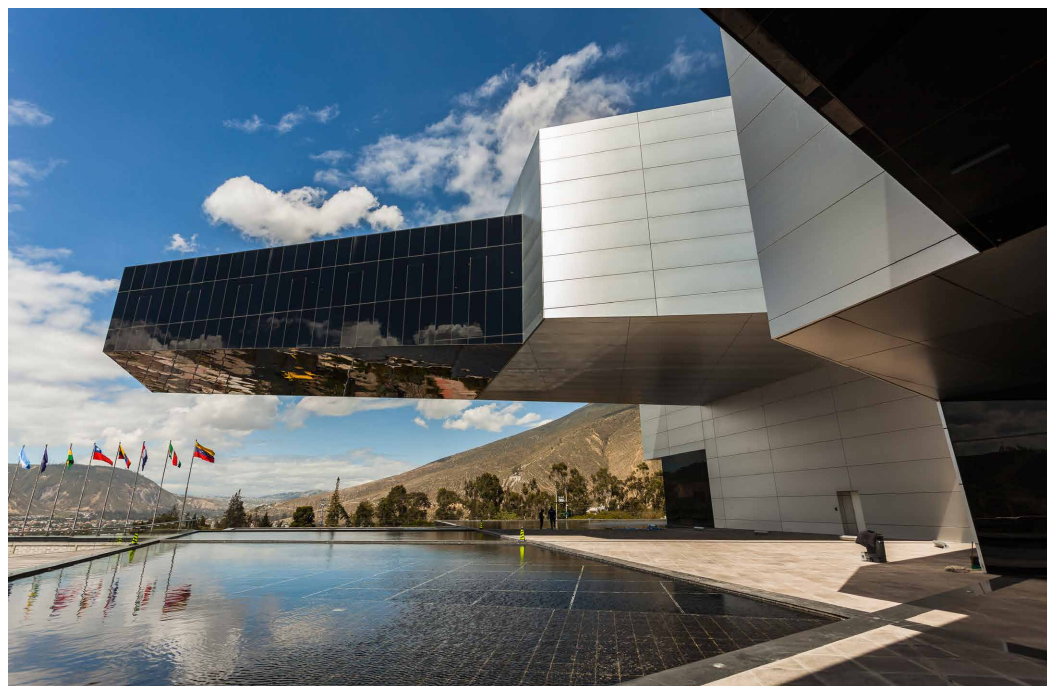




UNASUR Centre for the Settlement of Investment Disputes: Comments on the Draft Constitutive Agreement

Katia Fach Gómez and Catharine Titi



Can EU Member States Still Negotiate BITs with Third Countries?

Stefanie Schacherer

Recasting Rules and Exceptions? On the Relationship Between Regulatory Sovereignty and International Investment Law

Harm Schepel

Also in this issue: Brexit impacts on trade and investment policy; CETA to be concluded as a mixed agreement, expected to be signed in October; RCEP partners conclude 13th negotiating round and plan on three further rounds in 2016; India takes steps to reform its investment policy framework after approving new model BIT; *Philip Morris v. Uruguay*; *Philip Morris v. Australia*; *Transglobal v. Panama*; *Corona v. Dominican Republic*; *Crystallex v. Venezuela*; *Mesa v. Canada*; *İçkale v. Turkmenistan*

contents

- 3 Insights**
UNASUR Centre for the Settlement of Investment Disputes: Comments on the Draft Constitutive Agreement
Katia Fach Gómez and Catharine Titi
- 7 Can EU Member States Still Negotiate BITs with Third Countries?**
Stefanie Schacherer
- 9 Recasting Rules and Exceptions? On the Relationship Between Regulatory Sovereignty and International Investment Law**
Harm Schepel
- 11 News in Brief**
Brexit and contentious topics complicate TTIP negotiations, public opposition continues; EU negotiation agenda to continue despite Brexit, MERCOSUR and Indonesia at sight; United Kingdom makes trade and investment negotiation moves for post-Brexit era; CETA to be concluded as a mixed agreement, Commission hopes for signing in October; RCEP partners conclude 13th negotiating round in Auckland, three further rounds in 2016; India takes steps to reform its investment policy framework after approving new model BIT
- 13 Awards and Decisions**
Philip Morris v. Uruguay: all claims dismissed; Uruguay to receive US\$7 million reimbursement
Martin Dietrich Brauch
- 14 Corporate restructuring and abuse of rights: PCA tribunal deems Philip Morris's claims against Australia's tobacco plain packaging rules inadmissible**
Inaê Siqueira de Oliveira
- 16 ICSID tribunal upholds Panama's abuse of process objection; Transglobal to pay arbitration costs and most of Panama's legal expenses**
Inaê Siqueira de Oliveira
- 18 Claimant fails to comply with three-year limitation period under CAFTA-DR**
María Florencia Sarmiento
- 19 Venezuela ordered to pay US\$1.202 billion plus interest to Canadian mining company Crystallex for FET breach and expropriation**
Martin Dietrich Brauch
- 21 NAFTA tribunal dismisses claims against Canada on green energy Feed-In Tariff program**
Matthew Levine
- 23 Turkey–Turkmenistan BIT: tribunal finds claims admissible but dismisses them on merits**
Matthew Levine
- 26 Resources and Events**

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

Tel +41 22 917-8748
Fax +41 22 917-8054
Email itn@iisd.org

Executive Director – International Institute for Sustainable Development – Europe
Mark Halle

Group Director – Economic Law & Policy
Nathalie Bernasconi

Director of Communications
Damon Vis-Dunbar

Senior Communications Manager
Mira Oberman

Editor-in-Chief
Martin Dietrich Brauch

French Editor
Suzy Nikiéma

French Translator
Isabelle Guinebault

Spanish Editor
Marina Ruete

Spanish Translator
María Candela Conforti

Lead Information Architect (web)
Matt Rock

Design (PDF)
PortoDG | www.portodg.com.br

UNASUR Centre for the Settlement of Investment Disputes: Comments on the Draft Constitutive Agreement

Katia Fach Gómez and Catharine Titi



The idea of creating the Centre for the Settlement of Investment Disputes (Centre) of the Union of South American Nations (in Spanish, UNASUR) emerged in 2008. Ecuador, a UNASUR member state, denounced the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) in 2009, and in 2010 submitted a proposal for the Centre.¹ In 2012 UNASUR finished drafting the Draft Constitutive Agreement of the Centre for the Settlement of Investment Disputes of the UNASUR (CA).² A new version of this document exists since 2014.³

The Latin American media has recently reported that the UNASUR Working Group of High level Experts on the Settlement of Investment Disputes (Group) has reached a consensus on nearly 80 per cent of the 2014 draft.⁴ This means that the Centre may be about to be created. However, a priori, this must be taken with caution as Article 12 of the UNASUR Constitutive Agreement states that “all the norms of UNASUR shall be adopted by consensus”⁵ and as, according to different sources of information, there is a lack of consensus on matters of the CA that are not trivial at all.⁶

Based on what is known about the text so far, the CA contains 41 articles, divided into six titles. The objective of this article is to describe the most relevant rules of the CA.

Title I: General Provisions of the Agreement

Article 2 states that the CA shall not affect the applicability of investment dispute settlement mechanisms and other obligations contained in international agreements signed and ratified by any member state. “Member state” means any state that has signed and ratified the UNASUR Constitutive Agreement and is also a party to the AC (Article 3, paragraph 1).

A long Article 3 presents definitions of different key terms, including the definition of “Parties,” which,

contrary to the concept of member state, covers states as well as nationals of states that are not members of UNASUR. Supposing that both terms are used rigorously throughout the CA, the Parties would be deprived of a series of rights that pertain to member states, such as being part of the Board of Directors (Article 15).

“The UNASUR Working Group of High level Experts on the Settlement of Investment Disputes has reached a consensus on nearly 80 per cent of the 2014 draft.”

In relation to the nationality of legal persons, the CA states that it is up to the member states, when giving consent to submit the dispute to the Centre, to determine what legal persons are nationals of a state other than the state party to the dispute or situation (Article 3, paragraph 2). The Group still has to decide whether it accepts the proposal of Argentina, Bolivia and Venezuela on the cases in which states do not make such determination.

Title II: General Provisions of the Centre

Article 5 specifies that the Centre has jurisdiction over disputes that may arise between two

UNASUR member states; between a UNASUR member state and a state that is not a member of UNASUR; between a UNASUR member state and a national of another UNASUR member state; between a state that is not a member of UNASUR and a national of UNASUR member state; and between a UNASUR member state and a national of another state that is not a member of UNASUR. The most logical drafting of the last three items should have made reference to the national in the first place.

Paragraphs 3 and 4 of the abovementioned article allow states to notify the depositary of the CA (UNASUR General Secretariat, pursuant to Article 35, paragraph 2) that they do not accept to submit certain disputes or situations to the jurisdiction of the Centre, because of either the actors or the specific investment sector involved in the dispute. Paragraph 8, one of the rules

still under consultation among UNASUR states, does not allow the most-favoured-nation clause to be invoked “for purposes of consent.” Pursuant to paragraph 11, similarly to Article 26 of the ICSID Convention, when consenting to submit a dispute to the Centre, the state may require the national of another state to exhaust local administrative or judicial remedies.

“A novel mechanism is proposed to elect the president of the tribunal in case the Secretary of the Centre verifies that the parties are unable to reach an agreement on the president’s appointment.”

The guiding thread of paragraphs 10 and 12 of Article 5 is the effort of the AC for conciliation and arbitration to be the last resort in any dispute, maximizing recourse to consultations and negotiations through diplomatic channels—with respect to investor–state disputes—which can be conducted in parallel to conciliation or arbitration. On the contrary, the two latter mechanisms exclude any other national or international jurisdiction (Article 5, paragraph 12). In this sense, diplomatic protection or the submission of an international claim will only be possible after the state has failed or ceased to comply with the award rendered by the Centre (Article 5, paragraph 14).

Title III: Provisions on the Structure and Operation of the Centre

This title presents the structure and functions of the two bodies composing the Centre: the Board of Directors (Article 8) and the Secretariat (Article 9). In most cases, the decisions of the Board of Directors must be adopted by consensus. The CA provides for the possibility for a UNASUR member state that is not a member of the Centre to attend the meetings of the Board of Directors as an observer. UNASUR associated states can also gain access to this status. Article 11 addresses the matter of privileges and immunities of the Centre and, in contrast to Article 21 of the ICSID Convention, makes no express reference to immunities of conciliators and arbitrators. Article 12 lists the

main potential financial resources of the Centre, including annual contributions by the member states and donations by states, international organizations or private entities. A matter of evident practical importance under Title III, which so far has not been agreed upon by the Group, is the geographical location of the Centre’s headquarters (Article 10).

Title IV: Provisions on the Mechanisms Established within the Framework of the Centre

This title is the longest and contains the largest legal content of the CA. After Article 13 references the three mechanisms established within the scope of the Centre (facilitation, conciliation and arbitration), Article 14 describes facilitation as an optional preventive mechanism in the matter of technical opinions. Articles 15 to 17 focus on conciliation, which is described as a mechanism by which an impartial third party or group of third parties interpret the controverted points presented by the parties to the dispute and try to reconcile them. Conciliation can take place before or after arbitration commences. In the latter case, the arbitration proceeding will be suspended (Article 20, paragraph 3).

“The AC maximizes recourse to consultations and negotiations through diplomatic channels, leaving conciliation and arbitration as the last resort in any dispute.”

Articles 18 to 33 elaborate on different matters concerning the arbitral mechanism. Remarkably, they state that the constitution of the arbitral tribunal is at first glance similar to facilitation and conciliation: the parties agree on appointing a sole arbitrator or an odd number of arbitrators. However, a novel mechanism is proposed to elect the president of the tribunal in case the Secretary of the Centre verifies that the parties are unable to reach an agreement on the president’s appointment. The Secretary will present to the parties a list of five candidates, and each party must exclude two candidates from the list and rank its preferences with respect to the three remaining candidates. Finally, the Secretary will choose the president of the tribunal based on the coinciding choices of the parties (Article 18, paragraph 6).⁷

Article 22 refers to arbitral awards, with respect to

which Colombia and Venezuela have submitted proposals asking to clarify that arbitral tribunals may only grant pecuniary compensation. Articles 27 to 31 focus on the potential appeals against the award. Currently, this is the most controverted section between Group members. Along with the request for clarification (when the parties differ as to the meaning or scope of the arbitral award arises) and the request for revision (when either party discovers a new fact that could have been decisive in the award), the CA also provides for annulment, the grounds and time limits of which are very similar to those under Article 52 of the ICSID Convention. However, differences may arise as to the treatment of annulment by the two institutions if the proposal by Argentina, Ecuador, Paraguay and Venezuela finally prevails in the Group, namely, in favour of referring annulment requests to a Permanent Tribunal rather than to an ad hoc Commission.

“As to the challenging of conciliators and arbitrators, Argentina proposes that, contrary to the ICSID regime, the disqualification may never be decided by the other members of the conciliation or arbitral body. ”

Particularly novel with respect to the current system of investment arbitration under ICSID is the content of Article 31 of the CA, which outlines an appeal against the arbitral award. If such appeal is maintained in the final version of the CA, the parties will be allowed to file an appeal within 120 days if the award contains an error in the application or interpretation of the law applicable to the dispute.

Furthermore, Argentina, Paraguay and Venezuela defend the possibility of annulment in case of a manifest and material error of fact in the assessment of conclusive evidence. Once again, regarding annulment, UNASUR countries have not yet reached an agreement as to whether it shall be dealt with by an ad hoc Commission or by a Permanent Tribunal. The first option, advocated by Brazil, Colombia and Peru, advances a system for the appointment of the members of the Commission that replicates the above

mentioned system of exclusions and ranking as well as equates nationality to permanent residence (Articles 31 and 32). The second option, proposed by Argentina, Ecuador, Paraguay and Venezuela, provides that the Permanent Tribunal shall be composed of impartial and independent persons with recognized professional experience in the field of international law (Articles 32 bis and ter). It is also proposed that the Permanent Tribunal be composed of up to 12 members, one from each member state of the Centre, who will work in chambers of three members.

Article 33 is devoted to the recognition and enforcement of awards. After stating that the award is final and binding on the parties to the dispute and that it is enforceable as a domestic court decision, the provision grants the respondent state a period of 120 days to comply with the award. After that time, the provision authorizes the interested party to initiate the recognition and enforcement of the award. The proceeding will occur in accordance with the provisions of the procedural law of the state where such recognition and enforcement is sought, including international agreements to which it is a party. In this sense, the CA expressly refers to both the New York Convention and the 1975 Inter-American Convention on International Commercial Arbitration.

“Particularly novel with respect to the current system of investment arbitration under ICSID is the content of Article 31 of the CA, which outlines an appeal against the arbitral award. ”

Finally, this title finishes with two Articles (34 and 34 bis) referring to the lists of conciliators and arbitrators and to the procedure for challenging them. As to the first point, an innovative proposal was advanced by Argentina, to allow each member state of the Centre to request clarifications about the candidates proposed by other states or to present justifiable objections to the candidates when it understands that they do not meet the necessary qualifications. If the proposing and objecting states do not reach an agreement, the objection raised would prevail over the nomination of the candidate. As to the challenging of conciliators and arbitrators, Argentina proposes that, contrary to the ICSID regime, the disqualification may never be decided by the other members of the conciliation or arbitral body.

Title V: Final Provisions

This final title states that six ratifications will suffice for the CA to enter into force (Articles 35). According to the Group, this matter must be discussed by the Council of Ministers of Foreign Affairs of UNASUR.⁸

Article 36 provides that the settlement of disputes regarding the interpretation and application of the AC must be settled through direct negotiations between the states and, if they do not reach agreement after a six-month period, through a consensual decision by the Board of Directors. Article 37 refers to a review of the functioning of the Centre every five years. Article 39 states that the CA shall have indefinite duration and allows a member state to denounce it at any time.

Article 40 provides that no reservations may be made to the provisions of the CA, but does not prevent a Contracting Party from making interpretative declarations, provided that their sole purpose is harmonizing its domestic laws with the provisions of the CA, without excluding or modifying the legal effects of the AC. This provision and the entry into force of the CA have been highlighted by the Group as matters that may need further debate by the Council of Ministers of Foreign Affairs of UNASUR.⁸

“The creation of the Centre could enhance the legitimacy and popularity of the mechanisms for investor–state dispute settlement in UNASUR member states, through the implementation of the procedural and substantive novelties contained in the CA.”

Finally, Article 41 indicates that the CA is open for signature by UNASUR member states and by current UNASUR associated states that may acquire the status of UNASUR member state.

Title VI: Transitional provisions

This title focuses on, among other issues, the abovementioned need for preparing several additional necessary documents for the functioning of the Centre

(the Administrative and Financial Regulations, the Regulations on the Mechanisms Rules of the Centre and the Code of Conduct).

Next Steps in the Negotiation of the Centre

The most recent meeting of the Group took place in Montevideo, Uruguay, between March 29 and 31, 2016.⁹ We will have to wait to see if negotiators will soon be able to reach a political and legal agreement on the aspects of the CA that are still controverted. The future operation of the Centre is likely to generate scepticism, as it could undermine international standards in favour of regional parameters and, in turn, increased instability throughout the region. From a different perspective, the creation of the Centre could enhance the legitimacy and popularity of the mechanisms for investor–state dispute settlement in UNASUR member states, through the implementation of the procedural and substantive novelties contained in the CA.

Authors

Katia Fach Gómez is Professor of Private International Law in the University of Zaragoza (Spain). Her collaboration in this paper is part of a research project financed by *Humboldt Stiftung (Forschungsstipendium für erfahrene Wissenschaftler)*. The author is also member of the research projects *DER 2012-36806—Subprograma JURI*—and *e-Procofis S 14/3 DGA*. Catharine Titi is a Research Scientist of the *Centre national de la recherche scientifique (CNRS)* and the *Centre de recherche sur le droit des marchés et des investissements internationaux (CREDIMI)* of the University of Bourgogne (France).

Translated into English by María Candela Conforti.

Notes

1 See Fiezzoni, S. K. (2012). UNASUR arbitration centre: The present situation and the principal characteristics of Ecuador's proposal. *Investment Treaty News*, 2(2), 6–7. Retrieved from http://www.iisd.org/pdf/2012/iisd_itn_january_2012_en.pdf.

2 For an unofficial translation into English, see Sarmiento, M. G. (2015, November 20). *The 2012 Draft Constitutive Agreement of the Centre for the Settlement of Investment Disputes of the UNASUR*. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2698574.

3 For an unofficial translation into English, see Sarmiento, M. G. (2015, December 14). *The 2014 Draft Constitutive Agreement of the Centre for the Settlement of Investment Disputes of the UNASUR*. Retrieved from <http://ssrn.com/abstract=2703651>.

4 TeleSUR. (2016, January 16). *South America forms alternative to free trade kangaroo courts*. Retrieved from <http://www.telesurtv.net/english/news/UNASUR-Close-to-Forming-Investor-Dispute-Center-20160119-0036.html>.

5 Tratado Constitutivo de la Unión Sudamericana de Naciones, May 23, 2008. Retrieved from <http://www.unasursg.org/images/descargas/DOCUMENTOS%20CONSTITUTIVO%20DE%20UNASUR/Tratado-UNASUR-solo.pdf>.

6 Fach Gómez, K., & Titi, C. (2016). International investment law and ISDS: Mapping contemporary Latin America. *Journal of World Investment & Trade*, 17(4), 515–535.

7 See also Álvarez Zárate, J. M. & Pendleton, R. (2016). The international rule of law in Latin American investment arbitration. *Journal of World Investment & Trade*, 17(4), 681–699.

8 UNASUR. (2016). *Acta – XIII reunión presencial del grupo de trabajo de expertos de alto nivel sobre solución de controversias en materia de inversiones de UNASUR*. Retrieved from https://repo.unasursg.org/alfresco/service/unasursg/documents/content/ACTA_DE_LA_DECIMA_TERCERA_REUNION_PRESENCIAL_DEL_GRUPO_DE_TRABAJO_DE_EXPERTOS_DE_ALTO_NIVEL SOBRE SOLUCION DE CONTROVERSIA EN MATERIA DE INVERSIONES DE UNASUR.pdf?noderef=3883225f-6ec1-48bd-8dc9-72e6ed7dbfc4.

9 The authors wish to thank Professor José Manuel Álvarez Zárate for his efforts to obtain information on the results of this meeting of the Group.

Can EU Member States Still Negotiate BITs with Third Countries?

Stefanie Schacherer



Since the entry into force of the Lisbon Treaty in 2009, foreign direct investment (FDI) falls within the common commercial policy of the European Union and, as such, became part of the sphere of exclusive competence of the European Union.¹ The competence shift is evidenced by the negotiations of international investment agreements (IIAs) that the European Commission is conducting with a number of countries, including important economies, such as China and the United States. Against this background, third countries may be surprised when invited by individual EU member states to start bilateral investment treaty (BIT) negotiations. Does EU law allow member states to initiate BIT negotiations?

Only the European Union may legislate and adopt legally binding acts concerning areas within its exclusive competence. EU member states may only do so themselves if empowered by the European Union.² Accordingly, it falls to the European Union to decide whether to empower member states to conclude international treaties in fields of exclusive EU competence. This “re-empowerment” is usually adopted through secondary EU law (for example, EU regulations) and is often used to provide for transitional arrangements concerning areas over which the European Union newly acquired exclusive competence.³

With respect to the transfer of competence in the field of FDI, EU Regulation 1219/2012⁴ regulates two aspects of the transitional arrangements. It addresses the status under EU law of EU member states’ BITs that existed before the entry into force of the Lisbon Treaty, and allows member states to amend an existing BIT or conclude a new one with third countries provided that the terms, conditions and procedures set out in the regulation are respected (Art. 1, para. 1). In particular, to open negotiations or sign a BIT, member states must obtain authorization from the European Commission.

Regulation 1219/2012: rules on the required authorization and grounds for refusal

First, if a EU member state seeks to enter into BIT negotiations with a third country, it must notify its

intention in writing to the Commission (Art. 8, para. 1). The state must also transmit all relevant documentation including an indication of the negotiation objectives and the provisions to be discussed (Art. 8, para. 2). The Commission can refuse the authorization on four alternative grounds (Art. 9, para. 1):

- a) The negotiations would conflict with EU law other than the incompatibilities arising from the allocation of competences between the European Union and its member states.
- b) The negotiations would be superfluous because the Commission has submitted or has decided to submit a recommendation to open negotiations with the third country concerned.
- c) The negotiations would be inconsistent with the European Union’s principles and objectives for external action.
- d) The negotiations would constitute a serious obstacle to the negotiation or conclusion of an IIA with third countries by the European Union.

1. Conflict with EU law

The first ground seeks to avoid the adoption of member state BITs the application of which would result in a violation of EU law. There are a number of substantive areas of EU law where incompatibilities arose with respect to member state BITs that existed prior to 2009. For instance, BIT provisions on the free transfer of investment-related funds without any exceptions are incompatible with EU law, because primary EU law provides for such exceptions (recital 4).⁵ The European Court of Justice (ECJ) confirmed this incompatibility in 2007.⁶ Incompatibilities may also occur regarding the admission and the post-establishment treatment of foreign investments, since several secondary EU law instruments restrict or limit the rights of foreign investors to enter or operate in the internal market. Finally, incompatibilities may arise from the need for equal treatment of all EU nationals within the internal market as well as in third countries.⁷

2. European Union-led negotiations

The second ground to refuse authorization is present when the European Union itself intends to open or has already started negotiations with the third country in question. To deny the authorization to a member state appears to be logical and necessary to achieve the European Union’s long-term objective to ultimately replace all member state BITs with EU IIAs (recital 6). Without this ultimate goal, a comprehensive EU investment policy would be unattainable. The Commission periodically publishes ongoing EU trade and investment negotiations.⁸

3. Inconsistency with EU principles and objectives

The third ground seeks to ensure consistency with EU principles and objectives, which are foreseen by

primary EU law—the Treaty on the European Union and the Treaty on the Functioning of the European Union—in order to guide all EU external action.⁹ These principles and objectives are broader policy considerations, such as promoting democracy, the rule of law, human rights and fundamental freedoms, and sustainable economic, social and environmental development. Despite the difficulty to scrutinize future EU member state BITs in the light of these general principles, this ground for refusal underlines the importance of the principles and objectives of EU external action and provides the Commission with considerable political discretion when deciding on an authorization.

4. Serious obstacle to European Union-led negotiations

The fourth ground of refusal slightly overlaps with the second ground since obstacles are in particular likely to occur when the European Union itself has decided to open negotiations with the same third country. The question of seriousness must be assessed on a case-by-case basis.

The European Commission may decide to grant authorization conditioned upon the inclusion or removal of certain clauses from the negotiations and prospective agreements as needed to ensure consistency with the European Union's investment policy or compatibility with EU law (Art. 9, para. 2). Once negotiations start, the Commission must be kept informed about the progress and results of the negotiations throughout the different stages (Art. 10). It may also request to participate in the negotiations. Before a member state can sign the resulting agreement, the Commission must again be notified (Art. 11, para. 1). It then evaluates the text of the agreement based on the four criteria described above (Art. 11, para. 3). If those criteria are fulfilled, the Commission grants its final approval through the adoption of an implementing act, making it binding.¹⁰

New member state BITs will be maintained in force until an IIA between the European Union and the same third country eventually enters into force (Art. 3 and Art. 11, para. 4). Member states must inform the Commission on all aspects of member state BITs throughout the life of the agreements, in particular regarding all meetings of the contracting states and possible disputes arising between them as well as disputes between them and a investors (Art. 13).

Therefore, the terms, processes and conditions set out in Regulation 1219/2012 make clear that, even though EU member states may still negotiate new IIAs, their possibility to do so is dictated and controlled by the Commission.

Trends of BIT negotiations led by EU member states

According to the Commission, by mid-2016, it has given 93 authorizations to open new negotiations and 41 to open re-negotiations.¹¹ In addition, it has granted 16 authorizations to conclude new

agreements as well as 21 authorizations to conclude protocols for existing BITs with third countries.¹¹ After a member state has been authorized it has to notify the Commission of the conclusion and entry into force of the BIT (Art. 11, para. 6). The Commission must publish every 12 months a list of all the BITs signed by the member states (Art. 4, para. 1).¹²

EU member states have since 1959 concluded 1384 BITs with third countries.¹¹ Regulation 1219/2012 foresees that in the long run all member state BITs are to be replaced by EU IIAs but does not set a specific time frame. The current EU negotiating agenda will replace a part of existing member states BITs. Investment negotiations have so far been concluded with Canada, Singapore and Vietnam and others are still ongoing with countries such as Australia, China, India, Indonesia, Japan, New Zealand and the United States.⁸ However, the ultimate replacement of all existing member states BITs with EU agreements will take time, and the high number of authorizations granted shows that member states remain active in negotiating BITs. Most recently, France has concluded a BIT with Colombia,¹³ and Greece with the United Arab Emirates.¹⁴ For all of these reasons, it can be expected that individual EU member states will continue to request to negotiate new treaties with third countries.

Author

Stefanie Schacherer is a Ph.D. candidate and a Teaching and Research Assistant at the Faculty of Law of the University of Geneva.

Notes

- 1 Treaty on the Functioning of the European Union (TFEU), Art. 3, para. 1, and Art. 207. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>. The exact scope and content of exclusive competence remains subject to controversy.
- 2 TFEU, *supra* note 1, Art. 2, para. 1.
- 3 For instance, after the European Union gained exclusive competence in the field of judicial cooperation in civil matters, transitional arrangements were adopted under Regulation 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations. (2009) OJ L200/25. Retrieved from <http://eur-lex.europa.eu/eli/reg/2009/662/oj>.
- 4 Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. (2012) OJ L351/40. Retrieved from <http://eur-lex.europa.eu/eli/reg/2012/1219/oj>. In-text references to legal provisions, unless otherwise indicated, refer to this regulation.
- 5 See also TFEU, *supra* note 1, Arts. 64, 66 and 75.
- 6 Commission v. Austria C-205/06 and Commission v. Sweden C-249/06 of 3 March 2009, paras. 38–40 and 39–41 respectively.
- 7 For a more detailed analysis see Dimopoulos, A. (2011). *EU foreign investment law*. Oxford: Oxford University Press, pp. 310–318.
- 8 European Commission. (2016, May). *Overview of FTAs and other trade agreements*. Retrieved from http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.
- 9 Treaty on European Union (TEU), Art. 21. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>; TFEU, *supra* note 1, Art. 205 and Art. 207, para. 1.
- 10 Regulation 1219/2012, *supra* note 4, Art. 11, paras. 4 and 5, and Art. 16, para. 2, referring to Regulation 182/2011 of the European Parliament and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (2011) OJ L55/13. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32011R0182>.
- 11 European Commission, Directorate General for Trade, personal communication, July 1, 2016.
- 12 Official Journal of the European Union, OJ C 149, April 27 2016.
- 13 Agreement for the reciprocal promotion and protection of investments, Colom.–Fr., July 10, 2014. Retrieved from <http://investmentpolicyhub.unctad.org/IIA/treaty/3488>.
- 14 Agreement for the reciprocal promotion and protection of investments, Greece–U.A.E., June 5, 2014. Text not yet published.

Recasting Rules and Exceptions? On the Relationship Between Regulatory Sovereignty and International Investment Law

Harm Schepel



Book review of Pedro J. Martinez-Fraga and C. Ryan Reetz's *Public Purpose in International Law: Rethinking regulatory sovereignty in the global era*.¹

Obligations on states restraining their regulatory powers are traditionally seen as exceptions—cast in treaties or contracts—to customary international law.² It is in that light, for example, that in the Investment Chapter of the Comprehensive Economic and Trade Agreement (CETA), the European Union and Canada “reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection and the promotion and protection of cultural diversity.”³ To be sure, these exceptions have taken on enormous weight and importance over the last few decades, especially through treaty-based arbitral practice nurturing expansive interpretations of the standards of treatment that states commit to. But still, the traditional view holds that the prohibition of expropriation without compensation and the obligation to afford fair and equitable treatment, *however* intrusive on states’ sovereignty they may be, are properly framed as exceptions to customary international law.⁴

In view of widespread unease with the excesses of the international investment law regime, the pressing intellectual task at hand would seem to be to formulate a coherent doctrine defining and tempering the rights that investors derive from international law. Martinez-Fraga and Reetz, however, are refreshingly unfashionable in their outlook. They live in a “new space and era” defined by economic globalization, where “traditional notions of territorially based Westphalian sovereignty are no longer responsive to the common needs of nations,” and where the paradigm of independence gives way to a paradigm of interdependence.⁵ The intellectual task they set themselves is to work towards the formulation of a coherent doctrine of tempering public interest exceptions to the rule embodied by the generalized

obligations states have towards foreign investors.

To this end, *Public Purpose* investigates and canvasses the definition and role of the public purpose doctrine in all its iterations and permutations in the North American Free Trade Agreement (NAFTA) and the case law developed under its Chapter Eleven, in customary international law, in a huge sample of bilateral investment treaties (BITs), in a wide variety of human rights instruments, in the context of the principle of permanent sovereignty over natural resources, and in an impressive number of domestic laws on foreign investment. Hundreds of lucid pages of extremely hard work yield a scattered, “bankrupt” doctrine that covers either too much or too little. In the conclusion, the authors set out a number of principles towards the (re-)construction of the doctrine. A “self-judging,” wholly subjective standard will not do: there will have to be an objective standard, subject to discursive reasoning. It will have to be a unified doctrine harbouring a hierarchy of public purposes. Most tellingly, perhaps, the burden of proof will have to be reversed:

States applying public purpose in furtherance of the exercise of regulatory sovereignty should bear the burden by something akin to “clear and convincing” of demonstrating the objective foundations and commensurable underpinnings of the doctrine’s application. In this connection investors should enjoy a rebuttable presumption that public purpose is not sufficient to justify encroachment on an international obligation to protect foreign investment.⁶

Public Purpose is an unsettling book. The “paradigm change” is posited, the necessity to fashion a new public purpose doctrine accordingly assumed. The reconstruction of the doctrine, moreover, takes place against the background of an undifferentiated, clear and far-reaching set of obligations on the part of states regarding the protection of foreign investors that is just presumed to exist in a unified, inherently compelling form. Strangest of all, the book is preoccupied most with states’ assertions of public purpose where one would think they matter least: as one of the conditions for lawful expropriations.

To rehearse: investment treaties generally prohibit states from expropriating investments except a) for a public purpose, b) under due process of law, c) in a non-discriminatory manner and d) on payment of prompt, adequate and effective compensation. On the face of it, it is hard to see what if anything could ever turn on the condition of public purpose: it helps to distinguish between lawful expropriations (where the investor is being compensated) and unlawful expropriations (where the investor ought to be awarded damages). Absent any major differential between compensation and damages, it is not obvious why an investor would ever spend a lot of time and effort in claiming a lack of public purpose. It is also difficult to see what a state would have to

gain in arguing the point. As the tribunal in *Santa Elena* famously put the matter:

Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.⁷

In this light, the lack of effective examination by courts and tribunals of the public purpose doctrine proper is hardly as surprising and deplorable as Martínez-Fraga and Reetz make it out to be.⁸ But they seek to employ the doctrine to distinguish not between lawful expropriations and unlawful expropriations, but between regulatory measures and expropriations. This is, of course, a logical fallacy, or, as the tribunal in *Fireman’s Fund* had it, “putting the cart before the horse”:⁹ the inquiry into whether expropriation has taken place must logically be distinct from and prior to the determination whether it is lawful. Whatever the content of the public purpose doctrine for purposes of the latter stage of the analysis, it must hence be different from any public interest doctrine that plays a role in the former.

The authors will have nothing of it, however. In NAFTA jurisprudence, the authors note to their dismay that tribunals have taken to “reconfigure” the public purpose doctrine as one of “police powers” to distinguish “bona-fide” or “reasonable” regulatory acts from measures tantamount to expropriation. This leads to some of the more memorable passages in the book, a rant about “legal fiction” being “little more than a pretext for the expansion of regulatory sovereignty,” providing “rogue states with formal juridical justification for substantive inequities that rise to the level of illicit conduct,” and, what the authors obviously consider even worse,

the view that a State’s prerogative in a post-market entry to change or modify existing regulatory schemes to the material detriment of a foreign investor may render an economic activity “less profitable or even uneconomic to continue” but not necessarily constitute an indirect or creeping expropriation.¹⁰

At this point, one marvels at the power of economic globalization to overthrow accepted canons and received wisdom in international law: could it really be that intensified economic interactions between nations should lead, of necessity it seems, to a situation where every exception becomes a rule and every rule an exception? If taken to its logical conclusion, *Public Purpose in International Law* would hold that each and every measure taken by states that conceivably leads to material loss of foreign investors is unlawful under international law unless states can offer clear and convincing evidence that such measures are objectively

necessary for the achievement of an objectively defined public purpose.

The better view, surely, is that states have an inherent right to determine what is and what is not in the public interest. They also have an inherent duty under international investment law—as they have under international trade law—to make sure that the detrimental effects to foreign companies of measures taken in the furtherance of the public interest are minimized. That, in turn, requires a proportionality test that separates means from ends, much in the way that Article XX of the General Agreement on Tariffs and Trade (GATT) operates.¹¹ What Martínez-Fraga and Reetz consider the undesirable crossover between trade law and investment law¹² may well turn out to be what will save investment law from itself.

Author

Harm Schepel is Professor of Economic Law at Kent Law School and the Brussels School of International Studies, University of Kent.

Notes

¹ Martínez-Fraga, P. J., & Reetz, C. R. (2015). *Public purpose in international law: Rethinking regulatory sovereignty in the global era*. Cambridge: Cambridge University Press.

² See, for example, Viñuales, J. E. (2014). Sovereignty in foreign investment law. In Z. Douglas, J. Pauwelyn, & J. E. Viñuales (eds.), *The foundations of international investment law* (pp. 317–362). Oxford: Oxford University Press.

³ Comprehensive Economic and Trade Agreement (CETA), Investment Chapter, Article 8.9, paragraph 1 (emphasis added). Retrieved from http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

⁴ See, for example, *Saluka v. Czech Republic*, UNCITRAL, Partial Award of March 17, 2006, para. 262.

⁵ Martínez-Fraga & Reetz, 2015, *supra* note 1, p. 7.

⁶ Martínez-Fraga & Reetz, 2015, *supra* note 1, p. 353.

⁷ *Santa Elena v. Costa Rica*, Award of February 17, 2000, para. 72.

⁸ The authors see the state of affairs summed up in the American Law Institute’s Restatement of Foreign Relations Law, which notes that the public purpose limitation “has not figured prominently in international claims practice, perhaps because the concept of “public purpose” is broad and not subject to effective reexamination by other states. Presumably, a seizure by a dictator or oligarchy for private use could be challenged under this rule.” American Law Institute. (1987). *Restatement (Third) of Foreign Relations Law*, Section 712, Comment e. Reinsich sees things differently, claiming that “the practice of international courts and tribunals also demonstrates that—in spite of broad deference to expropriating States—they are willing to assess whether such public purpose has been genuinely pursued.” Reinsich, A. (2008). Legality of Expropriations. In A. Reinsich (ed.), *Standards of investment protection* (pp. 171–204). Oxford: Oxford University Press, p. 186. In fairness, the statement relies almost exclusively on the single instance of *ADC v. Hungary*, Award of October 2, 2006, para. 432.

⁹ *Fireman’s Fund v. Mexico*, Award of July 17, 2006, para. 174.

¹⁰ Martínez-Fraga & Reetz, 2015, *supra* note 1, pp. 106–107.

¹¹ See, for example, Kingsbury, B., & Schill, S. W. (2010). Public law concepts to balance investors’ rights with state regulatory actions in the public interest: The concept of proportionality. In S. W. Schill (ed.), *International investment law and comparative public law* (pp. 75–106). Oxford: Oxford University Press.

¹² Martínez-Fraga & Reetz, 2015, *supra* note 1, p. 264 *et seq.*

news in brief

Brexit and contentious topics complicate TTIP negotiations; public opposition continues

The 14th round of Transatlantic Trade and Investment Partnership (TTIP) negotiations was held in Brussels from July 11 to 15, 2016. Chief negotiators from the European Union, Ignacio Bercero, and United States, Dan Mullaney, **admitted** the need to overcome significant differences regarding services and procurement, despite progress on tariff elimination and regulatory cooperation.

Another factor holding back negotiations is Britain's June 23 vote to leave the European Union. Mullaney **emphasized** the need to reflect on this development: "Imagine if the United States said, for instance, 'Well, maybe TTIP will not apply to California'." Europe's second-largest economy, the United Kingdom is the largest market for U.S. services worldwide and accounts for 25 per cent of U.S. exports to the European Union.

As reported by **The Guardian** on July 20, certain U.S. officials suggest pushing for a "potentially swift bilateral trade and investment deal" with the United Kingdom as soon as it formally exits the European Union. This would serve to consolidate British–American economic relations as well as to expedite TTIP negotiations.

Opposition by civil society to the TTIP continues on many fronts. Outside the closed doors of the 14th round of negotiations, 40 protesters were escorted away by Brussels police after "**attacking**" **officials with confetti**. Opinion polls in **Germany** and **Luxembourg** indicate that people in both countries believe the agreement will bring more disadvantages than advantages. Civil society organizations from both countries and 18 other EU states signed a letter to Council of Europe President Donald Tusk demanding the **immediate withdrawal of the European Commission's mandate** to negotiate the TTIP.

Lack of transparency and of opportunities for public participation in negotiations is among the reasons for opposition. On May 2, Greenpeace Netherlands **leaked several negotiating documents, and called for debate before any further negotiations**. The European Commission furthered its commitment to transparency by **publishing nine of its proposals** during the 14th round.

In February the chief EU and U.S. negotiators **had announced** their intention to produce a consolidated draft by the end of July. At the end of the 14th round, Bercero affirmed this was more likely to occur by the end of September.

EU negotiation agenda to continue despite Brexit; MERCOSUR and Indonesia at sight

Despite the uncertainties in TTIP negotiations, EU Trade Commissioner Cecilia Malmström **said** they would survive Brexit, and is pushing to conclude negotiations before U.S. President Barack Obama leaves office in early 2017. Malmström recalled that the European Commission would continue to negotiate the TTIP and other trade and investment agreements on

behalf of the United Kingdom as an EU member state until Brexit is formalized.

Among these are **EU negotiations with MERCOSUR**, which resumed on June 23, and with Indonesia, **formally launched** on July 18. Negotiating rounds with both partners are expected to take place sometime in the second semester. The 17th round of negotiations of a **free trade agreement with Japan** is scheduled for September 2016 in Brussels.

In launching negotiations with Indonesia, the Commission recalled the recently completed agreements with Singapore (2014) and Vietnam (2015), and indicated that agreements with member states of the Association of Southeast Asian Nations (ASEAN) "will serve as building blocks toward a future EU–ASEAN agreement, which remains the EU's ultimate objective."

United Kingdom makes trade and investment negotiation moves for post-Brexit era

On July 8, 2016, Sajid Javid, former Business Secretary for the United Kingdom, **launched preliminary talks with India** on a future trade relationship between the two countries as soon as Britain formally leaves the European Union. "Following the referendum result," Javid stated, "my absolute priority is making sure the UK has the tools it needs to continue to compete on the global stage. That is why I am in India today to launch these initial trade discussions."

Before taking a different office within the British government on July 14, Javid expressed the British government's intention to build its trade capacity by hiring up to 300 staff, including trade negotiators, and to visit other key trade partners, including China, Japan, South Korea and the United States.

British Trade and Investment Minister Lord Price concluded his **first official trip to China and Hong Kong** on July 11, where he also focused on strengthening trade and investment relationships. He said he was optimistic about the future and added that "a number of countries have already expressed interest in the idea of trade talks with the UK."

On the same day, Chancellor of the Exchequer **George Osborne** went to New York to speak with leading figures on Wall Street, and would continue in missions to China and Singapore to discuss trade and investment. In a statement, he said: "Britain may be leaving the EU, but we are not quitting the world. We will continue to be a beacon for free trade."

Canadian Trade Minister Chrystia Freeland told the media that her team has been having "**technical exchanges**" **with the United Kingdom** on the Canada–European Union Comprehensive Economic and Trade Agreement (CETA), indicating that Britain is seeking Canada's advice on negotiations for a post-Brexit trade and investment agreement with the European Union. CETA is Brexit Minister David Davis's **preferred model** for a post-Brexit relationship with the bloc.

CETA to be concluded as a mixed agreement; Commission hopes for signing in October

On July 5, 2016, the European Commission proposed to the Council that the Canada–European Union CETA—agreed to in 2014 and **re-concluded in February 2016**—be signed as a “mixed agreement,” requiring signature and ratification by each of the EU member states. The Commission thus hopes for “a swift signature and provisional application.” Formal signing would take place in the Canada–European Union Summit, to be held in Brussels in late October.

The move comes one week after Commission President Jean-Claude Juncker **reportedly said** the opposite—that the CETA would be subjected to a simple approval procedure involving the European Parliament only—even against the preference of French President François Hollande, German Chancellor Angela Merkel and other EU member state leaders.

EU Trade Commissioner Cecilia Malmström **clarified** that “the open issue of competence for such trade agreements will be for the European Court of Justice to clarify, in the near future. From a strict legal standpoint, the Commission considers this agreement to fall under exclusive EU competence. However, the political situation in the Council is clear, and we understand the need for proposing it as a ‘mixed’ agreement, in order to allow for a speedy signature.”

She again praised CETA’s “new investment court system and enhanced rules on investment protection,” which represent “an important step towards the EU’s ultimate goal of a global investment court.”

Bulgaria and Romania stated they would veto the agreement because Canada failed to lift the visa requirement for their nationals. **Earlier this year**, the Dutch Parliament rejected provisional application of the deal, and Belgium’s Walloon Parliament opposes signature.

RCEP partners conclude 13th negotiating round in Auckland; three further rounds in 2016

The 13th round of negotiations for a Regional Comprehensive Economic Partnership (RCEP) was held in Auckland, New Zealand, from June 12 to 18, 2016.

The International Centre for Trade and Sustainable Development (ICTSD) **reports** that all countries have now submitted initial offers for trade in goods and services, and initial lists of reservations for investment. Negotiations—with further rounds scheduled for August, October and December—are expected to go beyond the 2016 deadline.

In April 2016, **Knowledge Ecology International leaked** an October 16, 2015 version of the investment chapter. The leaked draft includes 14 articles covering provisions frequently included in trade and investment agreements, including most-favoured-nation (MFN) treatment, minimum standard of treatment and prohibitions of

performance requirements and expropriation. The negotiating partners also aim at creating an investor–state dispute settlement mechanism.

RCEP is a mega-regional trade and investment agreement being negotiated since 2012 between Australia, China, India, Japan, New Zealand and South Korea, as well as the negotiating bloc of ASEAN member states: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Participating countries account for roughly 50 per cent of global population, 30 per cent of global GDP and 25 per cent of global exports.

India takes steps to reform its investment policy framework after approving new model BIT

India has started to send official **notices to terminate** bilateral investment treaties (BITs) to 57 partner countries with which it has BITs that have already expired or will expire in the near future.

Moreover, to the 25 countries with which India has BITs with initial durations expiring from July 2017 onward, India has started to propose **signing joint interpretative statements** to clarify ambiguities in treaty texts, for example, with respect to the definitions of investor and investment and the exclusion of taxation matters.

These bold steps follow the approval of **India’s new model BIT** in December 2015, which narrows the scope of the standard of treatment of investors (avoiding the term “fair and equitable treatment”), leaves out the MFN clause and includes investor obligations. While retaining investor–state arbitration, the model requires investors to exhaust local remedies before commencing international arbitration against the host state.

India’s foreign investment policy has shifted in response to an increased number of challenges to government measures and policies by foreign investors under investment treaties: **seven arbitration cases** are known to have been initiated against India since 2012.

Renegotiating investment treaties pursuant to the new model and embedding its revised policy in ongoing trade and investment negotiations—with partners such as Canada, European Union and the United States, and in the context of RCEP—will be India’s next political challenge.

A despondent **letter** sent on May 25, 2016 by EU Trade Commissioner Cecilia Malmström to India’s commerce and finance ministers illustrates the challenge. She warned that India’s notices of termination to “a significant number” of EU member states could “have serious consequences” if replacement treaties are not in place. According to her, it could “create a gap in investment protection and consequently discourage EU enterprises from further investing in India,” as investors “may perceive the investment climate as deteriorating.”

awards and decisions

Philip Morris v. Uruguay: all claims dismissed; Uruguay to receive US\$7 million reimbursement
Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7
Martin Dietrich Brauch

The long-expected final award has been rendered in the high-profile case initiated by tobacco giant Philip Morris in early 2010 against Uruguay over its tobacco control measures. On July 8, 2016, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) dismissed all claims by Philip Morris, ordering it to bear the full cost of the arbitration and to pay Uruguay US\$7 million as partial reimbursement of the country's legal expenses.

Background

Claimants were Philip Morris Brand Sàrl and Philip Morris Products S.A., both Swiss companies, and Abal Hermanos S.A. (Abal), a Uruguayan company acquired by the Philip Morris group in 1979. U.S.-based Philip Morris International Inc. is the ultimate parent company of the three claimants, jointly referred to as "Philip Morris" in this summary.

To counter the public health and economic impacts of the country's high smoking rate, Uruguay became a party to the 2003 Framework Convention on Tobacco Control (FCTC) of the World Health Organization (WHO) and enacted a series of domestic measures of tobacco control. In particular, the measures challenged by Philip Morris were Ordinance 514 of August 18, 2008 (the Single Presentation Regulation [SPR]) and Presidential Decree 287/009 of June 15, 2009 (the 80/80 Regulation).

SPR required graphic and textual anti-smoking warnings to be printed on the lower half of cigarette packs. It also prohibited the use of variants of any brand. To comply, for example, Philip Morris had to remove *Light*, *Blue* and *Fresh Mint*, keeping *Marlboro Red* only. The 80/80 Regulation increased the size of the warnings from 50 to 80 per cent.

In addition to challenging the two measures before Uruguayan courts, on February 19, 2010 Philip Morris filed with a request for ICSID arbitration, claiming that Uruguay expropriated its investment and denied it fair and equitable treatment (FET), among other breaches of the Switzerland–Uruguay bilateral investment treaty (BIT).

Indirect expropriation: claims and structure of tribunal's analysis

Philip Morris argued that the SPR expropriated several of its brand variants, including the associated goodwill and the intellectual property rights. Furthermore, it argued that the 80/80 Regulation destroyed the brand

equity of the remaining variants, by depriving Philip Morris of its ability to charge a premium price for them and thus affecting its profits. Uruguay denied that the measures were expropriatory and argued that, even if they were, they did not reduce the value of the business substantially.

The tribunal started from the undisputed point that trademarks and the associated goodwill are protected investments under the BIT, and assumed that Philip Morris's brands continued to be protected under Uruguayan trademark law even after the changes motivated by the challenged measures. It then focused its analysis on two questions: first, whether a trademark confers a right to use or only a right to protect against use by others, and second, whether the measures expropriated Philip Morris's investment.

Trademarks give an exclusive right to exclude others from use, not an absolute right of use

To answer the first question, the tribunal analyzed the legal framework applicable to trademark protection in Uruguay: Law No. 17,011 (Trademark Law), the Paris Convention for the Protection of Intellectual Property (Paris Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the Protocol on Harmonization of Intellectual Property Norms in MERCOSUR in the Field of Trademarks, Indications of Source and Appellations of Origin (the MERCOSUR Protocol).

The tribunal found that, under all these applicable sources of law, "the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State's regulatory power" (para. 271).

The SPR and the 80/80 Regulation did not expropriate Philip Morris's investment

The tribunal also dismissed the expropriation claim regarding the 80/80 Regulation. Considering that the brands continued to be printed on cigarette packs, it held that the limitation to 20 per cent of the package merely restricted the modalities of the use of trademarks, but could not have a substantial effect on the claimants' business.

Rather than considering each brand that Philip Morris had to discontinue when the SPR was enacted as an individual investment, the tribunal looked at Philip Morris's investment as a whole, "since the measure affected its activities in their entirety" (para. 283). From this standpoint, the tribunal concluded that the SPR was far from causing a substantial deprivation of the value of Philip Morris's investment. Even if it could have been more profitable in the absence of the SPR, the tribunal held that there could be no indirect

expropriation as sufficient value remained after the implementation of the measure.

The tribunal went on to hold that, in adopting both the SPR and the 80/80 Regulation, Uruguay complied with its national and international legal obligations for protecting public health. It further stated that both measures were taken in good faith, in a non-discriminatory manner and proportionately to the intended objective. As such, in the tribunal's view, the measures were a valid exercise of Uruguay's police powers, which cannot constitute an expropriation. Accordingly, the tribunal dismissed the expropriation claims entirely.

FET claim rejected in absence of arbitrariness and breach of legitimate expectations

The tribunal started its FET analysis addressing Philip Morris's allegation that the challenged measures were arbitrary. Referring to the international law standard under the *ELSI* case, which defines arbitrariness as a "wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety" (para. 390), the tribunal concluded that the measures were not arbitrary. Rather, it agreed that Uruguay adopted them in good faith and in order to protect public health. Furthermore, contrary to Philip Morris's contention that the measures were adopted without scientific support, the tribunal indicated that they were based on the FCTC process, which in turn was supported by scientific evidence.

In view of the circumstances of their adoption, the tribunal held that both measures were reasonable, and not "arbitrary, grossly unfair, unjust, discriminatory or [...] disproportionate," with "minor impact" on Philip Morris's business (paras. 410 and 420). A unanimous tribunal concluded that the adoption of the 80/80 Regulation did not breach the BIT. A majority tribunal concluded the same with respect to SPR.

However, the claimants' appointee to the tribunal, Gary Born, dissented on this point, finding single presentation a manifestly arbitrary and unreasonable requirement, "because it is wholly unnecessary to accomplishing its only stated objective," (para. 196 of the dissent) namely, "protecting consumers against deceptive uses of trademarks" (para. 172 of the dissent).

According to Philip Morris, Uruguay's measures "eviscerated" its legitimate expectations to explore its brand assets and enjoy its intellectual property rights, as well as undermined the legal stability of Uruguay's legal framework. However, relying on *EDF v. Romania* and *El Paso v. Argentina*, the tribunal noted that only specific undertakings or commitments could create legitimate expectations, and that Philip Morris did not provide evidence of specific commitments made by Uruguay regarding tobacco control measures. Furthermore, in view of the limited impact of the

measures on Philip Morris's business, it held that the challenged measures did not change the legal framework beyond the "acceptable margin of change" tolerated under the *El Paso* standard.

Tribunal dismisses Philip Morris's denial of justice claims

Philip Morris alleged that contradictory decisions of two Uruguayan courts—the Supreme Court of Justice (SCJ) and the *Tribunal de lo Contencioso Administrativo* (TCA)—concerning the 80/80 Regulation amounted to a denial of justice. However, according to the majority, although "unusual" and "surprising," the contradiction was not serious enough to amount to a denial of justice. "Outright conflicts within national legal systems may be regrettable but they are not unheard of," the majority reasoned (para. 529).

According to dissenting arbitrator Gary Born, the contradictory decisions, in both cases rejecting Philip Morris's claims, "amounted to 'Heads, I win; tails, you lose' treatment" (para. 40 of the dissent), and Uruguay's failure to provide Philip Morris access to a judicial forum to address the contradiction consisted in a denial of justice.

A second denial of justice claim was that the TCA rejected Philip Morris's application to partially annul the SPR not based on Philip Morris's own arguments, but on those brought by British American Tobacco in a different proceeding challenging the same regulation. While recognizing the procedural improprieties, the tribunal considered that the cases and claims were very similar and that Philip Morris's arguments were addressed, concluding that there was no denial of justice.

Notes: The ICSID tribunal was composed of Piero Bernardini (President appointed by ICSID's Secretary-General, Italian national), Gary Born (claimant's appointee, U.S. national) and James R. Crawford (respondent's appointee, Australian national). The award, including the Decision on Jurisdiction of July 2, 2013 as an annex, is available at <http://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>.

Corporate restructuring and abuse of rights: PCA tribunal deems Philip Morris's claims against Australia's tobacco plain packaging rules inadmissible
Philip Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12
Inaê Siqueira de Oliveira

Australia enacted the Tobacco Plain Packaging Act, a tobacco control legislation that removed brands from cigarette packs, on November 21, 2011. On the very same day, Philip Morris Asia Limited (PM Asia) served a Notice of Arbitration against Australia under the Hong Kong–Australia bilateral investment treaty (BIT), claiming that plain tobacco packaging amounted to an expropriation of its intellectual property rights.

A redacted version of the December 2015 decision by the arbitral tribunal established under the auspices of the Permanent Court of Arbitration (PCA) was published in May 2016. The tribunal accepted one of Australia's objections—the commencement of the arbitration configured abuse of rights because Philip Morris had changed its corporate structure to gain the protection of the BIT when a specific dispute was already foreseeable—and declined to hear the case.

Australia's tobacco plain packaging rules

Australia first considered plain packaging of cigarette packs in 1995, but the initiative gained momentum ten years later, after the World Health Organization (WHO) Framework Convention on Tobacco Control entered into force for Australia. State parties to this convention are under an obligation to develop and implement tobacco control measures, including comprehensive bans on advertising, promotion and sponsorship.

In 2009, Australia's National Preventive Health Taskforce recommended plain packaging of tobacco products, and a bill to remove brands, trademarks and logos from tobacco packaging was introduced in the Australian Senate. A heated debate about plain packaging legislation took place in Australia throughout the following months. Philip Morris vigorously opposed the proposal throughout the entire legislative process, expressing "concern about the unconstitutionality" of the measure (para. 110) and willingness to challenge it by litigation if necessary.

In November 2011, the government secured the votes to approve the bill at last. Australia then enacted the Tobacco Plain Packaging Act and implemented ensuing regulations.

Philip Morris's corporate restructuring

Philip Morris International Inc. (PMI) is one of the world's largest tobacco manufacturers. To manage its business in different regions around the world, PMI owns dozen of subsidiaries and affiliates, forming the so-called PMI Group.

The claimant, PM Asia, is a company based in Hong Kong that serves as regional headquarters for PMI's operations. The investment, Philip Morris Australia (PM Australia), is a holding company registered under the laws of Australia that owns all shares of Philip Morris Limited (PML), a trading company that engages in manufacturing, importing, marketing and distributing tobacco products for sale within Australia and for regional export.

A Switzerland-based company of the PMI Group owned PM Australia until February 23, 2011, when the ownership of the Australian subsidiaries was restructured. PM Asia acquired all shares of PM Australia and became the direct owner of the PMI

Group's investment in the country. Moreover, PM Asia alleged it had managed and controlled the Australian subsidiaries since 2001.

According to PM Asia, the restructuring of the Australian subsidiaries was part of a group-wide reorganization to "refine, rationalize and streamline PMI's corporate structure" (para. 466). Said differently, PM Asia alleged that the restructuring was unrelated to the plain packaging measures that formed the subject matter of the arbitration.

Australia's objections to the tribunal's jurisdiction: lack of control of the investment since 2001, irregular admission of the investment, lack of temporal jurisdiction, and abuse of rights

As the PCA tribunal accepted Australia's plea to bifurcate proceedings, the December 2015 decision deals solely with questions of jurisdiction and admissibility.

First, Australia disputed that PM Asia had exercised control of the Australian subsidiaries since 2001. Interpreting the control test under the BIT, which required "substantial interest in the company" (para. 497), the tribunal pointed out that oversight and management did not seem sufficient to establish control, given this particular aspect of the treaty. However, it did not decide the objection based on it. The tribunal departed from the interpretation task and indicated that PM Asia had not proven it exercised management control of the Australian subsidiaries. Thus, it dismissed PM Asia's allegations for failure to present evidence of control.

Second, Australia maintained that the investment was not admitted under Australian law and investment policies, as required by the BIT, because PM Asia had not disclosed its intention to bring a claim under the BIT, nor described how the restructuring could have an impact on national interest, making the application incomplete and thus misleading. However, considering that PM Asia had a *prima facie* evidence of admission—a No-objection Letter issued by government authorities—the tribunal shifted the burden of proof and went on to assess whether Australia had proven that the investment was *not* lawfully admitted.

The tribunal was not convinced that disclosure of intentions and description of impact on national interest were mandatory. Furthermore, the tribunal highlighted that, although PM Asia had not disclosed it was seeking BIT protection, Australia's Treasurer was aware of Philip Morris's intention to challenge the plain packaging measures. In the tribunal's view, Australia's assertion that it did not know PMI's intention "seem[ed] to be rather an admission of defect in its own internal procedures, where a matter of potentially important public policy was missed" (para. 518). Therefore, the tribunal dismissed the objection.

Third, Australia alleged that the tribunal lacked temporal

jurisdiction because the dispute between Philip Morris and Australia over plain packaging regulation arose *before* PM Asia acquired the shares of PM Australia. For Australia, “the existence of a dispute is a question of substance” (para. 525) and a dispute pertaining the plain packaging measures existed in substance prior to the PMI Group’s corporate restructuring.

The tribunal disagreed. Relying on *Gremcitel v. Peru*, it pointed out that “whenever the cause of action is based on a treaty breach, the test for a *ratione temporis* objection is whether a claimant made a protected investment before the moment when the alleged breach occurred” (para. 529). In the present case, the temporal jurisdiction requirement was met because the investment (namely, the acquisition of shares) was made before the alleged breach (namely, the Tobacco Plain Packaging Act of November 2011).

Australia’s final—and, as it turned out, decisive—objection was that PM Asia’s claim configured an abuse of right. Australia argued that, even if the tribunal had temporal jurisdiction, it would be precluded from exercising it because the acquisition of jurisdiction was abusive. Philip Morris, according to Australia, had modified its corporate structure to obtain BIT protection for an existing or foreseeable dispute. Thus, in Australia’s view, the claim constituted abuse of rights and was inadmissible.

Based on a review of investment arbitration case law on abuse of rights, the tribunal recalled that “restructuring an investment to obtain BIT benefits is not *per se* illegitimate” (para. 540) and that what distinguishes a legitimate restructuring from an illegitimate one is the existence of a foreseeable dispute. The tribunal’s assessment of whether the acquisition of the jurisdiction was abusive then depended on a key question: was a dispute about plain packaging reasonably foreseeable before the restructuring that resulted in PM Asia’s acquisition of PM Australia?

In the tribunal’s view, it was. Relying on *Tidewater v. Venezuela*, the tribunal defined foreseeability as “a reasonable prospect [...] that a measure which may give rise to a treaty claim will materialise” (para. 554). In applying this lower threshold to define abusive restructuring, it departed from the definition in *Pac Rim v. El Salvador*, which required “a very high probability” of dispute.

Applying the test to the case, the tribunal understood that, by the time PM Asia acquired PM Australia, there was no uncertainty about Australia’s intention to introduce plain packaging. Therefore, a dispute was foreseeable. In addition, given the evidence submitted, the tribunal ruled out Philip Morris’s allegations that taxes and other business reasons were determinative factors in the restructuring.

In sum, the tribunal concluded that Philip Morris

committed abuse of rights because it changed its corporate structure to gain BIT protection when a specific dispute against Australia over tobacco plain packaging was reasonably foreseeable. Therefore, it deemed all claims inadmissible and declined to exercise jurisdiction over the dispute, reserving the issue of costs for a final award.

Notes: The arbitral tribunal was composed of Karl-Heinz Böckstiegel (President appointed by the PCA Secretary-General, German national), Gabrielle Kaufmann-Kohler (Claimant’s appointee, Swiss national), and Donald M. McRae (Respondent’s appointee, Canadian national). The award is available at http://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf.

ICSID tribunal upholds Panama’s abuse of process objection; Transglobal to pay arbitration costs and most of Panama’s legal expenses

Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama (ICSID Case No. ARB/13/28)

Inaê Siqueira de Oliveira

In the proceeding brought by Transglobal Green Energy, LLC (a U.S.-based company) and Transglobal Green Panama S.A. (a Panama-based company) against Panama under the United States–Panama bilateral investment treaty (BIT), an ICSID tribunal accepted Panama’s abuse of process objection. Pointing out that Transglobal abused the international investment treaty system to bring its claims, the tribunal declined jurisdiction and condemned Transglobal to pay all arbitration costs, as well as most of Panama’s legal fees and expenses.

As the tribunal accepted Panama’s request to bifurcate proceedings, the award deals solely with jurisdiction and arbitration costs. In fact, as the tribunal decided on the abuse of process objection, it deemed unnecessary to deliberate on Panama’s remaining objections, which were related to absence of investment, waiver of the right to bring a dispute, most-favoured-nation (MFN) clause and domestic control of the investment.

Relevant Facts I: Bajo de Mina concession and Supreme Court decision

Transglobal’s claims arose out of events that date back to 2005. In May that year, La Mina Hydro-Power Corp. (La Mina), a Panamanian company, entered into a Concession Contract with Panama’s agency for regulation of public utilities (in Spanish, *Autoridad Nacional de los Servicios Públicos* [ASEP]) to design, build and operate a hydroelectric power plant at Bajo de Mina.

La Mina failed to commence the construction of the power plant within the agreed-upon deadline, so ASEP issued a resolution terminating the Concession Contract. In response, La Mina requested the Supreme Court of

Panama to grant injunctive relief against the termination and to review the administrative decision. The Supreme Court denied the request for injunctive relief.

Pending the Supreme Court's decision on the review of the termination decision, ASEP entered into a concession contract for the same project with another company, Ideal Panama S.A., which proceeded with the construction of the power plant. Later, in November 2010, the Supreme Court decided that La Mina's contract with ASEP remained in force and ordered the restitution of the concession to La Mina, which was not immediately executed.

Relevant Facts II: Transglobal Green Energy enters the scene

Just over a month after the Supreme Court's ruling, which remained unimplemented, Mr. Julio Lisac, the owner of La Mina, signed a Memorandum of Understanding (MOU) with Transglobal Green Energy (TGGE). In September 2011, both entered into a Partnership and Transfer Agreement (PTA), which provided for the creation of Transglobal Green Energy Panama (TGGE Panama), a special-purpose company to undertake the hydropower project at Bajo de Mina. Importantly, the PTA had the stated purpose of "individually or jointly look[ing] for and obtaining mechanisms to enable the execution of the November 11, 2011 [sic] Judgment, and enable[ing] the partnership to acquire the concession rights" (para. 85). Shortly thereafter, TGGE Panama was incorporated, with Mr. Lisac and TGGE as sole shareholders. Although TGGE held 70 per cent of shares, the tribunal later found that the voting arrangements and the principle of exclusive execution by Mr. Lisac revealed "Mr. Lisac's intent to remain in *de facto* control of TGGE Panama (para. 111).

Mr. Lisac requested the transfer of the Bajo de Mina concession rights to TGGE Panama. Then, on January 2012, before ASEP had decided on the transfer request, the Cabinet Council, a deliberative organ of high-ranking state officials, authorized the administrative rescue (*rescate administrativo*) of the concession "on grounds of urgent social interest" (para. 69).

ASEP implemented the administrative rescue of the Concession Contract. Since then, Mr. Lisac has initiated several judicial proceedings to recover the concession rights. On September 19, 2013, the Request for Arbitration was filed with ICSID.

Transglobal's abuse of process

The tribunal begun its analysis of jurisdiction by considering the objection based on abuse of process "because the existence of abuse of process is a threshold issue that would bar the exercise of the Tribunal's jurisdiction even if jurisdiction existed" (para. 100).

Panama asserted that Transglobal "attempted to create artificial international jurisdiction over a domestic dispute [...] by inserting a foreign investor into the ownership of a domestic project, at a time when the project was already embroiled in a domestic dispute" (para. 85). To prove that Mr. Lisac's dispute with Panama arose before Transglobal's investment, it listed a number of events, such as ASEP's 2006 resolution terminating the Concession Contract and the Supreme Court's 2010 decision. Transglobal did not offer counterarguments to the objection—in fact, it did not submit a counter-memorial on jurisdiction.

Citing *Phoenix v. Czech Republic*, the tribunal stated that "there is a line of consistent decisions of arbitral tribunals on objections to jurisdiction based on abuse of the investment treaty system" (para. 102). According to this line of cases, transferring a national investment to a foreign company in an attempt to obtain BIT protection to a pre-existing dispute configures abuse of rights and precludes the exercise of jurisdiction.

In determining whether Mr. Lisac had tried to internationalize his domestic dispute with Panama to bring it under BIT protection, the tribunal noted that the enforcement of the 2010 Supreme Court's ruling took a prominent place in the PTA signed between Mr. Lisac and TGGE. Indeed, the tribunal indicated that assisting in the enforcement of that judgment was the first obligation undertaken by TGGE under the PTA. Additionally, in the tribunal's view, the voting arrangement under the PTA revealed "Mr. Lisac's intent to remain in *de facto* control of TGGE Panama irrespective of the percentage of shares held and at the same time to benefit from the foreign nationality of TGGE for the purpose of pursuing this arbitration" (para. 111).

In its final remarks about the objection, the tribunal observed that procedural developments exposed an "intimate relationship of the ongoing court proceedings in Panama and this proceeding" (para. 113). Transglobal twice requested the suspension of the arbitration based on developments of the ongoing court proceedings in Panama. According to the tribunal, these suspension requests, made while Transglobal awaited the implementation of the 2010 decision, revealed that it was seeking international remedies for a pre-existing domestic dispute.

Arbitration costs and legal expenses

In its reasoning on costs, the tribunal acknowledged that, in cases involving abuse of process, "tribunals have tended to decide that claimants should bear the costs of the proceeding, [but] as regards the attorney's fees and expenses, the record is mixed" (para. 125). To illustrate this divide, it again quoted *Phoenix*, in which the claimant was ordered to pay the respondent's legal fees and expenses, and *Renée Rose Levy v. Peru*, in which the claimant was ordered to pay a reasonable—in the tribunal's assessment—contribution to the

respondent's fees and expenses.

The tribunal then sided with *Renée Rose Levy*, holding that the claimant should bear the costs of proceedings, as well as attorney's fees and expenses, "provided that the latter are reasonable" (para. 126).

Panama had argued that Transglobal's conduct throughout the arbitration—failing to provide translations of important documents, submitting discrepant documentary evidence and requesting suspensions while aware that Panama would oppose to them—had unnecessarily complicated Panama's defense. The tribunal considered that Transglobal had a "cavalier attitude" (para. 126) and, taking into account the overall course of proceedings, concluded that Transglobal should bear Panama's attorneys' fees and expenses, exception made to some early requests for shifting the costs and provisional measures relating to security for costs that were rejected.

Panama had also requested that the tribunal, based on its general authority under Article 61(2) of the ICSID Convention, ordered that all remaining funds in the administrative account were given to Panama. The tribunal denied this latter request because it understood "it had no authority to issue such an order" (para. 129).

Notes: The arbitral tribunal was composed of Andrés Rigo Sureda (President appointed by the co-arbitrators, Spanish national), Christoph H. Schreuer (Claimant's appointee, Austrian national), and Jan Paulsson (Respondent's appointee, Bahraini, French and Swedish national). The award of June 2, 2016 is available at <http://www.italaw.com/sites/default/files/case-documents/italaw7336.pdf>.

Claimant fails to comply with three-year limitation period under CAFTA-DR

Corona Materials, LLC v. Dominican Republic, ICSID Case No. ARB(AF)/14/3

María Florencia Sarmiento

A tribunal at the International Centre for Settlement of Investment Disputes (ICSID) declared that it lacked jurisdiction in the case of Corona Materials LLC (a U.S. company) against the Dominican Republic. In an award dated May 31, 2016, the tribunal held that Corona's request for arbitration was time-barred, as it failed to comply with the three-year limitation period under the Dominican Republic–Central America Free Trade Agreement (CAFTA-DR).

Factual background and claims

The case concerns a mining project to build and operate a mine in the Dominican Republic from which Corona would export construction aggregate materials.

In 2007 Corona submitted an application to operate a concession and a few months later applied for an

environmental license. Corona, argued that there were delays in the proceeding, and the Dominican Republic objected that Corona itself delayed the process by omitting documents and changing the scope of the project several times.

In August 2010 the Environmental Ministry informed Corona that it denied the licence as Corona's project was "not environmentally viable" (para. 43). Corona asserted that the negative was ill founded, while the respondent argued that the communication informed both the decision and the reasons. In October 2010 Corona submitted a request for reconsideration to which it had no formal response. According to the Dominican Republic, the deadline to seek reconsideration had expired.

Corona initiated arbitration against the Dominican Republic on July 30, 2014, challenging the following measures: (i) the denial of the environmental license application, which, in Corona's view, breached the CAFTA-DR articles on national treatment and minimum standard of treatment (including fair and equitable treatment and full protection and security) and constituted an indirect expropriation, and (ii) the absence of response to the request for reconsideration, which would amount to denial of justice.

The Dominican Republic denied all claims and objected to the tribunal's jurisdiction, maintaining that the alleged measures took place after the three-year period required under CAFTA-DR Article 10.18(1). The provision states that "[n]o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged [...] and knowledge that the claimant [...] or the enterprise [...] has incurred loss or damage."

Tribunal focuses analysis on whether claimant complied with three-year limitation period

The tribunal pointed out the similar wording between the limitation period provision in CAFTA-DR and the corresponding provision in Articles 1116(2) and 1117(2) of the North American Free Trade Agreement (NAFTA). Following NAFTA tribunals such as *Grand River v. United States* and *Feldman v. Mexico*, the tribunal concluded that the time period shall not be subject to any "suspension, prolongation or other qualification" (para. 192). First, the tribunal determined the earliest possible date on which Corona could have had actual or constructive knowledge of the breach or damage—the "critical date" (para. 199). Since the request for arbitration was dated June 10, 2014, the tribunal established the critical date three years earlier, on June 10, 2011, and set out to determinate whether Corona had knowledge before the critical date.

When did the claimant acquire actual or constructive knowledge?

The tribunal considered that the central measure adopted by the Dominican Republic was the Environment Ministry's refusal to grant the environmental license, which was notified to Corona by a letter dated August 18, 2010, expressly setting out the final character of the decision.

It considered further evidence showing that, in early 2011, Corona already contemplated the possibility of initiating arbitration under CAFTA-DR, as stated in correspondence exchanged by Corona and local officials. As regards the knowledge of the loss or damage, a letter of the same period proves that Corona was not only conscious of it but also able to estimate the amount (US\$342 million).

In the tribunal's view, as Corona manifested its opinion in February 2011 by sending a letter to the Environment Ministry to reconsider the decision of August 18, 2010, therefore it explicitly acknowledged its awareness of the damage. Given that this occurred before the critical date, the tribunal concluded that Corona failed to comply with the time limit set out in DR-CAFTA Article 10.18(1).

Tribunal addresses the issue of denial of justice

Corona asserted that the alleged denial of justice was a separate breach from the non-issuance of the environmental license. The tribunal, before its analysis of when Corona acquired knowledge of the damage, had already concluded that there was no valid basis for this claim, as the failure of the Dominican Republic to reconsider the refusal to grant the license implicitly confirmed its previous decision.

Although recognizing that it could end its task with the conclusion that Corona's claim was time barred, the tribunal considered appropriate to address the issue of the denial of justice, to which Corona had given important weight as the proceeding unfolded. In particular, Corona had stated that, for over five and a half years, the Dominican Republic has failed to respond to its motion for reconsideration.

First, the tribunal disagreed with Corona and held that an administrative act at the level of a first-instance decision-maker cannot constitute a denial of justice under customary international law. Furthermore, it noted that the CAFTA-DR is not drafted in broad terms, but focuses on different forms of "adjudicatory proceedings," accordingly, not all criminal, civil or administrative matters, acts or procedures fall within its scope. The tribunal noted that no administrative adjudicatory proceedings existed when Corona submitted its motion for reconsideration.

In addition, the tribunal indicated that, even if the motion could be considered to have triggered an administrative adjudicatory proceeding, the tribunal

would have to analyze whether local remedies had been exhausted in that particular case, as local remedies must be exhausted for a denial of justice to be upheld. Recalling that denial of justice rests upon a systemic failure of the state's justice system, the tribunal concluded that Corona failed to prove that taking a further step in the domestic legal system of the Dominican Republic would have been futile.

As a final point, the tribunal rejected Corona's argument under the waiver requirement in Article 10.18(2), which first requires the claimant to waive "any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach," and then establishes the possibility of an action regarding an interim injunctive relief not involving the payment of damages while pursuing a DR-CAFTA claim for damages.

Corona argued that the waiver required in order to submit the claim for damages barred it from initiating proceedings before the domestic courts of the Dominican Republic. However, the tribunal disagreed, considering that the DR-CAFTA is clear in its terms. Also, the tribunal indicated that the DR-CAFTA sets out a fork-in-the-road provision that did not prevent Corona from resorting to local remedies, but prohibited it from submitting a claim for the same alleged breach to local courts and international arbitration.

In conclusion, the tribunal decided that, under the CAFTA-DR, it could not make an award in favour of Corona for its denial of justice claim.

Decision and costs

The tribunal decided that the request for arbitration was time-barred and that it had no jurisdiction over the claims. It also ordered each of the parties to pay half of the arbitration costs and to bear its own legal fees and expenses.

Notes: The ICSID tribunal was composed by Pierre-Marie Dupuy (President proposed by the Chairman of the Administrative Council and agreed to by the parties, French national), Fernando Mantilla-Serrano (claimant's appointee, Colombian national), and J. Christopher Thomas (respondent's appointee, Canadian national). The award is available in English only at <http://www.italaw.com/sites/default/files/case-documents/italaw7314.pdf>.

Venezuela ordered to pay US\$1.202 billion plus interest to Canadian mining company Crystallex for FET breach and expropriation
Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2
Martin Dietrich Brauch

In a 273-page award dated April 4, 2016, a tribunal at the Additional Facility (AF) of the International Centre

for Settlement of Investment Disputes (ICSID) ordered Venezuela to pay US\$1.202 billion plus interest to Canadian company Crystallex International Corporation (Crystallex). The tribunal considered that the denial of Crystallex's environmental permit and the termination of its mining contract, among other actions by Venezuela, amounted to a high-level political agenda to nationalize a gold mine without compensation.

Factual background and claims

On September 17, 2002 Crystallex and Corporación Venezolana de Guayana (CVG), a Venezuelan state corporation, entered into a Mining Operation Contract (MOC) to develop mining concessions in the Las Cristinas area. Large gold deposits are said to exist in the area, located within Venezuela's Imataca National Forest Reserve.

Between 2003 and 2008 Crystallex sought the necessary permits. To address certain concerns raised by Venezuela, Crystallex had to submit a revised environmental impact study. Afterwards, in a letter of May 16, 2007, the Ministry of Environment requested Crystallex to post a bond to "guarantee the implementation of the measures proposed in the document presented for the Environmental Impact Evaluation of the project, which have been analyzed and approved by this Office." The letter further stated that, after the bond-related formalities, "the [environmental permit] [...] will be handed over" (para. 561).

Even though Crystallex posted the bond and paid the environmental taxes, the Ministry of Environment denied the environmental permit in a letter dated April 14, 2008, based on concerns over the project's impact on the environment and indigenous peoples in the Imataca reserve. In several public statements from 2008 to 2010, then-President Hugo Chávez and high-level officials expressed Venezuela's intention to nationalize gold deposits, including Las Cristinas.

Crystallex notified the Ministry of Mines of a treaty dispute as early as November 2008. However, only on February 16, 2011—after CVG formally rescinded the MOC on February 3, 2011—did Crystallex initiate arbitration against Venezuela for expropriation of its investments and failure to accord them fair and equitable treatment (FET) and full protection and security, in breach of the Canada–Venezuela bilateral investment treaty (BIT). Crystallex asked for compensation of US\$3.16 billion plus interest.

Venezuela frustrated Crystallex's legitimate expectations, among other FET breaches

The tribunal looked to case law—including *Rumeli v. Kazakhstan*, *Lemire v. Ukraine* and *Bayindir v. Pakistan*—to determine the content of the treaty's FET standard, and concluded that it comprises a set of common elements that are relevant to the case at issue: "protection of legitimate expectations, protection

against arbitrary and discriminatory treatment, transparency and consistency" (para. 543). It added that the conduct does not need to be outrageous or in bad faith to breach the standard.

According to the tribunal, most of Crystallex's alleged expectations presented a "circularity of argument" (para. 551) or were "too general and indeterminate" (para. 553) to constitute a frustration of legitimate expectations, and therefore a breach of FET. However, looking more closely at the May 16, 2007 letter, the tribunal considered that it clearly indicated that Venezuela had completed the process of analysis and would deliver the permit once the bond had been posted, thus creating legitimate expectations on which Crystallex relied, by posting the bond and paying the environmental taxes.

Importantly, the tribunal disagreed with Crystallex's suggestion that it had a right to the environmental permit. "From the point of view of international law," the tribunal affirmed, "a state could not be said to be under an obligation to grant a permit to affect natural resources, and would always maintain the freedom to deny a permit if it so considers" (para. 581).

While the tribunal considered that, up to the letter of May 16, 2007, "the investor was overall treated in a straightforward manner" (para. 588), it concluded that the permit denial letter of April 14, 2008 contained elements of arbitrariness and evidenced lack of transparency and consistency. For example, the tribunal stated that the letter's reference to global warming was "particularly troublesome," noting that "to raise this concern for the first time in an attempt to justify the denial of the Permit is a clear example of arbitrary and unfair conduct" (para. 592).

The tribunal also took issue with the lack of reference to scientific data or studies to justify the denial, and stated that it was "unable to see how thousands and thousands of pages submitted by Crystallex, ensuing from years of work and millions of dollars of costs, could be so blatantly ignored" (para. 597). These "huge efforts," according to the tribunal, "entitled Crystallex to have its studies properly assessed and thoroughly evaluated" (para. 597).

The tribunal held the letter denying the permit was fundamentally deficient and frustrated Crystallex's legitimate expectations created by the May 16, 2007 letter. Furthermore, it considered that Venezuela subjected Crystallex to a "'roller-coaster' of contradictory and inconsistent statements" (para. 606) in the lead-up to the MOC's rescission, thus breaching the FET standard under the BIT.

"Full protection and security" claim dismissed as it concerns physical, not legal security

Crystallex claimed that "full protection and security" encompasses legal security and stability, while

Venezuela argued that the standard is limited to physical security. The tribunal agreed with Venezuela's interpretation and based its decision on a line of cases including *Saluka v. Czech Republic* and *Rumeli v. Kazakhstan*. Given that Crystallex had neither claimed nor shown that Venezuela violated its physical security, the tribunal dismissed the claim.

Tribunal finds indirect expropriation in three groups of actions by Venezuela

In view of the BIT's broad definition of investment, which covers contractual rights "to search for, cultivate, extract or exploit natural resources" (para. 661), the tribunal found that Crystallex's rights under the MOC were capable of being expropriated.

Three groups of actions, cumulatively taken, led to the tribunal's finding of indirect expropriation: first, the denial of the permit and its surrounding events; second, the public statements by high-level political authorities following the permit denial, which evidenced Venezuela's intention to nationalize Las Cristinas and gradually caused the value of Crystallex's investment to decrease; and third, the rescission of the MOC.

The tribunal also assessed whether the expropriation was lawful. It accepted Venezuela's argument that the expropriation was carried out in pursuit of a public interest goal, and found that Crystallex did not establish that the expropriation occurred in violation of due process or in a discriminatory manner. However, given that Venezuela neither offered nor provided prompt, adequate and effective compensation, the tribunal held that Venezuela expropriated Crystallex's investment in breach of the BIT.

Tribunal uses average of two methodologies to calculate compensation

Considering the finding that Venezuela cumulatively breached the FET standard and the expropriation provision of the BIT, the tribunal decided to apply the "full reparation" standard under customary international law, using a "fair market value" methodology. It sided with Venezuela in choosing April 13, 2008—the day before the denial of the permit, which the tribunal saw as the first act in the creeping expropriation—as the appropriate valuation date.

In assessing the fair market value of the investment, the tribunal first asked whether it was appropriate to use the forward-looking approaches proposed by Crystallex (all of them aimed at calculating lost profits) or the backward-looking approach suggested by Venezuela (the cost approach, aimed at considering Crystallex's expenditures in the investment). Crystallex's summary of costs indicated expenditures in the amount of US\$644.8 million.

The tribunal considered that, in the case at hand, it was

appropriate to choose a methodology to calculate lost profits. It looked to the Standards and Guidelines for Valuation of Mineral Properties of the Canadian Institute of Mining, Metallurgy and Petroleum (CIMVal Guidelines) for confirmation of its methodological choice.

It then turned to the four forward-looking methodologies proposed by Crystallex. Dismissing the *P/NAV* method for not providing reliable figures and the *indirect sales comparison* method for yielding excessively speculative results, the tribunal awarded compensation of US\$1.202 billion, based on the average of the figures resulting from the *stock market* and *market multiples* methods. It also awarded pre- and post-award interest at the rate of the 6-month average U.S. dollar LIBOR plus one per cent, compounded annually.

Crystallex had also asked the tribunal to declare that the award was net of both Venezuelan and Canadian taxes, but the tribunal dismissed both requests.

Considering that "each side presented valid arguments in support of its respective case and acted fairly and professionally" (para. 959), the tribunal ordered each party to bear its own legal expenses and to share equally in ICSID costs.

Notes: The ICSID tribunal was composed of Laurent Lévy (President appointed by the parties, Brazilian and Swiss national), John Y. Gotanda (claimant's appointee, U.S. national) and Laurence Boisson de Chazournes (respondent's appointee, French national). The award is available in English at <http://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf> and in Spanish at <http://www.italaw.com/sites/default/files/case-documents/italaw7195.pdf>.

NAFTA tribunal dismisses claims against Canada on green energy Feed-In Tariff program

Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17

Matthew Levine

An arbitration tribunal constituted under the North American Free Trade Agreement (NAFTA) has issued its award subject to a dissenting opinion. The tribunal found jurisdiction under NAFTA Chapter 11 on Investment.

The majority of the tribunal found that Ontario's Feed-In Tariff program (FIT Program)—which created a tender process for long-term power purchase agreements (PPA) whereby business would sell clean energy to the provincial grid—constituted procurement for the purposes of NAFTA, which resulted in the dismissal of certain claims. The majority also found that Canada did not breach its international obligations under NAFTA Article 1105.

Background

The claimant, Mesa Power Group, LLC (Mesa), is a

company constituted under U.S. laws. Mesa is part of a group of companies that oversees and develops renewable energy projects, notably in the wind sector.

In 2009, Ontario implemented the FIT Program for clean energy producers. Contrary to expectations, a high number of applications were filed. Although Mesa submitted a total of six applications, including two in the earliest possible window, it ultimately failed to secure a single PPA under the FIT Program. In particular, all of Mesa's projects were located in Ontario's Bruce Region. Following the first and second round of tenders under the FIT Program, the province cited transmission constraints as a material reason for not awarding PPAs in that region.

In January 2010, while the FIT Program was ongoing, Ontario entered into a Green Energy Investment Agreement (GEIA) with a consortium led by the multinational Samsung. The GEIA required Samsung's consortium to establish and operate manufacturing facilities for wind and solar generation equipment in Ontario. In exchange, Samsung's group was, among others, guaranteed priority access to certain transmission capacity.

Mesa served Canada with a Notice of Arbitration under NAFTA Chapter 11 on October 4, 2011. It alleged that Canada had, contrary to Articles 1102 and 1103, treated Mesa and its investments less favourably than other investors in like circumstances; contrary to Article 1106, imposed minimum domestic content requirements; and, contrary to Article 1105, failed to treat Mesa's investments in accordance with the international law standard of treatment. Mesa requested damages of approximately US\$75 million.

The tribunal was constituted on July 16, 2012 under the auspices of the Permanent Court of Arbitration (PCA). Subsequently, all three arbitrators signed a "Declaration of Acceptance and Statement of Independence and Impartiality" regarding their appointment. On May 4, 2015, the presiding arbitrator disclosed that she was chairing an ICSID arbitration in which one of the party-appointed arbitrators appeared as counsel.

No requirement for "cooling-off period" in relation to each and every event

Canada objected to the tribunal's jurisdiction on the basis that the NAFTA Parties conditioned their consent to arbitration on a potential claimant following the procedures set out in NAFTA Articles 1118 to 1121 and that Mesa had not done so.

In particular, Mesa had filed its Notice of Arbitration only three months after the final decision of the Ontario government that it sought to challenge. Canada argued that Mesa did not comply with the six-month cooling-off period in Article 1120(1), and that the ordinary meaning of the phrase "events giving rise to a claim" in the provision designates each and every event. In

this respect, Canada was supported by the third-party submission of Mexico.

The tribunal proceeded to interpret Article 1120(1) in light of the principles of interpretation in the Vienna Convention on the Law of Treaties and bearing in mind the objectives stated in NAFTA Article 102(1). It ultimately agreed with Mesa: if Canada's argument were accepted, every new event related to a claim would require a claimant to wait for a further six months, which would apply however secondary or ancillary the new event may be. Thus, if events relating to the same claim kept occurring, a claimant would effectively be precluded from ever initiating arbitration under Article 1116(1). This interpretation, according to the tribunal, would effectively deprive the provision of *effet utile*, an outcome that is contrary to treaty interpretation rules.

FIT Program constitutes procurement

According to Canada, the obligations under NAFTA Articles 1102, 1103, and 1106 did not apply to Mesa's investment, because the FIT Program constituted "procurement" under Articles 1108(7)(a) and 1108(8)(b), which provide reservations and exceptions to the investment protections under NAFTA. As NAFTA Chapter 11 does not define the term procurement, Canada argued that the tribunal should accept the expansive approach taken in previous NAFTA arbitrations, for example, *ADF v. United States* and *UPS v. Canada*, as well as the World Trade Organization Panel and Appellate Body reports in *Canada – Renewable Energy*. Mesa, however, invoked the most-favoured-nation (MFN) clause in NAFTA Article 1103 and the better treatment provided under subsequent treaty practice, such as the 2009 Canada–Czech Republic Foreign Investment Promotion and Protection Agreement (FIPA).

In regards to the claimant's MFN argument, the tribunal observed that, "[f]or an MFN clause in a base treaty to allow the importation of a more favorable standard of protection from a third party treaty, the applicability of the MFN clause in the base treaty must first be established. Put differently, one must first be under the treaty to claim through the treaty. Thus, [...] for the Claimant to establish that Article 1103 of the NAFTA applies, it must show that the FIT Program does not constitute procurement" paras. 401-402. However, Mesa ultimately failed in this regard, and the tribunal concluded that the FIT Program did constitute procurement, dismissing the discrimination claims under Articles 1102 and 1103.

Charles Brower dissented from the finding that the FIT Program constituted procurement.

Tribunal settles on scope of customary international law standard of treatment

The tribunal considered submissions from the parties to the dispute and the non-disputing NAFTA Parties

(both Mexico and the United States) with regard to the interpretation and scope of Article 1105. In terms of interpretation, the tribunal found the Free Trade Commission's 2011 *Notes of Interpretation of Certain Chapter Eleven Provisions* (FTC Notes) to be binding.

On the scope of the customary international law minimum standard of treatment found in Article 1105, the parties diverged: Mesa claimed that it has evolved and now has the same content and meaning as the so-called "autonomous" fair and equitable treatment (FET) standard of modern bilateral investment treaties (BITs), while Canada advanced the view that Article 1105 in no way creates an open-ended obligation to be defined by tribunals.

Upon consideration of the parties' positions, the tribunal was of the unanimous opinion that the decision in *Waste Management II* had correctly identified the content of the customary international law minimum standard of treatment found in Article 1105. On this basis, it affirmed the following components of Article 1105: "arbitrariness; 'gross' unfairness; discrimination; 'complete' lack of transparency and candor in an administrative process; lack of due process 'leading to an outcome which offends judicial propriety'; and 'manifest failure' of natural justice in judicial proceedings" (para. 502). The tribunal also upheld the view that the failure to respect legitimate expectations of an investor must be considered when applying the standard, but does not in and of itself constitute a breach of Article 1105. In conclusion, the tribunal noted that when defining the content of Article 1105 "one should further take into consideration that international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs" (para. 505).

Dissenting opinion on whether Canada ultimately breached Article 1105

Although concurring on the above formulation of the applicable standard, Charles Brower dissented from the finding that Canada had not breached Article 1105. According to Brower, "[m]oreover, – and this can only be characterized as grotesque – as it actually happened, the Korean Consortium was thereby enabled to acquire low-ranked FIT applicants in order to fill its allotted 500 MW, thereby jumping clear losers in the FIT Program over higher-ranked, but ultimately unsuccessful FIT applicants, due to the reduced available megawattage" (para. 4 of the dissenting opinion).

Canada largely successful in application for costs

Pursuant to NAFTA Article 1135(1), the tribunal was at liberty to award costs in accordance with the applicable arbitration rules and followed Article 40 of the 1976 UNCITRAL Rules in finding that the claimant as the unsuccessful party must bear all of the costs of

the arbitration. In terms of costs of legal representation and assistance, however, the UNCITRAL Rules provided less direct guidance, and the tribunal was of the view that the claimant should bear all of its own and 30 per cent of Canada's costs.

Notes: The tribunal was composed of Gabrielle Kaufmann-Kohler (President appointed by appointed by the International Centre for Settlement of Investment Disputes as appointing authority, Swiss national), Charles Brower (claimant's appointee, U.S. national), and Toby Landau (respondent's appointee, British national). The final award of March 24, 2016 is available at <http://www.italaw.com/sites/default/files/case-documents/italaw7240.pdf> and Charles Brower's dissent at <http://www.italaw.com/sites/default/files/case-documents/italaw7241.pdf>.

Turkey–Turkmenistan BIT: tribunal finds claims admissible but dismisses them on merits

İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24

Matthew Levine

An arbitral tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has issued its award on the claims by a Turkish company against Turkmenistan. It found the claims admissible, despite an unusually worded arbitration agreement in the Turkey–Turkmenistan bilateral investment treaty (BIT). The award also found that failure to access local remedies did not preclude arbitration of the dispute.

On the merits, the tribunal declined to endorse the claimant's theory that Turkmenistan's substantive commitments in other investment treaties were applicable under the BIT's most-favoured-nation (MFN) provision.

Background

İçkale İnşaat Limited Şirketi (İçkale), a Turkish company engaged in the design, development and implementation of real estate and infrastructure projects, opened a branch office in Turkmenistan in 2004. Between March 2007 and July 2008, İçkale entered numerous construction contracts with various Turkish state entities.

Subsequently, İçkale began to encounter resistance from its state-owned business partners, which it attributed in large part to the political dynamics following the death of Turkmenistan's founding President. İçkale alleged that the scope of works was expanded without additional compensation, that there were unjustified delays in payment and that the host state imposed unfair penalties.

The claimant initiated ICSID arbitration under the BIT in 2010. The arbitration related to 13 construction projects, which included schools, kindergartens, a hotel and a cinema. İçkale claimed US\$570 million in

compensation relating to consequential damages, and loss of reputation, goodwill and business opportunities.

Parties disagree on novel fork-in-the-road clause

The claimant argued that the BIT contains a type of fork-in-the-road clause, which sets out that resorting to local courts is optional, but that if an investor chooses that option, it can only subsequently submit the dispute to arbitration if the local courts have not rendered a decision within a year. For the claimant, only the English and Russian versions of the BIT need be considered, and the Russian version was inaccurately translated from the English version.

The respondent argued that the domestic litigation requirement is apparent from all three versions of the BIT, that is, the English, Russian and Turkish versions. According to the Russian version in particular, the phrase in question could only be understood as “on the condition that” or “provided that.” Furthermore, the English version’s “provided that, if” clause did not have an ordinary meaning.

The tribunal noted that it was undisputed that both the English and Russian versions were authentic, but that the parties disagreed on how the Russian version should be translated to English. It further noted that the relevant rules of treaty interpretation are reflected in the Vienna Convention on the Law of Treaties (VCLT), specifically in Articles 31 through 33. Article 33, in particular, deals with the interpretation of treaties authenticated in two or more languages.

Tribunal addresses interpretation of BIT’s multiple versions

The tribunal considered the first step in establishing the meaning of the BIT to be the general rule of treaty interpretation as set out in VCLT Article 31. When read in this context, it was evident to the tribunal that Article VII(2) of the BIT, and in particular the “provided that, if” clause, is drafted in a manner that effectively leaves its meaning unclear or obscure. Rather than seeking a “corrected” version of the provision (para. 199), the tribunal was obligated to have recourse to supplementary means of interpretation under VCLT Article 32.

According to Article 32, the supplementary means of interpretation to which the tribunal may resort include “the preparatory work of the treaty” and “the circumstances of its conclusion.” However, there was very limited evidence of preparatory works other than in relation to the Turkish version. As such, the tribunal had to decide at this stage whether it could be considered an “authentic” version. The tribunal ultimately determined that only the English and Russian versions of the BIT may be considered authentic versions and, as such, returned to the interpretation of the “provided that, if” in light of the available, albeit limited, supplementary means of treaty interpretation

set out in VCLT Article 32. Here, the “the circumstances of its conclusion” took on considerable significance. However, the evidence as inconclusive and did not allow the tribunal to determine the meaning of the English version of the BIT.

The arbitrator appointed by the claimant—in a dissenting opinion, which is referenced below—disagreed with the tribunal on certain characterizations of expert evidence and underlying treaty provisions. Even so, in the context of the facts, treaty language, treaty practice and evidence in this particular case, the dissenting arbitrator accepted the tribunal’s interpretation of Article VII(2).

Domestic litigation requirement found in Russian version of treaty

The tribunal therefore turned to the interpretation of the Russian version of the BIT. While the respondent argued that the Russian uses language that is clearly mandatory on its face, the claimant maintained that it “can be translated in a manner that is literally the same as the English version” (para. 219). Having carefully reviewed the expert evidence, including both the expert opinions and the oral evidence, the tribunal decided to accept the respondent’s expert’s evidence on the proper translation. While the English version remained obscure, the Russian version was clear and ambiguous. The BIT did not establish which version prevails in case of divergence. Pursuant to the relevant rule of treaty interpretation in VCLT Article 33(4), the tribunal concluded by majority, to interpret Article VII(2) of the BIT so as to require recourse to domestic courts before international arbitration proceedings may be commenced.

International arbitration claims are admissible

Having found that Article VII(2) contains a domestic litigation requirement, the tribunal had to consider whether İçkale had failed to comply. The tribunal found that Article VII(2) sets out an admissibility requirement, rather than a question of jurisdiction.

The claimant acknowledged that it had not submitted the dispute to the local courts, but argued that domestic litigation would have been futile and was therefore unnecessary under well-established international law dating back to the 1903 *Selwyn* case. The tribunal found that the BIT’s requirement was not a reflection or incorporation of a rule of customary international law, but rather a *lex specialis* in the treaty itself. As a matter of admissibility, the consequences of İçkale’s non-compliance had to be determined in light of its procedural nature. In view of various facts related to the existence of related litigation in Turkish courts, the tribunal concluded that it would not be appropriate to require the claimant to first submit the present dispute to local courts.

Although in agreement with the final outcome, the arbitrator appointed by Turkmenistan disagreed with the tribunal's interpretation of Article VII(2). According to the dissent, Article VII(2) went to jurisdiction rather than admissibility. The dissent also disagreed, on the facts of this case, that İçkale's failure to take prior recourse to the national courts was not a bar to the admissibility of the claims.

No grounds for importing substantive protections in Turkmenistan's other treaties

The tribunal also had to address the issue of MFN protection. The claimant sought to rely on the BIT's MFN clause and non-derogation clause to advance claims relating to fair and equitable treatment (FET), full protection and security (FPS), non-discrimination standard and the umbrella clause. According to İçkale, the term "treatment" in the relevant articles of the BIT should be understood to cover at least the substantive protections provided to other foreign investors. Turkmenistan argued that the MFN clause does not allow such "importation" and that in any event the scope of application of the clause is limited to "similar situations" (para. 327).

The tribunal found the ordinary meaning of the MFN clause's terms to suggest that each party agreed to treat investments in a manner no less favourable than the treatment accorded in similar situations to investments by investors of any third state. In particular, the words "treatment accorded in similar situations" suggested that the MFN obligation required a comparison of the relevant factual situations.

The tribunal disagreed with İçkale's argument that any matters, including substantive protections, which are not expressly excluded from the scope of the MFN clause should be considered to be within its scope. Nor was the tribunal able to agree with the argument that it can rely on the BIT's derogation clause to import substantive investment protection standards included in other investment treaties concluded by Turkmenistan.

On the remaining allegations of unlawful expropriation, the tribunal was unable to conclude on the facts that such claims could be sustained. Ultimately, İçkale's claims were dismissed in their entirety for lack of merit.

Claimant ordered to reimburse 20 per cent of respondent's arbitration costs

The relevant rule on costs was Article 61(2) of the ICSID Convention, which does not prescribe any particular approach to the allocation of costs and thus granted the tribunal a considerable degree of discretion. Both parties accepted the "costs follow the event" principle. In view of the substantially greater amount spent by Turkmenistan on legal and expert fees and keeping in mind that the hearing was

postponed at the respondent's request, the majority found it appropriate to order İçkale to reimburse 20 per cent of the respondent's arbitration costs (US\$1.7 million).

Notes: The tribunal was composed of Veijo Heiskanen (President appointed by the Chairman of the Administrative Council, Finnish national), Carolyn Lamm (claimant's appointee, U.S. national), and Philippe Sands (respondent's appointee, British national). The final award as well as the partially dissenting opinions by Carolyn Lamm and by Philippe Sands, dispatched to the parties on March 8, 2016, are available at http://www.italaw.com/sites/default/files/case-documents/italaw7163_1.pdf.

Authors

Martin Dietrich Brauch is an International Law Advisor and Associate of IISD's Investment for Sustainable Development Program, based in Latin America.

Inaê Siqueira de Oliveira is a Law student at the Federal University of Rio Grande do Sul, Brazil.

Maria Florencia Sarmiento is a teaching and research assistant at the Catholic University of Argentina.

Matthew Levine is a Canadian lawyer and a contributor to IISD's Investment for Sustainable Development Program.

resources and events

Resources

Policy Brief #4: Investment in Agriculture, “Investing in Land for Water: The converging legal regimes”

By Makane Moïse Mbengue, Susanna Waltman & Laura Turley, Published by IISD, July 2016

Investment in farmland is motivated in large part by access to water resources, but water-related impacts tend to be an afterthought in the “land grabbing” debates. These same water resources are lifelines for local farmers, pastoralists and other communities, which makes sound legal frameworks all the more necessary. This policy brief presents the different sources of law that are triggered by the use of water for farmland investments, and makes recommendations to help reconcile different legal regimes while ensuring water issues are adequately addressed. Available at <https://www.iisd.org/library/investing-land-water-converging-legal-regimes-policy-brief-4-investment-agriculture>

Establishing Judicial Authority in International Economic Law

By Joanna Jemielniak, Laura Nielsen & Henrik Palmer Olsen (Eds.), Published by Cambridge University Press, July 2016

The intensified juridification of international relations by a growing number of international courts is a central development in international law. This book discusses how international judicial authority is established and managed in key fields of international economic law: trade law, investor–state arbitration and international commercial arbitration. The analysis explores the interplay between these areas of economic dispute resolution, tracing their parallel developments and identifying the ways they influence each other on mechanisms and solutions. Drawing together contributions from many scholars, this volume considers issues such as the usage of precedent and the role of legitimacy, suggesting that the consolidation of judicial authority is a universal trend which impacts on state behaviour. Available at <http://www.cambridge.org/academic/subjects/law/international-trade-law/establishing-judicial-authority-international-economic-law>

IIA Mapping Project

By United Nations Conference on Trade and Development (UNCTAD), Published by UNCTAD, July 2016

The IIA Mapping Project is an ongoing effort that aims to map all IIAs for which texts are available (about 2,700). Individual treaties are mapped by law students from over 25 participating universities worldwide, under the supervision of their professors and with the overall guidance and coordination of UNCTAD. The database launched in July 2016 is part of UNCTAD’s International Investment Agreements (IIA) Navigator and contains a detailed mapping of 1,400 IIAs. It offers a tool for policymakers, researchers and other investment and development stakeholders to understand trends in IIA drafting, assess the prevalence of different policy approaches and identify treaty examples. It allows users to view elements of the mapped treaties, select treaties based on key elements (for example, qualifiers for fair and equitable treatment, scope of the expropriation clause or investor–state dispute settlement) and compare treaty elements over time and across countries. Available at <http://investmentpolicyhub.unctad.org/IIA/mappedContent>

World Investment Report 2016, “Investor Nationality: Policy Challenges”

By UNCTAD, Published by UNCTAD, June 2016

IIA reform is intensifying and yielding the first concrete results. About 100 countries have used UNCTAD’s Investment Policy Framework and its Road Map for IIA reform to review their IIA networks. During this first phase of IIA reform, countries have built consensus on the need for reform, developed new model treaties and started to negotiate new, more modern IIAs. Despite significant progress, much remains to be done. Phase two of IIA reform will require countries to focus more on the existing stock of treaties. Promoting and facilitating investment is crucial for the post-2015 development agenda. The report presents a Global Action Menu for Investment Facilitation to further enhance the enabling environment for investment in sustainable development. The report also looks at the policy challenges arising out of investor nationality. Indirect ownership structures and mailbox companies have the potential to significantly expand the reach of IIAs. The blurring of investor nationality has made the application of rules and regulations on foreign ownership more challenging. About one-third of investor–state dispute settlement (ISDS) claims are filed by claimant entities that are ultimately owned by a parent in a third country. About one-third of apparently intra-regional foreign affiliates in major mega-regional treaty areas, such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), are ultimately owned by parents outside the region. Available at <http://unctad.org/wir>

IIA Issues Note, “Investor–State Dispute Settlement: Review of Developments in 2015”

By UNCTAD, Published by UNCTAD, June 2016

The issues note reviews developments in ISDS in 2015. A record high of 70 ISDS cases were filed in 2015, with a continued large share of cases against developed countries. The overall number of publicly known ISDS claims reached 696 (key information on each case is available on UNCTAD’s ISDS Navigator at <http://investmentpolicyhub.unctad.org/ISDS>). Arbitral decisions rendered in 2015 touch upon a number of important legal issues concerning the scope of treaty coverage, the conditions for bringing ISDS claims, the meaning of substantive treaty protections, the calculation of compensation and others. On some issues, tribunals followed previous decisions, while on some other issues they adopted approaches that departed from earlier decisions. Available at <http://investmentpolicyhub.unctad.org/Publications/Details/144>

Foreign Investor Protections in the Trans-Pacific Partnership

By Gus Van Harten, Published by Canadian Centre for Policy Alternatives (CCPA), June 2016

This study examines the special privileges, enforced through ISDS, which would be given to foreign investors under the TPP. These include the right to compensation where government laws, regulations, or other decisions are found to interfere with an investor’s interests. It shows that those financially benefitting from such rights in past agreements have mostly been very large companies or wealthy individuals. The author also explains how the TPP expands ISDS rules to cover “investment agreements” between the federal government and foreign investors, and how it weakens protections for financial regulation. The study concludes that expanding and enshrining such investor privileges carries major risks for voters and taxpayers in all TPP countries, with no compelling evidence of a corresponding benefit for the public. Available at <https://www.policyalternatives.ca/publications/reports/foreign-investor-protections-trans-pacific-partnership>

Can the Mauritius Convention Serve as a Model for the Reform of Investor–State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap

By Gabrielle Kaufmann-Kohler & Michele Potestà, Published by Geneva Center for International Dispute Settlement (CIDS), June 2016

The paper proposes a possible roadmap that could be followed if states were to decide to pursue a reform initiative of the existing investor–state arbitration regime in international investment agreements (IIAs), based on three main blocks: the design of an International Tribunal for Investments (ITI), the design of an Appeal Mechanism (AM) for investor–state arbitral awards and the establishment of an opt-in multilateral convention to extend those new dispute resolution options to states' existing IIAs. While concluding that the challenges involved in broader reforms of the investor–state arbitration regime are substantially more complex than the introduction of a transparency standard in investment treaties, the paper also shows that the Mauritius Convention could provide a useful model. Available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf

Signing Away Sovereignty: How Investment Agreements Threaten Regulation of the Mining Industry in the Philippines

By Cecilia Olivet, Jaybee Garganera, Farah Sevilla & Joseph Purugganan, Published by Transnational Institute (TNI), May 2016

Mining firms have been one of the main corporate sectors worldwide to take advantage of ISDS mechanisms to sue states for regulation of mining, having sued governments for a total of US\$53 billion so far. The Philippines, one of five countries worldwide with the highest overall mineral reserves, has bet heavily on the mining industry as a development strategy, with 47 large-scale mines in operation and growing evidence of their social and environmental costs. This briefing argues that the country's ability to properly regulate or close polluting mines will be severely constrained by a network of investment treaties the Philippines has signed, which provide excessive protection for foreign investors. This legal straitjacket will become still tighter if the government goes ahead with the EU–Philippines Free Trade Agreement and the Regional Comprehensive Economic Partnership (RCEP). Available at <https://www.tni.org/en/publication/signing-away-sovereignty>

Events 2016

September 7

SEMINAR, “DO ARBITRATORS TEND TO STRETCH THEIR JURISDICTION IN INVESTMENT ARBITRATION? A DEBATE BASED ON YUKOS AWARDS,” Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Stockholm, Sweden, <http://www.sccinstitute.com/about-the-scc/event-calendar/stockholm-do-arbitrators-tend-to-stretch-their-jurisdiction-in-investment-arbitration/>

September 18–23

IBA ANNUAL CONFERENCE 2016, International Bar Association, Washington, D.C., United States, <http://www.ibanet.org/Conferences/Washington2016.aspx>

September 19–22

MASTER CLASS ON INVESTMENT ARBITRATION, Association for International Arbitration (AIA) & Brussels Diplomatic Academy (Vrije Universiteit Brussel), Brussels, Belgium, <http://arbitration-adr.org/activities/?p=conference&a=upcoming>

September 27–28

ICSID COURSE, “NAVIGATING AN ICSID ARBITRATION FROM START TO FINISH,” & ICSID–CRCICA JOINT CONFERENCE, “KEY ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION,” International Centre for Settlement of Investment Disputes (ICSID) & Cairo Regional Centre for International Commercial Arbitration (CRCICA), Cairo, Egypt, <https://webapps.worldbank.org/apps/ICSIDWEB/Documents/Cairo%20Conference%20and%20101-Flyer%20and%20Program.pdf>

October 24–28

INTERGOVERNMENTAL FORUM ON MINING, MINERALS, METALS AND SUSTAINABLE DEVELOPMENT (IGF) ANNUAL GENERAL MEETING (AGM) 2016, “THE SUSTAINABLE DEVELOPMENT GOALS (SDGS) AND MINING,” IGF & IISD, Geneva, Switzerland, <http://globaldialogue.info/pdf/2016/igf-agm-invite.pdf>

November 2–3

11TH ANNUAL COLUMBIA INTERNATIONAL INVESTMENT CONFERENCE, “CLIMATE CHANGE AND SUSTAINABLE INVESTMENT IN NATURAL RESOURCES: FROM CONSENSUS TO ACTION,” Columbia Center on Sustainable Investment (CCSI), New York, United States, <http://ccsi.columbia.edu/2016/11/02/11th-annual-columbia-international-investment-conference-climate-change-and-sustainable-investment-in-natural-resources-from-consensus-to-action>

November 2–8

SINGAPORE INTERNATIONAL ARBITRATION ACADEMY (SIAA) 2016, “THE INVESTMENT TREATY WORLD IS CHANGING...,” National University of Singapore's Centre for International Law (CIL), Singapore, <https://cil.nus.edu.sg/siaa-2016>

November 7–9

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

November 10

SUSTAINABLE DEVELOPMENT AND INTERNATIONAL ARBITRATION, Association for International Arbitration (AIA) Italy, International Chamber of Commerce (ICC) Italy & Vrije Universiteit Brussel, Brussels, Belgium, <http://arbitration-adr.org/activities/?p=conference&a=upcoming>

November 21

BRIDGING THE CLIMATE CHANGE POLICY GAP: THE ROLE OF INTERNATIONAL LAW AND ARBITRATION, SCC, IBA, ICC and Permanent Court of Arbitration (PCA), Stockholm, Sweden, <http://www.sccinstitute.com/about-the-scc/event-calendar/save-the-date-bridging-the-climate-change-policy-gap-stockholm>



Investment Treaty News Quarterly is published by the International Institute for Sustainable Development. The views expressed in this publication do not necessarily reflect those of the IISD or its funders, nor should they be attributed to them.

IISD contributes to sustainable development by advancing policy recommendations on international trade and investment, economic policy, climate change and energy, measurement and assessment, and natural resources management, and the enabling role of communication technologies in these areas. We report on international negotiations and disseminate knowledge gained through collaborative projects, resulting in more rigorous research, capacity building in developing countries, better networks spanning the North and the South, and better global connections among researchers, practitioners, citizens and policy-makers.

IISD's vision is better living for all—sustainably; its mission is to champion innovation, enabling societies to live sustainably. IISD is registered as a charitable organization in Canada and has 501(c)(3) status in the United States. IISD receives core operating support from the Government of Canada, provided through the International Development Research Centre (IDRC), from the Danish Ministry of Foreign Affairs and from the Province of Manitoba. The Institute receives project funding from numerous governments inside and outside Canada, United Nations agencies, foundations and the private sector.

The ITN Quarterly welcomes submissions of unpublished, original works. Requests should be sent to Martin Dietrich Brauch at itn@iisd.org

To subscribe to the ITN Quarterly, please visit:
<http://www.iisd.org/itn/subscribe>

International Institute for Sustainable Development
International Environment House 2
9, Chemin de Balexert,
5th Floor, 1219, Chatelaine,
Geneva, Switzerland

Tel: +41 22 917-8748
Fax: +41 22 917-8054
Email: itn@iisd.org