Investor-State Arbitration

1. Introduction to investor-state arbitration
3. Substantive protections offered by investment treaties
4. Procedural protections offered by investment treaties (ICSID or UNCITRAL? Timeline of a typical case)
5. Bigger picture?

www.pca-cpa.org
1. Introduction
   Who should know about it?

1. Commercial lawyers
   - Disputes involving Mauritian investors overseas
   - Disputes involving multinationals investing in Mauritius
   - Investment planning for choosing where to invest
   - Investment planning for choosing through what structures to invest

2. National Government
   - Awareness of potential claims against Mauritius
   - Negotiating optimal protections for Mauritian investors overseas

3. International commercial arbitration lawyers

4. Public international lawyers

5. Public interest groups

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1. Introduction
   When could it come up?

• **Diverse types of investments**
  (Oil exploration, gas transportation, power generation, mining, water concessions, hotels, roads, insurance, duty free concessions, cotton, telecommunications, fisheries, tv broadcasting, financial services…)

• **Diverse types of wrongdoing claimed**
  (revocation of a licence, military possession of a hotel, change in environmental regulations, denial of justice before local courts, nationalization of industry, failure to prevent looting…)

• **Diverse countries involved…**
  Not just developing countries, but also NAFTA states (US, Canada, Mexico), many former Communist states that have had privatization programs
I. Introduction

What is it?

- Claim by a foreign investor against a host State
- Old days: resort to diplomatic protection or local courts
- Now: sue State directly in arbitration, if State consents
  - Investment agreement
  - National investment law
  - Bilateral investment treaty ("BIT") or multilateral investment treaty

Consent in a contract or national law


12.3 Arbitration.

(a) Any party may initiate arbitration by notice of intention to arbitrate to the other party naming the Dispute (as defined in Section 12.1) to be arbitrated. Upon the giving of such notice, the Dispute shall be determined by the arbitration panel of an Arbitrator who is agreed upon in writing by the parties. Failing such agreement within four weeks after notice by either party, the Arbitrator shall be appointed upon the application of any party by the United Nations Commission on International Trade Law ("UNCITRAL") sitting under its rules for conciliation and arbitration (the "Arbitration Rules"). The Arbitrator shall be a person whose profession and experience make him or her qualified to consider the Dispute.

Article 12. Settlement of Investment Disputes

1. Investment disputes shall be resolved in accordance with any applicable procedure agreed to in advance between the investor and authorized state bodies of the Kyrgyz Republic that are not included in the above agreement or the other party's legal defense by the investor in accordance with the legislation of the Kyrgyz Republic.

2. If such agreement is not reached, the investment dispute between authorized state bodies of the Kyrgyz Republic and investor shall be resolved by submitting an arbitration agreement between parties. If parties fail to agree within 3 months from the date of first written notice for such consultation, the dispute shall be resolved by the Arbitrator in accordance with a court of the Kyrgyz Republic, unless one of the parties to a dispute petitions the foreign investor and the state body requests to conclude the dispute in accordance with any of the following procedures:

(a) by applying to the International Center for Settlement of Investment Disputes (ICSID) pursuant to the Convention on settlement of investment disputes between states and citizens of other states or the rules regulating the use of additional means for the settlement of the dispute by the Secretary-General of the Center of

by applying to arbitrage or an international temporary ad hoc tribunal commercial court located in accordance with the adjective rules of the Commission on international trade law.
1. Introduction

Consent in a treaty

Mauritius-South Africa BIT

ARTICLE 7

Settlement of Disputes between an Investor and a Contracting Party

1. Any legal dispute between an investor of one Contracting Party and the other Contracting Party relating to an investment of the former which have not been amicably settled shall, after a period of six months from written notification of a claim, be submitted to international arbitration if the investor concerned so wishes.

I. Introduction

Investor-State claims on the rise!

Figure 1. Known investment treaty arbitrations (cumulative and newly instituted cases), 1987-2010

Source: UNCTAD
I. Introduction

Reasons behind the boom

- Rise in global commerce generally
- Rise in Bilateral Investment Treaties (now around 3000)
- Establishment of special purpose forum - ICSID
  - International Centre for the Settlement of Investment Disputes
  - Institution set up under the Washington Convention of 1965
  - Established by World Bank to facilitate investor-State disputes
  - Over 140 Member States. Over 120 pending cases
  - Secretariat is in Washington DC (http://icsid.worldbank.org/ICSID)

Mauritius BITs (or "IPPAs")

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<tr>
<th>Partner</th>
<th>Date of signature</th>
<th>Date of entry into force</th>
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<td>5-Mar-97</td>
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20 ratified BITs
1. Introduction

Purpose of BITs: Mutual Benefit

Mauritius-South Africa BIT - Preamble

The Government of the Republic of Mauritius and the Government of the Republic of South Africa (hereinafter referred to as the “Contracting Parties”);

DESIRING to create favourable conditions for greater investment by investors of one Contracting Party in the territory of the other Contracting Party; and

RECOGNISING that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in the territories of both Contracting Parties;

HAVE agreed as follows:

2. Application of BITs

What is protected?

– “Investment” defined broadly in most BITs
  • See Mauritius-South Africa BIT, Art. 1(a)
  • Usually covers property, shares, concessions, IP rights, major projects

– Only disputes arising directly out of “investments” can go to ICSID
  • See ICSID Convention, Art. 25, gateway provision

– Hallmarks of an investment:
  • Long duration
  • Expectation of returns
  • Risk
  • Substantial commitment, significance to State

– Not: pre-investment expenses, ventures not contributing to State
  • Not simple sales and delivery contracts
2. Application of BITs

What is protected?

Romak S.A. (Switzerland) v. Uzbekistan

- Contract for the delivery of wheat, along with a statement of intent to develop a long-term relationship.
- “the term ‘investments’ under the BIT has an inherent meaning . . . entailing a contribution that extends over a certain period of time and that involves some risk.”
- Romak did not own an investment as the rights arose from a one-off commercial transaction.

Who is protected?

- Definition of “investors” by reference to law of the host State
- Both “nationals “and “companies” defined
  - See Mauritius-South Africa BIT, Art. 1 (1)(c)
- Direct and indirect investors, even minority shareholders
- Locally incorporated entities
- Article 25 ICSID Convention
2. Application of BITs

Who is protected?

**Soufraki v. United Arab Emirates**

- Concession agreement between Dubai Department of Ports and Customs and Mr. Soufraki, a **Canadian national** (according to the agreement).
- Dispute arose regarding cancellation of Concession Contract.
- Mr. Soufraki sought damages between $580 million and $2.5 billion on the basis of **Italy-UAE BIT**, claiming **Italian nationality** (he was born in Libya).
- Tribunal reviewed evidence and Italian nationality laws and denied jurisdiction.

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**Nationality issues to look out for**

- No “double-dipping”
  - See Argentine-Australia BIT, Art. 2 (2)-(4)
- Watch for “denial of benefits” (no substantial business connections)
  - See Energy Charter Treaty
- Assignments by non-ICSID eligible nationals and vice versa
- Is the host State a party to ICSID at relevant times?
- Can a national bring a claim against its own State?
2. Application of BITs

When is an investment protected?

- Applies to “all investments, whether made before or after the date of entry into force of this Agreement”
  - Mauritius-South Africa BIT, Art. 11; Mauritius-Singapore BIT (Art 2(2))

- Applies to investments made at any time but not to claims relating to events that occurred before a certain date
  - Mauritius-Czech Republic, Art. 2 (After 27 April 2000)

- Applies to investments whenever made, but only to disputes that arise after treaty enters into force
  - Mauritius-Portugal BIT, Art. 11, Mauritius-Romania BIT, Art. 6

Other limits: specific approval

- **Australia-Indonesian BIT, Article III(1)(a):**
  
  “This Agreement shall apply to: (a) investments by investors of Australia in the territory of the Republic of Indonesia which have been granted in accordance with the Law No. 1 of 1967 concerning Foreign Investment or with any law amending or replacement it”

- **Gruslin v. Malaysia (ICSID Case No. ARB/99/3)**
  
  Jurisdiction denied, not an “approved project”
2. Application of BITs
Other limits: legality

- $2 million in briefcase to Kenyan President to induce duty free concession (which had ICSID arbitration clause). Tribunal held contract unenforceable as contrary to international public policy (ordre public), English law and Kenyan law. World Duty Free Company Limited v. Republic of Kenya (ICSID Case No. Arb/00/7, Oct 2006)

- See Mauritius-South Africa BIT, Art. 1(1)(a) [definition of investment “‘investment’ means every kind of asset (permitted by each Contracting Party in accordance with its laws)”]

- Conflict of “intra-EU” BITs with EU law?
  Eureko v. Slovak Republic

3. Substantive Protections in BITs
Snapshot

- Fair and equitable treatment
  - See Mauritius-South Africa BIT, Art. 3(1)

- Full protection and security
  - See Mauritius-South Africa BIT, Art. 3(1)

- No unreasonable or discriminatory measures
  - See Mauritius-South Africa BIT, Art. 3(1)

- Most Favoured Nation Treatment and National Treatment,
  - See Mauritius-South Africa BIT, Art. 3(2), 3(3)

- Compensation for damage caused by war, revolution, etc.
  - See Mauritius-South Africa BIT, Art 4

- No expropriation without prompt, adequate and effective compensation
  - See Mauritius-South Africa BIT, Art. 5

- Transfer of investments and returns
  - See Mauritius-South Africa BIT, Art. 6
3. Substantive Protections in BITs
Fair and Equitable Treatment

ARTICLE 3
Treatment of Investments

1. Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.

Flexible standard, covering concepts of bad faith, due process, legitimate expectations, and equity.

State will infringe if conduct is “arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory and exposes claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety” (Waste Management v. Mexico)

Tecnicas Medioambientales Tecmed S.A. v. United Mexican States

- License to operate a hazardous waste landfill, renewable yearly.
- License is not renewed without warning. Community opposition to the landfill motivated the decision.
- “The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor. . .”
- Tribunal finds breach of fair and equitable treatment.
3. Substantive Protections in BITs

Full Protection

Some treaties require “security and protection.”

Generally requires due diligence and vigilance on part of host State to ensure no harm comes to investment.

Traditionally used for physical protection, claims of violence, civil unrest, looting (AMT v. Zaire; AAPL v. Sri Lanka (Sri Lankan security forces destroyed investor’s shrimp farm and killed more than 20 employees))

Now also used for legal and economic protection and security (Azurix v. Argentina, CME v. Czech Republic)

3. Substantive Protections in BITs

National and MFN Treatment

2. Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State.

3. Each Contracting Party shall in its territory accord to investors of the other Contracting Party treatment not less favourable than that which it accords to its own investors or to investors of any third State.

- **National Treatment**: host State must treat foreign investors and their investments no less favorably than those of its own nationals and companies in like circumstances. Only differences in treatment based on nationality will lead to breach (e.g. UPS v. Canada) [but see Mauritius-South Africa exception]

- **MFN**: Have been used to import substantive rights from other treaties (e.g. “full effect” clause in White Industries v. India) and procedural rights from other treaties (e.g. go to arbitration without going to courts first: Moffezini v. Spain).
3. Substantive Protections in BITs

Expropriation

ARTICLE 5

Expropriation

1. Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation. Interest at a normal commercial rate shall be paid for undue delay in paying such compensation.

Examples: direct – ConocoPhilips v. Venezuela (nationalization of oil industry, suing for > $30 billion); indirect – Letco v. Liberia (reduced territory of timber exploitation); Philips Petroleum v. Iran (series of “creeping” measures))

Philip Morris v. Uruguay (and against Australia). Tobacco companies allege expropriation of trademarks via plain packaging tobacco legislation
4. Procedural Rights in BITs

Amicable settlement

ARTICLE 7

Settlement of Disputes between an Investor and a Contracting Party

1. Any legal dispute between an investor of one Contracting Party and the other Contracting Party relating to an investment of the former which have not been amicably settled shall, after a period of six months from written notification of a claim, be submitted to international arbitration if the investor concerned so wishes.

2. Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

   (a) the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965, when each Contracting Party has become a party to said Convention;

   (As long as this requirement is not met, each Contracting Party agrees that the dispute may be settled under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID) or

   (b) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission of International Trade Law.

3. If after a period of three months from written notification of the investor’s decision to refer the dispute to international arbitration there is no agreement on one of the alternative procedures referred to in paragraph (2), the dispute shall, at the request in writing of the investor concerned, be dealt with in terms of the procedure preferred by the investor.

Arbitration Clause
4. Procedural Rights in BITs
Choice b/w ICSID and UNCITRAL

What forum are parties choosing?

PCA has administered over 60 investment treaty arbitrations under UNCITRAL Rules in last 10 years

4. Procedural Rights in BITs
10 factors affecting choice

1. Confidentiality and Publicity
2. Institutional Support
3. Appointment of Arbitrators
4. Challenges to Arbitrators
5. Interim relief from courts
6. Disposal of frivolous claims
7. Jurisdictional limitations
8. Costs
9. Annulment/Setting Aside
10. Enforcement

See: J. Levine “Navigating the Parallel Universe of Investor-State Arbitration under the UNCITRAL Rules”
4. Procedural Nuts and Bolts

Typical timeline

Preliminary Phase (6-12 months)
- Attempt amicable settlement
- Choice to go to arbitration, which type?
- Commence arbitration (file Request for Arbitration)
- Registration by Secretariat (if ICSID)
- Constitute the Tribunal (usually 3 arbitrators)
- Hold a preliminary procedural conference, set schedule, agree on procedure

Jurisdictional Phase (9-18 months)
- Need to show consent; personal, temporal and subject-matter jurisdiction
- Discovery (sometimes)
- Written pleadings: Memorial, Counter-Memorial, Reply, Rejoinder
- Hearing on jurisdiction: witnesses (sometimes), oral argument
- Decision on jurisdiction
4. Procedural Nuts and Bolts

Typical Timeline

Merits Phase (12-24 months)
- Discovery
- Written pleadings: Memorial, Counter-Memorial, Reply, Rejoinder, include witness statements, documents and expert reports
- Pre-hearing conference
- Hearing on merits: witnesses (nearly always), oral argument

Separate Quantum Stage (3-6 months)
- Sometimes there will be a separate stage for damages
- Parties may exchange expert reports, or Tribunal may appoint own expert for a valuation, e.g. *Saluka Investments v. Czech Republic*
4. Procedural Nuts and Bolts

Typical Timeline

Award and Post-Award phase

- Award on merits, dismiss or reject claims, include provision for costs
- Only limited avenue for challenge (annulment proceeding under ICSID Convention or via courts of place of arbitration under national arbitration law)
- Enforceable by means of ICSID Convention (directly) or alternatively New York Convention (via courts at place of enforcement)

General observations

- Long!
  - Can run from 1 - 5 years.

- Costly!
  - UNCTAD Report estimates average costs of an investment arbitration are between $1 to $2 million in legal fees for each of the parties, and about $400,000 in expenses and fees of the tribunals
  - Allocation of costs is discretionary
  - Generally borne equally, but dilatory conduct can tip the balance

- Special!
  - Can be slower when State is a party (instructions, chain of responsibility);
  - Budgetary committees, ministerial supervision, cabinet decisions;
  - Often political; Often budgetary constraints
  - Sensitivities re: document production
5. Bigger Picture?
Trend towards transparency

Rationale for NGO participation

- From Suez et al v. Argentina, quoted in Biwater v. Tanzania)

“This case will consider the legality under international law, not domestic private law, of various actions and measures taken by Governments. The international responsibility of a State, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction. The factor that gives this case particular public interest is that the investment dispute centres around the water distribution and sewage systems of a larger metropolitan area, the City of Buenos Aires … . Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favour of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve. These factors lead the tribunal to conclude that this case does involve matters of public interest of such a nature that have traditionally led courts and other tribunals to receive amicus submissions from suitable non parties… Given the public interest in the subject matter of this case it is possible that appropriate non parties may be able to afford the tribunal perspectives, arguments and expertise that will help it arrive at a correct decision.”

5. Bigger picture?
Trend towards transparency

- NAFTA note of interpretation July 2001
- ICJ Practice Direction XII, February 2002
- OECD Investment Committee Statement June 2005
- Amendments to ICSID Rules, April 2006
- UNCITRAL Working Group considering transparency
- Some states including transparency provisions directly into BITs/ FTAs (e.g. NAFTA, Australia-ASEAN-NZ FTA)
5. Bigger Picture?
The future

- **The “Grand Bargain” that underlies investment arbitration**
  - States give away certain sovereign prerogatives to regulate economic activity within their territory in exchange for the promise of further investment in the future
  - Premise: foreign investors having assurance of arbitration will be more willing to invest in host State (insulates against political risk)

- **The “Backlash” against investment arbitration**
  - Investment arbitration perceived as inherently unfair and biased towards protecting investors at expense of legitimate Host State regulation
  - BITs said to correlate only weakly with increased foreign investment (*disputed*)
  - Ecuador and Bolivia have recently withdrawn from ICSID
  - BUT: statistics suggest Host States win over 50% of ICSID cases
  - PCA and ICSID caseload continue to climb