

NEW ISSUES IN THE SETTLEMENT OF DISPUTES  
OF INTERNATIONAL INVESTMENTS

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I. THE GLOBAL REACH OF THE ROLE OF DISPUTE SETTLEMENT

A global context.

Whoever drafted the text of the first bilateral investment treaty could not have imagined how popular his or her work would become. It has been copied by the thousands and found its way into over 2000 treaties today in force, in addition to it being reflected in various multilateral treaties dealing also wholly or in part with investments.<sup>1</sup> It has been interpreted and reinterpreted by numerous international tribunals and domestic courts.

Along this process, which is not long in time, a number of issues have been clarified, either in terms of the development of new approaches or understandings or of the placing of limits. The aggregate of developments has meant that the settlement of disputes relating to foreign investments has become truly global in the past decade, both in the meaning of substantive law and also in respect of important jurisdictional questions. It is also opening the way for new developments concerning other important international activities, such as trade. It might well happen that in the long term these unfolding arrangements will also apply to a variety of aspects that today appear exclusively related to domestic law and jurisdictions.

This contribution in honour of Judge Mensah purports to examine the main issues characterizing this evolution, with particular reference to those decisions of ICSID tribunals that have to a significant extent influenced a change in perspective, not only in respect of the extent of bilateral investments treaties and related instruments but also of the very meaning of international law in some aspects. In spite of critical

perceptions, that are not entirely wrong in some matters,<sup>2</sup> the end result of such a process has helped thus far to reach a balance between the right of host States to undertake regulatory functions in the public interest and the right of foreign investors to carry on their business without arbitrary or unlawful interference.

The expression of consent and its limits.

On a number of occasions a State Party to the ICSID Convention that is brought to court by an investor raises the question that it has not expressly consented to the submission of that particular dispute to arbitration. In that point of view, commitment to arbitration under a bilateral investment treaty requires a specific “compromis” in which both parties will agree to that submission and its modalities. True enough, this was the traditional modality of inter-State arbitration in the early part of the twentieth century. States agreed to the arbitration of disputes under a treaty, but this was normally regarded only as a “pactum de contrahendo”, the implementation of which required an additional and specific “compromis”.

This is, however, a question that has fundamentally changed in the context of the settlement of investment disputes. Interestingly enough this is not the result of the ICSID Convention that only requires the parties to consent in writing to the submission of the dispute to the Centre.<sup>3</sup> It is rather the result of the network of bilateral investment treaties that have provided for the overall expression of consent by States parties in respect of disputes that might arise with foreign investors. This same result can be obtained by a general offer of submission to ICSID arbitration in domestic law.

As these investors are not a party to the treaty but are the beneficiaries of rights bestowed directly upon them under international law, or under domestic law, their own expression of consent might come later in time or under separate instruments. This happens typically when consent by the investor is given in a direct agreement with the

State concerned or simply by resorting to such a choice in writing, or even by instituting proceedings in the Centre.

ICSID tribunals have had no difficulty in finding that the offer by the State to submit to arbitration, followed by acceptance, is a definite binding legal obligation without further steps needed to establish jurisdiction.<sup>4</sup> This is not just the result of the operation of the bilateral investment treaty in respect of ICSID but also in so far other choices are available to the investor, particularly arbitration under UNCITRAL rules.

But also ICSID tribunals have controlled exaggeration in this matter not accepting modalities that are far remote from a proper consent. In *Cable TV v. St. Kitts and Nevis*, for example, the tribunal ruled that references to an ICSID clause in domestic proceedings did not amount to consent to arbitration.<sup>5</sup> On the other hand, however, tribunals have also been strict in not allowing a State that has expressed its consent to elude its obligations in respect of the foreign investor. So happened in *CSOB v. Slovakia*, where the Tribunal found that an ICSID clause included in a BIT not yet in force had been embodied by the parties in a direct agreement and upheld jurisdiction on this basis.<sup>6</sup>

In this same case, although the pertinent treaty provided that upon the agreement of both parties the dispute would be submitted to the Centre, it was held that this did not mean, as alleged, that submission had to be made jointly as this would imply the need for an additional agreement to put into practice the consent expressed by the State in the treaty.<sup>7</sup> The “pactum de contrahendo” approach was thus expressly ruled out.

“Arbitration without privity” is here to stay, as evidenced not only by a variety of bilateral investment treaties but also by multilateral arrangements.<sup>8</sup> The NAFTA, in the context of the operation of the ICSID Additional Facility, like the Energy Charter Treaty, contain forms of unconditional consent to ICSID or UNCITRAL arbitration.

A rather disquieting view was recently held by a Respondent State in the context of a dispute submitted to ICSID under a bilateral investment treaty. Because there had been diplomatic demarches by the State of the investor's nationality in support of the investor's right to take the dispute to arbitration, the Respondent State made the argument that there was a State to State dispute that had to be settled first through the operation of the ad-hoc arbitration that investment treaties normally provide for disputes between States parties. It should be noted that diplomatic exchanges directed to facilitate the settlement of the dispute are not considered a form of diplomatic protection under Article 27(2) of the Convention.

That argument would have meant that recourse to ICSID arbitration by a private investor and the Centre's jurisdiction would be paralysed until a different arbitration finalizes. As diplomatic exchanges not amounting to diplomatic protection regularly take place when there is an investment dispute, it would be easy for any Respondent State to elude its obligations toward the investor by claiming the existence of an inter-State dispute. This situation would entangle ICSID's jurisdiction for long periods of time to the disadvantage of the investor. Moreover, it is quite evident that the kind of disputes between States parties to which the inter-State procedures could apply are very different from those affecting the investor's rights under a bilateral treaty, a situation somewhat paralleled by Article 64 of the Convention and its negotiation history. The tribunal rejected the request for staying of the proceedings before ICSID.

#### An expanding dispute settlement system.

One noticeable aspect of the globalization of foreign investment dispute settlement is that it is not exclusively related to a relationship between developed and developing countries as was to an extent originally conceived. It is much broader than that. In fact, developing countries have followed among themselves the same approach

of bilateral investment treaties and signed such instruments by the hundreds, with no or little modification. And the same is true of multilateral investment treaties made among developing countries, such as the MERCOSUR Protocols<sup>9</sup> or Free Trade Agreements.<sup>10</sup>

There are two other aspects important to note in this process of globalization. The first is that under the ICSID Convention not only an investor can bring a State to court but also a host State can initiate proceedings against an investor provided a written consent has been given, as happens often under direct investment agreements. States has seldom used this alternative and it seems that awareness about its existence is not widespread.<sup>11</sup> There is also of course the possibility of counterclaims in a proceeding initiated by an investor.

The second aspect is still more significant. For many years developed countries appeared to believe that bilateral investment treaties were a one way street allowing for claims against developing host States. Much to the surprise of a few OECD countries, investors from developing countries have recently initiated proceedings against them, thus evidencing that bilateral treaties mean a two-way street. At least one of these claims has been successful.<sup>12</sup>

#### The critical date.

Time of course plays a most important role in affirming or dismissing jurisdiction in a given case. In *Tradex v. Albania*, for example, the Tribunal admitted an objection to jurisdiction on the basis of an investment treaty that had not yet entered into force.<sup>13</sup> In *Holiday Inns v. Morocco*, however, the Tribunal faced a more complex situation. At the time of the investment agreement containing the consent to arbitration the pertinent States had not yet ratified the ICSID Convention, but these requirements were satisfied before proceedings were actually instituted. The Tribunal concluded that it was the date when conditions were satisfied that should be deemed to constitute the

date of consent and, accordingly, affirmed jurisdiction as the request for arbitration was made after this date.<sup>14</sup>

Also time is of the essence of most bilateral investment treaties in that disputes that can be submitted to arbitration are normally only those that arise after the treaty has entered into force. The investment in most cases might have been made earlier. Given the fact that discussions and disagreements between investors and host States might extend for a long period of time, tribunals occasionally have to decide on the critical date in which the dispute arose and whether it is under its jurisdiction. The test was explained in *Maffezini* where it was held that disagreements and difference of views might extend for a period of time, even before the entry into force of the treaty, but what matters is the moment in which there is a claim with a legal meaning in respect of rights and obligations of the parties concerning the investment.<sup>15</sup>

This jurisprudential line was, however, interrupted in *Lucchetti* where an ICSID tribunal, contrary to *Maffezini*, declined to admit jurisdiction in respect of a dispute concerning measures amounting to expropriation that originated after the treaty was in force, because it believed that an earlier dispute was one and the same in spite that it dealt with a construction permit.<sup>16</sup> This decision of course opens the door for a State to claim that any dispute with an investor before the coming into force of the treaty, even if different, means that there is a continuing dispute excluding jurisdiction.

#### Resort to safeguards.

There are a number of safeguards available to the parties of bilateral investment treaties that are not always resorted to and the very existence of which many times appear not to be particularly noted, until it is too late. States, for example, can exclude from investment treaties given classes of disputes. Most treaties, however, include broad expressions of consent. On occasions more limited expressions of consent are

made in national legislation or in investment agreements, but then these may not be quite relevant if the dispute arises under the terms of a broadly defined treaty.

A second safeguard concerns the exhaustion of local remedies, a rather basic feature of traditional international claims that found its way into Article 26 of the ICSID Convention. As noted in the Annulment Decision in *Amco v. Indonesia*, this safeguard must be resorted to in an express manner and certainly before consent is perfected.<sup>17</sup> Also, as noted in *Maffezini*, other procedural provisions, such as a submission to local courts for a certain period of time, are not equivalent to a requirement to exhaust local remedies.

One additional aspect concerning the expression of consent and safeguards needs to be examined in the light of this evolution. All bilateral investment treaties provide for a period in which amicable settlement must be attempted, most often a six-month period. It also happens that occasionally the investor will not follow this requirement or do so rather casually, and it happens more frequently that the government will ignore all the communications from the investor to this effect. The view has recently arisen that such is just a procedural step and not a jurisdictional requirement, and that what matters is to afford the government an opportunity to engage in such settlement which if not taken might open the way to arbitration even before the period in question has lapsed.<sup>18</sup>

Two aspects appear relevant to find an answer to this question. The first is that, as noted in *Tradex v. Albania*, when the investor repeatedly requests the government to enter into discussions and this is ignored over a period of time, then on completion of the six-month period the request for arbitration may be introduced and such efforts will be considered enough to satisfy the amicable settlement requirement.

The second aspect is whether ICSID's Secretary-General could register a request that has not complied with the six-month amicable settlement requirement. The answer to this is that probably it cannot. Then the conclusion is that the issue is not merely procedural but concerns a crucial question of jurisdiction. Just as the investor cannot pretend registration and ultimately jurisdiction if amicable settlement has not been attempted, so too the State cannot object to registration and ultimately to jurisdiction if it has not reacted to the pertinent invitations to this effect during the established period of time.

#### Rightful claimants.

Some of the most difficult issues that ICSID tribunals have had to deal with in examining jurisdiction of the Centre and their own competence concern the question of who may be a party to proceedings before the Centre. This is in part connected with the interpretation of Article 25 of the Convention, but it is also connected with the extent of investment agreements and investment treaties.

A first issue that has given place to growing confusion relates to the status of a constituent division or agency of a State as parties to an ICSID proceeding. Under the Convention, the participation of such division or agency requires the approval of the State or else that the State notifies that no such approval is necessary. Seldom has this been done. But when proceedings are instituted against the State because of acts or omissions of such divisions or agencies then often the argument is made that no approval has been given to the effect of their participation.

However, one thing is the participation of a division or agency in its own right and quite another is the responsibility of the State for the conduct of its organs, whether they are a part of the central government or entirely decentralized, including provinces, municipalities and other entities that exercise public functions. The designation

envisaged in the Convention relates to the first aspect only, that is when an investment agreement has been entered into with a given subdivision or agency and then such entity is authorized by the State to participate in an ICSID proceeding in order to make effective the consent of the entity and the investor to submit their disputes to arbitration. It was thus held in *Cable Television v. St. Kitts and Nevis* that an investment agreement made with a constituent subdivision of that State that included an ICSID clause could not determine the jurisdiction of the Centre as that entity had not been designated by the State in accordance with Article 25.<sup>19</sup>

But if the dispute arises under a bilateral or multilateral investment treaty to which the State is a party and concerns an investment agreed to with a given subdivision or agency, even if such entity has not been designated to participate in ICSID proceedings, the State is still accountable for responsibility under international law. Article 4 of the Articles on State Responsibility, which on this point unequivocally reflect customary international law, is very precise in establishing the responsibility of the State for acts or omissions of its organs.<sup>20</sup>

This question was discussed and decided in the case of *Compagnie Générale des Eaux (or Vivendi) v. Argentina*, where the existence of a concession contract with an Argentine province and the fact that that province had not been designated to participate in ICSID proceedings, did not prevent the Centre's jurisdiction under a bilateral investment treaty between Argentina and France whose provisions governed the rights and obligations of the Republic of Argentina and foreign investors in its territory.<sup>21</sup>

The participation of natural persons as claimants in ICSID cases has not given place to particular difficulties as on this point the applicable rules of international law are generally well established, including the test of effectiveness in case of disputed facts as decided by the International Court of Justice in the *Nottebohm* case.<sup>22</sup> Yet, the

evolution of jurisdictional requirements in respect of natural persons has been notably less intense than with regard to corporate entities.

Corporate claims.

Very different, however, is the situation concerning juridical persons. The very complexity of corporate structures and investment consortia offers fertile ground for divergent views about who can or cannot claim before ICSID or other arbitration mechanisms.

The private or public nature of the functions of a corporate entity has recently given place to important clarifications. The Convention envisaged allowing for claims by private entities against a State, but not by public entities against another State, although this alternative was not entirely ruled out in the negotiations. In *CSOB v. Slovakia* the claimant was a State agency of the Czech Republic that initiated proceedings against Slovakia what prompted an objection to jurisdiction on this basis. Interestingly enough, the Tribunal found that jurisdiction could be upheld as that particular entity, although owned by the State, was engaged in banking activities that had been privatized and were essentially commercial by nature.<sup>23</sup> The test thus became not government control but the essence of the activities performed. The same test was later applied in *Maffezini* to establish whether some activities of an agency of the Spanish State were of a public or private nature and hence engaged or not the responsibility of the State.

Agreement of the parties on the question of corporate nationality will of course be most influential on a finding of jurisdiction by a tribunal. So happened, for example, in *MINE v. Guinea* where an agreement of the parties establishing that a corporation had Swiss nationality prevailed over the fact that technically the nationality was

different.<sup>24</sup> Issues relating to the real interest behind the investment and control of a corporation are relevant to this effect.

The ICSID Convention facilitates this more flexible approach. In particular, Article 25(2) (b) refers to the situation of a corporate entity that has the nationality of the Defendant State, but because of foreign control the parties have agreed it should be treated as a national of the other relevant State party, and thus can claim against the Defendant State. It is not unusual that bilateral investment treaties and investment agreements will contain clauses to this effect.

ICSID tribunals have occasionally found that certain arbitration clauses and other provisions might result in an implied agreement to treat a locally incorporated company as a foreign investor, as evidenced in *Amco v. Indonesia*<sup>25</sup> and *Klöckner v. Cameroon*.<sup>26</sup> It should be noted that this same result can be achieved by means of the definition of investment, which if broad enough, as is usually the case, might not need an agreement on nationality or control.

Questions about who actually controls a corporation have also been discussed by ICSID tribunals. In *SOABI v. Senegal*, an ICSID tribunal went quite far in searching for the controlling entity of a locally incorporated company.<sup>27</sup> The immediate controller was a Panamanian company, but Panama was not a party to the Convention; beyond that company, Belgian nationals were in control and Belgium was a State party. The tribunal ultimately accepted this last control. In *Amco v. Indonesia*,<sup>28</sup> however, the tribunal refused to go beyond the control exercised by the immediate parent company of a locally incorporated company.

Whether joint control of a company by foreign investors of different nationality and protected under different bilateral investment treaties qualifies to the effect of admitting jurisdiction, was also raised in the recent parallel ICSID cases of *Sempra-*

*Camuzzi*.<sup>29</sup> The tribunal held that such control, arising out of a shareholders agreement that was public and approved by the host State, did qualify for protection under the treaty as the investment had been conceived as an integrated operation before the claim arose.

A second related issue that arises in this context is whether a foreign investor is allowed to claim for damages affecting a corporate entity only when such investor has a controlling interest or can do so even if it is a minority shareholder. The claims by minority shareholders and related interests have also been admitted in the context of jurisdiction, particularly when the investor has been required by law or regulation to participate in a different company, usually a local company.<sup>30</sup> Limits to this development have also been placed by ICSID decisions when the claim is not covered by the expression of consent to arbitration because of being too remote.<sup>31</sup>

#### Defining investment.

Many aspects discussed above are closely related to the definition of investment. It is well known that the Convention did not define “investment” as there was no agreement on this point.<sup>32</sup> Many examples of investment were given along the negotiation of the Convention. The precise definition of investment was therefore left to the consent of the parties on jurisdiction, normally embodied in the bilateral investment treaties. This is not to say that these treaties are entirely free to define jurisdiction as the parties may please. The definition has to be compatible with the meaning of the Convention and not go beyond what can be reasonably regarded as investment.

In most cases the dispute will relate to an investment on which there can be no doubt. In a few instances doubt has arisen and the Secretary-General has refused registration because the case is manifestly outside the jurisdiction of the Centre. So too an ICSID tribunal can refuse to accept jurisdiction on this ground. As ICSID

jurisprudence develops, a number of cases have clarified whether a particular activity is or not an investment under the relevant treaty. Taxation inconsistent with mining contracts,<sup>33</sup> the development of a timber concession,<sup>34</sup> construction contracts<sup>35</sup> and other activities have been identified as a pertinent investment under the relevant treaties. On the other hand, for example, in *Mihaly v. Sri Lanka* negotiations on a construction project that had not materialized in a contract were held not to constitute an investment.<sup>36</sup>

A dispute about whether a bank guarantee constitutes investment was decided in *Joy Mining v. Egypt*, having the tribunal decided that this was an ordinary commercial contingent liability and, therefore, it had no jurisdiction.<sup>37</sup>

Two new situations have recently emerged. In *Pope & Talbot, Inc. v. Canada*, Canada argued that the dispute did not concern investment but trade and hence the tribunal lacked jurisdiction; the tribunal, however, found that the two questions were not “wholly divorced from each other”.<sup>38</sup> The tribunal in *S. D. Myres, Inc. v. Canada* faced similar arguments and decided that the questioned measures concerning goods “can relate to those who are involved in the trade of those goods and who have made investments concerning them”.<sup>39</sup> The connection between trade and investment is thus becoming a strong one.

#### Disputes concerning financial markets.

The second new development relates to financial instruments. Although not typically an investment of the traditional kind, financial instruments have become a crucial source for government financing and heavy investments are made in them worldwide. In *Fedax v. Venezuela* the tribunal had to deal with promissory notes issued by the government that had circulated internationally and *Fedax*, a foreign financial institution, had invested in them. The tribunal decided that the promissory notes were a

means by which loans and credit benefiting the State had been made available and their purchase qualified as an investment under the investment treaty.<sup>40</sup> Also in *CSOB v. Slovakia*, the tribunal held that loans in the circumstance of a large banking operation qualified as an investment.<sup>41</sup> In both cases it was held that the resources made available to the State did not need to be physically transferred across borders to qualify as an investment.

Financial developments cannot of course extend indefinitely as a covered dispute and the circumstances will provide clear limits to this end. In a recent case, a Belgian investor who had bought a participation in an international asset fund claimed against Malaysia on the ground that general economic measures adopted by this country had diminished the value of his portfolio. Although this claim was dismissed on jurisdictional grounds, there was little hope for it to succeed on the merits.

#### Strict connection with an investment.

The Convention also requires the dispute to be a legal dispute and to arise directly from the investment. In *Amco v. Indonesia*, a dispute concerning general tax obligations under domestic law invoked in a counter-claim was held not to qualify as an investment as it did not arise directly from the investment made.<sup>42</sup> Occasionally, however, there is some confusion between a dispute arising directly from an investment and the question of the investment being a direct and not an indirect one. The point was also discussed in *Fedax v. Venezuela*, where the tribunal held:

“However, the text of Article 25 (1) establishes that the “jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment”. It is apparent that the term “directly” relates in this Article to the “dispute” and not the “investment”. It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute

arises directly from such transaction. This interpretation is also consistent with the broad reach that the term “investment” must be given in light of the negotiating history of the Convention”.<sup>43</sup>

As noted above, the definition of investment agreed to in treaties is usually very broad and encompasses movable and immovable property, shares and other forms of participation in a company, claims to money and other contracts of financial value, intellectual property, business concessions and other matters. This broad definition is at the very heart of the interpretation of treaties made by ICSID and other tribunals. Although under Article 24(4) of the Convention a Contracting State can notify the Centre of classes of disputes it would or would not consider submitting to the jurisdiction, this is seldom done and in any event such a notification does not constitute consent under the Convention nor does it change any consent given in other instruments.

It might be important for governments and investors to be as precise as possible on the investments they intend to protect as this may avoid many disputes and misunderstandings and might also avoid ancillary claims and counterclaims that further complicate disputes submitted to arbitration.

#### Substantive treatment approaching uniformity.

The definition of investment is not merely a jurisdictional question. It also touches heavily upon the merits of a claim as the action or omission of State organs and agencies will be measured against the type of investment concerned. The substantive treatment embodied in bilateral and other investment treaties is virtually the same. Fair and equitable treatment, national treatment, non-discrimination, most-favored-nation treatment, fund transfers and requirements and guarantees concerning expropriation are almost identical throughout the spectrum.

It is interesting to note that the discussion on the merits in most cases relates to the balancing of the rights of the State with those of the investor. The protection of property and acquired rights is no longer a fundamental issue in international law. For a long time the right to protection could not be easily reconciled with the supremacy of national sovereignty. Only after difficult confrontations an understanding was reached about the limits of the respective contentions, and conditions were set to diplomatic protection and the right to expropriate, including the right to compensation. International adjudication was instrumental in reaching such understandings.

The success of this approach, together with inescapable economic realities, has been so evident that outright direct expropriation is today rather exceptional and has a number of well set requirements to be accepted as valid under international law. If one examines the list of ICSID and other relevant cases of the past few years will realize that this type of expropriation is quite exceptional.<sup>44</sup>

Some degree of accommodation has also been taking place in respect of indirect or regulatory expropriation, but this is thus far insufficient, scant and on occasions contradictory. The State holds its right to adopt measures in pursuance of public policies. Investors hold their right to be compensated if such measures amount to a taking. Neither of these views can be questioned in and of themselves. The problem lies in how and where the respective limits and conditions should be established, that is in identifying the point of common interest and reconciliation.

Yet, when we might have thought that the legal framework was rightly evolving in the direction of attaining such a balance, principally under the case law of ICSID, all of a sudden the confrontation flares up again. Is there a NAFTA/BIT treatment or just a

minimum customary law standard? Are such standards those of the twenty-first century or still those of the nineteenth century?<sup>45</sup>

International legal thinking has had great difficulty in focusing on the right approach to the issue of regulatory authority, particularly if it entails indirect expropriations, as opposed to formal expropriation. This again is evidenced by examining the list of ICSID and NAFTA cases where the vast majority concerns such questions as the right of the State to adopt certain types of regulations, the distribution of powers within the State and its various provincial or local governments, the effects of those measures and their connection with the treatment embodied in treaties.

Two issues on which this discussion is based must be disposed of at the outset. There can be no doubt about the first such issue, namely the right of the State to adopt regulatory measures in implementation of legislation and other expressions of sovereignty. The second issue is that regulatory authority cannot be validly exercised if it violates the framework of legal rights and obligations in which it operates. This will be subject to scrutiny by constitutional bodies, judicial entities or international mechanisms.

#### Limits of regulatory powers.

The problem lies in establishing the limit of such powers or functions under international law. First, it appears that it is a well-established principle that States may not act in a manner contrary to treaties and contracts, at least those contracts that are under some form of protection of international law itself.<sup>46</sup> Second, as noted, it is quite evident that under the principle of attribution States are responsible under international law for acts not only of central government authorities but also of any other public agency exercising regulatory functions of some sort.

In the light of recent ICSID and NAFTA case law, as well as under many other international precedents,<sup>47</sup> it has also become evident that most of the problems with regulatory authority entailing some form of expropriation occur not with central government authorities that are conscious of international obligations but with lesser governmental units, local states, municipalities and the like. This has gone so far that in a recent treaty it was necessary to expressly provide for the obligation to adopt measures to ensure the compliance with the treaty provisions by national, provincial and regional authorities and a mechanism of supervision was established to this effect.<sup>48</sup>

Domestic and international judicial control over administrative decisions of States and its various agencies has helped to pave the way for finding the right balance in this respect. More recently, again in the light of both domestic and international experiences, the doctrine of legitimate expectation appears to be gaining momentum as a standard that has to be respected in terms of citizens' rights, or for that matter investors' rights.

#### In search of legitimate expectation.

In *Preston*, a leading English case, the House of Lords ruled that unfairness amounting to an abuse of power could arise from conduct equivalent to breach of contract or representation.<sup>49</sup> Still more directly in *R. v. North and East Devon Health Authority, ex p. Coughlan*<sup>50</sup> the Court of Appeal in England sought to redress the inequality of power between the citizen and the State.<sup>51</sup> In this case it was held that:

“Where the Court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.

Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.”<sup>52</sup>

The Court, having examined prior cases, then added:

“The court’s task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or extant promise”.<sup>53</sup>

The situation is not altogether different under international law. Governments and international organizations may undertake changes of policy in their continuing need to search for the best choices in the discharge of their functions. However, to the extent that policies earlier in force might have created legitimate expectations both of a procedural and substantive nature for citizens, investors, traders or other persons, these may not be abandoned if the result would be so unfair as to amount to an abuse of power. This also assumes the international protection of the rights concerned. Herein lies the limit of discretion and the role of judicial review as a means of redress.

Because this approach is rooted in fairness it would not be unthinkable that from citizens’ rights and foreign investors’ rights it might gradually expand into other areas of concern for the international community, most notably trade, the international civil service and other matters. Global society is approaching, quite rightly, global protection.

## Notes

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- <sup>1</sup> Elöise Obadia: “ICSID, Investment Treaties and Arbitration: Current and Emerging Issues”, in Gabrielle Kaufmann-Kohler and Blaise Stucki: Investment Treaties and Arbitration, 2002, 67-75.
- <sup>2</sup> See generally M. Sornarajah: The Settlement of Foreign Investment Disputes, 2000.
- <sup>3</sup> ICSID Convention, Article 25.
- <sup>4</sup> Francisco Orrego Vicuña and Christopher Pinto: “Peaceful Settlement of Disputes, Prospects for the 21<sup>st</sup> Century”, Report Prepared for the Centennial of the First International Peace Conference, in Frits Kalshoven: The Centennial of the First International Peace Conference, Reports and Conclusions, 2000, 261-418, at 286.
- <sup>5</sup> *Cable TV v. St. Kitts and Nevis*, ICSID Award of January 13, 1997.
- <sup>6</sup> *CSOB v. Slovakia*, ICSID Decision on Jurisdiction of May 24, 1999.
- <sup>7</sup> Ibid.
- <sup>8</sup> J. Paulsson: “Arbitration without Privity”, ICSID Review, Foreign Investment Law Journal, Vol. 10, 1995, 232.
- <sup>9</sup> MERCOSUR, 1994 Colonia and Buenos Aires Investment Protocols.
- <sup>10</sup> See, for example, the 1994 Free Trade Agreement between Colombia, Mexico and Venezuela.
- <sup>11</sup> *Gabon v. Société Serete S. A.*, ICSID Case No. ARB/76/1, and discussion in Ibrahim F. I. Shihata and Antonio R. Parra: “The Experience of the International Centre for Settlement of Investment Disputes”, ICSID Review-Foreign Investment Law Journal, Vol. 14, 1999, 299-361, at 316.
- <sup>12</sup> *Maffezini v. Spain*, ICSID Award of November 13, 2000.
- <sup>13</sup> *Tradex v. Albania*, ICSID Decision on Jurisdiction of December 24, 1996.
- <sup>14</sup> *Holiday Inns v. Morocco*, Unpublished, Reported in Lalive: “The First ‘World Bank’ Arbitration”, British Year Book of International Law, Vol. 51, 1980, at 123.
- <sup>15</sup> Supra note 12.
- <sup>16</sup> *Empresas Lucchetti S. A. v. Peru*, Award on Jurisdiction, February 7, 2005.
- <sup>17</sup> *Amco v. Indonesia*, ICSID Annulment Committee, ICSID Reports, Vol. 1, at 526.
- <sup>18</sup> *Lauder v. Czech Republic*, Final UNCITRAL Award of September 2001, pars. 181-191; *Ethyl Corporation v. Canada*, Award on Jurisdiction of June 24, 1998, pars. 74-88.
- <sup>19</sup> Supra note 5.
- <sup>20</sup> Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002; and James Crawford: The International Law Commission’s Articles on State Responsibility, 2002, Comments on Article 4, at 94-99.
- <sup>21</sup> *Compañía de Aguas del Aconquija et al. v. Argentina*, ICSID Award of November 21, 2000, and *Vivendi* ICSID Annulment Decision, July 3, 2002.
- <sup>22</sup> *Nottebohm Case* (Second Phase), ICJ Reports, 1955.
- <sup>23</sup> Supra note 6.
- <sup>24</sup> *MINE v. Guinea*, ICSID Award of January 6, 1988.
- <sup>25</sup> *Amco v. Indonesia*, ICSID Decision on Jurisdiction of September 25, 1983.
- <sup>26</sup> *Klöckner v. Cameroon*, ICSID Award of October 21, 1983.
- <sup>27</sup> *SOABI v. Senegal*, ICSID Decision on Jurisdiction, August 1, 1984.
- <sup>28</sup> Supra note 25.
- <sup>29</sup> *Sempra v. Argentina / Camuzzi v. Argentina*, Decisions on Jurisdiction, May 11, 2005.
- <sup>30</sup> *CMS Gas Transmission Company v. Republic of Argentina, Decision on Objections to Jurisdiction*, 2003, International Centre for Settlement of Investment Disputes, 42 *ILM* (2003), 788.
- <sup>31</sup> *Enron Corporation and Ponderosa Assets, L. P., v. The Argentine Republic, Decision on Jurisdiction*, 2004.
- <sup>32</sup> See *Fedax v. Venezuela*, Decision of the ICSID Tribunal on Objections to Jurisdiction, July 11, 1997, pars. 21-26, with citations to the relevant cases and literature.
- <sup>33</sup> *LETCO v. Liberia*, ICSID Award of March 31, 1986.
- <sup>34</sup> *SOABI v. Senegal*, ICSID Award of February 25, 1988.
- <sup>35</sup> *Salini v. Morocco*, ICSID Decision on Jurisdiction of July 23, 2001.
- <sup>36</sup> *Mihaly International Corporation v. Sri Lanka*, ICSID Award of March 15, 2002.
- <sup>37</sup> *Joy Mining v. Egypt*, Award on Jurisdiction, July 30, 2004.
- <sup>38</sup> *Pope & Talbot Inc. v. Canada*, Award on Motion to Dismiss, January 26, 2000.
- <sup>39</sup> *S. D. Myres, Inc. v. Canada*, Partial Award of November 12, 2000.
- <sup>40</sup> Supra note 32.
- <sup>41</sup> Supra note 6.
- <sup>42</sup> *Amco v. Indonesia*, Resubmitted Case, Decision on Jurisdiction of May 10, 1988.

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<sup>43</sup> Supra note 32.

<sup>44</sup> Direct Expropriation was involved for example in the case *Compañía de Desarrollo de Santa Elena S. A. v. Republic of Costa Rica*, ICSID Award of February 17, 2000. In other prominent cases only regulatory measures alleged to have amounted to expropriation were involved, as was the case for example in *Metalclad v. Mexico*, 40 International Legal Materials 55 (2001) and *Waste Management Inc v. Mexico*, 40 International Legal Materials 56 (2001).

<sup>45</sup> Asan Sedigh: “What Level of Host State Interference Amounts to a Taking under Contemporary International Law?”, The Journal of World Investment, Vol. 2, 2001, 631. See also the discussion in connection with environmental regulations in Thomas Wälde and Abba Kolo: “Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law”, International and Comparative Law Quarterly, Vol. 50, 2001, 811-848.

<sup>46</sup> Rosalyn Higgins: “The Taking of Property by the State: Recent Developments in International Law”, Recueil des Cours, Academy of International Law, Vol. 176, 1982-III, 263.

<sup>47</sup> Sedigh, cit, 666-671.

<sup>48</sup> Protocol to the Argentina-Chile Treaty on Mining Integration and Cooperation, 20 August 1999, Article 5.

<sup>49</sup> *Preston v IRC* (1985) 2 All ER 327, (1985) AC 835.

<sup>50</sup> *R v North and East Devon Health Authority, ex Parte Coughlan* (2000) 3 All ER 850.

<sup>51</sup> Mark Elliott: “Case and Comment, House of Lords Decisions”, Cambridge Law Journal, Vol. 59, 2000, 421.

<sup>52</sup> *R v. North and East Devon*, cit, par. 57.

<sup>53</sup> *R v. North and East Devon*, cit, par. 65.