

Arbitration Under Investment Treaties

General Report

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PREFACE

1. INTRODUCTION

From 23 to 27 August 2005, AIJA (*Association Internationale des Jeunes Avocats*) will hold its 43rd Annual Congress in Mexico City. At the congress, the Arbitration Commission will hold a working session on the subject "Arbitration under Investment Treaties", which will address the concept of bilateral investment treaties (BITs) and explore some of their salient features.

BITs are treaties originally entered into between capital-importing countries and capital-exporting countries with the aim of promoting investments by providing a certain level of security and protection to investors. Although investors are not a party to such treaties, they are usually able to invoke a clause from the BIT allowing them to lodge a claim with an international arbitral tribunal against the foreign state with which their own state concluded the relevant BIT. This allows a private party to seek redress under public international law directly from an independent forum, something which would otherwise be difficult to do. The claim must relate to an investment made by the investor in the relevant foreign state (the host state). The legal basis of such claims is to be found in the text of the relevant BIT and typically includes, for example, the obligation on the part of the host state to provide fair and equitable treatment, to provide full security and protection, and not to treat the investment in a discriminatory manner or less favourably than investments by its own nationals.

BITs have become immensely important for those investing abroad as they provide security against unfair treatment by the authorities in the state in which the relevant investment is made, and against failure by such authorities to properly protect the investment against third parties. Although the first BIT was signed in 1959, it is only recently that the value and importance of these treaties for investors has come to be widely recognised. To date, more than one hundred disputes between investors and host states have been submitted to arbitral tribunals under the dispute resolution clause of a BIT. Many of these disputes have been administered by the International Centre for Settlement of Investment Disputes (ICSID, Washington D.C.), established in 1966 at the initiative of the World Bank. (Lists of pending cases and of awards rendered can be reviewed at the ICSID website at <http://www.worldbank.org/icsid/>)

BITs are welcomed by investors for the effective protection offered by the mechanism of impartial adjudication by arbitrators. Investors have succeeded in obtaining substantial amounts in damages in relation to a wide variety of violations of BITs, including the implementation of certain tax measures and the imposition of certain restrictions regarding the handling of environmental waste. Awards such as these have, however, also led to concerns being voiced that BITs impose undue restrictions on the sovereign power of capital-importing countries to regulate their economy or protect their environment. In response, tribunals have argued that BITs do not restrict a country's ability to structure the economy and its internal policies as such, but that they do entail the possibility of redress if such measures are adopted in violation of specific commitments given to the investor in, e.g. BITs.

In preparation for the Arbitration Working Session at the 43rd AIJA Annual Congress, participants from both capital-exporting and capital-importing countries have written national reports: Argentina, Finland, Germany, Mexico, Netherlands, Portugal, Romania, Spain, Sweden, Switzerland, United Kingdom and the United States of

America. These report on their country's attitude towards BITs and how this has affected investments that were made either by investors from their country or in their country by foreign investors. The participants have compiled national reports which have been incorporated in this General Report. In addition, three reports have been drawn up about international law issues that frequently arise in investment treaty arbitration and that raise fundamental questions about the outer limits of the protection that BITs can offer.

2. OVERVIEW OF BIT PRACTICE AND SYNOPSIS OF THE NATIONAL REPORTS

Since the signing of the first bilateral investment treaty (between Germany and Pakistan) in 1959, BITs have been concluded by the vast majority of states: at least 170 of the approximately 190 countries of the world. The number of BITs concluded by each of these states ranges from one or two (e.g. Angola and Belize) to as many as 127 (Germany; see national report of Germany).

Afghanistan, Andorra, Gibraltar, Monaco and Suriname do not appear to have entered into BITs. Nevertheless, investments in these states may be protected by other means. For instance, the United Kingdom has designated Gibraltar (and other subdivisions) as competent to become a party to disputes submitted to ICSID (see national report of the UK).

In total, some 2300 BITs have been concluded, the texts of many of which can be found at http://www.unctadxi.org/templates/DocSearch_779.aspx. A number of national governmental websites also provide information on the number of BITs concluded by the state in question, as well as the relevant texts.

The great majority of countries that have entered into BITs are also party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Notable exceptions include Brazil, Poland, Canada, Cuba and Mexico. A few states have made reservations to the ICSID Convention, in that they have notified ICSID of certain classes of disputes which they would not consider submitting to ICSID arbitration. China, for instance, has notified ICSID that it will only consider submitting disputes over compensation resulting from expropriation and nationalisation. Guyana, Jamaica and Saudi Arabia have excluded disputes arising out of, inter alia, investments relating to certain natural resources.

The objective of BITs being the protection of investments by foreign investors, most BITs contain arbitration clauses pursuant to which such investors may initiate arbitral proceedings against the host state, some of them after exhaustion of the internal State local legal remedies. A number of the BITs entered into by China and Germany do not contain such clauses at all. A number of additional exceptions can be found as well; see inter alia the respective national reports.

In Treaties that do contain an arbitration clause, it is either provided for ad hoc arbitration or arbitration in accordance with the rules of e.g. ICSID, UNCITRAL or ICC. Under some Treaties parties may agree on submission to any other arbitral institution or according to any other rules on arbitration. Many of the treaties contain a clause pursuant to which parties during a certain term should negotiate a solution, before the arbitration can be initiated.

There is considerable variation in the number of BIT-claims brought against different host states. The Republic of Argentina was flooded with BIT claims following a broad privatisation project and the subsequent amendment of the country's newly introduced exchange and monetary policies. If NAFTA arbitrations are excluded, no other state has been drawn into arbitration under investment treaties as often. With regard to NAFTA arbitration, it is worth mentioning that all three of the relevant states have been confronted with claims by investors and that only the U.S.A. has kept a "clean record" in this regard (although its success in the Loewen case could be described as a narrow victory, and was in any event controversial).

When comparing states and their involvement in arbitration under investment treaties, one must bear in mind that many disputes are fought outside the public arena, e.g. the BIT dispute currently pending between the Dutch holding company Eureko B.V. and the Republic of Poland (see national report of the Netherlands). Some may never be publicly known. By contrast, other disputes lead to awards that are widely known and cited from, such as the Vivendi Decision on Annulment and the less generally accepted awards in SGS/Pakistan and SGS/Philippines. Awards such as these, and many others, can be found on the internet (e.g. www.worldbank.org/icsid/cases/cases.htm, www.iisd.org/investment/invest-sd/archive.asp, <http://ita.law.uvic.ca/news.htm>, www.kluwerarbitration.com) or from legal magazines such as Mealey's International Arbitration Report or International Legal Matters. "Google" will also be of great assistance at times!

I look forward to discussing the topic of Arbitration under Investment Treaties with you in Mexico City.

Last, but not least, I would like to thank the contributors who have made the compilation of this General Report possible. In order of 'appearance', I express my gratitude to **Alejandro Gorbato** (Grosso & Gorbato, Argentina), **Marko Hentunen** (Castrén & Snellman, Finland), **Tina Denso** (Brödermann & Jahn, Germany), **Carla Sánchez Cordero** (Mexican Secretariat of the Economy, Mexico), **Rui Botica Santos** (Coelho Ribeiro e Associados, Portugal), **Gerard Meijer** and **Rogier Schellaars** (De Brauw Blackstone Westbroek, The Netherlands), **Crenguta Leaua** (Cunescu, Balaciu & Asociatii, Romania), **Héctor Sbert** (Ramos & Arroyo Abogados, Spain), **Paulo Fohlin** (Vinge, Sweden), **Daniel Marugg** and **Sabine Burkhalter Kaimakliotis** (GHR Rechtsanwälte, Switzerland), **Steven Friel** (Debevoise & Plimpton, United Kingdom), **John Fellas** and **Leon Chung** (Hughes Hubbard & Reed, U.S.A.), **José Maria Corrêa de Sampaio** and **Diogo Rocha Neves** (PACSA Law Firm, Portugal), **Reynaldo Urtiaga** (Bryan, González Vargas & González Baz, Mexico), **Christian Oetiker** (Vischer, Switzerland), and **Noah Rubins** (Freshfields Bruckhaus Deringer, France).

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