

The Dynamic Evolution of the ICSID System

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A. Investment and Development

There is broad consensus, that private investment is the most important factor in economic development. This has led most developing countries to revise their previously reserved attitudes towards FDI and to adopt an open and welcoming attitude towards foreign investors.¹

Much of the investment climate in a country will consist of economic and political factors such as market access, the availability and cost of production factors, taxation, the existence of infrastructures, the existence of a functioning public administration, the level of corruption and political stability.

In addition to economic and political factors, the legal framework for FDI is also important in determining its investment climate. A particularly important aspect of the legal protection of foreign investments is the settlement of disputes between host States and foreign investors. Impartial and effective dispute settlement is an essential element in the protection of investments.

B. Protecting Foreign Investments - Procedural Alternatives

In the absence of other arrangements, a dispute between a host State and a foreign investor will normally be settled by the domestic courts of the host State. From the investor's perspective, this type of dispute settlement carries important disadvantages. Rightly or wrongly, the courts of the host State are often not seen as sufficiently impartial in this type of situation. In addition, domestic courts are bound to apply domestic law even if that law should fail to protect the investor's rights under international law. In addition, the regular courts will often lack the technical expertise required to resolve complex international investment disputes.

Domestic courts of other States are usually not a realistic alternative. In most cases, they will lack territorial jurisdiction over investment operations taking place in another country. In addition, sovereign immunity and other judicial doctrines will usually make such proceedings impossible.

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¹ See World Investment Report 2003, FDI Policies for Development: National and International Perspectives, UNCTAD (2003).

Diplomatic protection was a frequently used method to settle investment disputes. It requires the espousal of the investor's claim by his home State and the pursuit of this claim against the host State. This may be done through negotiations or through litigation between the two States before an international court or arbitral tribunal. But diplomatic protection has several disadvantages. The investor must have exhausted all local remedies in the host country. Moreover, diplomatic protection is discretionary and the investor has no right to it. Also, diplomatic protection is unpopular with States against which it is exercised and may lead to tensions in the relations of the States concerned.

Today, direct arbitration between the host State and the foreign investor is the preferred option for the settlement of investment disputes. International arbitration provides an attractive alternative to the settlement of investment disputes by national courts or through diplomatic protection. Arbitration is usually less costly and more efficient than litigation through regular courts. It offers the parties the opportunity to select arbitrators who enjoy their confidence and who have the necessary expertise in the field. Moreover, the private nature of arbitration, assuring the confidentiality of proceedings, is often valued by parties to major economic development projects.

If arbitration is not supported by a particular arbitration institution, it is referred to as *ad hoc* arbitration. *Ad hoc* arbitration requires an arbitration agreement that regulates a number of issues. These include the selection of arbitrators, the applicable law and a large number of procedural questions. A number of institutions, like UNCITRAL, have developed standard rules that may be incorporated into the parties' agreement. But *Ad hoc* arbitration is subject to the rules of the arbitration law of the country in which the tribunal has its seat. The enforcement of awards rendered by such tribunals is subject to the same rules as awards by tribunals dealing with commercial cases.

C. Tango: Two Steps Forward - One Step Back

I. Step One: The ICSID Convention

In this situation, the ICSID Convention² was a major step forward. It is designed to close an important procedural gap. It was drafted in the 1960ies and entered into force in 1966. It currently has 143 Parties.

2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159 (1966); 4 ILM 532 (1965).

1. Purpose and Advantages

The idea of the ICSID Convention is to stimulate investment and hence economic development³ by improving the standard of protection for foreign investments and the overall investment climate.

Compared to *ad hoc* arbitration, the ICSID Convention offers considerable advantages: it offers a system for dispute settlement that contains not only standard clauses for submission and rules of procedure but also institutional support for the conduct of proceedings. It assures the non-frustration of proceedings and provides for an award's recognition and enforcement.

2. Jurisdiction

The ICSID Convention is specialized in the settlement of investment disputes. Therefore, the existence of a legal dispute arising directly out of an investment is a prerequisite for ICSID's jurisdiction.⁴ The concept of an investment is not defined in the Convention but many BITs and multilateral treaties contain definitions of investment.

In actual practice, the concept of "investment" has been given a wide meaning. A variety of activities in a large number of economic fields have been accepted as investments. In addition to traditional typical investment activities, these include pure financial instruments like the purchase of government bonds and the extension of loans.⁵ They also include civil engineering contracts like the construction of a highway⁶ and certain other services.⁷ Decisive criteria are a certain duration of the relevant activities, an element of profit, the presence of a certain economic risk, a substantial commitment as well as the relevance of the project for the host State's development.

Proceedings under the Convention are always mixed. One party (the host State) must be a State party to the Convention. The other party (the investor) must be a national of another Contracting State. Either party may initiate the proceedings but in actual practice it is nearly always the investor who is the claimant.

3 ICSID Convention, Preamble, para. 1.

4 ICSID Convention, Article 25(1).

5 *Fedax v. Venezuela*, Decision on Jurisdiction, 11 July 1997, 5 ICSID Reports 186; *Československá Obchodní Banka A.S. v. Slovakia*, Decision on Jurisdiction, 24 May 1999, 5 ICSID Reports 335; *CDC v. Seychelles*, Award, 17 December 2003.

6 *Salini Costruttori v. Morocco*, Decision on Jurisdiction, 23 June 2001, 42 ILM 609 (2003); *Bayindir v. Pakistan*, Decision on Jurisdiction, 14 November 2005.

7 *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406; *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518.

An additional requirement is that the investor must not be a national of the host State. But if a foreign investor operates through a company that is registered in the host State, it is possible for the investor and the host State to agree that the company will be treated as a foreign investor because of foreign control.⁸ The nationality requirements under the ICSID Convention as well as under bilateral treaties have led to some creative nationality planning. For instance, an investor may create a company in a particular State for the primary purpose of gaining access to international arbitration.

Access to investment arbitration, including ICSID arbitration, requires consent to jurisdiction by both parties. Participation in the ICSID Convention does not amount to consent to jurisdiction.⁹ This consent may be given in several ways. Consent may be contained in a direct agreement between the investor and the host State such as a concession contract. Alternatively, the basis for consent can be a standing offer by the host State which may be accepted by the investor in appropriate form. Such a standing offer may be contained in the host State's legislation. A standing offer may also be contained in a treaty to which the host State and the investor's State of nationality are parties. Most BITs and some regional treaties dealing with investments contain such offers. The more recent cases that have come before ICSID show a trend away from consent through direct agreement between the parties towards consent through a general offer by the host State which is later accepted by the investor often simply through instituting proceedings.

3. Characteristics

Proceedings under the ICSID Convention are self-contained. This means that they are independent of the intervention of any outside bodies. In particular, domestic courts have no power to stay, to compel or to otherwise influence ICSID proceedings.¹⁰ Domestic courts would have the power to order provisional measures only in the unlikely case that the parties agree thereto.¹¹ An annulment or other form of review of an ICSID award by a domestic court is impermissible.

The principle of non-frustration means that a case will proceed even if one party fails to cooperate. This circumstance alone will be a strong incentive to cooperate. ICSID proceedings are not threatened by the non-cooperation of a party. If one of the parties should fail to act, the proceedings will not be stalled. The Convention provides a watertight system against the frustration of proceedings by a recalcitrant party. *E.g.*: arbitrators not appointed by the parties will be appointed by the Centre¹²;

8 Article 25(2)(b) of the Convention.

9 ICSID Convention, Preamble, para. 7.

10 Article 26 of the Convention.

11 ICSID Arbitration Rules Article 39(6).

12 Article 38 of the Convention.

the decision on whether there is jurisdiction in a particular case is with the tribunal¹³; non-submission of memorials or non-appearance at hearings by a party will not stall the proceedings¹⁴; non-cooperation by a party will not affect the award's binding force and enforceability.

The system of arbitration is highly effective. This effectiveness is the result of several factors: Submission to ICSID's Jurisdiction is voluntary but once it has been given it may not be withdrawn unilaterally.¹⁵

Awards are binding and final and not subject to review except under the narrow conditions provided by the Convention itself.¹⁶ Non-compliance with an award by a State would be a breach of the Convention and would lead to a revival of the right to diplomatic protection by the investor's State of nationality.¹⁷

The Convention provides an effective system of enforcement. Awards are recognized as final in all States parties to the Convention. The pecuniary obligations arising from awards are to be enforced like final judgements of the local courts in all States parties to the Convention.¹⁸ Domestic courts have no power to review ICSID awards in the course of their enforcement. However, in the case of an award against a State the normal rules on immunity from execution will apply.¹⁹ In actual practice this will usually mean that execution is not possible against assets that serve the State's public functions.

The system of dispute settlement under the ICSID Convention is likely to have an effect even without its actual use. The mere availability of an effective remedy will influence the behaviour of parties to potential disputes. It is likely to have a restraining influence on investors as well as on host States. Both sides will try to avoid actions that might involve them in arbitration that they are likely to lose. In addition, the prospect of litigation will strengthen the parties' willingness to settle a dispute amicably.

4. Caseload

ICSID had a slow start. The Convention entered into force in 1966 but the first case was not registered before 1972. The 1970ies and 1980ies saw steady but only intermittent action. One or two cases per year were typical for that period.

The last ten years have seen a dramatic increase in activity. In 1995 there were four ICSID arbitrations pending. Today (26 April 2006) more than 100 are pend-

13 Article 41 of the Convention.

14 Article 45 of the Convention.

15 Article 25(1) of the Convention.

16 Article 53(1) of the Convention.

17 Article 27(1) of the Convention.

18 Article 54(1) of the Convention.

19 Article 55 of the Convention.

ing.²⁰ During 2005 27 new cases were registered. Therefore, more than two new cases per month are registered on average.

II. Step Two: The BIT Regime

1. Consent to Jurisdiction

A second big step forward in investment arbitration was the discovery and use of bilateral investment treaties (BITs) as basis for jurisdiction in investment arbitration. BITs have existed for some time. But their number has increased enormously during the 1990ies. In addition, regional treaties such as NAFTA and ECT also offer jurisdiction.

In the earlier cases of investor-State arbitration jurisdiction was always based on contracts between investors and host States. During the last 10 years most cases were brought on the basis of treaty provisions.²¹ This has led to an enormous increase in the number of cases. It has also changed the character of the cases.

The vast majority of BITs contain clauses referring to investor-State arbitration. The States parties to the BIT offer consent to arbitration to investors who are nationals of the other contracting party.

The dispute settlement clauses in many BITs offer several possibilities. These may include the domestic courts of the host State, procedures agreed to by the parties to the dispute, ICSID arbitration, ICC arbitration, and *ad hoc* arbitration often under the UNCITRAL rules.

A provision on consent to arbitration in a BIT is merely an offer by the respective States that requires acceptance by the other party. The arbitration agreement is perfected through the acceptance of that offer by an eligible investor, *i.e.* a national of the other State party to the BIT.

It is established practice that an investor may accept an offer of consent contained in a BIT by instituting ICSID proceedings. Therefore, where a BIT of this kind is in place, an investor no longer needs a formal arbitration agreement with the host State but can simply invoke the BIT. The Tribunal in *Generation Ukraine v. Ukraine* said:

“... it is firmly established that an investor can accept a State's offer of ICSID arbitration contained in a bilateral investment treaty by instituting ICSID proceedings. There is nothing in the BIT to suggest that the investor must communicate its consent in a different form directly to the State; ... It follows that the Claimant validly

20 For detailed information on pending cases see: <http://www.worldbank.org/icsid/cases/pending.htm>.

21 The first case in which consent was based on a BIT was *AAPL v. Sri Lanka*, Award, 27 June 1990, 4 ICSID Reports 250.

consented to ICSID arbitration by filing its Notice of Arbitration at the ICSID Centre."²²

Treaty clauses providing for investor/State arbitration vary in scope. Some refer to all disputes concerning investments. Other treaties just refer to violations of the treaty itself. For instance, both the NAFTA²³ and the ECT²⁴ offer arbitration just for violations of the respective treaty itself.

Some BITs offer consent to jurisdiction in narrow terms. For instance, most BITs of China only offer jurisdiction for disputes about the amount of compensation for expropriation owed to an investor. But in China's most recent BITs (notably with Germany) jurisdiction extends to any dispute with respect to investment.

2. Umbrella Clauses

The scope of consent offered in a BIT may also be affected by an umbrella clause contained in the treaty. An umbrella clause is a provision in a treaty under which the States parties undertake to observe any obligations they may have entered into with respect to investments. In other words, contractual obligations are put under the treaty's protective umbrella. After some initial hesitation, most tribunals have now accepted that under the regime of an umbrella clause, violations of the contract become treaty violations.²⁵ Therefore, a provision in a BIT offering consent to arbitration for violations of the BIT extends to contract violations covered by the umbrella clause.

3. MFN Clauses

Most BITs and some other treaties for the protection of investment²⁶ contain most favoured nation or MFN clauses. A MFN clause contained in a treaty will extend the better treatment granted to a third State or its nationals to a beneficiary of the treaty. This has led to the question of whether the effect of MFN clauses is restricted to substantive standards or extends to the provisions on dispute settlement in these treaties. Put differently, is it possible to avoid the limitations attached to consent to arbitration in a treaty by relying on an MFN clause in the treaty if the respondent

22 *Generation Ukraine v. Ukraine*, Award, 16 September 2003, paras. 12.2, 12.3.

23 Article 1116 NAFTA.

24 Article 26(1) ECT.

25 *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518; *Eureko v. Poland*, Partial Award, 19 August 2005; *Noble Ventures v. Romania*, Award, 12 October 2005; *MTD v. Chile*, Award, 25 May 2004. But see: *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406; *El Paso Energy Intl. Co. v. Argentina*, Decision on Jurisdiction, 27 April 2006.

26 See Article 1103 NAFTA.

State has entered into a treaty with a third State that contains a consent clause without the limitation? For instance, would a national of a country that has an old style BIT with China, providing for jurisdiction only for the amount of compensation, be able to invoke an MFN clause to benefit from China's new BIT with Germany with its broad jurisdictional clause? Or even more radically, if the treaty containing the MFN clause does not offer consent to arbitration, is it possible to rely on consent to arbitration in a treaty of the respondent State with a third party?

Tribunals have used MFN clauses in a number of cases to overcome procedural obstacles where consent to jurisdiction had been given in the basic treaty.²⁷ But the issue whether an MFN clause can be used to establish jurisdiction which does not otherwise exist is an open question. I would tend to agree with Emmanuel Gaillard²⁸: why not?

4. Shareholder Protection

Another area where big strides have been made is shareholder protection.²⁹ Investments often take place through the acquisition of shares in a company that has a nationality different from that of the investor.

The classical position was represented by *Barcelona Traction*³⁰: only corporate rights would be protected and the corporation had to have the right nationality. Under this doctrine, a company established under the law of the host State would be disqualified, in principle, because it did not have the status of a foreign investor. A company established under the law of another State would be disqualified if that State did not have a BIT or another suitable treaty with the host State or because the company's home State was not a party to the ICSID Convention.

The issue is particularly acute where investments are made through companies incorporated in the host State. Many States require a locally incorporated company as a precondition for the investment. The local company would not as such qualify as a foreign investor and would hence be excluded from resorting to international arbitra-

27 *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005); *Gas Natural v. Argentina*, Decision on Jurisdiction, 17 June 2005. But see: *Salini v. Jordan*, Decision on Jurisdiction, 29 November 2004; *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005.

28 *Gaillard*, Establishing Jurisdiction Through a Most-Favored Nation Clause, *New York Law Journal*, June 2, 2005 p. 3.

29 See especially *Alexandrov*, The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *Ratione Temporis*, 4 *The Law and Practice of International Courts and Tribunals* 19 (2005); *Schreuer*, Shareholder Protection in International Investment Law, *Transnational Dispute Management*, Vol. 2, Issue N° 03, June 2005.

30 *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, Judgement, 5 February 1970, ICJ Reports 1970, p. 4.

tion. This would have deprived a large proportion of foreign investment of international protection.

Contemporary treaty law offers a solution that gives independent standing to shareholders: most BITs include participation in a company in their definition of investment. In this way, the participation in the locally incorporated company becomes the investment. Even though the local company is unable to pursue the claim internationally, the foreign shareholder in the local company may pursue the claim in his own name. Put differently, the local company is not endowed with investor status but the participation therein, is seen as the investment. The shareholder may then pursue claims for adverse action by the host State against the local company that affects its value and profitability. Arbitral practice on this point is extensive and uniform.³¹

This is not a roundabout way of introducing a control theory to the nationality of corporations. Minority shareholders too have been accepted as claimants and have been granted protection under the respective treaties.³² This practice has also been extended to indirect shareholding through an intermediate company.³³ The same technique has been employed where the affected company was incorporated not in the host State but in a third State.³⁴

This shareholder protection extends not only to ownership in the shares but also to the assets of the company. Adverse action by the host State in violation of treaty

31 See e.g.: *Antoine Goetz et consorts c. République du Burundi*, Decision of 2 September 1998, 6 ICSID Reports 3; *Emilio Augustín Maffezini v. The Kingdom of Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396; *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic* (the Vivendi case), Decision on Annulment, 3 July 2002, 6 ICSID Reports 340; *Azurix Corp. v. Argentine Republic*, Decision on Jurisdiction, 8 December 2003, 43 ILM 259 (2004); *LG&E Energy Corp. v. Argentine Republic*, Decision on Jurisdiction, 30 April 2004; *Plama Consortium Ltd. v. Republic of Bulgaria*, Decision on Jurisdiction, 8 February 2005; *AMT v. Zaire*, Award, 21 February 1997, 36 ILM 1531 (1997), 5 ICSID Reports 11; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, Award, 25 June 2001, 6 ICSID Reports 241; *CME Czech Republic B. V. (The Netherlands) v. The Czech Republic*, Partial Award, 13 September 2001; *Camuzzi v. Argentina*, Decision on Jurisdiction, 11 May 2005.

32 See e.g.: *AAPL v. Sri Lanka*, Award, 27 June 1990, 4 ICSID Reports 246; *LANCO v. Argentina*, Decision on Jurisdiction, 8 December 1998, 5 ICSID Reports 367; *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic* (the Vivendi case), Decision on Annulment, 3 July 2002, 6 ICSID Reports 340; *CMS Gas Transmission Company v. Republic of Argentina*, Decision on Jurisdiction, 17 July 2003, 42 ILM 788 (2003); *Champion Trading Co. and Ameritrade International Inc. v. Arab Republic of Egypt*, Decision on Jurisdiction, 21 October 2003; *GAMI Investments, Inc. v. Mexico*, Award, 15 November 2004; *LG&E Energy Corp. v. Argentine Republic*, Decision on Jurisdiction, 30 April 2004.

33 See e.g.: *Siemens A.G. v. Argentine Republic*, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005); *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, Decision on Jurisdiction, 14 January 2004.

34 *Ronald S. Lauder v. The Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66; *Waste Management INC. v. United Mexican States*, Award, 30 April 2004, 43 ILM 967 (2004).

guarantees affecting the company's economic position gives rise to rights by the shareholders.³⁵

This generous extension of procedural rights to shareholders is likely to lead to some interesting situations. Practical problems may arise where claims are pursued in parallel, especially by different shareholders. In addition, the affected company itself may pursue certain remedies while a group of its shareholders may pursue different ones. The situation becomes even more complex where indirect shareholding through intermediaries is combined with minority shareholding. In such a case shareholders and companies at different levels may pursue conflicting or competing litigation strategies that may be difficult to reconcile and coordinate.

III. Step Three: Backing Off?

Developments have not all been in favour of investors. The enthusiasm for investor protection has been dampened by the sometimes painful experience of States in losing cases. The pain is particularly acute if the damages awarded are high or if there are multiple cases against the State in question. For some countries the mere fact of being sued is already a cause of alarm and a reason to think about ways to limit the access of investors to international arbitration.

Signs of retreat from investment arbitration have manifested themselves in a number of ways. Here are a few examples.

1. The Revival of Domestic Remedies

One is the revival of domestic remedies.³⁶ International investment arbitration dispenses with the traditional requirement to exhaust local remedies, at least in principle. Article 26 of the ICSID Convention specifically does away with this traditional requirement "unless otherwise stated". Arbitral practice confirms that the exhaustion of local remedies is not required in contemporary investment arbitration.³⁷

But States have attempted to counteract international arbitration by inserting forum selection clauses in investment contracts. Under these clauses disputes arising in the context of the contract are to be taken to national courts or tribunals. When the investors instituted international arbitration on the basis of a BIT, the host States

35 *GAMI Investments, Inc. v. Mexico*, Award, 15 November 2004.

36 Generally see *Schreuer*, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 *The Law and Practice of International Courts and Tribunals*, 1-17 (2005).

37 *Lanco v. Argentina*, Decision on Jurisdiction, 8 December 1998, para. 39, 40 ILM 457, 469/70 (2001); *Generation Ukraine v. Ukraine*, Award, 16 September 2003, paras. 13.1-13.6; *Yaung Chi Oo v. Myanmar*, Award, 31 March 2003, para. 40, 42 ILM 540, 547/48 (2003); *Loewen v. United States*, Award, 26 June 2003, paras. 142 et seq., 42 ILM 811 (2003).

would object contending that the contractual forum selection clause, pointing to domestic litigation, constituted a waiver of international arbitration.

Tribunals have reacted by adopting the distinction between treaty claims and contract claims. They have held consistently that the contractual clauses pointing to domestic courts did not deprive them of their jurisdiction to hear claims for violations of international law, especially BIT claims.³⁸

The distinction between contract claims and treaty claims has become a standard feature of recent investment arbitrations. The Respondent's objection, that the case only involves contract claims and the Claimant's insistence that treaty rights are involved, are routine features of many recent cases. As it turned out, the distinction between treaty claims and contract claims is not always easy. A particular course of action by the host State may well constitute a breach of contract and a violation of international law. The two categories are not mutually exclusive. Rather, two different standards have to be applied to determine whether one or the other or both have been violated. The *ad hoc* Committee in *Vivendi*³⁹ said:

“... whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract ...”⁴⁰

The situation is made even more complex by the fact that some treaties offer jurisdiction for any investment dispute, which probably includes contract claims. Also umbrella clauses will convert contract breaches into treaty breaches.⁴¹

The problem with the separate treatment of contract claims and treaty claims is less a theoretical than a practical one. It leads to situations where the claimant is

38 See e.g. *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic*, Award, 21 November 2000, 16 ICSID Review – FILJ 643 (2001); 5 ICSID Reports 296; 40 ILM 426 (2001); *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision on Annulment, 3 July 2002, 6 ICSID Reports 340, 41 ILM 1135 (2002); *Salini Costruttori SpA et Italstrade SpA c/ Royaume du Maroc*, Decision on Jurisdiction, 23 July 2001, Journal de Droit International 196 (2002), 6 ICSID Reports 400, 42 ILM 609 (2003); *CMS v. Argentina*, Decision on Jurisdiction, 17 July 2003, 42 ILM 788 (2003); *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, 42 ILM 1289 (2003); *Azurix v. Argentina*, Decision on Jurisdiction, 8 December 2003; *Enron v. Argentina*, Decision on Jurisdiction, 14 January 2004; *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004. For a broader discussion see Schreuer, Investment Treaty Arbitration and Jurisdiction over Contract Claims - the *Vivendi I* Case Considered, in Weiler, ed., International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law 281-323 (2005).

39 *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision on Annulment, 3 July 2002, 6 ICSID Reports 340, 41 ILM 1135 (2002).

40 At para. 96.

41 See above at Fn 25.

compelled to pursue part of its claim through national and another part through international procedures. This has undesirable results. The need to dissect cases into contract claims and treaty claims to be dealt with by separate fora requires claim splitting and has the potential of leading to parallel proceedings. This is uneconomical and contrary to the goal of reaching final and comprehensive resolutions of disputes.

Even worse, the separation of types of claims arising from the same set of facts can lead to a situation where a host State, threatened by a treaty claim before an international tribunal, will start domestic proceedings before a local court or domestic tribunal which it can control in order to counteract and frustrate the international proceedings. In this way, the host State can exert pressure on the investor to settle or withdraw the treaty claim. Alternatively, the host State can use the domestic proceedings to recoup the money awarded in the international award through an action for breach of contract against the investor. Put differently, allowing the host State to pursue contract claims from the same dispute in its own domestic forum can undermine the procedural protection granted to the foreign investor in the BIT.

In some cases tribunals have reintroduced domestic remedies in a different way. They have at times indicated that a violation of a treaty standard occurs only once some redress has been sought and denied through proceedings in domestic courts. For instance, a tribunal found that a de facto expropriation could not be assumed in the absence of a reasonable effort to obtain correction in the domestic courts.⁴²

Similarly, another tribunal found that the availability of local remedies was relevant to whether the host State had violated the treaty standard of fair and equitable treatment.⁴³ It is not difficult to see that the rationale in these cases can be developed into something that reintroduces the local remedies rule through the back door.

2. Restricting Substantive Standards

In another attempt to stem the tide of investment claims States have attempted to limit the meaning of the substantive standards granted to investors.

One such attempt concerns the standard of fair and equitable treatment (FET) which is contained in most treaties. This standard has created a considerable amount of case law and is nowadays invoked in almost every case. Its somewhat open ended and flexible nature, has led to attempts to restrict its meaning.

Article 1105(1) of the NAFTA providing for FET has been the subject of an official interpretation by the NAFTA Free Trade Commission (FTC), a body composed of representatives of the three States Parties with the power to adopt binding inter-

42 *Generation Ukraine, Inc. v. Ukraine*, Award, 16 September 2003, para. 20.30. See also *Lauder v. Czech Republic*, Award, 3 September 2001, para. 204, 9 ICSID Reports 66.

43 *Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004, para. 116.

pretations.⁴⁴ The FTC interpretation of July 2001 states that Article 1105(1) reflects the customary international law minimum standard and does not require treatment beyond what is required by customary international law.⁴⁵ NAFTA tribunals have accepted the FTC interpretation.⁴⁶

The recent BITs of the US and Canada incorporate this approach by stating that FET does not require treatment beyond what is required by customary IL.⁴⁷

Tribunals not operating under such restrictive interpretations have not adopted a dogmatic position on whether the fair and equitable treatment standard contained in BITs is an autonomous standard or merely reflects customary international law.⁴⁸ Rather, they have interpreted the relevant provisions in BITs autonomously as a matter of treaty interpretation.⁴⁹

Professor *Dolzer* has pointed out that the attempt to contain the meaning of FET by equating it with customary IL may have exactly the opposite effect. The specific meaning that tribunals have given to fair and equitable treatment may be projected into customary international law. The consequence is that investors may in the future invoke the detailed case law on fair and equitable treatment as part of customary international law even in situations that are not subject to a treaty provision containing that standard.

Another area where there have been recent attempts to dampen the enthusiasm of investors to bring claims against host States has been expropriation. There is a lively debate surrounding the State's right to regulate in the public interest. Of course it is not per se unreasonable for States to insist on their right to regulate. On the other hand, investors predictably insist on the protection of their assets even if the State purports to act in the public interest.

44 Article 1131 (2) NAFTA.

45 FTC Note of Interpretation of 31 July 2001.

46 See e.g.: *Mondev International Ltd. v. United States of America*, Award, 11 October 2002, 6 ICSID Reports 192, paras. 100 *et seq.*; *United Parcel Service of America, Inc. v. Canada*, Award, 22 November 2002, 7 ICSID Reports 288, para. 97; *ADF Group, Inc. v. United States of America*, Award, 9 January 2003, 6 ICSID Reports 470, paras. 175–178; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award, 26 June 2003, 7 ICSID Reports 442, paras. 124–128; *Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004, paras. 90–91. See also *United Mexican States v. Metalclad Corp.*, Judgment, Supreme Court of British Columbia, 2 May 2001, 5 ICSID Reports 236, paras. 61–65.

47 US Model BIT 2004, Article 5(1)(2).

48 See *CMS Gas Transmission Company v. Argentina*, Award, 12 May 2005 at paras. 282–284 where the Tribunal found that the question whether the standard of fair and equitable treatment was identical with customary international law was not relevant in the case before it since “the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.” At para. 284.

49 See e.g. *Técnicas Medioambientales Tecmed S. A. v. The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004), paras. 155 and 156; *MTD v. Republic of Chile*, Award, 25 May 2004, paras. 110–112; *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, paras 188–190.

Under classical IL and most treaty provisions dealing with expropriation, the existence of a public purpose is a requirement for the legality of an expropriation together with non-discrimination and appropriate compensation. It would seem to follow that a legitimate public purpose cannot be the basis of an argument that no expropriation has occurred. Rather, the existence of a public purpose is a requirement for the expropriation's legality in addition to compensation.

Recent treaties, especially of the United States state that except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.⁵⁰

Judge *Schwebel* has referred to these Developments as a "Regressive Development of International Law"⁵¹. Indeed there is a danger that immunizing interferences with investments on account of their public purpose may seriously undermine the protection against indirect expropriations as we know it.

These ideas have already borne fruit in arbitral practice. In *Methanex v US*⁵² the Tribunal said quite bluntly that a measure that is taken for a public purpose, is non-discriminatory and is accomplished with due process is not an expropriation but a lawful regulation and hence does not require compensation.⁵³ This position was subsequently repeated and expanded in *Saluka v. Czech Republic*.⁵⁴

There are two kinds of problems with that approach. One is a question of logic. The other is a matter of policy. As a matter of logic, if a lawful expropriation requires a public purpose and full compensation it seems difficult to say that a legitimate public purpose means there is no expropriation but just regulation and therefore no compensation needs to be paid.

The policy issue is perhaps more serious. Once it is accepted that regulatory action for a public purpose by definition is not an expropriation, one is on a very slippery slope. It will not be difficult to find a legitimate public purpose for most measures affecting foreign investors. It would then be for the investor to bear the economic consequences of such measures even if they radically affect the investment. Taken to its logical conclusion this could well spell the end of protection of foreign-owned property as we know it.

50 US Model BIT 2004, Annex B, Para. 4 (b).

51 *Schwebel*, The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law, *Transnational Dispute Management*, Vol. 3, N° 2, April 2006.

52 *Methanex v. United States*, Award, 3 August 2005.

53 At Part IV, Chapter D, paras. 7, 14.

54 *Saluka v. The Czech Republic*, Partial Award, 17 March 2006 at paras. 254, 255, 262, 276.

3. Tango Argentino: Some Radical Proposals

Among the States that are unhappy about investment arbitration, Argentina is surely the unhappiest. It has several dozen cases pending against it and there are a number of adverse decisions already although most of these concern jurisdictional questions and are hence preliminary. The aggregate amount in dispute under these cases is staggering and goes into the billions.

Argentina, is considering drastic action. There are a number of proposed bills that foresee:

- denouncing all BITs that foresee international investment arbitration,
- establishing that claims against Argentina may only be brought to Argentinean courts,
- declaring that international arbitral awards are unenforceable unless they have been reviewed by local courts.

These proposals are obviously contrary to Argentina's treaty obligations under the ICSID Convention and under the applicable BITs. From a legal perspective such threats may not carry much weight and are easily dismissed. Nevertheless signs of States becoming weary with the system of investment arbitration should not be taken lightly. Other countries might follow suit and take joint action once they realize that they continue to be on the losing side of investment arbitrations. After all, it is the States that ultimately control the system.

So is investor-State arbitration in danger? The answer is probably: not yet but we should not necessarily take it for granted. There may well be further curtailments or even calls to replace the current system by a State v. State system.

D. Finale: It Takes Two to Tango

The Complementary Interests of Investors and Host States

It is appropriate to keep in mind and to remind States that investment arbitration is not a one-sided system that works all in favour of investors. Investment protection is also in the longer term interest of host States. It is no coincidence that the ICSID Convention was conceived in the framework of the World Bank and that the first sentence of its Preamble refers to the need for international cooperation for economic development and the role of private international investment therein.

Investment arbitration carries more than one advantage to host States. The more obvious advantage is a country's improved investment climate through the possibility of international arbitration. The possibility of going to arbitration is an important element of the legal security required for an investment decision. In other words, by offering arbitration the host State creates an important incentive to foreign investment.

The Tribunal in *Amco v. Indonesia*⁵⁵ pointed out that:

“...to protect investments is to protect the general interest of development and of developing countries.”⁵⁶

In addition, by consenting to ICSID arbitration the host State protects itself against other forms of foreign or international litigation. In particular, a major advantage of ICSID arbitration is that the host State effectively shields itself against diplomatic protection by the State of the investor's nationality.

Before investors received the right to pursue claims on their own behalf on the international level, the standard practice was for their home States to act on their behalf. This method carried political disadvantages for both States. It often created friction between the States concerned and cast a shadow over their relations. Not surprisingly, developing countries do not like being leaned upon by powerful industrialised States. In an investment dispute the limited inconvenience of having to defend a case before an international tribunal may be vastly preferable to the alternative of feeling the pressure of the United States, of Germany or of the European Commission.

Like most successful human endeavours investment arbitration serves the interests of all concerned. It is important to make sure that the system keeps its proper balance but also that everyone concerned is aware of this mutual interest.

55 *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389.

56 At para. 23. See also Award, 20 November 1984, 1 ICSID Reports 413, at para. 249.