investment deals.

Finally, it is worth noting the AG's comments on the compatibility of investor–state dispute settlement (ISDS) in the EUSFTA with the EU Treaties. This contentious legal issue is likely to make its way to the ECJ in the form of a request for an Opinion by Belgium.[11] The Commission did not ask the ECJ to resolve this question and only asked the ECJ who was competent to conclude the EUSFTA. This may suggest that the Commission's request was borne out of political expediency, seeking to expand its powers only and avoiding any legal issues that may constrain them. What is more, in public meetings with Members of European Parliament, the Commission is even saying that, if the ECJ does not object to ISDS in Opinion 2/15, **we can assume that it considers the mechanism compatible with the EU Treaties.**[12]

The Opinion of AG Sharpston refutes this argument. She states that "the Court is not asked to consider, for example, the compatibility of an ISDS mechanism with the Treaties. […] My analysis in this Opinion is therefore without prejudice to such issues (if any) as there may be concerning the material compatibility of the EUSFTA, including the provisions regarding the ISDS mechanism, with the Treaties."[13]

Even so, the ECJ's views in Opinion 2/15 could have implications for a future request for an Opinion on the compatibility of the Investment Court System (ICS) in CETA, the EU–Vietnam FTA or any other FTA. If the ECJ takes an even wider view than the AG's on EU competence, this may facilitate the conclusion of agreements such as CETA as "EU only." This in turn would sideline member states' ability to request an Opinion, as a swift ratification would ensure that **the ECJ can no longer express itself on the issue.**[14]

Author

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Notes

1 For a history of the decades-long push by the Commission to extend EU trade policy to cover investment, culminating with the Lisbon Treaty, see the excellent contribution by Basedow, R. (2016). A legal history of the EU's international investment policy. *The Journal of World Investment & Trade*, *17*(5), 743–772.

2 Consolidated versions of the Treaty on European Union [hereinafter TEU] and the Treaty on the Functioning of the European Union [hereinafter TFEU] [2012] O.J. C326/01, TEU, art. 5, paras. 1–2. Retrieved from http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:12012E/TXT.

3 TFEU, *supra* note 2, art. 3.

4 TFEU, *supra* note 2, art. 4.

5 TFEU, *supra* note 2, arts. 5–6.

6 TFEU, *supra* note 2, arts. 3(1)(e), 207.

7 Opinion of Advocate General Sharpston delivered on 21 December 2016, Opinion procedure 2/15, initiated following a request made by the European Commission. Retrieved from http://curia.europa.eu/juris/document/document.jsf?text=&docid=186494&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=429984.

8 *Id.*, para. 322.

9 For a detailed discussion, see http://europeanlawblog.eu/2017/01/10/the-power-to-conclude-the-eus-new-generation-of-ftas-ag-sharpston-in-opinion-215/

10 TFEU, *supra* note 2, arts. 218(5)–(6).

11 Ankersmit, L. (2016). Belgium requests an Opinion on Investment Court System in CETA. *Environmental Law Network International [ELNI] Review*, *2*, 54–57. Retrieved from https://dial.uclouvain.be/downloader/downloader.php?pid=boreal:178426&datastream=PDF_01.

12 EU Committee on International Trade (INTA), Committee meeting, Nov. 10, 2016, 09:05–12:40 at 12:30:30. Retrieved from http://www.europarl.europa.eu/ep-live/en/committees/video?event=20161110-0900-COMMITTEE-INTA.

13 Opinion of Advocate General Sharpston, *supra* note 8, para. 85.

14 See Opinion 3/94 [1995] ECR I-4577. Retrieved from http://curia.europa.eu/juris/showPdf.jsf?text=&docid=99635&doclang=EN.

insight 2

Can Bolivian State-Owned Companies Submit to International Arbitration? Analyzing Bolivia's Intricate Legal Framework on Foreign Investment

José Carlos Bernal Rivera

Bolivia's new policies regarding foreign investment and arbitration have not gone unnoticed by ITN in the past.[1] The laws on investment promotion and on arbitration are two of the most notorious pieces of legislation resulting from the process of change initiated by the Bolivian government under President Evo Morales since 2006. These two laws, along with the law on state-owned companies, have been labelled by the Attorney General of Bolivia as the "New Investment Laws" of Bolivia,[2] and reflect Bolivia's public policy regarding investment protection and the participation of the private sector in the economy.

However, it is still hard to provide a clear and certain answer to one of the most important questions that these laws were meant to resolve: can Bolivian state-owned companies submit to international arbitration? Different answers can be drawn depending on the type of state-owned company, the transaction at hand and the specific industry. For this, we must make a careful reading of the three New Investment Laws altogether. However, even combining the three laws, the drafting of the norms on this topic is unclear and may be subject to different interpretations. This note tries to describe the current scenario in Bolivia.

1. Why are state-owned companies so important for Bolivian investment policy?

The structure of the Bolivian economy has undergone many changes under the Morales presidency. Before 2006, the key companies and public services in Bolivia were "mixed corporations," with capital from both the state and foreign private companies, as a result of the privatization and capitalization measures implemented in the 1990s (Law 1554 of 1994). Since 2006, the government has implemented a policy to recapture natural resources, which led to a series of nationalizations and expropriations, and to the rise of many state-owned companies.

The state's new role in the Bolivian economy is the reason why state-owned companies are now so important for investment policy. They have become protagonists in the most important industries of the Bolivian economy. As part of this new policy, the Bolivian Constitution was reformed in 2009, and the recapture of natural resources was one of the most important changes in the new Constitution. Article 309 of the Constitution provides that managing the property rights over natural resources and controlling the production and industrialization of such resources is one of the objectives of state-owned companies. The Constitution only mentions the word "arbitration" once, and it does so to provide that foreign companies performing activities in the oil and gas sector may not submit to international arbitration (Art. 366).

Under the Constitution, the state's role in the economy is "to direct and control the strategic sectors of the economy" (Art. 316), such as oil and gas, mining, electricity and others. The result of this policy change is that strategic industries of the Bolivian economy are inaccessible to foreign investors, unless the investment is channelled through or made in collaboration with state-owned companies.

In addition, many smaller state-owned companies have entered non-strategic sectors of the economy and compete in them with the private sector. Among these companies are Papelbol (paper), Cartonbol (carton), Lacteosbol (milk products) and BOA (airline). It is reported that currently 63 state-owned companies, with varying degrees of state intervention, operate in Bolivia.[3]

2. What do the New Investment Laws provide for state-owned companies?

Considering that foreign investment in Bolivia is intrinsically connected to the operation of state-owned companies, the importance of the question in this note is more evident. What norms are applicable to state-owned companies? In particular, can state-owned companies submit to arbitration with private companies investing in Bolivia? A close reading of the Arbitration Law (Law 708),[4] the Law on State-Owned Companies (Law 466),[5] and the Investment Promotion Law (Law 516)[6] provides us with some clues, but not with definitive answers.

a. Laws on State-Owned Companies and on Investment Promotion

These two laws deal with arbitration only indirectly. The Law on State-Owned Companies—which predates the Arbitration Law—simply provides that disputes among the partners within state-owned companies (namely, between private companies and the state) will be subjected to specific norms to be established in the new arbitration law to be created.

However, it also develops important concepts. It distinguishes three kinds of state-owned companies: i) State Companies have 100 per cent of state capital; ii) Mixed State Companies have more than 70 per cent of state capital; and iii) Mixed Companies have more than 50 per cent of state capital (Law 466, Art. 6).

The Investment Promotion Law takes a similar approach regarding dispute resolution. It mandates the publication of a new arbitration law, which "shall include specific regulations for dispute resolution regarding investments" (Law 516, Transitory Art 3.I) and must be framed in the "principles of equity, truthfulness, good faith, confidentiality, impartiality, neutrality, legality, celerity, economy and mutual acceptability" (Law 516, Transitory Art. 3.II). In line with this mandate, the arbitration law enacted later includes a separate section addressing investment dispute resolution and expanding the principles of law applicable to that specific section.

In another important feature, the Investment Promotion Law reinforces the provisions of the Constitution by providing that only subject to the rights granted by the state may private investors develop economic activities in strategic sectors (Law 516, Art. 6). It also defines the differences between Bolivian, Mixed and Foreign Investments. These terms are also used in the Arbitration Law enacted later.

b. Law on Arbitration

To arrive at the core part of the question, it is necessary to take a closer look at Law 708 on Conciliation and Arbitration.

The point of departure is the list of non-arbitrable matters (that is, matters expressly excluded by law from being subject to conciliation and arbitration). Among these, the law expressly excludes "property over natural resources," "administrative contracts, with the exceptions set forth in the Law," and "matters affecting the public order" (Law 708, Art. 4).

Therefore, administrative contracts cannot be subject to arbitration, with some unclear exceptions not expressly mentioned. State Companies may enter into administrative contracts, but also into commercial agreements, which, under this article, should not be reached by this restriction. Also, the ambiguity of the term "public order" provides ample room for discussion. Would any right of a state-owned company be considered non-arbitrable, as it affects public interests and thus would be considered "a matter affecting public order" within the meaning of the law?

What are the exceptions not expressly mentioned? The law seems to provide two possible answers. First, it provides that state entities and state-owned companies may initiate arbitration regarding disputes arising only from agreements entered into with foreign companies not domiciled in Bolivia (Law 708, Art. 6). Second, state-owned companies may include arbitration clauses in their administrative contracts, "while" ("en tanto" in Spanish) these companies migrate to the legal regime set forth on Law 466 on state-owned companies (Law 708, Transitory Art. 4).

Regarding these two points, it is important to note that Article 6 might be contrary to the constitutional provision that prohibits according foreign enterprises conditions more favourable than those accorded to Bolivian companies (Constitution, Art. 320). Why is it possible for foreign companies to submit to arbitration, while this option is not available for Bolivian companies? On the other hand, Transitory Article 4 also creates interpretation problems regarding the word "while" ("en tanto" in Spanish), because it is unclear whether arbitration is available to the companies that have already migrated to Law 466 or whether it is only available to companies that have not yet migrated to the new regime.

Finally, the Arbitration Law establishes a whole new section on "disputes with the state regarding investments" (Law 708, Title IV, Chapter II). In this section, the law relies heavily on the definitions of the other New Investment Laws, by establishing different rules for Bolivian Investments, on the one hand, and for Mixed and Foreign Investments, on the other. However, in both cases, the law provides that arbitration shall be domestic and have its seat in Bolivian territory, and that Bolivian law shall be the procedural law applicable to the arbitration (*lex arbitri*), thus barring the possibility of subjecting investment disputes to international arbitration facilities.

It is logical to assume that these provisions on investment are applicable to all kinds of investment made in Bolivia, including foreign direct investment. However, as a result of the constitutional provisions explained above and of the heavy presence of the state in so many industries in the Bolivian economy, it is likely that these provisions would have special importance for investments channelled through Mixed Companies or Mixed State Companies.

3. Conclusions

It is not easy to draw hard conclusions on inconclusive norms. I believe that the best way to summarize this note is from the perspective of the foreign investor. If the foreign investor participates in a strategic sector of the Bolivian economy (for example, oil and gas), international arbitration with the state seems to be completely barred by constitutional provisions. Contracts between foreign investors and state-owned companies regarding other industries may be submitted to arbitration, but only if the agreements are not administrative in essence, or provided that the barrier of "non-arbitrable" matters can be successfully avoided by applying one of the exceptions of the arbitration law. On the other hand, if a foreign investment takes place through a state-owned company, disputes between the investor and the state as partners of the company may be submitted to arbitration, but following the specific norms applicable to the different types of investments and of state-owned companies, in which case international arbitration is out of the question. Clear and conclusive jurisprudence will be very important to shed more light on these intricate rules.

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1 Brauch, M. D. (2014, August 11). Opening the door to foreign investment? An analysis of Bolivia's new investment promotion law. *Investment Treaty News*, *5*(3), 9–12. Retrieved from http://www.iisd.org/itn/2014/08/11/opening-the-door-to-foreign-investment-an-analysis-of-bolivias-new-investment-promotion-law; Menacho Diederich, P. (2015, November 26) Conciliation and arbitration law: Times of change in investment protection in Bolivia. *Investment Treaty News*, *6*(4), 6–7. Retrieved from http://www.iisd.org/itn/2015/11/26/conciliation-and-arbitration-law-times-of-change-in-investment-protection-in-bolivia.

2 Procuraduría General del Estado. (2015, August). *Procurador destaca tres leyes que garantizan la inversión privada*. Retrieved from http://www.procuraduria.gob.bo/index.php/en/design-and-features/noticias/275-procurador-destaca-tres-leyes-que-garantizan-la-inversion-privada.

3 EJV! (2015, April 30). *En Bolivia hay 63 empresas estatales; Gobierno advierte con cerrar las que no dan ingresos*. Retrieved from http://eju.tv/2015/04/en-bolivia-hay-63-empresas-estatales-gobierno-advierte-con-cerrar-las-que-no-dan-ingresos.

4 Plurinational State of Bolivia. (2013, December 27). *Ley 708: Ley de conciliación y arbitraje*. Retrieved from: http://www.lexivox.org/norms/BO-L-N708.xhtml.

5 Plurinational State of Bolivia. (2013, December 27). *Ley 466: Ley de la empresa pública*. Retrieved from: http://www.lexivox.org/norms/BO-L-N466.xhtml.

6 Plurinational State of Bolivia. (2014, April 4). *Ley 516: Ley de promoción de inversiones*. Retrieved from: http://www.lexivox.org/norms/BO-L-N516.xhtml.

insight 3

The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest

Lise Johnson and Brooke Skartvedt Guven

A significant percentage of investor–state dispute settlement (ISDS) claims are reportedly settled between the parties to the dispute before an award is issued. By one count, 26 per cent of investment disputes concluded as of December 31, 2015 (444 cases) were settled.[1] This number is almost certainly an underestimate: it does not capture the settlement of disputes that are not publicly known, and does not reflect any settlements negotiated prior to the filing of an ISDS claim.

Settlements can be seen as positive outcomes, saving parties the time and expense of arbitration. However, in the context of disputes involving governments, settlements raise threats to principles of good governance, including government accountability, respect for the rule of law, transparency, and respect for citizens' rights and interests under domestic law and international human rights norms.[2] When a settlement agreement also includes the settlement of a counterclaim, the threats are exacerbated.

To date, although discussions of investment treaty and ISDS reform have intensified and have effected change in certain areas, these issues regarding settlements and counterclaims have received relatively little attention. Yet, given the frequency of settlements, the apparent ascendency of counterclaims and the policy issues both raise, any reform agenda must also cover these topics. After highlighting some of the problematic aspects of settlements and counterclaims, this note suggests some possible ways forward.

1. Settlements by government respondents: Implications for good governance

In ISDS disputes, respondent states are often represented by a particular national agency that, depending on domestic law and institutions, may exercise sole or significant control over litigation strategy, deciding which arguments to advance or avoid, as well as whether and on what terms to settle. This raises issues for the intra-governmental and intra-national distribution of powers.

Assume, for example, that the agency handling a dispute is also responsible for negotiating investment treaties and handling other issues relating to cross-border economic and political activities, and that the conduct challenged by the investor is failure by environmental officials to authorize a proposed project. The government body defending the case may have the power to settle the dispute by agreeing to waive environmental requirements irrespective of environmental officials' legitimate concerns.[3]

A wide range of similar situations could arise in which the settling entity adopted positions contrary to the prerogatives of other national agencies, the intent of legislatures, or the rights of subnational governments.

Relatedly, a settling agency could undermine the rights of constituents. A settlement might authorize a mining project resisted by local communities; offer a tax exemption depleting funds available for social services; approve electricity tariffs out-of-reach for consumers; guarantee privileged access to water, land, or other natural resources over competing claims;[4] or include any number of other commitments to act or not act, or pay or forego damages.

As has been recognized by courts and commentators in the context of domestic litigation, giving the government such broad powers to unilaterally determine what arguments to make and what settlements to adopt can significantly—and negatively—impact the rights and interests of non-parties to the litigation.[5] As one academic has noted, "consent of the *Government*" is not the same as "consent of the *governed*."[6]

Emphasizing these issues, the U.S. Chamber of Commerce, a business organization, has highlighted a "sue and settle" problem that arises when government agencies settle, rather than defend, lawsuits by private parties. By entering into settlements, the U.S. Chamber of Commerce states, a government agency commits itself to "legally binding, court-approved settlements negotiated behind closed doors, with no participation by other affected parties or the public," which allows agencies to avoid the legislatively established norms governing the rulemaking process, frustrating the separation of powers and distorting the priorities and duties of the agency in favor of private outside groups.[7]

These concerns are even more valid in the context of ISDS.

2. Protections for the public interest: Domestic law vs. investment law

Various rules and mechanisms exist in some domestic contexts for public and judicial oversight of settlement agreements. These include:

- Statutory requirements that apply prior to the formation of a settlement agreement, such as rules requiring the government to give the public notice of and an opportunity to comment on proposed agreements[5]
- Rules permitting or giving non-parties the right

to intervene in disputes and comment on or object to settlements[8]

- Requirements for judicial approval of certain proposed agreements[9]
- Doctrines preventing enforcement of settlement agreements that violate the law.[10]

ISDS provisions and arbitral rules, however, provide no similar rules aimed at protecting non-party rights and interests, or mechanisms for ensuring public oversight of proposed settlement agreements.

> "There is no express requirement in treaties or arbitral rules that a settlement agreement concluded between the disputing parties and not submitted to the tribunal be made public."

For one, with the exception of a recent agreement concluded by the European Union,[11] there is no express requirement in treaties or arbitral rules that a settlement agreement concluded between the disputing parties and not submitted to the tribunal be made public. If submitted to the tribunal and entered as an order or award, the agreement may come to light, but may do so too late for any response. A growing number of treaties and the Rules on Transparency of the United Nations Commission on International Trade Law (UNCITRAL) require transparency of awards, among other documents related to an arbitration. Even so, there are no precise rules regarding timeliness of such disclosures, and no requirement that, even if a settlement agreement were transmitted to a tribunal, it would be made public *before* being given the tribunal's powerful stamp of approval.

Moreover, investment treaties and the arbitral rules they apply contain no provisions enabling non-parties to join ongoing litigation and weigh in on or challenge proposed settlements. The most non-parties can do is seek to provide input as an amicus curiae, with no guarantee that their voices will be taken into account. And, while doctrines such as the *Monetary Gold* principle may safeguard the rights of non-parties by requiring dismissal of cases whose resolution will affect non-parties' interests, tribunals have tended to apply this doctrine narrowly, if at all. This is particularly concerning because, as one recent study found, settlements are more likely when private and state parties wish to hide procedural and substantive outcomes from other stakeholders.[12]

Finally, given the international law nature of ISDS cases, the settling agency may be able to successfully assert that the primacy of international law over domestic law justifies, if not mandates, enforcement of any ISDS settlement.

Even if the settlement agreement were clearly unlawful under the respondent state's law, it might be difficult for the state (or constituents within the state) to prevent its enforcement. Assume stakeholders in a state successfully challenged the validity of a settlement agreement in domestic courts. If the government subsequently refused to abide by the settlement agreement, the investor could challenge the government's breach in ISDS and may succeed, as tribunals have enforced contractual commitments made by governments even where those commitments have doubtful legality under applicable domestic law.[13]

A settlement agreement would be even further immunized from challenge if it were entered as an award, even though questions may arise regarding enforcement of non-pecuniary remedies. Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the agreement could potentially be vacated at the seat of arbitration, or refused enforcement on public policy grounds. However, these recourse options may not preclude eventual enforcement.[14] Under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), the opportunity to resist enforcement is even narrower.

3. Issues with settlements as part of counterclaims

These concerns over settlement may be magnified when the substantive obligations that are the subject of a settlement agreement also involve government counterclaims.

Many concerns relate to the overarching issue of whether and which claims are or should be the government's to bring and settle: Can a respondent state settle claims relating to harms the investor caused to the state's citizens? If so, would the settlement preclude future actions against the investor by those who were harmed? While some tribunals have declared that investors who are not a party to a settlement agreement are not impacted by its terms, it is unclear that the same rule would apply when judging the effects of an ISDS settlement agreement reached by the state, given the state's arguable power to represent (and potentially dispose of claims by) its constituents.[15]

What is to prevent a state from using human rights or environmental claims of harms to marginalized communities as bargaining chips? Are there any reliable mechanisms to ensure that communities will receive any amounts recovered from the investor? Similarly, are there checks to ensure that any settlement reached by the state is adequate in light of the investor's conduct and the harm suffered by third parties? Any rules for avoiding collusion between the investor and state to dispose of particular claims through an ISDS settlement agreement?

When an ISDS settlement agreement improperly purports to limit or has the effect of limiting the claims of non-parties, (how) does that affect the settlement agreement's validity and enforceability? Could a settlement be vacated by non-parties to the agreement on these grounds? Would non-parties have standing to raise a “public policy” exception to enforcement? Similarly, if the investor, the state or both breached settlement obligations benefitting non-parties, would those non-parties be able to seek enforcement?

These questions do not have easy answers, and it is outside the scope of this note to explore them—and the many similar questions that may arise—in detail. Even so, they are important to raise in order to highlight the reality that counterclaims might benefit the settling state, but may not benefit, and may in fact harm, the rights and interests of stakeholders within that state. Procedural and substantive mechanisms at the national and international law levels are needed to avoid those intra-national harms.

4. Proposals relating to the settlement of investment disputes

To the extent ISDS continues to be included in investment treaties, states may consider adopting measures to identify and address the threats to good governance raised by settlements and counterclaims. Options could include:

- At the domestic level, as a critical first step, states could implement domestic rules and practices related to their ability to settle ISDS disputes. These laws could address who has authority to settle and what process must be followed, provide for appropriate transparency and a meaningful opportunity to comment on proposed settlements, and require settlement agreements to specify that they are void or invalid to the extent they are inconsistent with domestic law and applicable international law norms, including on human rights, environmental protection and other areas.

> “States could ensure that treaties and arbitral rules clearly require transparency of settlement agreements entered into by the government.”

- At the international level:
  - States could ensure that treaties and arbitral rules clearly require transparency of settlement agreements entered into by the government, including those agreements not entered as awards or orders.
  - Treaties could specify that the validity of any settlement agreement is subject to compliance with procedural and substantive requirements of domestic law, international human rights norms and other areas of international law, as appropriate.
  - Irrespective of whether such language is present in the treaty, arbitrators should decline to enter settlement agreements that are illegal under domestic law (for example, for lack of authority to conclude the agreement) as orders or awards, and investors should not be permitted to rely on fair and equitable treatment (FET) or expropriation obligations to enforce illegal agreements or secure compensation for their breach.
  - Arbitrators should refrain from entering settlement agreements as awards if they do not meet appropriate criteria, including that the settlement be lawful and free from improper collusion or corruption, and not purport to waive or affect the rights of non-parties.
  - States party to the New York Convention could consider agreeing to an interpretive instrument clarifying that the “public policy” exception is meant to preclude enforcement of settlement agreements that are invalid or ultra vires under the law of the host state, international human rights law or other areas of international law. Those party to the ICSID Convention could clarify that it would be a “manifest excess of powers” for the tribunal to purport to enter such a settlement agreement as an award.

Author

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news in brief

SIAC Investment Arbitration Rules come into effect; new SCC rules include appendix on investment treaty disputes

On January 1, 2017, the Investment Arbitration Rules of the Singapore Investment Arbitration Centre (SIAC) came into effect. Among the highlights are provisions on early dismissal of claims and defences, submissions by non-disputing parties and mandatory disclosure of third-party funding arrangements. The tribunal may consider such arrangements when apportioning costs.

The 2017 Arbitration Rules of the Stockholm Chamber of Commerce (SCC) entered into force on the same day. Appendix III contains additional provisions applicable to treaty-based investor–state arbitrations. Third parties or non-disputing treaty parties may request or be invited by the tribunal to make a written submission. Moreover, absent agreement on the number of arbitrators, investment tribunals will be composed of three arbitrators by default.

CETA approved by EU Parliament; provisional application depends on ratification by Canada

On February 15, 2017, the European Parliament approved the Comprehensive Economic and Trade Agreement (CETA), signed by Canada and the European Union on October 30, 2016 after seven years of negotiations. The agreement was approved by 408 Members of the European Parliament and rejected by 254, with 33 abstentions.

As reported in ITN, this approval paves the way for provisional application, which is expected to occur in the next few months, once Canada also ratifies the agreement. Provisions on investment protection (including the Investment Court System [ICS]), portfolio investment and related provisions from the financial services chapter will only enter into force after national ratification by individual EU member states, a process that can take several years.

After the vote, European Commission President Jean-Claude Juncker said: "This progressive agreement is an opportunity to shape globalization together and influence the setting of global trade rules. The best example of this is the work that we are already doing with our Canadian friends to establish multilateral rules to deal with investment issues."

Trump pulls United States out of TPP; intends to pursue bilateral agreements

On January 23, 2017, fulfilling a campaign pledge, U.S. President Donald Trump formally withdrew the United States from the Trans-Pacific Partnership (TPP), signed in February 2016. The Trump administration indicated that it would pursue bilateral agreements instead.

In his campaign, the U.S. President also promised to renegotiate the North American Free Trade Agreement (NAFTA) with Canada and Mexico. In a meeting with Canadian Prime Minister Justin Trudeau on February 13, Trump said that U.S.–Canada trade relationships needed mere "tweaking," while U.S.–Mexico relations posed greater challenges.

European Union and Canada co-host discussions on a multilateral investment court

On December 13 and 14, 2016, the European Commission and the Canadian Government co-hosted exploratory discussions on establishing a multilateral investment court. Government representatives from several countries attended the closed-door meeting in Geneva.

Upon concluding CETA, the two hosts had vowed to "work expeditiously" to create a permanent investment court, building on the ICS mechanism included in the agreement. The goal of the new court is to replace the existing regime of ad hoc investor–state arbitration as well as bilateral ICS mechanisms included in EU trade and investment agreements. It would be open to all interested countries to resolve disputes under existing and future investment treaties.

Argentina, Brazil, India, Japan and other nations reportedly rejected the initiative, which Canada and the European Union continued to advance at the World Economic Forum (WEF), in Switzerland. Indian Commerce and Industry Minister Nirmala Sitharaman said that "India summarily rejected" the idea that CETA, incorporating an investor–state dispute settlement (ISDS) mechanism, could be the template for a similar multilateral agreement.

In the occasion, Minister Sitharaman also emphasized India's position in favour of requiring investors to exhaust local remedies before resorting to international tribunals: "Only after all local options have been exhausted for settling disputes between a corporate and a government, do we want to permit issues to be taken up in international arbitration tribunals."

On February 27, the European Commission held a stakeholder meeting on a multilateral reform of investment dispute resolution. It is also holding a public consultation on options for a multilateral reform of investment dispute resolution, due to close on March 15.

Following criticisms of CETA, academics propose reforms in EU trade and investment policy and negotiations

On December 5, 2016, the Belgian region of Wallonia published the Namur Declaration, proposing to change EU trade policy and negotiations. The document was initially signed by 40 academics from several countries, including Paul Magnette, Minister-President of Wallonia. The region made the news in October 2016, when its parliament temporarily blocked the approval of CETA by the Belgian federal government.

Based on public concerns expressed in the context of CETA negotiations, the declaration makes proposals under three principles: (1) respect for democratic procedures, (2) compliance with socio-economic, sanitary and environmental legislation, and (3) guarantee of public interests in the dispute resolution mechanism.

In response to the Namur Declaration, over 60 European academics praised the European Union's "unique decision-making process ensuring democratic legitimacy at multiple levels (going beyond any other country)" and denounced the threat of "attempts to renationalize EU policies." They issued the Trading Together Declaration, developing five proposals to make the European Union more democratic.

Among the five proposals are increased transparency of all EU institutions on the objectives they pursue in international trade policy, as well as access of "all private stakeholders (not just foreign investors)" to mechanisms to ensure states' compliance with international agreements, "including obligations on sustainability, environmental, social and health protection."

awards and decisions

ICSID tribunal dismisses claims brought against Indonesia based on forged mining licences

Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB/12/14 and ICSID Case No. ARB/12/40

Inaê Siqueira de Oliveira

After rendering separate decisions on jurisdiction—one for the case brought by British company Churchill Mining PLC under the United Kingdom–Indonesia bilateral investment treaty (BIT), and another for Australian company Planet Mining Pty. Ltd.'s case under the Australia–Indonesia BIT—the arbitral tribunal consolidated the two arbitrations, as both were based on the same facts, and issued a single award.

The requests of both claimants had relied on the same set of documents, which the arbitral tribunal deemed to be forged. Thus, the tribunal considered all claims inadmissible, ordering the claimants to bear all arbitration costs and to reimburse 75 per cent of Indonesia's legal expenses.

Factual background and claims

A group of seven Indonesian companies—the Ridlatama group—introduced the mining project East Kutai Coal Project (EKCP) to the claimants, to explore a large coal deposit in the Regency of East Kutai, Indonesia. The claimants invested in EKCP by acquiring all shares of PT Indonesian Coal Development (PT ICD), a company registered in Indonesia.

Later, certain companies within the Ridlatama group obtained (fraudulently, as the tribunal later concluded) mining licences for large areas in the EKCP. These companies had Pledges of Shares Agreements and Cooperation Agreements with PT ICD, which would plan, set up and perform all mining operations in exchange for 75 per cent of the generated revenue.

Conflicts began as of 2010. The areas of certain licences granted to the Ridlatama group substantially overlapped with those of licences that had been given to other companies. At the recommendation of the Indonesian Ministry of Forestry, the Regent of East Kutai revoked all licences belonging to Ridlatama companies.

The Ridlatama group initiated proceedings against Indonesia before Indonesian courts, while the claimants resorted to the International Centre for Settlement of Investment Disputes (ICSID) in 2012, seeking full compensation for the expropriation of their investment.

Applicable law—and a "duty to adopt principles established in a series of consistent cases"

As the BITs were silent on the legal consequences of forgery, the tribunal deemed appropriate to apply, in addition to the BITs, Indonesian law and international law (para. 235). As to the relevance of previous decisions, the tribunal reasoned that, although it was not bound by previous decisions, it should pay "due consideration" to them because it had a "duty to adopt principles established in a series of consistent cases" in order to contribute "to the harmonious development of international investment law" (para. 253).

Fraudulent scheme to forge mining licences

Indonesia opposed the authenticity of 34 documents. In substance, the dispute centred on the signature in those documents. Government records showed that officials typically sign important documents (such as the ones related to mining licences) by hand, while all the signatures in the disputed documents had been mechanically reproduced.

In addition to the signature issue, several troubling oddities in ancillary elements also pointed to a fraudulent scheme put in place to fabricate documents. Other documents existed in more than one version, did not contain signatures or initials of officials, or were not registered in the government database. There was no paper trail regarding the licence application process, and ten days after the Regent of East Kutai had revoked the licences of the Ridlatama companies a supposed Re-Enactment Degree was issued to declare the licences valid again. The oddity did not escape the arbitral tribunal: "Why should a government revoke a license one day and reinstate it ten days later?" (para. 441). All things considered, the arbitral tribunal "found that a fraudulent scheme permeated the Claimants' investments in the EKCP" (para. 507).

As to whether the claimants had taken part in the fraudulent scheme, the arbitral tribunal noted that the record pointed "towards Ridlatama rather than the Claimants in relation to the forgery of the contentious documents" (para. 476).

Legal consequences of forgery

The arbitral tribunal resorted to international law and investment case law to establish the legal consequences of forgery. It conducted a large review of cases and concluded that, depending on the circumstances of each case, fraud could affect the tribunal's jurisdiction (as in *Phoenix v. Czech Republic*, *Inceysa v. El Salvador* and *Europe Cement v. Turkey*), could affect the admissibility of the claim (as in *Plama v. Bulgaria*) or could be addressed in the merits (as in *Cementownia v. Turkey*, *Malicorp v. Egypt* and *Minnotte v. Poland*).

Relying on *Venezuela Holdings v. Venezuela*, *Phoenix v. Czech Republic*, *Europe Cement v. Turkey* and *Hamester v. Ghana*, the tribunal reasoned that fraudulent behaviour configures abuse of right (or, under certain circumstances, abuse of process), which is contrary to the principle of good faith, because an investor cannot benefit from treaty protection when her underlying conduct is deemed improper.

The arbitral tribunal went further, observing that particularly serious cases of fraudulent conduct, such as *WDF v. Kenya* and *Metal-Tech v. Uzbekistan*, have been held as contrary to international public policy. Following that train of thought, it reasoned that "claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy" (para. 508).

Having established the seriousness of a fraudulent scheme to forge mining licences, the arbitral tribunal turned to the question of whether a wrongdoing committed by a third party (the Ridlatama group) could affect the investors' claim. To do so, it relied on the test proposed in *Minnotte v. Poland* to assess whether the claimants *knew* or *should have known* of the Ridlatama group's wrongdoing.

Using the standard of willful blindness (also referred to as "deliberate ignorance"), the arbitral tribunal concluded that the claimants had incurred in remarkable absence of diligence. In the arbitral tribunal's view, they were aware of the risks involved in investing in the coal mining industry in Indonesia, which had an "endemic problem" of corruption, and, even so, failed to engage in proper due diligence and oversight in their dealings with the Ridlatama group.

In sum, as the fraudulent scheme affected the entirety of the claimants' investment, the tribunal deemed all their claims inadmissible.

Costs

The arbitral tribunal considered it appropriate to adopt the "costs follow the event" approach and order the claimants to bear all costs. As Indonesia had incurred in much greater legal fees and expenses (approx. US$12 million) than the claimants (US$4 million), the arbitral tribunal ordered the claimants to pay 75 per cent of Indonesia's fees and expenses.

Notes: The tribunal was composed of Gabrielle Kaufmann-Kohler (President appointed by the co-arbitrators, Swiss national), Albert Jan van den Berg (claimant's appointee, Dutch national), and Michael Hwang (respondent's appointee, Singaporean national). The award of December 6, 2016 is available at http://www.italaw.com/sites/default/files/case-documents/italaw7893.pdf. The Decisions on Jurisdiction in *Churchill Mining Plc v. Indonesia* and *Planet Mining Pty Ltd v. Indonesia*, both dated February 24, 2014, are respectively available at http://www.italaw.com/sites/default/files/case-documents/italaw3103.pdf and http://www.italaw.com/sites/default/files/case-documents/italaw3104.pdf.

Renco failed to comply with formal waiver requirement under U.S.–Peru Trade Promotion Agreement

Renco Group Inc. v Republic of Peru, UNCT/13/1

María Florencia Sarmiento

An arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) declared that U.S.-based investor Renco Group Inc. (Renco) failed to comply with the waiver requirement under the United States–Peru Trade Promotion Agreement (TPA). Accordingly, the tribunal declined to exercise jurisdiction over the case.

Background

On April 4, 2011, U.S.-based mining company Renco initiated arbitration proceedings on its own behalf and of its wholly-owned enterprise, Doe Run Peru S.R. LTDA (DRP). Renco alleged that Peru breached its TPA obligations to afford fair and equitable treatment (FET) and national treatment, as well as certain contractual obligations. In an Amended Notice of Arbitration dated August 9, 2011, Renco withdrew the enterprise claim while retaining the claim on its own behalf.

TPA Article 10.18(2)(b) comprehends two different requirements: a *formal* one, which is the requirement to submit a written waiver giving up the right to initiate or continue before any administrative tribunal or court under the law of any party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach, and a *material* one, which requires the investor to abstain from initiating or continuing local proceedings in violation of its written waiver.

The scope of the Partial Award of July 15, 2016 is the written waiver accompanying Renco's Amended Notice of Arbitration. The waiver states that, "to the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on merits"—"the reservation of rights" (paras. 58–59).

Peru asserted that Renco failed to comply with both the formal and material requirements of TPA Article 10.18(2). It noted that with the "reservation of rights" Renco reserved the right to bring claims in another forum and that, accordingly, Renco's waiver did not comply with the TPA.

The tribunal's analysis of the waiver requirement under TPA Article 10.18(2)

The tribunal started its analysis by interpreting under the Vienna Convention of the Law of Treaties the relevant provisions involved in the claim, which establish the procedures that an investor may follow in order to submit a dispute to arbitration—the TPA articles on "Submission of a Claim to Arbitration," "Consent of Each Party to Arbitration" and "Conditions and Limitations on Consent of Each Party."

The tribunal noted that its jurisdiction would be established upon a valid arbitration agreement between Renco and Peru, formed when Renco accepted Peru's standing offer to arbitrate claims by arbitration in accordance with the requirements under the TPA. However, it highlighted that compliance with Article 10.18(2) was a condition and limitation of Peru's consent to arbitrate, constituting an essential prerequisite to the existence of the arbitration agreement and thus, to the tribunal's jurisdiction.

Turning to the validity of Renco's waiver and reservation of rights, the tribunal considered that the wording of the Article 10.18(2)(b) demonstrates that waivers qualified in any way are impermissible, and that this interpretation is consistent with the object and purpose behind this article that is to protect a respondent state from litigating in multiple proceedings. The tribunal also determined that the article constitutes a "no U-turn" provision that precludes the investor to pursue a subsequent claim in domestic forum, including if the claim is dismissed on jurisdictional or admissibility grounds.

To conclude, the tribunal analyzed the consequence of Renco's non-compliance with Article 10.18(2)(b). It pointed out that it would have been preferable if Peru had raised the waiver objection at the outset of the proceedings, given that the arbitration has been on foot for a long time and that the issue became very complex since the consequences of non-compliance with Article 10.18(2)(b) are very severe.

Tribunal dismisses Renco's attempt to cure the waiver or sever the reservation of rights and rejects Renco's argument that Peru abused its rights

In its decision, the tribunal also took into account (1) whether it would be possible to cure the waiver, (2) whether the tribunal could sever the reservation of rights and (3) whether Peru's arguments and conduct in relation to the waiver constituted an abuse of rights.

Regarding the possibility to cure the waiver, Renco submitted that the defect was only in form and that tribunals can cure formal requirements. Peru contended that the tribunal was not empowered to do so. The majority of the tribunal concluded that the submission of a valid waiver is a condition of the initial existence of a valid agreement and that therefore the tribunal was without any authority. One of the arbitrators accepted that Renco could unilaterally cure its defective waiver.

As to the severability principle, the tribunal concluded that the principle could not be applied in the case because no arbitration agreement came into existence and, therefore, the tribunal had no power to sever the reservation of rights.

Peru had raised for the first time the issue of defective waiver in the Notification of Preliminary Objections, filed three years after the institution of the proceedings. Renco asserted that Peru's objections constituted an abuse of rights, submitting that Peru's purpose was not to ensure the due respect of the waiver rights but to evade its duty to arbitrate Renco's treaty claims. The tribunal concluded that Peru legitimately sought to exercise its right to receive a waiver in compliance with Article 10.18(2)(b). Yet, it highlighted that a possible abuse of rights could arise if Peru argued in any future proceedings that Renco's claims were time barred because of the three-year period established in Article 10.18(1).

Decision and costs

The majority declared that Renco failed to comply with the formal requirement of Article 10.18(2)(b) by including the reservation of rights in the waiver together with the Amended Notice of Arbitration, that it could not unilaterally cure its defective waiver, and that it failed to establish the requirements for Peru's consent to arbitrate under the treaty. Consequently, the tribunal dismissed the claims for lack of jurisdiction.

In the Partial Award on Jurisdiction, the tribunal had reserved the question of costs for a later award. In the Final Award, the tribunal decided to depart from the presumption that "costs follow the event" contained in the UNCITRAL Rules given that (a) Peru had only achieved a relative, rather than an absolute, measure of success; (b) the issues raised in the waiver phase of the arbitration were novel and complex; and (c) Peru delayed in raising its objection to the Tribunal's jurisdiction on the basis of Renco's non-compliance with Article 10.18(2)(b) of the Treaty. As a conclusion, the tribunal ordered each party to bear its own legal and other arbitration costs and to bear half of the costs of the tribunal and the administering authority.

Notes: The arbitral tribunal was composed by Michael J. Moser (President agreed to by the parties, Austrian national), L. Yves Fortier (claimant's appointee, Canadian national), and Toby T. Landau (respondent's appointee, British national). The Partial Award on Jurisdiction of July 15, 2016 is available in English at http://www.italaw.com/sites/default/files/case-documents/italaw7434.pdf and in Spanish at http://www.italaw.com/sites/default/files/case-documents/italaw7435.pdf, and the Final Award of November 9, 2016 is available in English at http://www.italaw.com/sites/default/files/case-documents/italaw7744_1.pdf and in Spanish at http://www.italaw.com/sites/default/files/case-documents/italaw7745.pdf.

***Pac Rim v. El Salvador:* all claims dismissed; OceanaGold to pay US$8 million in costs**

Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12

Martin Dietrich Brauch

On October 14, 2016, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) dismissed on their merits all claims by Pac Rim Cayman LLC (Pac Rim) against El Salvador. The tribunal ordered the mining company—currently owned by Australian-Canadian OceanaGold—to pay US$8 million towards El Salvador's legal costs.

Factual background

Between 2002 and 2008, two Salvadoran subsidiaries of Pac Rim acquired various mining exploration licences in El Salvador. Pac Rim's largest activity was the El Dorado project, in Cabañas, one of the country's poorest regions. Having verified that the area contained significant high-grade gold reserves, Pac Rim's subsidiary Pac Rim El Salvador (PRES) applied in December 2004 to convert its exploration licences—which were to expire in January 2005—into an exploitation concession.

The application failed to include certain documents required under El Salvador's Mining Law, such as the environmental permit and the consent of the landowners of property located in the surface area of the requested concession.

In late 2005, Salvadoran authorities proposed an amendment to the Mining Law to expressly limit the required documentation to the area affected by the mine's infrastructure; if approved, the amendment would reduce the number of documents PRES needed to obtain. Though supporting PRES in the hope that the amendment would be approved, the authorities also formally requested that PRES submitted missing documents required by law.

However, PRES never submitted them, and El Salvador's legislature rejected the amendment in February 2008. On March 10, 2008, Salvadoran President Antonio Saca said that he was in principle against granting new mining exploitation permits; a year later, he stated that Pac Rim would not be granted a concession.

Claims and decision on jurisdiction

On April 30, 2009, Pac Rim—on its own behalf and in respect of its subsidiaries—initiated arbitration against El Salvador under the country's Investment Law and the Dominican Republic–Central America–United States Free Trade Agreement (CAFTA).

Asking for damages exceeding US$314 million, it claimed that the denial of the El Dorado concession resulted from El Salvador's alleged *de facto* ban on metallic mining, in breach of the country's obligations under Salvadoran and international law. El Salvador submitted that Pac Rim was not entitled to an exploitation concession, and that the state did not breach any obligations and was therefore not liable for any damages.

In its decision on jurisdiction of June 1, 2012, the tribunal dismissed the claims under CAFTA, but affirmed its jurisdiction under El Salvador's Investment Law.

Tribunal overlooks case advanced by amicus curiae *CIEL*

In a non-disputing party submission, the Center for International Environmental Law (CIEL) argued that El Salvador's measures regarding El Dorado were supported by its international obligations on human rights and the environment. However, the tribunal considered it unnecessary to address CIEL's case, because the disputing parties did not consent to disclose the factual evidence to CIEL, and because the tribunal's decisions "do not require the Tribunal specifically to consider the legal case advanced by CIEL: and, in the circumstances, it would be inappropriate for the Tribunal to do so" (para. 3.30).

Tribunal rejects El Salvador's additional jurisdictional objections

El Salvador argued that claims based on international law and the Salvadoran Constitution fell outside the scope of the consent to arbitrate contained in Article 15 of the Investment Law. The tribunal dismissed the objection. Noting that the applicable law was not specified in the Investment Law or in any agreement between the parties, the tribunal invoked ICSID Convention Article 42(1) to decide that Salvadoran law (including the Constitution) and the applicable rules of international law applied to the arbitration.

According to El Salvador, the consent to international arbitration under Article 15 was trumped by other provisions of Salvadoran law, as the Investment Law specifically subjects subsoil-related investments to the Constitution and secondary laws, and the Mining Law refers disputes involving mining exploration licences or exploitation concessions to the exclusive jurisdiction of Salvadoran courts. The tribunal, however, held that El Salvador's interpretation was not binding, and refused to "apply other legislative provisions that would override an expression of jurisdictional consent that is valid, clear and unambiguous as a matter [of] international law" (para. 5.68).

El Salvador also invoked the Salvadoran Civil Code to argue that certain claims were time-barred. The tribunal rejected the objection by recalling: "the fact that a provision of Salvadoran legislation provides the consent to arbitration does not mean that the Tribunal's decisions on jurisdiction are governed by Salvadoran law" (para. 5.71). It also held that investment tribunals do not necessarily need to apply domestic statutes of limitations.

Award focuses on El Dorado project

In determining whether Pac Rim was entitled to the El Dorado concession, the tribunal focused on two aspects: the legal interpretation of Mining Law Article 37(2)(b) and the claim of estoppel or *actos propios*. Both are summarized as follows.

Pac Rim had also pleaded ancillary claims regarding five other mining areas, but the tribunal dismissed them, finding that the investor failed to establish liability, causation and injury.

Article 37(2)(b) interpreted adversely to Pac Rim's case

Article 37(2)(b) requires that the applicant for an exploitation concession submit "the property title for the real estate or authorized permissions, in legal form, from the landowner." For Pac Rim, this merely required documentation for the area (likely) to be *directly affected*, while El Salvador understood it as requiring documentation for the *entire* surface area of the requested concession. The tribunal rejected Pac Rim's argument based on three factors.

The first factor was the acquiescence by Pac Rim and PRES: although knowing that the state's interpretation of Article 37(2)(b) was not in their favour, they relied on the possibility of an amendment, and did not pursue any other plan: "They were confident that amending legislation would see them right. In this regard, they were mistaken" (para. 8.30).

Second, the tribunal deferred to El Salvador's interpretation of the provision, holding: "As a general approach, deference should be given by an international tribunal to the unanimous interpretation of its own laws given in good faith by the responsible authorities of a State at a time before the emergence of the parties' dispute" (para. 8.31).

Finally, the tribunal looked at a third, teleological factor. Applying the proportionality principle under the Salvadoran Constitution, it concluded that Article 37(2)(b) required consent from surface owners or occupiers facing potential or actual risks—beyond those directly affected by the activity—and concluded that Pac Rim did not fulfill the requirement.

Tribunal rejects claim based on estoppel or actos propios *doctrine*

Pac Rim also argued that El Salvador had made "clear and unequivocal representations" that the Article 37(2)(b) issue would not lead to a denial of the concession, and that Pac Rim had relied in good faith on those representations; El Salvador would thus be, under international law or Salvadoran law, estopped or precluded from stating otherwise. However, the tribunal did not find any representation by El Salvador to the effect that, absent the amendment to the provision, PRES would have been deemed in compliance with the requirement, or that the concession would be granted even without such compliance.

Notes: The ICSID tribunal was composed of V. V. Veeder (President appointed by the parties, British national), Guido Santiago Tawil (claimant's appointee, Argentinian national) and Brigitte Stern (respondent's appointee, French national). The award is available in English at http://www.italaw.com/sites/default/files/case-documents/italaw7640_0.pdf and in Spanish at http://www.italaw.com/sites/default/files/case-documents/italaw7641_0.pdf.

NAFTA tribunal orders Canada to pay U.S. wind power developer more than CAD28 million

Windstream Energy LLC v. Government of Canada, PCA Case No. 2013-22

Matthew Levine

An arbitral tribunal under Chapter 11 of the North American Free Trade Agreement (NAFTA) has reached the award stage. Although dismissing the discrimination and indirect expropriation claims, the tribunal upheld the claim of failure to provide fair and equitable treatment (FET), and ordered Canada to pay damages and half of the investor's legal costs, totalling over CAD28 million (roughly US$21.4 million).

Background and claims

The claimant, Windstream Energy LLC (Windstream), is a company constituted under U.S. laws. It was in the business of developing an offshore wind electricity generation project in the province of Ontario, Canada (Offshore Project).

In 2009, Ontario enacted a Feed-in-Tariff (FIT) scheme whereby a tender process was opened for independent renewable energy producers to sell into the provincial grid. Through the tender process, Windstream secured a FIT contract for the Offshore Project.

Following various permitting delays related to Windstream's development activities, Ontario ultimately imposed a moratorium on offshore wind projects. The primary reason given for the moratorium was that additional scientific research was necessary. Meanwhile, other holders of FIT contracts were offered alternative opportunities to participate in Ontario's clean energy sector, which were not offered to Windstream.

Windstream initiated arbitration in January 2013 and the tribunal was constituted in July 2013. Windstream's principal claims were that the province's conduct had fallen below the FET standard in NAFTA and had an effect that was tantamount to expropriation.

Tribunal dismisses indirect expropriation claim

For the tribunal, the determination of whether an indirect expropriation has taken place is in the first place a matter of evidence and thus a factual determination of whether an effective taking of property attributable to the state has taken place. This would be the case even if there has been no formal transfer of title, and even if the state has not obtained any economic benefit. In turn, the first step in determining whether an effective taking has taken place is to determine whether the investor has been substantially deprived of the value of its investment.

Having carefully reviewed the relevant evidence, the tribunal found that on the facts in the current case no expropriation had taken place. Among other relevant factors, the tribunal indicated that the FIT Contract was still formally in force and had not been unilaterally terminated by Ontario, and that the investor's CAD6 million security deposit was still in place and had not been taken or rendered otherwise worthless because of any action taken by the province. It therefore could not be said that the investor had been substantially deprived of its investment.

Tribunal finds that administration of moratorium was unfair and inequitable

The parties disagreed on the content of the minimum standard of treatment set out in NAFTA Article 1105(1) as well as on how the content of that standard should be established.

In the tribunal's view, it was for each party to support its position as to the content with appropriate legal authorities and evidence. In principle the content of a rule of customary international law, such as the minimum standard of treatment, could best be determined on the basis of evidence of actual state practice establishing custom that also shows that the states have accepted such practice as law (*opinio juris*). However, neither party had produced such evidence, and so the tribunal had to rely on indirect evidence to ascertain the content, such as decisions taken by other NAFTA tribunals.

Upon consideration of the indirect evidence provided by the parties, the tribunal noted that Windstream invoked the FET element but not the "full protection and security" element of NAFTA Article 1105(1). The tribunal therefore considered whether Ontario's conduct was "unfair" or "inequitable" in accordance with the customary international law minimum standard of treatment, and recalled that this determination was best done not in the abstract, but in the context of the facts of the case.

The tribunal found nothing unfair or inequitable in the evidence related to Ontario's decision to impose a moratorium on offshore wind development and the related process. It considered that, while government conduct leading up to the moratorium could have been more transparent and public opposition to offshore wind was present, these factors did not amount to a breach of NAFTA.

However, it found that the conduct of the province following the moratorium was more troubling. According to the tribunal, Ontario did little to address the scientific uncertainty and, most importantly, did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium. The tribunal concluded that failure "to take the necessary measures, including when necessary by way of directing the OPA [Ontario Power Authority, a regulatory agency], within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and the development of the Project created by the moratorium, constitutes a breach of Article 1105(1) of NAFTA" (para. 380).

Damages valuation based on comparable transactions

The tribunal determined the appropriate method of valuation in light of the project's particular stage of development. It pointed out that, while it is common to use the discounted-cash-flow (DCF) method to value offshore wind projects, "it is not usually used for projects that have not yet reached financial closure, given the many risks and uncertainties surrounding such projects" (para. 474). In the circumstances, the tribunal considered that the project was best valued on the basis of the comparable transactions methodology.

Upon consideration of the evidence on comparable transactions—offshore wind projects in Europe—the tribunal observed a range of between 18 and 24 million euros as relevant to the valuation of Windstream's project. It then considered potential adjustments, but concluded that the mid-point of the above range was appropriate, that is, 21 million euros. Based on the exchange rate of the date of the award, this was converted to CAD31,182,900.

However, the tribunal noted that Windstream was not entitled to compensation for the full value of its investment, which included a letter of credit that remained in place and the FIT Contract that remained in force. The tribunal then found that the above valuation must be discounted by CAD6 million to account for the letter of credit, but that the value associated with the potential reactivation or renegotiation of the FIT Contract was extinguished upon the issuance of the arbitral award.

Costs

The tribunal agreed with and noted the parties' agreement with the principle in Article 42 of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) establishing that "[t]he cost of the arbitration shall in principle be borne by the unsuccessful party" (para. 512). This rule applied to legal costs, but not arbitrations costs, that is, the costs and fees of the tribunal and the Permanent Court of Arbitration (PCA).

In terms of the apportionment of legal costs, the tribunal recalled that Windstream had prevailed, and although only one of its four claims was granted, this was one of its two principal claims. Ultimately, the tribunal found it appropriate for Canada to reimburse half of Windstream's legal costs. As regards arbitration costs, for the tribunal these effectively arose out of the parties' arbitration agreement, and thus it was more appropriate that each of the parties cover half.

Notes: The tribunal was composed of Veijo Heiskanen (President by agreement of parties, Finnish national), R. Doak Bishop (claimant's appointee, U.S. national), and Bernardo Cremades (respondent's appointee, Spanish national). The final PCA award of September 27, 2016 is available at http://www.italaw.com/sites/default/files/case-documents/italaw7875.pdf.

PCA tribunal dismisses expropriation and FET claims concerning an eco-touristic venture

Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06

Amr Arafa Hasaan

On June 27, 2016, a tribunal under the auspices of the Permanent Court of Arbitration (PCA) dismissed all claims by Canadian businessman Peter A. Allard against Barbados under the Canada–Barbados bilateral investment treaty (BIT) and the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Seeking over CAD29 million in damages, Allard claimed that a failure by Barbados to take environmental protection measures breached the BIT and resulted in the destruction of the value of his investment in an eco-tourism site.

Background

In 1994, Allard decided to establish an eco-tourism attraction in the western part on the south coast of Barbados. Between 1996 and 1999 he incorporated a company and acquired land in Barbados for the construction of a Sanctuary, opened to the public in 2004. After a failure in the South Coast Sewage Treatment Plant in 2005, Allard decided to sell the Sanctuary in 2007, announcing its closure on October 29, 2008.

Allard initiated arbitration against Barbados on May 21, 2010 claiming that the government's actions and hesitation in closing the sluice gate of the sewage treatment plant resulted in drastic environmental damage, making his investment in the eco-touristic site worthless, in breach of BIT provisions on fair and equitable treatment (FET), full protection and security (FPS) and expropriation.

According to Allard, the Sanctuary suffered severe environmental degradation that gradually transformed it into "little more than a mosquito-infested swamp" (para. 56) by the time of its closure in 2009. Barbados rejected this allegation, asserting that the ecology of the site was not promising when Allard decided to start his business.

In a 2014 award, the tribunal dismissed Barbados's jurisdictional objections *ratione materiae* and *ratione personae*. It found that Allard owns and controls assets pursuant to Barbadian law, and that these assets constitute an investment under the BIT. However, it postponed to the merits phase its examination of one issue of Barbados's objection to the tribunal's *ratione temporis* jurisdiction.

Allard's decision to invest predates Barbados's representations; no breach of FET

Allard alleged that Barbados failed to meet his legitimate expectations as an investor and thus breached its FET obligation under the BIT. According to Allard, he relied on representations made by some Barbadian officials that reflected Barbados commitment to maintain the eco-environment in the area surrounding the Sanctuary.

Barbados contended that the FET standard corresponds to the minimum standard of treatment of aliens under customary international law. Further, it added that the representations and circumstances Allard relied on happened after his decision to invest.

The tribunal found that none of the statements relied on by Allard qualified as specific representations that could generate legitimate expectations: they were either plans or reports prepared by experts hired privately by Allard himself. In addition, the tribunal concluded that, except for one document dated 1986, all representations were made after his decision to invest, in 1994. Therefore, the tribunal concluded that Barbados did not breach its FET obligation.

Barbados fulfilled its FPS commitment

Allard alleged that the FPS commitment meant more than securing against physical interference with the investment. He asserted that Barbados failed to adequately manage the sluice gate, which he considered as the main reason for environmental degradation at the Sanctuary, in addition to its failure to enforce its environmental laws. In response, Barbados contended that the FPS standard is limited to protection against direct physical harm to the investor or its property.

The tribunal found that Barbados took all necessary steps to protect the investment: Barbadian officials implemented procedures to prevent environmental damages to the Sanctuary. Further, the tribunal concluded that Barbados's purported failure to apply the pertinent environmental law is irrelevant to the alleged breach of the FPS standard. Moreover, it pointed out that Allard never alerted Barbados of the problems associated with not applying those laws. As a result, the tribunal held that Barbados complied with its FPS obligation.

Indirect expropriation claim is not substantiated

Allard alleged that Barbados's measures were tantamount to expropriation. In particular, he indicated that, in 2003, Barbados implemented a reclassification plan of lands adjacent to the Sanctuary, allegedly resulting in a substantial increase of impurities into the Sanctuary and turning it into a conservation project rather than a touristic one. He added that Barbados's failure to apply the relevant environmental laws and to operate the sluice gate properly allowed the environmental degradation of the Sanctuary. In turn, Barbados contended that Allard was never deprived of the Sanctuary or of its economic worth. On the opposite, it claimed that the site attracted visitors until its closure in 2009.

The tribunal was persuaded that Allard remained the sole operator of the site either as an eco-touristic attraction or later as a café: he had not been deprived of the physical possession of the real estate. It also pointed out that Allard gained economic benefit of running his business until he decided to close it. The tribunal also found that Allard failed to establish a cause-and-effect bond between the alleged degradation of the surrounding environment and his decision to cease his business. According to the tribunal, he also failed to substantiate the existence of exceptional damage to the marine environment before he made his decision to opt out of the Sanctuary. For the tribunal, Barbados's purported failure to enforce the relevant environmental laws did not reflect a breach of its obligations under the BIT. Accordingly, the tribunal dismissed the expropriation claim.

Dismissal of remaining jurisdictional objections

BIT Article XIII(3) establishes a three-year time bar for submitting a claim to cover a damage in a breach of the BIT. As Allard filed the dispute on May 21, 2010, Barbados maintained that the tribunal would not have jurisdiction over facts before May 21, 2007. In its 2014 Award on Jurisdiction, the tribunal had postponed to the merits phase the decision on its *ratione temporis* jurisdiction concerning the alleged mismanagement of the sluice gate before May 21, 2007. In the 2016 award, having found that Barbados fulfilled its commitments under the BIT, the tribunal considered it futile to examine the remaining jurisdiction objection.

In its closing statement at the hearing, Barbados claimed that Allard's answers under cross-examination gave rise to two new jurisdictional issues. However, the tribunal affirmed that the new jurisdictional objections were not based on any new facts or circumstances, and concluded that they should have been raised before the Award on Jurisdiction.

Notes: The PCA tribunal was composed of Gavan Griffith (President appointed by the co-arbitrators, Australian national), Andrew Newcombe (claimant's appointee, Canadian national) and W. Michael Reisman (respondent's appointee, U.S. national). The June 26, 2016 award, including the Decision on Jurisdiction of June 13, 2014 as an annex, is available at http://www.italaw.com/sites/default/files/case-documents/italaw7593.pdf.

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resources and events

Resources

Treaty Shopping in International Investment Law

By Jorun Baumgartner, Published by Oxford University Press, February 2017

The book examines the practice of treaty shopping—the strategic change of nationality or the strategic invocation of another nationality with the aim of accessing another investment treaty for purposes of investment arbitration—to investigate the challenges this practice poses in investment arbitration. It analyzes the practice under customary international law and international investment law, and discusses the different ways by which arbitral tribunals have dealt with the value judgment at the core of the distinction between objectionable and unobjectionable treaty shopping. The book examines past and current investment treaty drafting practice and makes concrete recommendations on how states wishing to curb the possibility of treaty shopping could reform investment agreements to make them less susceptible to the practice. Available at https://global.oup.com/academic/product/treaty-shopping-in-international-investment-law-9780198787112.

The Most-Favoured-Nation Clause in Investment Treaties

By Suzy H. Nikièma, Published by IISD, February 2017

Most-favoured nation (MFN) is a both common and controversial clause in investment treaties. It has been the object of differing and unexpected interpretations by treaty-based arbitral tribunals. In particular, since *Maffezini v. Spain*, an original interpretation of MFN led to the possibility for investors to import more favourable provisions from a third-party bilateral investment treaty (BIT) concluded by their host state. The controversies around MFN raise fundamental questions in the context of current changes in the international investment law and arbitration regime. Part of IISD's Best Practices Series, this study conducts a typology of investment treaties and then an analysis of the differing interpretations by the tribunals of several key issues. The issues surrounding certain interpretations of the MFN clause and the reactions of states in their recent treaties are reviewed in order to draw lessons for states. Available in English and French at http://www.iisd.org/library/iisd-best-practices-series-most-favoured-nation-clause-investment-treaties.

Exhaustion of Local Remedies in International Investment Law

By Martin Dietrich Brauch, Published by IISD, January 2017

The customary international law rule of exhaustion of local remedies (ELR) aims at safeguarding state sovereignty by requiring individuals to seek redress for any harm allegedly caused by a state within its domestic legal system before pursuing international proceedings against that state. Investment tribunals—ruling on their own jurisdiction—have generally dispensed with the rule, allowing foreign investors initiate a claim without prior recourse to the host state's administrative or judicial courts. In recent years, several states have reintroduced a mandatory requirement to pursue or exhaust local remedies in their investment treaties, and other states are considering a similar path. This advisory bulletin, part of IISD's Best Practices Series, reviews state-of-the-art approaches and policy options for ELR in international investment law, based on lessons learned from customary international law, international human rights law, and investment treaty practice and jurisprudence. Available in English and French at http://www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law.

Promoting Gender Equality in Foreign Agricultural Investments: Lessons from voluntary sustainability standards

By Kathleen Sexsmith, Published by IISD, January 2017

This report analyzes the gender-related content of five major global agricultural sustainability standards and five principles for responsible investment in agriculture. It answers the question: Do the global principles and standards improve gender equality? It also examines how to build on the successes and failures of these initiatives to improve gender equality in agricultural investments. The experiences of the sustainability standards are used to provide guidance for responsible investment. Available at http://www.iisd.org/library/promoting-gender-equality-foreign-agricultural-investments-lessons-voluntary-sustainability.

IGF Guidance for Governments: Managing artisanal and small-scale mining

By Dan Paget, Nicholas Garrett & Alec Crawford, Published by the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), January 2017

The guidance document presents a step-by-step process for governments to develop, implement and monitor an effective artisanal and small-scale mining (ASM) management strategy. It includes steps on how to ensure effective, inclusive strategy development and implementation, as well as effective governance of the process overall. It encourages the user to focus on the local context, and to continually think about the most practical and feasible ways for a government to achieve its ASM-related sustainable development objectives. Available at http://www.iisd.org/library/igf-guidance-governments-managing-artisanal-and-small-scale-mining.

Lex Petrolea and International Investment Law: Law and practice in the Persian Gulf

By Nima Mersadi Tabari, Published by Routledge, 2016

The book analyzes jurisprudence on the settlement of upstream petroleum disputes between host states in the Persian Gulf and foreign investors. The author considers the historical, political, and socio-economic roots of the existing frameworks and levels of protection offered to foreign investors. Focusing on petroleum-related disputes, he initially delivers a comprehensive survey of the jurisprudence of international investment law and investment treaty arbitration. Following on from this, in three dedicated chapters, the author provides in-depth analysis of the legal regimes governing the matter in the major producers of the region: Saudi Arabia, Iraq and Iran. Available at https://www.routledge.com/Lex-Petrolea-and-International-Investment-Law-Law-and-Practice-in-the/Tabari/p/book/9781138656499.

Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law

By Andrew D. Mitchell, David Heaton, & Caroline Henckels, Published by Edward Elgar, 2016

Non-discrimination requirements, such as MFN treatment and national treatment obligations, are central to both international trade law and international investment law. Significant inconsistencies between the fields are evident, however, in the way adjudicators have treated key elements of the test for discrimination. The authors survey and criticize the manner in which tribunals have employed the concept of regulatory purpose in determining whether discrimination has occurred, and propose a new definition of regulatory purpose that assists in framing the test for unlawful discrimination in both fields of law. The book compares and contrasts trade and investment law, drawing out several parallels and suggesting areas in which one legal system might answer or shed light on questions arising in the other. Available at http://www.e-elgar.com/shop/non-discrimination-and-the-role-of-regulatory-purpose-in-international-trade-and-investment-law.

Private Investments and Agriculture: The importance of integrating sustainability into planning and implementation

By Livia Bizikova, Published by IISD, December 2016

Agriculture is often a significant source of livelihoods and food security for people in many countries. Recently, we have seen an increase in large-scale investment into agriculture. Important policy questions are: To what do extent these large-scale agricultural investments contribute to improving local livelihoods, and economic and environmental conditions? And how do these contributions compare with needed investments in agriculture to reduce rural poverty and food insecurity? This briefing note examines some dimensions of these questions, focusing on the following areas: impacts on water quantity, land and soil quality, land tenure and community benefits, and off-farm migration. Available at http://www.iisd.org/library/private-investments-and-agriculture-importance-integrating-sustainability-planning.

Reassertion of Control over the Investment Treaty Regime
By Andreas Kulick (Ed.), Published by Cambridge University Press, December 2016

Driven by public opinion in host states, contracting parties to investment agreements are pursuing many avenues to curb a system that is being perceived as having run out of control. This book examines the many issues of procedure, substantive law, and policy which arise from this trend. From procedural aspects such as frivolous claims mechanisms, the establishment of appeals mechanism or state–state arbitration, to substantive issues such as joint interpretations, treaty termination or detailed definitions of standards of protection, the it identifies and discusses the main means by which states do or may reassert their control over the interpretation and application of investment treaties. Each chapter tackles one of these avenues and evaluates its potential to serve as an instrument in states' reassertion of control. Available at http://www.cambridge.org/academic/subjects/law/international-trade-law/reassertion-control-over-investment-treaty-regime.

International Investment Law and Water Resources Management: An appraisal of indirect expropriation
By Ana Maria Daza-Clark, Published by Brill | Nijhoff, December 2016

Hydrological variability, increasing competition for water, and the need for regulatory flexibility may increasingly compel governments to adopt measures with significant economic impact on foreign investment. The book offers an appraisal of indirect expropriation, revisiting the police power doctrine. Through the lens of international investment law, the author explores a framework that assesses the legitimate exercise of police power with particular attention to the special nature of water resources. Available at http://www.brill.com/products/book/international-investment-law-and-water-resources-management

The ASEAN Comprehensive Investment Agreement: The Regionalisation of Laws and Policy on Foreign Investment
By Julien Chaisse & Sufian Jusoh, Published by Edward Elgar, 2016

International investment law is one of the fastest growing areas of international economic law and policy which increasingly rely on large membership investment treaties such as the Association of Southeast Asian Nations' (ASEAN) Comprehensive Investment Agreement (ACIA). This book examines the role of this specific international treaty on investment and situates it in the wider global trend towards the regionalisation of laws and policy on foreign investment. According to the authors, collective commitment to a common standard contributes to depoliticise any potential conflict between individual investors and host states, making the agreement particularly crucial to discussions involving ASEAN Member States and between ASEAN and Dialogue Partners as well as to investment decisions including investment liberalisation and investment facilitation. Available at http://www.e-elgar.com/shop/the-asean-comprehensive-investment-agreement.

Performance Requirements and Investment Incentives Under International Economic Law
By David Collins, Published by Edward Elgar, 2016

The book analyzes performance requirements and investment incentives as vital tools of economic policy. Adopting a consciously broad definition of both instruments, it assesses their treatment under international economic law, and links the debate surrounding the use of such tools to the rise of emerging markets as key participants in economic globalization. Focusing on the inter-relation between performance requirements and investment incentives, the author illustrates the problems caused by their differential control and considers some possible approaches to achieving effective oversight. Drawing on network governance theory, he considers a unified regime of governance, which would allow for more comprehensive and systematic evaluation. Available at http://www.e-elgar.com/shop/performance-requirements-and-investment-incentives-under-international-economic-law.

Events 2017

March 29
GENEVA TALKS ON FOREIGN INVESTMENT IN AFRICA, "The Rise of Investor Obligations in African Investment Agreements," Universities of Geneva and Lausanne, at University of Geneva, Geneva, Switzerland, http://aila.org.uk/resources/Pictures/Geneva%20Talks%20-%2029%20March%202017.pdf

March 30–31
2017 OECD GLOBAL ANTI-CORRUPTION & INTEGRITY FORUM, "In the Public Interest: Taking Integrity to Higher Standards," Organisation for Economic Co-operation and Development, at OECD Conference Centre, Paris, France, https://www.oecd.org/cleangovbiz/integrity-forum-2017.htm

April 2
CONFERENCE "A PARADIGM SHIFT IN INTERNATIONAL INVESTMENT LAW," Africa International Legal Awareness (AILA) & University of Geneva Faculty of Law, at Cairo Regional Centre for International Commercial Arbitration, Cairo, Egypt, http://aila.org.uk/page-1806075

April 4
JOINT UNCITRAL–LAC CONFERENCE ON DISPUTE SETTLEMENT, United Nations Commission on International Trade Law (UNCITRAL) & Ljubljana Arbitration Centre (LAC), at Slovenian Chamber of Commerce and Industry, Ljubljana, Slovenia, http://www.sloarbitration.eu/en/Joint-UNCITRAL-LAC-Conference

April 11
EXPERT MEETING "DEVELOPING A NEW ACCOUNTABILITY AND DISPUTE SETTLEMENT MECHANISM ON INVESTMENT," IISD & American University Washington College of Law's Program on International and Comparative Environmental Law, at American University, Washington D.C., United States, http://www.iisd.org/event/washington-expert-meeting-developing-new-accountability-dispute-settlement-mechanism-investment

April 12–15
111TH ASIL ANNUAL MEETING, "What International Law Values," American Society of International Law (ASIL), at Hyatt Regency Capitol Hill, Washington D.C., United States, https://www.asil.org/annualmeeting

April 12
14TH ANNUAL ITA–ASIL CONFERENCE, "Third-Party Funding in International Arbitration: Legal & Ethical Considerations," Institute for Transnational Arbitration (ITA) & ASIL, at Hyatt Regency Capitol Hill, Washington D.C., United States, http://www.cailaw.org/Institute-for-Transnational-Arbitration/Events/2017/ita-asil.html

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