SETTLEMENT OF INTERNATIONAL INVESTMENT DISPUTES

International Treaty Arbitration and Enforcement of Foreign Arbitral Awards
INTRODUCTION AND JURISDICTION

• The enforcement of international law
• Neutral forum to adjudicate investment disputes
• Genesis of mechanisms for the settlement of investment disputes
• Investor / State disputes
  o Sovereign immunity in respect of adjudication and execution
  o Consent to arbitration / adjudication
  o Enforcement in local courts
• International Commercial Arbitration
  o concession agreements
  o general investment contracts
INTRODUCTION AND JURISDICTION

• International Investment Treaty Arbitration
  o bilateral investment treaties
  o multilateral investment treaties, including Energy Charter Treaty (ECT)
  o general international law
  o concession agreements?
SOVEREIGN IMMUNITY

• Host state courts and local law
  o legislative impediments to civil claims
  o delay and language
  o potential bias

• Host states’ liability in international law
  o sovereign equality of states
  o one state’s courts do not readily exercise jurisdiction over the acts of another state
  o only obligations between states or between states and international organisations
  o obligations are, generally, not enforceable in the absence of consent to jurisdiction of an adjudicative forum
ENFORCING INTERNATIONAL LAW OBLIGATIONS: POLITICAL

• Usually within the sole discretion of the investor’s state
• Amicable engagement, including negotiations and economic incentives
• More rigorous engagement: diplomatic protection and demarche
• Disengagement
  o economic and political sanctions
  o Security Council and regional bodies
  o military options
• Hague Convention, 1899
• International Court of Justice
  o 69 submitted to jurisdiction, often subject to limitations
• Only the states are involved
ARBITRATION

• Internationalisation of commerce
• The rise of developing states
• The need for consistent, predictable treatment of investments globally
• Mechanism for the settlement of disputes: Convention on the Settlement of Investment Disputes between States and the Nationals of Other States / Washington Convention, 1965 (ICSID Convention)
• Mechanism for the enforcement of foreign arbitral awards: Convention on the Recognition and Enforcement of Foreign Arbitral Awards / New York Convention, 1958 (NY Convention)
• The adoption of UN Commission on International Trade Law (UNCITRAL) Rules in 1976
• Proliferation of international arbitration fora
CONSENT TO JURISDICTION: BITS

- International Investment Agreements (IIAs)

- Source: UNCTAD
CONSENT TO JURISDICTION: BITS

• There were under 200 Bilateral Investment Treaties (BITs) by 1980
• There are over 2900 BITs in existence today, most of which have been fully ratified and are in force
• BITs do not require incorporation into domestic law
• BITs contain general consent to jurisdiction clause in respect of any breaches of the relevant BIT
• Investors can enforce the host state’s obligations directly against such State
• Usually governed by international law, together with any other “applicable” law
• BITs provide extensive substantive protection against unlawful and insufficiently compensated expropriation, unfair and inequitable treatment, denial of justice, and failure to provide a standard of national treatment and most favoured nation treatment and to protect and secure investments fully
CONSENT TO JURISDICTION: MULTILATERAL TREATIES

• ECT
• Came into force in April 1998
• Sector-specific
• Protects investments associated with an economic activity in the energy sector made in a host state which is a party to the ECT by investors who are nationals or permanent residents of one of the state parties to the ECT (investor state)
• Broader definition of investor than under most BITs
• Investors are protected even where the host state is the investor state, provided that the investor is controlled by the nationals of another state party to the ECT
ARBITRAL FORA

• Main international commercial arbitration fora/rules:
  o International Chamber of Commerce, Paris (ICC)
  o London Court of International Arbitration (LCIA)
  o Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
  o UNCITRAL Rules
  o Permanent Court of Arbitration, Hague (PCA)

• Main international investment treaty arbitration fora/rules:
  o International Centre for the Settlement of Investment Disputes (ICSID)
  o UNCITRAL Rules
  o PCA
SOUTH AFRICA'S POSITION ON BITS

• South Africa concluded over 40 BITs, prior to 2008; mostly in the 1990s
• In 2006/7, the South African government faced its first international investment treaty arbitration in *Foresti*
• In 2009, the government commissioned a review of its investment policies, including BITs
• The review concluded that a change was needed as:
  o BITs conflicted with the South African Constitution;
  o the proliferation of BITs endangered South African government's policy space and its social and economic priorities, jeopardising sustainable development;
  o BITs have no material bearing on the flow of Foreign Direct Investment (FDI) into South Africa;
  o International tribunals tend to expand their jurisdiction under the BITs, are too independent and are inconsistent;
  o BITs placed undue obligations on Host States, including a broad conception of fair and equitable treatment
SOUTH AFRICA'S POSITION ON BITS

• South Africa thus proceeded to withdraw from BITs from 2012, including Belgium/Luxembourg, Spain, Germany and the Swiss Confederation

• Once a BIT is cancelled, no new investments by foreign investors are subject to BIT protection, but investments existing upon cancellation continue to be protected for 10 to 20 years

• SA published the Promotion and Protection of Investment Bill (the Bill) in 2013

• The Bill is domestic legislation which the government intends to replace the protections included in the BITs

• The Bill is a substantial departure from the investment treaty regime and international law standards:
  o it vests the power to decide all disputes in domestic courts;
  o it narrowly, but vaguely defines an investment as a "material economic investment" or significant underlying physical presence;
  o the standard for compensation and expropriation is generally that set out in the Constitution or less;
SOUTH AFRICA'S POSITION ON BITS

- it does away with compensation resulting from indirect or creeping expropriation;
- it generally excludes compensation for:
  - deprivation which does not result in acquisition of ownership by government, unless total destruction or substantial impairment;
  - regulatory measures in numerous spheres from its remit, including subsidies provided by government, government procurement, development finance institutions, taxation and free trade areas;
  - measures in the public interest, including protection of public welfare, environmental protection, state security, and apparently any measures set forth in clause 10(1) of the Bill, including measures to promote and preserve cultural heritage, foster economic development and achieve the realisation of socio-economic rights
- the Bill being domestic legislation, it can always be repealed without further ado by the SA legislature
SOUTH AFRICA'S POSITION ON BITS

- the standard of compensation is "just and equitable" and not full market value compensation
- it provides no MFN standard
- it does not provide for full protection and security, but equal level of security as may be "generally provided" to "other investors" and "subject to available resources and capacity"
RESPONSES TO SA POSITION

• SA's position gives rise to a number of anomalies: some practical; others legal:
  o There is little to no point in the Bill if it simply parrots the constitutional protections: the Constitution contains entrenched provisions which are more difficult to repeal
  o If the purpose of the Bill is to further the constitutional protections afforded to foreign investments, then this is not apparent from the Bill
  o The very purpose of BITs was to prescribe standards, internationalise adjudication and to entrench independent oversight, to ensure that investments are not subject to political undulations. For a foreign investor, a local Act which can easily be repealed and simply provides for local adjudication is cold comfort
  o It is one thing never to have signed BITs, but it is quite another to resile from them without even attempting to renegotiate terms at an international level. The countries with whom SA has BITs account for over 80% of its FDI.
RESPONSES TO SA'S POSITION

- This creates a negative perception about SA government's objectives, and it is clear that the European states have had a negative response to the government's actions.

- The movement away from protection under international law are peculiar having regard to the regional and international trends:
  - BITs and multilateral treaties continue to be concluded to protect investments throughout the world (with the possible exception of certain South American states);
  - the EU has specifically engaged with a number of State counterparts to modify some of its treaties to take account of concerns raised, including clarifying the substantive standards, improving the skill and independence of arbitrators and enhancing transparency and predictability of the arbitral process. It is unclear why SA government chose not to engage with its European partners on enhancing or modifying the existing protections;
RESPONSES TO SA POSITION

• the need for transparency (such as hearing all stakeholders) and has also been incorporated into numerous international arbitration rules, including UNCITRAL Rules on Transparency in Treaty-Based Investor/State Arbitration. the fact that the protections in BITs are largely reflective of customary international law;

• the trend in the Southern African region is towards entrenching international law protection for all foreign investments. This is clearly evident from the SADC Protocol on Trade and Investment (which entered into force in 2010 and is binding on South Africa) and the SADC Model BIT (developed with SA input and published in 2012);

• SA championing international law in international relations and the centrality of international law in SA's legal discourse and the Constitution, including sections 231 and 239.
ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

• NY Convention and the Recognition and Enforcement of Foreign Arbitral Awards Act, 1977 (the 1977 Act), except for ICSID awards, which are self-contained

• the NY Convention entered into force in June 1959 and has over 140 state parties

• the 1977 Act provides an obligation to enforce arbitral awards rendered in a foreign jurisdiction or which are not considered to be domestic arbitral awards (eg, where lex arbitri is not SA law)

• the 1977 Act does not provide for recognition, but only enforcement of awards

• numerous reasons for enforcing foreign judgments and arbitral awards:
  o the requirements of international commerce;
  o comity;
  o reciprocity;
  o avoiding respondents from acting in breach of their obligations with impunity
ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

- closed list of (largely procedural) grounds for non-recognition or non-enforcement in the NY Convention and the 1977 Act:
  - invalidity of arbitration agreement
  - improper notice of arbitration proceedings
  - award exceeds the scope of submission to arbitration
  - unlawful composition of arbitral tribunal
  - award not yet binding or has been set aside by a competent authority of the country in which or under the law of which the award was made
  - dispute not arbitrable
  - recognition or enforcement would contravene public policy

- provisions of the Protection of Businesses Act, 1978 requiring Ministerial consent have been interpreted to have very limited remit (only strictly to raw materials, and not to disputed relating to manufactured goods or professional services) (Richman v Ben Tovim [2006] SCA 148 (RSA))

- generally, SA courts respect judgments and arbitral awards, foreign and local, are will recognise and enforce them, barring exceptional circumstances (Government of the Republic of Zimbabwe v Fick [2013])
ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

- The courts retain a discretion to enforce an arbitral award even where one of the grounds of refusal in section 4 of the 1977 Act has been established. For instance, in foreign jurisdictions, even an award which has been set aside by the courts in the jurisdiction where it was rendered, foreign courts have sometimes enforced the award (Yukos Capital SARL v OAO Rosneft (Amsterdam Court of Appeal) LJN: BI 2451, 200.005.269 (28 April 2009); Corporacion Mexicana de Mantenimiento Integral, S De RL de CV (Comissa) v Pemex-Exploracion y Produccion No. 10 Civ. 206 (AKH), 2013 WL 4517225, (S.D.N.Y. Aug. 27, 2013))
ICSID ENFORCEMENT: GENERAL

• Article 52(5) allows the annulment committee to stay enforcement of the award pending committee’s decision

• Once the procedures in Articles 50, 51 and 52 are complete, the award is final and binding

• Article 53(1)
  o “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

• Article 54(1):
  o “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State”
ICSID ENFORCEMENT: EXAMPLES

• United States
  o 22 U.S.C.A. § 1650a
  o “The pecuniary obligations imposed by [an ICSID] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.”
  o The Federal Arbitration Act does not apply to ICSID awards

• Argentina
  o Debate over the relationship between Articles 53(1) and 54(1)
  o U.S. and creditors say they deal with different subjects and Article 53 is a free-standing treaty obligation, requiring Argentina to abide by awards
  o Argentina says Article 54 qualifies Article 53 and thus that Argentina has complied with its obligations by designating a system for enforcement
  o Sempra Energy International v Argentine Republic
ICSID ENFORCEMENT AND EXECUTION

• Article 54(3)
  o Execution governed by the law on the execution of judgments in force in the country where execution is sought

• Article 55
  o Article 54 does not derogate from the law of the enforcement forum on sovereign immunity from execution of an award

• *Benvenuti & Bonfant*

• *Liberian Timber Corporation v Liberia*

• *Societe Ouest Africaine des Betons Industriels v Senegal*

• *AIG Capital Partners v Republic of Kazakhstan*
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