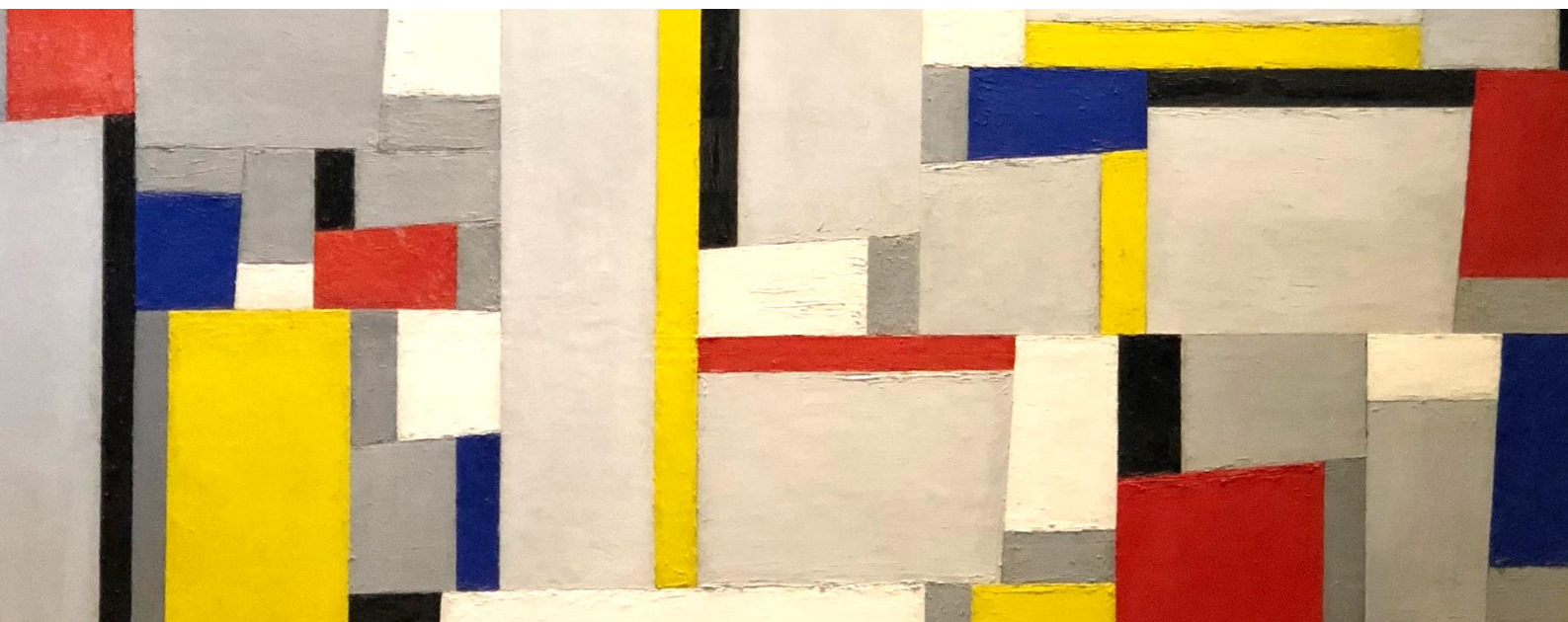


LEGAL ASSISTANCE TO MAKE FOREIGN INVESTMENT WORK BETTER FOR SUSTAINABLE DEVELOPMENT IN THE LEAST DEVELOPED COUNTRIES



United Nations Office of the High Representative
for the Least Developed Countries,
Landlocked Developing Countries and
Small Island Developing States

NOTE

The purpose of this occasional policy papers series, published by the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), is to analyse policy issues relating to the development of the least developed countries (LDCs), stimulate discussions and promote international cooperation. In keeping with this objective, the authors are encouraged to express their own views, which do not necessarily reflect the views of the United Nations or its member States.

The series is prepared under the general guidance of the Under Secretary-General and High Representative and the overall supervision of the Director of the UN-OHRLLS. This occasional paper has been edited by Americo B. Zampetti, Senior Officer, UN-OHRLLS.

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List of Abbreviations

| | |
|---------------------|--|
| ASEAN | Association of South-East Asian Nations |
| BIT | Bilateral Investment Treaty |
| COMESA | Common Market for Eastern and Southern Africa |
| ECOWAS | Economic Community of West African States |
| FDI | Foreign Direct Investment |
| FET | fair and equitable treatment |
| FTA | Free Trade Agreement |
| ICSID | International Centre for Settlement of Investment Disputes |
| ICSID Convention | Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) |
| IDLO | International Development Law Organization |
| ISDS | investor-state dispute settlement |
| LDCs | Least Developed Countries |
| NAFTA | North American Free Trade Agreement |
| New York Convention | United Nations Convention on the Enforcement of Foreign Arbitral Awards |
| PCA | Permanent Court of Arbitration |
| SADC | Southern African Development Community |
| UNCTAD | United Nations Conference on Trade and Development |
| UNCITRAL | United Nations Commission on International Trade Law |
| UN-OHRLLS | United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States |

Introduction

Foreign direct investment (FDI) holds the potential to significantly help Least Developed Countries (LDCs)¹ to diversify their economies, reduce dependence on commodities and promote new activities in the manufacturing and services sectors (not just in the extractive industries) with higher local value-addition, decent job creation and a deeper integration of local firms in international value-chains. This in turn can make a crucial contribution to poverty eradication and sustainable development of the LDCs.

FDI flows to the LDCs increased significantly in 2015 to US\$44 billion, but declined by 13 per cent in 2016 to US\$38 billion, with FDI flows to LDCs still only accounting for 2 per cent of world FDI and 5 per cent of FDI to developing countries. FDI inflows to the LDCs remain concentrated in a few mineral and oil extracting countries, with Angola, Bangladesh, Ethiopia, Mozambique and Myanmar accounting for 64 per cent of the total in 2015. FDI to LDCs remains mainly resource seeking, especially in the extractive sectors, with investment in manufacturing or services often hampered by small populations, limited access to regional or global markets and modest availability of a skilled workforce.² Although small, FDI in the LDCs provides scope to align investor interests with national sustainable development strategies, and shape project designs through domestic policies and mutually beneficial contract negotiations.

Foreign investments take place in many ways. As UNCTAD noted:

“In the past, TNCs [trans-national corporations] primarily built their international production networks through FDI (equity holdings), creating an internalized system of affiliates in host countries owned and managed by the parent firm. Over time, TNCs have also externalized activities throughout their global value chains. They have built interdependent networks of operations involving both their affiliates and partner firms in home and host countries. Depending on their overall objectives and strategy, the industry in which they operate, and the specific circumstances of individual markets, TNCs increasingly control and coordinate the operations of independent or, rather, loosely dependent partner firms, through various mechanisms. These mechanisms or levers of control range from partial ownership or joint ventures, through various contractual forms, to control based on bargaining power arising from TNCs’ strategic assets such as technology, market access and standards.”³

¹ The 47 LDCs are: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Dem. Rep of the Congo, Djibouti, Eritrea, Ethiopia, Gambia, Guinea-Bissau, Haiti, Kiribati, Lao People's Dem. Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Sudan, Timor-Leste, Togo, Tuvalu, Uganda, United Republic of Tanzania, Vanuatu, Yemen and Zambia.

² See UNCTAD, World Investment Report 2017, p. 79 et seq. UN-OHRLS, State of the LDCs 2017, p. 40.

³ See UNCTAD, World Investment Report 2011: Non-Equity Modes of International Production and Development, page 124.

Foreign investors thus use nowadays a large variety of equity and non-equity investment modalities (including strategic alliances, co-production and marketing, co-research and development, contract design and manufacturing, franchising, management contracts, contract farming and licensing).

In most cases one or more contracts between the foreign investor and local entities, private or public, are required to set out the terms and conditions for an investment project. Investment contracts through their terms and conditions regulate the allocation of tasks, costs, risks, responsibilities, profits and benefits for the local entity and the foreign investor. They often represent crucial means to generate income and spur economic growth and development. Contracts concluded by a foreign investor (or a local subsidiary of a foreign investor) and a State (or a state-owned entity) are referred to as “State contracts.”⁴ State contracts often relate to the exploitation of natural resources, including in the areas of mining, energy, forestry, agriculture, fishing, as well as infrastructure building and operation, and privatization processes. As a result their impact on the domestic economy is often large.

Poorly negotiated investment contracts, and in particular State contracts, often do not yield the expected advantages for the host country and may cause loss of public revenues, corruption, resource and environmental degradation and depletion, safety hazards and protests by local communities. All these issues often lead governments to seek contract renegotiations or even expropriation with serious consequences for the operation of the investment project. Hence, well-crafted and fair contracts are in the interest of both host governments and foreign investors and they also contribute to uphold the rule of law in the host country. In many instances however LDCs governments do not have the capacity to effectively negotiate such contracts. The same can be said of bilateral or other investment-related international agreements, which in many ways affect the domestic, regional and international legal framework within which investment projects are carried out.

Implementation, enforcement and monitoring of investment contracts and international investment agreements are also complex activities where LDCs require assistance to ensure that they truly work for their benefit. And more specifically that they do not lead to disputes and litigation with the investors. Investment contracts often set out the law applicable to the investment project and a forum for dispute resolution. Typically, they contain an arbitration clause for arbitration in a forum outside of the host country (sometime to be preceded by mediation or conciliation), rather than dispute resolution by the local courts. Arbitration can also be provided for in national legislation, bilateral investment agreements or other regional or plurilateral agreements to which the LDCs are parties. Dispute settlement can be very costly and targeted assistance can help LDCs have effective representation in the arbitral proceedings.

The importance to promote sustainable development through investment and support LDCs in investment negotiations and dispute settlement was underscored at UN level in the 2011 Istanbul Programme of Action for the LDCs and in the outcome document of the 2015 Addis Ababa Action Agenda.⁵ In addition, the instrumental role of FDI for the realization of the Sustainable

⁴ On State contracts, also referred to as “investment contracts” or “investment agreements,” see RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 79-86 (OUP 2012); Patrick Dumberry, *International Investment Contracts*, in Tarcisio Gazzini and Eric De Brabandere eds. *INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS* 215-43 (Martinus Nijhoff, 2012).

⁵ See United Nations, “Programme of Action for the Least Developed Countries for the Decade 2011-2020” (A/CONF.219/3/Rev.1, 23 May 2011), paragraphs 120-122 and “Addis Ababa Action Agenda of the Third International Conference on Financing for Development” (A/RES/69/313, 17 August 2015), paragraph 46: “We note with concern that many least developed countries continue to be largely sidelined by foreign direct investment that

Development Goals for the LDCs is recognized in goal 10/target 10.b, which stresses the importance to encourage FDI to the LDCs in accordance with their national plans.⁶ While several organizations provide various forms of advisory support to LDCs none appears to provide comprehensive and timely assistance in the areas of investment negotiations and dispute settlement.⁷

Against this background it is important to establish a comprehensive programme to provide at short notice assistance to the governments of LDCs and “under-resourced” LDCs firms with the aim of making available the advisory services of the relevant categories of professionals, including lawyers, financial analysts, economists, technical and industry specialists required for investment negotiations and dispute settlement.

This kind of legal and inter-disciplinary assistance is generally very costly when sourced in the market-place. The aim of the initiative is to harness primarily the services of experts who are ready to provide support to the LDCs on a “pro-bono” or reduced-fee basis, including in the context of corporate social responsibility initiatives of the organizations to which they belong thus catalyzing the readiness of professionals worldwide to contribute with their expertise to the sustainable development of the poorest section of the international community.

The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLS), thanks to a grant from the Government of Italy, together with the International Development Law Organization (IDLO) have designed an innovative program (the “Investment Support Programme for the LDCs” (ISP/LDCs)) specifically aimed at providing such assistance.

The Programme - as an international scheme for legal aid and expert assistance - aims at providing investment-related negotiation and dispute-settlement advisory and representation services to requesting LDC governments and eligible private sector entities through arranging for multi-disciplinary teams to assist them in preparing for, and conducting, negotiations and participating in arbitral proceedings or alternative dispute resolution methods. The Programme also intends to arrange complementary training and capacity building activities on demand. Ultimately the Programme intends to support the LDCs in their efforts to increase foreign investments and the benefits they derive from such investments.

The ISP/LDCs has been designed as a program of the International Development Law Organization (IDLO), in light of its treaty based mandate and experience in the areas covered by the Programme. IDLO is expected to establish a roster of individual experts, as well as partnerships with law firms, consultancies, professional associations, universities, research centers and non-governmental organizations willing to collaborate with the Programme. IDLO

could help to diversify their economies, despite improvements in their investment climates. We resolve to adopt and implement investment promotion regimes for least developed countries. We will also offer financial and *technical support* for project preparation and *contract negotiation, advisory support in investment-related dispute resolution*, access to information on investment facilities and risk insurance and guarantees such as through the Multilateral Investment Guarantee Agency, as requested by the least developed countries.” (emphasis added) Development partners confirmed this offer in the Political Declaration adopted in May 2016 in Antalya at the “Comprehensive High-level Midterm Review of the Implementation of the Istanbul Programme of Action for the Least Developed Countries for the Decade 2011-2020”, A/CONF.228/L.1, 23 May 2016, paragraph 67.

⁶ General Assembly resolution 70/1, “Transforming our world: the 2030 Agenda for Sustainable Development”.

⁷ For an inventory of existing sources of assistance for direct contract negotiations, including criteria for support, see: [http://negotiationsupport.org/providers?f\[0\]=field_attr_support_type%3Adirect_contract_negotiation](http://negotiationsupport.org/providers?f[0]=field_attr_support_type%3Adirect_contract_negotiation); no source appears to be available specifically to cover assistance for dispute settlement and arbitration.

will promote complementarity with existing initiatives that provide relevant assistance to the LDCs so as to avoid any duplication of efforts.

The Programme was presented at the United Nations in New York at a special event held on 22 September 2017. The event was co-chaired by the High Representative for the LDCs, UN Under Secretary-General Fekitamoeloa Katoa 'Utoikamanu and the Director-General of IDLO, Irene Khan. More information about the ISP/LDCs and the proceedings of the special event, including summary of the interventions by LDC Ministers and LDC development partners may be found at: <http://www.idlo.int/investment-support-programme-least-developed-countries>.

This occasional paper collects their remarks, as well as the keynote address by the Vice-President of the International Court of Justice, Judge Abdulqawi Ahmed Yusuf and the papers presented during two expert panel discussions, which analyze some of the legal complexities and challenges that LDCs face in investment negotiations and dispute settlement. The event saw wide participation of representatives of the LDCs, their development partners, the legal community, international organizations, academia and civil society.

Prefatory remarks

Fekitamoeloa Katoa 'Utoikamanu

LDCs have great needs for rapid industrialisation, job creation, infrastructure development, energy generation, as well as technology and innovation advances. These are all priorities of the 2011 Istanbul Programme of Action for the LDCs and are crucial to realize the 2030 sustainable development agenda and the Sustainable Development Goals. And we all know these priorities do require more and better quality foreign direct investment in LDCs.

Over the last decade, inward FDI stock in LDCs has played a catalytic role in economic development, enhancing productive capacity and creating jobs and expertise. However, FDI flows to LDCs still only accounts for about 2 per cent of world FDI and 5 per cent of total FDI to developing countries. FDI inflows to the LDCs remain concentrated in a few countries and in the mineral and oil sectors. Larger and more and diversified FDI flows need to go to all LDCs and steps need to be taken to ensure that the benefits deriving from FDI are maximized. These have been long-standing LDCs priorities.

One area of support that stands out in terms of promoting more and better quality FDI to the LDCs is advisory support for investment-related negotiation and dispute resolution. Investment contracts are becoming increasingly complex in the era of international production and global value chains. Such complexity also translates in capacity asymmetry, with LDCs often at a disadvantage across the negotiating table. And when contracts terms may not turn out to the advantage of the host country and its people, friction may emerge and sometimes costly international litigation ensues. Similarly, investment-related international agreements are becoming intricate and far-reaching in their effects.

Against this background, we are very grateful to the Government of Italy for a generous grant that allowed us to work on the preparation of the Investment Support Programme that we are presenting and discussing today. We are also particularly thankful to the International Development Law Organization that has partnered with us in the conceptual phase of the Programme design and is now taking on the responsibility of the Programme.

As an intergovernmental organization IDLO counts many of the LDCs among its members as well as program countries; because of its mandate, experience in providing advisory and capacity building services in legal areas central to the key objectives of the Programme, and its close relationship with the UN and commitment to UN sustainable development goals, IDLO is especially well placed to undertake this responsibility in an effective and responsive way. We are sure that with the strong leadership of Ms. Khan and her dedicated staff the Programme will be a success. My Office will continue to support the Programme in any way we can, including by participating in its Steering Committee.

We started the conceptualization of the Programme at a side event during the 2016 Midterm Review of the Istanbul Programme of Action for the LDCs, which reaffirmed the global

commitment to address the special needs of the LDCs. We have since been discussing the Programme with many experts from LDCs and beyond. Some are with us today. The initiative aims to provide on-demand legal and professional assistance to governments of the LDCs and LDC firms with resource constraints to help them in investment-related negotiations and dispute settlement. The Programme's objective is thus to establish an international scheme for legal aid and expert assistance. We trust that with the active support of the legal profession the initiative will be successful and will provide much needed assistance to the LDCs in an area where their needs are large.

Keynote Speech: Balancing the Rights and Obligations of States and Investors: Challenges Facing LDCs

Abdulqawi A. Yusuf

Introduction

I thank the organisers of this conference for the chance to speak at the launch of this important initiative. It is a great honor to address this distinguished gathering on the challenges facing LDCs in relation to Foreign Direct Investment.

Let me say at the outset that FDI remains crucial for the development of LDCs. In the past twenty years, FDI flows to LDCs increased enormously, from around \$5 billion USD in 2000 to \$37.9 billion USD in 2016. For some LDCs, this amounts to a significant inflow into their economy: in 2016, for example, Angola attracted \$14.4 billion of FDI, Ethiopia \$3.2 billion, and Mozambique \$3.1 billion.

2015 marked the high-water mark of FDI in LDCs (\$44 billion USD). In 2016, it slightly declined, it was ranked third in terms of external financial flows to LDCs, ranking after development aid and remittances from overseas workers.

This dip can be easily explained by the close link between FDI flows to LDCs and the price of natural resources which fluctuate in line with market pressures. Once the price of these resources starts to climb again, it is to be expected that FDI will again pick up, pushing levels past their 2015 peak.

The fluctuation of the market prices of natural resources is not the only challenge facing LDCs with regard to FDI flows. There are many others. I will briefly address today the challenges LDCs must confront in relation to the negotiation of investment agreements, the conclusion of bilateral investment treaties (BITs), and in the settlement of disputes that may arise from such investments.

Challenges in relation to BITs

Let me start with the set of challenges that may arise in relation to the negotiation and conclusion of BITs. The vast majority of investment treaties that have been concluded over the past thirty years are BITs. They account for over 2900 of the 3300 investment agreements currently in force, 621 of which have been signed by LDCs (approximately 20%). These agreements set out the reciprocal obligations of the Parties and establish the mechanisms by which disputes related to investments are to be solved, normally outside the host State's court system.

Perhaps the main challenge that LDCs face is in relation to the first step in the treaty-making process, the negotiations. Many capital exporting countries have draft agreements, called "model BITs" that provide blueprints for their negotiations. The United States, France, Germany, the United Kingdom all have model BITs that reflect their own interests and serve as the basis for treaty negotiations, as do the majority of other capital exporting countries.

Whereas the majority of developed, and some developing, States use their model BITs as the starting point for negotiations, LDCs often do not come to the negotiating table with a similar document that reflects their specific concerns and needs. They do not have a pre-prepared and ready-made model BITs. This significantly skews the outcome of the negotiating process. The result is that the terms of BITs which are finally signed are normally those in the model BIT of the capital exporting country with hardly any input from LDCs.

One academic study found, for example, that the officials of a capital exporting State had doubts in 1981 as to whether their Somali counterparts had even read the model treaty Mogadishu signed with them. Things have improved since then, as the understanding of LDC officials and the pool of skills within the relevant ministries has increased. But there are still disparities that exist between LDCs and their developed country counterparts.

Since then, there have also been attempts by certain regional groupings, particularly in Africa, to create model investment agreements that reflect the concerns of developing and LDC States. One notable example is the Southern African Development Community model BIT of 2012 (the “SADC model BIT”). SADC has 15 member States, 8 of which are LDCs. The SADC model BIT emphasises that the purpose of investment promotion is to support the sustainable development of the host State by highlighting the obligations of investors as well as of host States.

Unlike many of the model BITs of developed States, the SADC model BIT imposes obligations on investors to provide information about their investment to the host States, to conduct environmental and social impact assessments, to comply with minimum standards for human rights, environment and labor, and to act transparently with regard to investments involving the government. Article 16 of the SADC BIT, for example, provides that:

“Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and in the application of internationally accepted accounting standards.”

Another example is the Common Market for Eastern and Southern Africa (COMESA) Investment Agreement (the “CCIA”), adopted in 2007. The COMESA comprises 19 member States, 12 of which are LDCs. A part of the membership overlaps with that of SADC. The CCIA seeks to offer a new approach that is sensitive to the realities of African States, providing, according to the agreement, “investors with certain rights in the conduct of their business within an overall balance of rights and obligations between investors and Member States.”

Like the SADC model BIT, the CCIA recognizes the non-economic implications of FDI for the host country, and emphasizes, in particular, the importance of environmental and labour protection. For example, Article 5(d) of the Agreement provides that Member States shall:

“not waive or otherwise derogate from [or offer to waive or otherwise derogate from] measures concerning labour, public health, safety or the environment as an encouragement for the establishment, expansion or retention of investments”

These instruments, however, remain unutilised. Despite the fact that the CCIA was adopted ten years ago, it has not yet reached the required number of ratifications to enter into force. Likewise, the SADC BIT hasn’t been used. Its use, however, has been championed by South Africa; not an LDC, but a driving force behind the SADC.

The contents of certain BITs have also improved in the sense that the model BITs of some developed countries takes into account the concerns of LDCs. A good example of this is the 2013

Benin-Canada BIT, which explicitly recognizes the importance of health, safety, and environmental measures for the host State and investors alike.

A second major challenge facing LDCs in the context of investment agreements concerns the standards to be included in BITs. Such standards may include fair and equitable treatment, full security and protection, the most favoured nation clause, and the umbrella clause. They are all standards that have emerged from the practice of capital exporting countries. As a result, they have been elaborated, studied, and reflected on by experts in those countries that understand the definition and scope of application of those standards better than anyone else.

For representatives of LDCs, the meaning of those standards is often less well-known and opaque. Jeremy Bentham, a British philosopher, observed that the law is sometimes “like a thick mist, through which no plain man, not even a man of sense and learning, who is not in the trade, can see neither through it, nor into it”. Those standards can be like the thick mist described by Bentham.

LDCs do not have many people trained in the trade of formulating standards in BITs. The scope and reach of some of these standards, and their implications for the LDCs, can only be appreciated with a substantive knowledge of investment law jurisprudence. Yet, those States subscribe to such standards, most often without having them defined in the agreement, because they need to attract foreign investment into their countries.

Challenges in relation to arbitration

I will now turn to a second set of challenges, which arise in relation to arbitration – the dispute settlement mechanism that is invariably included in BITs to settle disputes between investors and host States. Here again, the same issues come up.

Before coming to the interpretation of the treaty standards themselves, the main challenge faced by LDCs concerns the composition of the arbitral tribunal as such. The composition of a tribunal is of unique significance because the awards that they issue contribute to the development of investment law through the incremental concretization of treaty standards.

Most of the time, LDCs themselves do not have experienced arbitrators and the arbitrators that they appoint are therefore not their nationals. As a result, LDC perspectives are not brought to bear on the decision-making process, the concerns of LDCs are relegated to the sidelines and are not reflected in the interpretation of investment treaty standards, although the arbitration is about the conduct of their authorities, their policies or their legislation. This is also a challenge which arises from a lack of training in the “trade”, as it were.

Another challenge, always in arbitration, is the venue of the arbitration. Normally, LDCs spend a lot of money to participate in arbitration proceedings because they are conducted far from their shores, in European capitals or in the United States. In addition to paying for counsel and arbitrators, therefore, LDCs have to pay for a delegation to travel around the world to present its case.

To my mind, there would be many benefits to repatriating arbitration proceedings by moving the venues closer to the issues with which they deal. An encouraging development is the establishment of regional and domestic arbitration centres in LDCs, such as the Kigali International Arbitration Centre. Through the work of centres like this, it is possible that

delocalization may gradually be reduced and that many arbitrations involving LDCs may take place in such centres.

Then, there is the issue of the interpretation of standards by tribunals. The standards that are incorporated in investment agreements leave a great deal of latitude to the tribunal to interpret and apply them to the facts of the case at hand. LDCs also find themselves at a disadvantage here because, as noted before, they do not appoint arbitrators from their own States, so the interpretation of standards ends up reflecting the concerns of capital-exporters and their companies. As a result, international investment jurisprudence has evolved in a more corporate-friendly, as opposed to LDC-friendly, manner.

One example can be seen in the “regulatory chill” generated by expansive interpretations of the fair and equitable treatment obligation. Some tribunals have interpreted that standard to mean that a State’s legal framework cannot be changed, even if such change is in the public interest. For example, the tribunal in *Occidental v. Ecuador* understood the standard to encompass the “obligation not to alter the legal and business environment in which the investment has been made.”

Other tribunals have, however, recognized that a State has a legitimate right to regulate in the public interest. The Tribunal in *Parkerings-Compagniet v. Lithuania* put this best when it stated that:

“Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about [an] amendment brought to the regulatory framework existing at the time an investor made its investment.”

Without arbitrators that can understand the specific concerns and needs of LDCs, it cannot be expected that arbitral tribunals will adopt interpretations that are sensitive to LDCs’ special circumstances.

Conclusion

This leads me to my final point. Can the challenges that LDCs face be best met through expert advice or through the development of skills by training initiatives? I would say both. The programme that is being launched today, the Investment Support Programme for the LDCs, is predominantly aimed at the provision of expert advice from outside LDCs, although I note that it includes some provision for capacity building.

In order to avoid the perpetuation of reliance on foreign expertise, it would be desirable to have any short-term assistance linked to training programmes to ensure that there is a good pool of domestic talent that can help LDCs face the challenges that I have outlined in this speech.

There is a West African proverb which says “if you borrow another person’s legs, they will not get you very far”.

A few years ago, the African Institute for International Law (AIIL) was created in Arusha, Tanzania, and it immediately embarked on the organization of training seminars for African countries in the area of investment law and arbitration as one of its priority programmes in partnership with the African Legal Support Facility (ALSF). So far, more than 150 people have graduated from such courses at the African Institute and continue to be in contact with the Institute to update and improve their skills for the future. The International Development Law

Organization, based in Rome, also has experience in training officials from LDCs in investment matters.

The main emphasis should therefore be placed on extending and strengthening the training programmes of the AAIL and IDLO for officials, practitioners, and scholars of investment law from LDCs. That is the best way for LDCs to meet these challenges: to negotiate in an informed manner, to conclude better BITs, and to participate effectively in arbitrations affecting their particular interests and circumstances.

In the short term one may be able to borrow the legs of others, and rely on foreign expertise for advice, but in the medium and long-term skills development and capacity-building can best strengthen your own legs and help you march forward by yourself.

The Art of Negotiating Investment Treaties and Investment Contracts in a Changing World of International Investment Law

Surya P. Subedi

Introduction

Having published a major book on ‘International Investment Law: Reconciling Policy and Principle’ (Oxford: Hart Publishing, 3rd edition, 2016), and working as a legal advisor to an LDC, Nepal, I have been researching into the ways and means of empowering LDCs and other developing countries through various legal instruments available under international law. Therefore, I welcomed the opportunity to participate in the high-level dialogue on legal and expert assistance to make foreign investment work better for the sustainable development of the LDCs on 22 September 2017 in the UN in New York.

While many LDCs are stuck with the BITs that they concluded with investor countries without fully realising the nature and scope of the key provisions of such treaties and the use of them by foreign investors to sue the host LDC governments, other LDCs are keen to conclude new treaties to attract foreign investment needed for their economic development and to stimulate their economy. Furthermore, they have to grapple with the creative and expansive interpretation of the provisions of such treaties by international investment tribunals often beyond the understanding of the meaning and scope of such provisions at the time of the conclusion of such treaties. Cardinal Richelieu was reported to have said: “I do not care so much who makes the laws or what the laws are, so much as who interprets and applies the laws!” That indeed is the key to the current challenges within international investment law.

The provisions in treaty or investment contracts are being interpreted by investment tribunals differently in some cases from when they were negotiated. The case law or jurisprudence has been driving the agenda for some time now. Keeping up-to-date with both treaty practice and case-law itself has been a challenge for most LDCs and many developing countries. LDCs have traditionally been regarded as ‘rule takers’ rather than ‘rule makers’. Therefore, this paper aims to examine the issues within international investment law that have a profound impact on the ability of LDCs to attract, manage and retain foreign investment.

The objective of negotiating investment treaties and investment contracts

In order to attract and manage foreign investment in the best interests of the country and maximize the benefit from it for the country, an LDC will need to have political stability, strong rule of law, underpinned by an independent judiciary and respect for human rights. The experience of many countries shows that attracting foreign investment itself is not an end. Many countries have attracted a great deal of foreign investment but the country has not benefitted much from it. Therefore, the challenge for LDCs is to have a sensible national legal and policy framework in place to attract and manage foreign investment to maximize the benefit for the country. For this, a bilateral investment treaty or an investment contract should include provisions concerning, inter alia, the transfer of technology, employment of local people in meaningful positions, use of local raw material, requirement to reinvest certain percentage of the profits in the country itself and to

contribute to the local economy and respect for human rights and protection of the local environment. The LDCs are in a better negotiating position these days than they were in the 1970s, 80s and 90s when they had to offer all kinds of incentives, such as tax holidays, to attract foreign investment. The current economic situation is favourable for investor receiving countries. It is no longer take or leave it position that the LDCs experienced in the 1980s and 1990s.

Negotiation strategy for investment treaties

(1) Substantive provisions

There are a number of areas in which an LDC has to take a strategic position when it comes to concluding a bilateral investment treaty or an investment contract. To begin with, it would make a big difference on how widely or narrowly the terms investor or investment are defined. For instance, LDCs should consider carefully whether portfolio investment or purely commercial contracts are excluded from or included in the definition of investment. Another area to consider is to safeguard the right to regulate and to define investor obligations, including implementation of corporate social responsibility. Equally important is how to define the nature and meaning of the principles of fair and equitable treatment and the international minimum standard and the interrelationship between these two principles. The investor-state dispute settlement mechanism (known as the ISDS system) included in many bilateral investment treaties or other international investment agreements has been at the centre of controversy in recent years. There is now a growing concern that the changes in this area of law have not been managed well and are squeezing the policy space of the host countries as some investment tribunals have gone too far in limiting or disregarding the sovereign rights of host countries.

(2) Dispute settlement mechanism

Traditionally, BITs were regarded as instruments designed to assist developing countries to attract foreign investment so that the capital, managerial know-how and technology needed for economic development could flow from developed to developing countries. However, due to the recent developments within the international law of foreign investment, the perception is that neither the institution of a BIT, nor foreign investment law itself, is serving either the interests of developing countries or the higher policy objectives of the international community, such as promoting economic and social justice or sustainable development. For instance, under BITs many developing countries have been required to 'outsource' the adjudication of key elements of their public policy to international investment tribunals. However, the growing perception is that the 'outsourcing' of the settlement of investment disputes is not working well and the time has come to review the investment dispute settlement mechanism itself.

There seems to be a certain unease on the part of many developing countries and some developed countries about the recent trend in jurisprudence of international investment tribunals. This is especially so in relation to the awards made against countries such as Argentina in a number of recent cases by international investment tribunals arising out of the financial crisis the country experienced in 2000–2001. Many investment tribunals rejected the argument based on the doctrine of necessity or legitimate public interests advanced by Argentina to defend the emergency measures it took in the face of the financial crisis in the country around the turn of the 20th century. Thus, the question as to whether foreign investment law should become the law of investment protection or rather remain simply foreign investment law capable of reconciling itself with other competing extant and evolving principles of international law has become a pertinent one.

As the number of investment cases referred to international investment tribunals has increased, concern has also been expressed that some of the decisions of such tribunals may have gone too far or become too creative in interpreting the rules of foreign investment law, such as those concerning indirect expropriation or fair and equitable treatment in favour of foreign investors, at the expense of the legitimate sovereign rights of host states, including the regulatory or 'police powers' of states or other environmental or human rights considerations. Indeed, a number of decisions of international investment tribunals, which have sought to provide protection to foreign investors by resorting to creative interpretations of the rules of foreign investment at the expense of national and international public policy, have come under heavy public scrutiny. Thus, pressure is growing on international investment tribunals from civil society organisations, states and academics to reconcile private interests with public interests or to reconsider the fairness of the investor-state dispute settlement system altogether. This is because under the current ISDS mechanism only investors enjoy a private right to action when seeking redress under the majority of international investment agreements (IIAs), BITs and free trade agreements (FTAs). Host countries do not enjoy such a choice; only investors can initiate the ISDS mechanism when disputes between investors and host countries arise.

Because of the foregoing reasons, international investment law is currently undergoing an exciting phase in its development and taking a new turn for the following reasons. First, foreign investors have started to sue host governments over the exercise of their regulatory powers and international investment tribunals have started to undermine the policy space of sovereign states, resulting in a backlash against the ISDS mechanism not only in developing countries but also in some developed countries. Secondly, there has been a backlash against the very institution of BITs or IIAs, around which international investment law has developed in recent decades. Thirdly, some of the leading states which have traditionally stood as staunch supporters of the traditional regime of investment protection seem now to be retrenching and accommodating some of the concerns raised by academics, civil society and other stakeholders.

These concerns centre around two main areas: the excessive protection accorded to foreign investors, and the creative and expansive trend in jurisprudence in favour of foreign investors. The examples of this shift in attitude are the provisions in the 2012 US Model BIT, and the European Commission's proposal in September 2015 to create a new World Trade Organization (WTO) Dispute Settlement Body-style Investment Court with an appellate body in relation to the negotiations with the US over a Transatlantic Trade and Investment Partnership (TTIP). The new US Model BIT, which contains a number of provisions designed to strike a balance between investment protection and public interest, has set a trend in this direction and countries such as India are in the process of following suit. It is an admission that international investment law should not exist in isolation but rather as a part of the broader international legal order. As such, it should thus accommodate competing interests. Fourthly, the division between pro-status quo scholars and practitioners and reformists has become sharper in academic discourse. In particular, the rift often involves those who are opposed to any major reform of the BIT/IIA regime or the ISDS mechanism and those who have championed reforms such as the creation of an international investment court or an appellate mechanism. The reformists especially advocate the revising of BIT/IIA framework by removing the ISDS mechanism. As a result, this polarisation has made the study of international investment law ever more interesting. The issues relating to the international investment regime has started to receive attention far beyond the confines of a small group of investment negotiators, practitioners and academics, as well as the sporadic involvement of non-governmental organisations.

Different stakeholders from various walks of life are increasingly interested in investment law matters, especially the ISDS mechanism. The main concern for these stakeholders seems to be with the ISDS mechanism due to the apparent inconsistencies in arbitral decision-making, insufficient regard by some arbitral tribunals to the host state's right to regulate in interpreting IIAs, BITs or FTAs, charges of bias of the system in favour of foreign investors, concerns about the lack of independence and impartiality of arbitrators, and the absence of an appellate mechanism to ensure the correctness of their decisions.

A new trend in state practice

A growing number of new model BITs or IIAs have started to include provisions designed to admit non-compensable regulatory expropriation. The 2012 US Model BIT is an example. The Indian Model BIT goes significantly further than other model BITs in narrowing down the definition of investment by excluding portfolio investment and intellectual property, omitting altogether the troublesome principles of fair and equitable treatment and most-favoured-nation treatment, incorporating the notion of non-compensable regulatory expropriation, and requiring the exhaustion of local remedies before resorting to international arbitration and limiting the scope for ICSID-style arbitrations.

This Model BIT requires foreign investors to contribute to the development of the host country and to operate by recognising the rights, traditions and customs of local communities to benefit from treaty provisions on investor protection. Thus, it gives host countries the right to initiate counterclaims in international arbitration, allows the possibility of bringing civil action against foreign investors in their home countries for wrongs committed abroad, and places restrictions on the discretion of arbitral tribunals when interpreting substantive principles in a BIT or IIA.

Another example of state practice in this direction is the 2011 India-Nepal BIT which defines in Article 5(2) the nature and scope of regulatory expropriation. The definition of regulatory expropriation in this BIT is an attempt to reconcile the law on foreign investment protection with other competing principles of international law. It respects the sovereignty of states and enables them to fulfil their commitments flowing from other international treaties or to pursue bona fide economic, environmental, health- and safety-related policies in the greater interest of the native residents in the host countries. It reads as follows:

(c) Non-discriminatory regulatory measures by a Contracting Party that are designed and applied to protect legitimate public welfare objectives including the protection of health, safety and environment do not constitute expropriation or nationalization; except in rare circumstances, where those measures are so severe that they cannot be reasonably viewed as having been adopted and applied in good faith for achieving their objectives.

(d) Actions and awards by judicial bodies of a Contracting Party that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns, do not constitute expropriation or nationalization.

Generally speaking, the issues within international investment law are becoming more overarching and interlinked and environmental issues are gaining in significance/prominence. Regulatory expropriation is becoming more acceptable. Some developing states have decided to withdraw from traditional pattern of BITs and terminate older generation of such treaties. Such States are in the process of review or renegotiation of existing BITs to protect national interests.

The way forward for LDCs

Given the state of their economic development, their legal and political systems and other geographical handicaps, withdrawing from the bilateral investment treaty system does not seem to be a sensible option for LDCs. Therefore, working towards reforming and strengthening the existing system seems to be a pragmatic way forward for them. In the absence of other viable alternatives, getting along with the existing system and making the most of it seems to be sensible course of action for LDCs. However, they have to develop their capacity to make the most of it and working in concert with other countries, the LDCs should take and assert leadership in the process of reform so that the reform works well for them. Working in concert, the LDCs should endeavour to transit from 'rule takers' to 'rule shakers' and finally to a 'rule makers.' Working in concert, the LDCs could come up with a model BIT of their own and harmonise or coordinate their practice. They should share best practices with each other and working with organisations such as UNCTAD, IDLO, OHRLLS and PCA, the LDCs should look to influencing the development of international investment law rather than being the consumers of the existing law and constantly striving hard to implement the law made by others. It is where organisations such as IDLO, UNCTAD and OHRLLS can assist the LDCs and empower them to secure a fairer deal for them under international investment law.

Negotiating Investment Contracts: Least Developed Countries and the Legitimate Expectations Doctrine

Mamadou Hébié

Introduction

A survey of international investment case law reveals that investment tribunals have reviewed the manner in which state officials have behaved during or in relation to negotiations leading to an investment. In this context, tribunals often held that state officials have created expectations for the investors that they characterized as legitimate. In such cases, investment tribunals considered that these expectations were judicially enforceable against host states that created them. The decision of investment tribunals to acknowledge and enforce these expectations is constructed retrospectively and in an objective manner. The real intent of the host state, as well as the validity of the expectations created under its domestic law, are not taken into account. Rather, tribunals attach legal consequences to certain facts or to some conduct attributable state officials to justify their findings. By identifying the principles supporting these findings relating to the creation of legitimate expectations, this paper aims to help least developed countries to avoid creating legitimate expectations when this is not their intent.

This paper is divided in four sections. Section I examines how investment tribunals have used the fair and equitable treatment (hereinafter FET) clause in bilateral investment treaties to protect the expectations of investors created during the period leading to the investment. This section also helps to understand the problems surrounding the legitimate expectations doctrine. Section II reviews the different strategies that states, including some least developed countries, have adopted to curb the expansive interpretation of the fair and equitable treatment clause, including its legitimate expectations component. In light of the limits of these initiatives, this section also suggests a strategy that completes the existing ones. The proposal is based upon a command of investment case law relating to the legitimate expectations doctrine. Section III details the implementation of the strategy proposed and reviews the conditions under which investment tribunals grant compensation to investors on the basis of the legitimate expectations doctrine. Based on the review of the case law conducted in Section III, Section IV offers some policy recommendations that least developed countries can take into account to avoid creating adverse legitimate expectations.

I. Investment negotiations and the “judicial invention” of the legitimate expectations doctrine under the fair and equitable clause

Whereas the FET clause was traditionally a marginal clause in the protection of foreign investors (A), the increasing ‘arbitralization’ of the field of international investment law turned it into the leading cause of liability of host states (B).

A. The traditional view of the FET clause: a marginal standard of investment protection

Investor-State contracts between a state and a foreign investor define the rights and the obligations of the two parties relating to the investment. As such, investment contracts reflect the understanding of the two parties on the mutually agreeable terms applicable to the investment. However, the contract is not the only legal instrument applicable to an investment. Besides domestic law, states, including least developed countries, have concluded bilateral investment treaties aiming at protecting, at the international level, the investments made by the nationals of one party in the territory of the other. Some of these agreements are concluded between developing countries. Others are concluded between developed countries. However, the majority of bilateral investment treaties involve a developing and a developed country.

In a general manner, bilateral investment treaties protect only the investment made by the nationals of one of the parties in the territory of the other party, through substantive and procedural guarantees, including the right to have recourse to arbitration. As such, the protection that investors and their investment may have under investment treaties rarely covers the period prior to the investment.¹

Yet, since the beginning of the twenty-first century, investment tribunals have created a link between the conditions under which an investor has accessed to the territory of the host state and its subsequent treatment. The FET clause that is embodied in several bilateral investment treaties served of linkage point. On very uncertain legal grounds,² investment tribunals held that the frustration of the legitimate expectations entertained by foreign investors during the pre-investment stage breached the FET clause.

The traditional understanding of the FET clause is not very exacting and hardly foresaw this possibility. Thus, in the *Neer* case, which was decided in 1926, the arbitral tribunal held that:

“the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”³

The *Neer* case is the remnant of the inter-war period when the legal rights of individuals in international law were not immediate, but derivative. Before 1945, individuals' rights under international law were substantively protected only through the floor of the minimum standard of treatment. Procedurally, their respect was guaranteed through the subsidiary and ad hoc mechanism of diplomatic protection.⁴ It is clear that the traditional minimum standard of treatment has benefited from the changing perceptions on the protection of human rights at the international level. Still, obligations arising under the fair and equitable treatment clause are not

¹ See, on the different approaches in treaty practice, RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 88-89 (OUP 2012).

² Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 (1) ICSID Review 88, 91-92 (2013) (observing that one of the first cases to rely upon the doctrine of legitimate “cited no authority which would support the inclusion of the protection of “basic expectations” in the fair and equitable standard.”)

³ L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, 15 October 1926, UNRIAA, vol. 4, 61-62.

⁴ Hence, the cases *Mavrommatis Palestine Concessions* (Judgment) (1924) PCIJ Series A No 2 at 6-37; *Interhandel Case* (Switzerland v. USA) 1959 ICJ REP. 6. (March 21); *Elettronica Sicula S.P.A. (ELSI)*, (Judgment) (1989) ICJ REP. 15 (July 20); *Barcelona Traction, Light and Power Company, Limited* (Judgment) ICJ REP 3 (February 5); *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), (Merit) (2010) ICJ. REP. 639 (November 30).

normally very exacting.⁵ Actually, FET clauses did not attract many criticisms, if any, during the challenge of the New International Economic Order unlike the legal regime applicable to nationalization. It is, therefore, not a surprise that states did not show any reluctance to include FET clauses as a standard of protection applicable to foreign investments in their investment treaties. It would be pointless for the parties to conclude a bilateral investment agreement when they intend to treat their respective nationals and their investments unfairly or in an inequitable manner.

It is only recently that the FET clause gained prominence in the protection of foreign investments thanks to investment tribunals. In the traditional diplomatic protection system, only few cases of fair and equitable treatment reached the adjudication stage. The majority of cases involving a breach of the rights of a foreigner remained at the domestic level through the discretionary character of a state's choice to resort to diplomatic protection or through the conditions relating to it, such as the exhaustion of local remedies. In the current system of investment law, none of these traditional "safeguards" exists, except provisions to the contrary. Quite often, foreign investors initiate directly arbitration proceedings, based on bilateral investment treaties, in order to solve disputes relating to the fairness and equity of their treatment.

It is obvious that a state and an investor's views could diverge in concrete cases on whether the investor was treated fairly and equitably. The increasing "judicialization" of the field of international investment law entailed, almost naturally, the delegation to arbitral tribunals of the power to determine the legal significance of the terms "fair and equitable", and how the legal standard that they embody should be applied in concrete cases.

B. The regained importance of the fair and equitable treatment standard

In less than a decade, starting from the early 2000, investment tribunals turned the previously benign FET clause into a powerful weapon against host states. The open texture of the terms "fair and equitable treatment" allowed these tribunals to expand the scope of the protection allocated to investors under this heading. Thus, the *Tecmed* standard, which is the most influential *dictum* in this respect, reads:

"The Arbitral tribunal considers that this provision of the Agreement [the FET clause], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. 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, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all state actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host state to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive

⁵ See a recent recollection in *International Thunderbird Gaming Corporation v. The United Mexican states*, UNCITRAL, Award (26 January 2006), para. 194.

the investor of its investment without the required compensation. In fact, failure by the host state to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host state and to determine whether the actions of the host state conform to the fair and equitable treatment principle.”⁶

The consecration by the *Tecmed* decision of the legitimate expectations doctrine was an instant success. Following the *Tecmed* case, investment tribunals singled out three types of expectations as deserving protection under the fair and equitable treatment clause. The non-contentious type of expectations relates to those arising from contractual stipulations limiting the regulatory power of the state to take measures regarding the investment, such as stabilization clauses. These specific arrangements have been considered as capable of generating legitimate expectations to their performance. The second type of expectations is controversial and relates to legitimate expectations that tribunals have based on informal representations, guarantees or assurances that a state may provide to investors. The third type of expectations is even more controversial. It concerns the finding of some tribunals that investors have legitimate expectations to the stability and predictability of the general regulatory framework governing their investments.

Concretely, the legitimate expectations doctrine enlarges the scope of the responsibility of the host state in two main ways.

First, it extends the scope of the protection granted to investors to the pre-investment period. However, even formal proposals made during negotiations are not considered as binding upon states, unless when they are accepted in a legal instrument. Any contrary position would run against the very essence of negotiations, which entail that states make proposals and counterproposals for the sake of reaching an agreement.⁷ In other words, legitimate expectations might be based on representations less formal than proposals made during negotiations. Certainly, the protection under the legitimate expectations doctrine comes into play only when the investment is ultimately secured.⁸ Nonetheless, the doctrine allows expectations that are not necessarily secured in the terms of the contract to provide a cause of action and a ground of liability of the host state before investment tribunals.

Second, investment tribunals have not taken into account the intent of the host state to create judicially enforceable expectations to the benefit of the investor. The contestations that often arose in the context of litigation indicate that host states were not always aware that their actions or omissions could be later interpreted as creating judicially enforceable expectations. Besides, under the principle of the continuity of the international law personality of the state,⁹ a government could be held responsible for frustrating expectations that were unknowingly and unwillingly generated by previous governments.

⁶ *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican states*, ICSID Case No. No. ARB (AF)/00/2, Award (29 May 2003), para. 160.

⁷ *Government of the State of Kuwait/The American Independent Oil Company (AMINOIL)*, March 24, 1982, *International Legal Materials*, 1982, vol. 21, p. 1011, par. 70 (taking for “[g]ranted that a party cannot be held to attitudes taken up in the course of negotiations – involving, as is often the case, concessions and renunciations offered for the sake of reaching an agreement – the same is not true of an initial position taken up at the outset of the negotiations, for this reflects, at least grosso modo, the way in which that party assesses its rights and obligations on the juridical plane.”)

⁸ *Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat*, UNCITRAL, Award (17 December 2015), para. 330.

⁹ *Aguilar-Amory and Royal Bank of Canada Claims (Great Britain v. Costa Rica) (Tinoco Claims Arbitration)*, 1 R.I.A.A 369 (1923).

On the basis of the legitimate expectations doctrine, investment tribunals did not hesitate to award investors substantial compensation, often equivalent to that due if their properties had been expropriated.¹⁰ However, it is doubtful whether the *Tecmed* dictum was a sound restatement of the law. In a study published in 2013, Michele Potestà found that:

“if one observes the awards given by investment treaty tribunals in the last few years, one will hardly find any example where the concept of ‘legitimate expectations’ has not been invoked by the claimant and, at least to a certain extent, endorsed by the tribunal.”¹¹

However, it is not clear whether the *Tecmed* dictum stands as good law. A fierce critic of the dictum observes that:

“[The dictum] is a fortuitous winner because this passage from the award in *Tecnicas Medioambientales Tecmed SA v. United Mexican States* did not supply the test that the tribunal actually applied to Mexico’s conduct on the facts of that case. Perhaps for this reason, no authority was cited by the tribunal in support of its obiter dictum. The *Tecmed* ‘standard’ is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain. But in the aftermath of the tribunal’s correct finding of liability in *Tecmed*, the quoted obiter dictum in that award, unsupported by any authority, is now frequently cited by tribunals as the only and therefore definitive authority for the requirements of fair and equitable treatment.”¹²

Recent decisions of investment tribunals have adopted a more restrictive approach to the legal ground of responsibility based on legitimate expectations. Nonetheless, states have also taken measures to limit the scope of the legitimate expectations doctrine.

II. Strategies devised by states to address the challenges raised by the legitimate expectations doctrine

States have reacted to the enlargement of the scope of the fair and equitable treatment clause essentially by amending its wording in their investment treaties, as well as their Model BITs. As useful as this approach may be for the future, it does not always provide a solution instantly applicable by investment tribunals (A). Thus, this study suggests that the least developed countries engage with the existing investment case law on legitimate expectations in a more strategic manner (B).

A. Tackling the challenge of the legitimate expectations doctrine: the treaty approach

States have addressed the challenge raised by the legitimate expectations doctrine in various ways. For instance, states parties to the North American Free Trade Agreement (NAFTA) opposed any interpretation of the concept of fair and equitable treatment as including the doctrine of legitimate expectations. In an interpretative note, state parties to the NAFTA treaty interpreted the FET

¹⁰ To avoid any confusion, the *Institut de droit international* recalled in 2013 that: “Compensation due to an investor for violation of the FET standard shall be assessed without regard to compensation that could be allocated in case of an expropriation, in accordance with the damage suffered by the investor.” See, Article 13 of the IDI Resolution, *Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties*, Tokyo Session, 13 September 2013.

¹¹ Potestà, *supra* note 2, 88.

¹² Zachary Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureka and Methanex*, 22 (1) *Journal of International Arbitration* 27, at 28 (2006).

clause of this instrument as referring only to the customary international law minimum standard of treatment of foreigners.¹³ As a consequence, the doctrine of legitimate expectations plays a marginal role in the case law of NAFTA investment law tribunals.¹⁴ The recent EU-Canada Comprehensive Economic and Trade Agreement (CETA), which includes a NAFTA state party, that is to say Canada, displays a similar restrictive approach to the doctrine of legitimate expectations.¹⁵ As the formulation of the FET clause in the NAFTA is similar to its formulation in other investment treaties, no textual difference compels a distinction between NAFTA and non-NAFTA regimes.¹⁶ Still, outside the NAFTA context, the protection of investors' legitimate expectations has rather flourished.

Unlike NAFTA countries, least developed countries have not unanimously taken a position with respect to the legitimate expectations doctrine. Some African least developed countries have progressively tried to limit the scope of the fair and equitable treatment standard in different regional legal instruments. They have mainly adopted in this respect three strategies.

Similarly to NAFTA treaty parties, an initial strategy has consisted in defining the fair and equitable standard by reference to the minimum standard of treatment under customary international law. Thus, the Economic Community of West African States (ECOWAS) Common Investment Rules define the FET standard as a component of the "customary usage of international law minimum standard of treatment of aliens as the minimum standard of treatment to be accorded to investments".¹⁷ The 2007 Common Market for Eastern and Southern Africa (COMESA) Investment Rules also adopt a similar approach. It strengthened this approach by specifically imposing on arbitrators to take into account the different levels of development of the COMESA member states. Thus, Article 14 paragraph 3 of the COMESA Investment Rules provides that:

"For greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time. Paragraphs 1 and 2 of this Article do not establish a single international standard in this context."¹⁸

¹³ NAFTA Free Trade Commission, Dispute Settlement: Notes of Interpretation of Certain Chapter 11 Provisions, point 2.1 (July 31, 2001).

¹⁴ See Patrick Dumberry, *The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105*, 31 (1) Journal of International Arbitration 47-74 (2014).

¹⁵ Article 8.10 paragraph 4 of the CETA, 30 October 2016: "When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated." The text of the agreement is available at: <http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf>.

¹⁶ Florian Dupuy & Pierre-Marie Dupuy, *What to Expect from Legitimate Expectations? A Critical Appraisal and Look into the Future of the "Legitimate Expectations" Doctrine in International Investment Law*, in FESTSCHRIFT AHMED SADEK EL-KOSHERI: FROM THE ARAB WORLD TO THE GLOBALIZATION OF INTERNATIONAL LAW AND ARBITRATION 272, 279-280 (Mohamed Abdel Raouf, Philippe Leboulanger & Nassib G. Ziadé eds., 2015).

¹⁷ Supplementary act A/SA.3/12/08 adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (available at, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3266>, visited on 1 October 2017).

¹⁸ Article 14, paragraph 3 of the Investment Agreement for the COMESA Common Investment Area (available at, http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf, visited on 19 September 2017).

The SADC Model BIT of 2012 maintains the fair and equitable treatment clause only as a second-best alternative,¹⁹ while voicing strong criticisms against it. It expressly defines the FET standard using terms that mirror the formula used in the above-quoted *Neer* case.²⁰

In another move, African countries facing the challenge raised by the extensive interpretation of the FET clause advocated by investment tribunals have proposed an alternative standard. The new proposal took place in the context of the SADC, which Model BIT suggests replacing the fair and equitable treatment clause with the “fair administrative standard”. The relevant provision reads as follows:

“The State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice] [due process] to investors of the other State Party or their investments [taking into consideration the level of development of the State Party].”²¹

It is noteworthy that Article 5 of the Model SADC BIT refers to the level of development of the host State, and to the administrative and procedural due process protection of the investor.

A final strategy of African countries, including African least developed countries, to withstand the challenge raised by the case law on the legitimate expectations doctrine has consisted in excluding altogether the fair and equitable standard of protection from the recently adopted Pan-African Investment Code (PAIC). The PAIC, which aims at providing African countries with a model investment code to use in their BITs negotiations, omits the “fair and equitable treatment” clause altogether, including its legitimate expectations sub-category.²²

As useful as these strategies are in signaling the discontent African countries feel with respect to the current investment case law on FET, they have obvious limitations.

First, model BITs, such as the SADC Model BIT and the PAIC are not treaties in force. Therefore, investment tribunals are not bound to apply their provisions in concrete cases. These model BITs become part of the applicable law only when African countries manage to eradicate the standard of fair and equitable treatment from their bilateral investment treaties, especially those already concluded with capital-exporting countries.

Second, the COMESA and ECOWAS investment rules are binding legal instruments. However, their legal regime is applicable only to the relations between the state parties and their respective nationals. As such, these rules are not applicable to the relations between COMESA and ECOWAS countries with other investors, such as those of capital-exporting countries.

Third, denouncing current bilateral investment treaties will not impede investment tribunals to apply the doctrine of legitimate expectations in the near future. For instance, in reaction to the expansive interpretation of investment tribunals, some states, such as South Africa,

¹⁹ See Article 5 of the SADC Model BIT (available at, <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>, visited on 19 September 2017).

²⁰ Article 5 paragraph 2 of the SADC Model BIT reads: “For greater certainty, paragraph 5.1 requires the demonstration of an act or actions by the government that are an outrage, in bad faith, a willful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency.”

²¹ Article 5, Option 2 of SADC Model BIT (available at, <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>, visited on 19 September 2017).

²² See the Draft Pan-African Investment Code, 26 March 2016, (available at <http://repository.uneca.org/pdfpreview/bitstream/handle/10855/23009/b11560526.pdf?sequence=1>, visited on 21 September 2017).

have started to denounce their bilateral investment treaties or not to renew those that have expired. Yet, the sunset clauses contained in these BITs often postpone their extinction to a later date, usually 10 years after their denunciation.²³ Consequently, all investments made between the period of the denunciation of the BIT and that of its effective extinction may remain protected by the existing bilateral investment treaties, including their fair and equitable treatment clauses.

Pending the eventual success of the different efforts that aim at changing the content or discarding the FET clause altogether, this paper suggests that the least developed countries engage with the existing case law on the protection of foreign investments strategically. Consequently, least developed countries might adjust their investment institutions and practices accordingly in such a way as not to create legitimate expectations.

B. The approach suggested: a strategic engagement with the investment case law on legitimate expectations

A strategical engagement with the existing case law governing the doctrine of legitimate expectations requires a careful reading of the existing case law on the topic. It postulates that an understanding of the relevant case law unveils the red flags to which investment tribunals attach the consequence of generating legitimate expectations. A state, which is aware of these red flags, can try to avoid them and, with them, the risk of unwillingly creating expectations that investment tribunals may later deem legitimate.

However, this strategic engagement with the existing case law relating to the doctrine of legitimate expectations faces one major methodological hurdle. The international investment case law on legitimate expectations is not unanimous. Whereas some tribunals, such as the *Tecmed* decision referred to above, have adopted a very expansive approach to the doctrine, other tribunals have been fairly reserved. Which trend of the existing case law should then provide the basis for making policy recommendations? This paper answers this methodological difficulty in two steps.

First, the difference in outcome between two tribunals does not automatically imply that they differed on the applicable legal standard. Two tribunals may diverge with respect to whether in a specific case a state conduct has generated legitimate expectations to the benefit of the investor, while adopting the same underlying legal test. In other words, the facts of the case may play a role. It is only when the legal standard is different that, in a second step, it becomes necessary to choose among different trends the basis of policy recommendations.

Second, the choice between competing normative standards consecrated in case law should be based upon two main considerations. On the one hand, policy recommendations should not rest exclusively on the reviewer's own views on the doctrine of legitimate expectations and its conditions. In a very contested area such as international investment arbitration, the outcome of a case does not exclusively depend on logic, legal reasoning and skills. Rather, it may also depend on the composition of the bench of the tribunal, as well as the personal sensitivities of the arbitrators.²⁴ Thus, even a statistical analysis of the existing investment case law might prove unhelpful to determine with certainty the appropriate policy recommendations worth formulating. On the other hand, it is not judicious, from a strategic perspective, to be overly cautious and to burden a possible state action by trying to pre-empt every possible negative decision that an

²³ See for example: South Africa's 2013 withdrawal of the 1998 *Agreement between the Belgo-Luxembourg Economic Union and the Republic of South Africa on the reciprocal promotion and protection of investments* BIT (Article 12(2) sunset clause); India's 2016 withdrawal of the 1995 *Agreement between the Republic of India and the Kingdom of the Netherlands for the promotion and protection of investments* BIT (Article 16(1) sunset clause).

²⁴ Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System* 107 (1) *American Journal of International Law* 45-94 (2013).

arbitral tribunal might reasonably make. Consequently, this paper favors distinguishing between (a) areas of consensus, (b) areas of plausible interpretation, and (c) marginal views in the case law on legitimate expectations. This approach holds especially true for investment arbitration due to the tendency of investment tribunals to cross-reference to each other's decisions, without systematically questioning their rationales.²⁵

III. *A brief survey of the case law of investment tribunals on legitimate expectations*

This section provides a very brief overview of the key legal principles upon which investment tribunals have relied to determine whether a state has created legitimate expectations to the benefit of the investor (A). It also examines whether these tribunals have taken into account certain factors, including the level of development of the host country, to exclude or mitigate its responsibility for the creation of adverse legitimate expectations (B).

A. On the parameters governing findings of legitimate expectations by investment tribunals

Investment tribunals have refused to equate the legitimate expectations doctrine with the subjective expectations of the investor.²⁶ Instead, they seem to use four parameters to determine whether a state created judicially enforceable legitimate expectations in favor of the investors. These parameters relate to the nature of the conduct giving rise to legitimate expectations (1), the author of the conduct (2), the moment when it took place (3) and, finally, the conduct characterizing the unlawful act (4).

1) The nature of the conduct giving rise to legitimate expectations

Two trends are identifiable in case law with respect to the nature of the conduct giving rise to legitimate expectations. The first trend of case law was influenced by the dictum formulated by the arbitral tribunal in the *Tecmed* case. The recent trend in case law is more reserved and requests a specific state conduct with respect to the investor. It distinguishes between several hypotheses.

The first hypothesis relates to the situation when the investor has been able to secure contractual guarantees to limit the host state's discretionary use of governmental power. This is the case when the contract contains stabilization clauses. In this context, a question may arise whether the breach of the contract is equivalent to the breach of the bilateral investment treaty. However, the intervention of the state in its sovereign capacity to breach the contract might be significant to establish the breach of the BIT.²⁷ Case law reflects the dual legal significance of contractual clauses. On the one hand, when such contractual commitments exist, the host state is held responsible for failing to respect its contractual obligations, and the legitimate expectations of the investor he had promised not to adversely frustrate.²⁸ On the other hand, tribunals have

²⁵ Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AJIL 179, 179 (explaining that investment treaty case law looks like "a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the view and practices of states in general or the treaty parties in particular").

²⁶ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), at para. 358.

²⁷ See in this respect, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/03, Decision on Jurisdiction, 22 April 2005, para. 268; *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003, at 51.

²⁸ *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008), para 261.

dismissed claims based on legitimate expectations pointing that, in the case at hand, the investor had not been able to secure a specific provision limiting the use of governmental power, such as stabilization clauses.²⁹

The second hypothesis deals with the situation when an investor has not been able to obtain specific contractual clauses relating to his investment. Yet, the investor alleges that, in an informal manner, through promises, representations, guarantees and assurances, the host state conveyed legitimate expectations that were later frustrated. Investment tribunals have referred to these informal promises and representations in two manners.

Adopting a very strict approach, some tribunals have required investors' expectations to possess a "quasi-contractual nature". Although not very clear, these tribunals seem to require a relation of a reciprocal nature between the investor's decision to invest and the government's representations. Thus, in this context, tribunals have taken into account the fact that the guarantees offered by the state were instrumental in inducing the investment.³⁰ Other tribunals have not emphasized the "quasi-contractual" character of the investors' expectations. They have rather pointed to their specificity, downplaying therefore the immediate link between the representations made by the host state and the investor's decision to invest. Representations have been deemed specific, on the one hand, when it was proven that they related to a specific investor or a group of identifiable investors and, on the other hand, when they specified the exact standard of conduct the host state committed to.³¹ Conversely, investment tribunals have dismissed representations, which were deemed of a general character. This is the case of representations which did neither address an identifiable investor nor contain a specific commitment from the government. Thus, general statements made in the context of a "roadshow", where government officials speak highly of the investment conditions in their countries, were not considered as generating legitimate expectations.³² In the same manner, simply encouraging remarks by the host State are not sufficient to meet the threshold of specificity.³³

Tribunals have considered that conduct arousing legitimate expectations can be both positive or negative. Oral and written promises, assurances and representations, which imply a positive action from a state official, were all considered as capable of generating legitimate expectations to the benefit of the investor.³⁴ In addition, the arbitral tribunal in *El Paso v. Argentina* accepted

²⁹ *Impregilo S.p.A. v. Argentine Republic* (I), ICSID Case No. ARB/07/17, Final Award (21 June 2011), at para. 290-291; *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Final Award (21 January 2016), para. 490; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (28 June 2016), paras. 426-427; *Rusoro Mining Limited v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016), para. 465.

³⁰ *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 766 (affirming that: "Fourth, as the tribunal has explained in its discussion of the 1105 legal standard, a violation of Article 1105 based on the unsettling of reasonable, investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the state and the investor, whereby the state has purposely and specifically induced the investment.")

³¹ *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award (16 May 2012), at paras 269-270 (holding that: "As indicated above, the unilateral expectations of a party, even if reasonable in the circumstances, do not in and of themselves satisfy the requirements of international investment law. To satisfy such requirements claimants must demonstrate reliance on specific and unambiguous state conduct, through definitive, unambiguous and repeated assurances, and targeted at a specific person or identifiable group. This they have not done.")

³² *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), at paras. 375-378 and see also 392-395.

³³ *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (30 November 2011), para 10.3.7.

³⁴ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008), para 327 (Ecuador's commitments to the Claimants were echoed in written and oral assurances which were provided by high-ranking government officials prior to the investment.)

that legitimate expectations could be created through “specific promises in person-to-person business meetings”.³⁵ Although tribunals do not reject oral evidence *per se*, no tribunal seems to have yet based legitimate expectations exclusively on private oral statements alleged by the investor.³⁶ Besides, tribunals tend to give more weight to contemporary written evidence than to the subsequent denial by a state official of an intent to create legitimate expectations.³⁷ Negative acts, such as abstention, especially the failure to clarify a legal issue relating to the investment in a situation when the government was under the obligation to do so, have also been considered as capable of generating legitimate expectations.³⁸

One investment tribunal has attached legitimate expectations to the “common level of legal comfort” an investor might expect in any country, without linking it to a specific conduct of the host state with respect to the investor.³⁹ The legitimate expectations that are considered under this heading relate, more or less, to the ordinary functioning of the domestic law rules and institutions. In these circumstances, the host state seems bound only to satisfy the requirements of due process when affecting negatively a foreign investment. In other words, procedural legitimate expectations require from the host state to act in conformity with general principles of law, such as good faith and the principles of non-discrimination.⁴⁰

2) The author of the conduct giving rise to legitimate expectations

Investment tribunals generally held that only a *state* conduct can create legitimate expectations opposable to the host state. The conduct of private actors is not capable of generating legitimate expectations to the benefit of the investor. Thus, an investor cannot claim legitimate expectations when he or she was misled by a legal advice provided by a private counsel which turned to be wrong.⁴¹ In contrast, all state organs, including those of entities exercising governmental actions,

³⁵ El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award (31 October 2011), para 375-378.

³⁶ Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award (18 August 2008), para. 352 (holding that: “The Tribunal has found no assurances on record concerning outstanding penalties. It is true that the Claimants refer to assurances given in meetings held with the Government (...) However, the former Minister of Energy and Mines, as well as the Minister of Finance, categorically deny having given such assurances. In the meetings they only explained the economic difficulties faced by Ecuador and expressed their satisfaction with Duke’s intention to invest in the country. (WS Raúl Baca Carbo, former Minister of Energy and Mines and WS of Fidel Jaramillo, former Minister of Finance). In view of such contradictory declarations and of the lack of contemporaneous written evidence, the Tribunal cannot but conclude that the existence of assurances is not established.”)

³⁷ Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia, ICSID Case No. ARB/04/6 Award (19 November 2017), para. 272 (maintaining that: “The Tribunal has taken into account that Mr xxx in his oral testimony, denied that either he or his Ministry ever intended to make any promise or representation that the Banks would get paid under the Estrôbprom Guarantee. The Tribunal accepts that no contractual promise was ever made by the Respondent; but it cannot give any further weight to this testimony, as compared to the terms of the Letter and its contemporary events. The Respondent was manifestly trying to find some means to get the Loan repaid to the Banks; so were the Banks; this was the general spirit of the Estonian Government’s attitude towards the Banks at that time; and the Letter was the natural and concrete result.”)

³⁸ Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Final Award (22 May 2017), para. 103; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 Award (28 September 2007), para. 113. See also, *International Thunderbird Gaming Corporation v. The United Mexican states*, UNCITRAL, Award (26 January 2006) (Separate Opinion Wälde), para. 4.

³⁹ Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award (28 March 2011), para. 70 (pointing out that: “These legitimate expectations were not based on an individual negotiation between Mr. Lemire and the Ukrainian State; they represent the common level of legal comfort which any protected foreign investor in the radio sector could expect.”)

⁴⁰ Dupuy & Dupuy, *supra* note 16, 279-280.

⁴¹ ADF Group Inc. v. United states of America, ICSID Case No. ARB (AF)/00/1, Award (9 January 2003), at para. 189.

are capable of generating legitimate expectations. In conformity with the rules of attribution under the responsibility of states for international wrongful acts,⁴² it is irrelevant whether the organ whose conduct is relied upon by the investor belongs to the executive, the judiciary or the legislative power of the state. It is also irrelevant whether such organ occupies a high or a low-ranking position in the state organization. Yet, investment tribunals give greater importance to statements of high-ranking state officials, such as presidents,⁴³ and ministers,⁴⁴ when deciding to recognize the existence of legitimate expectations. For illustration purposes, in *MTD v. Chile*, the arbitral tribunals took into account a written statement made by the President of Chile which was read at the inauguration of the investment project, when upholding the investor's legitimate expectations.⁴⁵

Second, it is irrelevant whether the conduct of the organ at stake is in conformity or not with the rules of the domestic legal order. The test that seems accepted by investment tribunals in this regard is whether the conduct of the state organ was "cloaked with the mantle of governmental authority."⁴⁶ In other words, except cases when a state organ is manifestly incompetent to take a measure, his or her conduct will be deemed capable of generating legitimate expectations.

3) The moment of creation of legitimate expectations

The moment when legitimate expectations have to be created is the period of the investment. This finding is already apparent from the *Tecmed* dictum.⁴⁷ This period has been interpreted in a flexible manner to cover the entire period between the private decision to invest in a specific country to the moment when the investment is made and operational.⁴⁸ We have already alluded to the increasing trend in case law to require a certain link of reciprocity or causality between the decision to invest and the informal representations made by state officials. Excluding any representation which had no effect in the decision to invest is a consequence of this requirement. Representations offered after the investment also fall under this category.⁴⁹ As such, they do not generate legitimate expectations. The only plausible exception in this regard relates to the decision

⁴² See the bases of attribution under the law of state responsibility in Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 (adopted by the General Assembly through resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol. I)/Corr.4.)

⁴³ *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007), para 300 (referring to the message to Congress by Argentina's president when requesting the ratification of the relevant BIT).

⁴⁴ *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia*, ICSID Case No. ARB/04/6 Award (19 November 2017), paras 247-247; 263-272.

⁴⁵ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004), paras 156-157.

⁴⁶ *Southern Pacific Properties (Middle East) and Southern Pacific Properties Ltd v. The Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992, 82

⁴⁷ *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican states*, ICSID Case No. No. ARB (AF)/00/2, Award (29 May 2003), para 154.

⁴⁸ *Mamidoil Jetoil Greek Petroleum Products Societe SA v Albania*, ICSID Case No ARB/11/24, Award (30 March 2015), at paras. 695-698; See also, *AES Summit Generation Limited and AES-Tisza Erömu Kft v. Hungary*, ICSID Case No ARB/07/22, Award (17 September 2010), at para. 10.3.36; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008), at para. 340; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), at para. 130. *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Final Award (22 May 2017), paras. 262; *AES Summit Generation Limited and AES-Tisza Erömu Kft v. Hungary*, ICSID Case No ARB/07/22, Award (17 September 2010), at para. 9.3.13.

⁴⁹ *Mamidoil Jetoil Greek Petroleum Products Societe SA v Albania*, ICSID Case No ARB/11/24, Award (30 March 2015), at para. 695.

to continue or to increase an ongoing investment.⁵⁰ Representations made in such contexts may also legitimately arouse the expectations of the investor to compliance with their terms.

4) The conduct breaching legitimate expectations

Investment tribunals have taken a wide range of situations into account to determine whether a state frustrated the legitimate expectations it had generated.

First, tribunals have considered that the inconsistency between representations made by different organs of the host state breached investors' legitimate expectations. Thus, in the *Metalclad* case, the contradiction between statements of the federal government and later those of the local government regarding the necessity of a permit for the investment was held to frustrate the investor's legitimate expectations.⁵¹ The contradictions between the promises made by state officials belonging to the executive branch of the government and the decisions taken later by the judiciary branch were also held as breaching the investor's legitimate expectations in *Franck Charles Arif v. Republic of Moldova*.⁵²

Second, investment tribunals have considered that legitimate expectations were breached in case of inconsistency between the representations made by the host state, viewed as a unilateral whole, and its subsequent behavior.⁵³ In this context, investment tribunals have not deemed relevant the fact that the representations conveyed to the investor had no legal basis under domestic law when ascertaining whether they could generate legitimate expectations. Thus, in *SPP v. Egypt*, the arbitral tribunal held that:

"It is possible that under Egyptian law certain acts of Egyptian officials, including even Presidential Decree No. 475, may be considered legally nonexistent or null and void or susceptible to invalidation. However, these acts were cloaked with the mantle of governmental authority and communicated as such to foreign investors who relied on them in making their investments. Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts. If the municipal law does not provide a remedy, the denial of any remedy whatsoever cannot be the final answer."⁵⁴

⁵⁰ See, *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award (12 November 2010), para. 287. "legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment".

⁵¹ *Metalclad Corporation v. The United Mexican states*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), at paras. 85 and 85-88.

⁵² *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013), at para 557.

⁵³ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, (Award 22 September 2014), para. 577-583, especially 578-579 (observing that: "For almost twenty years from the granting of the Brisas Concession, the Administration raised no objections to Claimant's mining activities regarding what in the last stage of the relations it alleged to be a failure to respect time-limits fixed by the corresponding Mining Law and the Mining Title, leading to the termination of the various concessions. (...) Claimant had therefore good reasons to rely on the continuing validity of its mining titles and rights and an expectation that it would obtain the required authorization to start the exploitation of the concessions.")

⁵⁴ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No ARB/84/3 Award (20 May 1992), paras. 82-83. See also, *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision of Jurisdiction (6 July 2007), para. 190-192 (holding that: "In the Tribunal's view, Respondent

However, when an investor has induced a state in issuing representations which were based on wrong facts, he or she cannot later claim legitimate expectations on the basis of such a decision.⁵⁵

Third, investment tribunals have held that bribery forced upon an investor by state officials to secure its investment were breaches of his or her legitimate expectations. In *EDF v. Romania*, the tribunal held that:

“A request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the claimant pursuant to the investment treaty, as well as a violation of international public policy, and (...) exercising a State’s discretion on the basis of corruption is a (...) fundamental breach of transparency and legitimate expectations.”⁵⁶

B. The possibility of mitigating factors

Two mitigating factors are potentially relevant when examining the creation of legitimate expectations. On the one hand, one may wonder whether the ‘biographical’ situation of the host country is to be taken into account when determining the legitimate character of the expectations alleged by an investor. On the other hand, one may question whether an investor has a duty of due diligence, which would absolve or mitigate the responsibility of the host state.

Regarding the first question, no tribunal seems to have ever rejected the applicability of the doctrine of legitimate expectations based on the fact that the host state was a developing or a least developed country. Thus, legitimate expectations were held in favor of investors against developing and least developed and developing countries alike, including Egypt, Tanzania, Burundi, and Mongolia. Actually, the defendants in the majority of the case law relating to the legitimate expectations doctrine are developing or least developed countries. The level of development is not, therefore, a blanket exception to the application of the legitimate expectations doctrine. Nevertheless, some investment tribunals factored the general conditions of the host country and took them into account when analyzing the legitimate character of the expectations claimed by the investor. Three hypotheses are noteworthy. First, investment tribunals have considered that investors cannot claim legitimate expectations to the stability of the law applicable to their investment when investing in countries transitioning to a market economy.⁵⁷ Second, investment tribunals have held the same view with respect to investments made in countries facing a general instability or political disturbances such as *coups d’Etat*.⁵⁸ Third, some investment

cannot simply avoid the legal effect of the representations and warranties set forth in the JVA and the Concession by arguing that they are contained in agreements which are void ab initio under Georgian law.”)

⁵⁵ *International Thunderbird Gaming Corporation v. The United Mexican states*, UNCITRAL, Award (26 January 2006), paras. 151-159.

⁵⁶ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009), para. 221 (holding that : « The Tribunal shares the Claimant’s view that a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that “exercising a State’s discretion on the basis of corruption is a [...] fundamental breach of transparency and legitimate expectations.”); See also, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14 (Award, 22 June 2010), para. 422.

⁵⁷ *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, (Award) para. 370; *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, (Award), paras. 292-293; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011), at paras. 301-302; See also, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), at paras. 334-336.

⁵⁸ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009), at paras 192-197; *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12 (Award 7 June 2012), para 245.

tribunals have also limited or rejected the scope of legitimate expectations to a stable legal framework that a foreign investor may claim when investing in countries facing economic and financial crises.⁵⁹ A tribunal has in this context pointed the significant business experience that the investor had in the country to challenge his claim to legitimate expectations.⁶⁰ As apparent, the biographical situation of the host state was taken into account only in relation to claims of legitimate expectations to the stability of the legislative framework governing the investment. None of these instances concerned legitimate expectations based on contractual provisions or those based on specific representations, assurances and guarantees offered by the host state.

Regarding the second point, some tribunals have refused to recognize legitimate expectations claimed by the investor when the latter has failed to exercise the level of due diligence to be expected from a professional businessman. Thus, in *Parkerings v. Lithuania*, the tribunal rejected the investor's claim arguing, among others, that he could have obtained the relevant information, including by securing the help of a law firm.⁶¹ In *MTD v. Chile*, the tribunal observed that

“it is the responsibility of the investor to assure itself that it is properly advised, particularly when investing abroad in an unfamiliar environment. However, in the case before us, Chile is not a passive party and the coherent action of the various officials through which Chile acts is the responsibility of Chile, not of the investor.”⁶²

Sharing the blame between the parties, the tribunal took into account the failure of the investor to conduct an independent due diligence investigation with respect to the quantum.⁶³

IV. Policy recommendations

This paper has reviewed the international investment case law on legitimate expectations with the aim of identifying the factors structuring the decision of tribunals to hold a host state responsible on this account. On this basis, I suggest the following policy recommendations that may assist least developed countries to avoid international responsibility on the basis of the legitimate expectations doctrine.

At the psychological level, least developing countries should adopt a broad definition of the notion of “investment negotiations”. The negotiations of investment contracts should not be defined restrictively to refer only to the negotiations of their terms. Instead, it should be broadly defined to encompass the conduct of the parties relating to the implementation of the subjective decision to invest until its concrete operationalization. Consequently, least developing countries should save, and keep good records of the communications, oral and written, made in this context. As investments may last decades, only an institutional memory could assist incoming state officials to know and understand, beyond the terms of specific contracts, the actions of their predecessors and their margin of action. For evidentiary purposes, state officials could feel more relaxed when making oral statements in private settings than written or oral statement in a public context.

⁵⁹ Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5, para. 75.

⁶⁰ Metalpar S.A. and Buen Aire S.A. v. Argentine Republic, ICSID Case No. ARB/03/5 (6 June 2008), para 187.

⁶¹ Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (11 September 2007), at para 342.

⁶² MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (25 May 2004), para. 117.

⁶³ Ibid., paras. 242 and 243.

At the institutional level, two main recommendations may arise from this analysis.

First, developing countries were often held to have frustrated the legitimate expectations of investors through the inconsistent views of their organs. The logical remedy to this situation consists in coordinating internally the relations between state organs. In this respect, several countries, including certain least developed countries, such as Rwanda, have established investment facilitation centers, which accompany investors in the entire process leading to the investment. Depending on the terms of their mandate, investment promotion and facilitation centers may centralize and streamline the relations between the host state and foreign investors, mitigating therefore the possibility of inconsistent and contradicting statements. However, it would be pointless to establish investment facilitation centers while allowing, at the same time, different domestic actors to interact with foreign investors without any coordination.⁶⁴

Second, investment tribunals have often given great weight to statements made by high-ranking state officials, such as presidents and prime ministers, when these statements contained specific promises directed to identifiable investors. In the majority of cases, the statements made by these holders of a political office did not rest upon a thorough knowledge of the domestic and international legal frameworks governing the investment. It seems, therefore, sensible that the relations between investors and the host state take place at the administrative and expert level, and not at the political level. It is easy to prove that a subordinate low-ranking state official has acted *ultra vires* and to call on the foreign investor's duty of due diligence in such context. However, it is more difficult to challenge the fact that the investor could legitimately rely upon statements made by a high-ranking state official, such as a president or a prime minister, or of any minister acting in the field of his or her competence.⁶⁵ Although presidents and prime ministers may act *ultra vires*, the circumstances when they do so are not manifest to a third party, such as the foreign investor. This recommendation does not aim at setting aside the long tradition of the economic diplomacy that high-ranking state officials naturally conduct. High-ranking state officials may still participate in "roadshows" or praise in a general manner the attractiveness of their country. However, their statements should not target identified or identifiable investors nor specifically detail the future conduct of the state, when it is not certain that the government wants to be bound by their terms.

At the relational level, three main considerations have to be kept in mind.

First, communications relating to an investment, even before the signature of an investment contract and its operationalization, are potential sources of rights and obligations relating to such investment. Consequently, least developed countries should carefully draft these communications. They should also keep in mind the possibility that a given communication might potentially be invoked against them in a litigation context. Consequently, it is strongly recommended that least developed countries establish an internal review mechanism of the legal significance of their communications directed to investors. Besides, the terms of such communications, as well as their possible exceptions and qualifications, should be carefully drafted.

⁶⁴ MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (25 May 2004), at para. 163.

⁶⁵ On this last point, see *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016), at paras. 553-557 (refusing to base legitimate expectations on low-ranking state officials representations, as well as on high-ranking state officials acting *ultra vires*, but accepting that the investor could hold legitimate expectations on assurances given by the Minister of environment on environmental matters).

Second, the state officials of least developed countries dealing with foreign investors should systematically invite further requests for clarification. This forthcoming attitude, which may be expressed in communications addressed to investors has two advantages. On the one hand, it helps clarify potential ambiguities on the scope or legal significance of the communication. On the other hand, this attitude clearly shifts the burden of due diligence on the investor in case of doubt.

As far as investment *contracts* themselves are concerned, tribunals have given importance to their terms whether they accepted or rejected claims based on legitimate expectations. The recommendation in this regard is therefore obvious. It consists in including in the contract all the obligations the host state is ready to accept, while excluding therefrom any obligation he is not ready to accept. It is, therefore, important at the moment of drafting the contract to specifically indicate, as far as possible, issues that could be or could fall out of the expectations of the investor.

Dispute Resolution Clauses in Investment Contracts/Investor-State Agreements: Practical Considerations

Paolo Di Rosa

1. Introduction

Investment contracts, also known as “investment agreements” or “Investor-State Agreements (“ISAs”),” are contracts entered into by foreign investors and a host State (or a State agency or instrumentality, or a State-owned entity). Such contracts are designed to govern the terms and conditions under which an investment will be made in the recipient country. They generally relate to major long-term investment projects in the host State, often in high-cost and risky investments, such as in the infrastructure, energy, mining, transportation, and telecommunications sectors. ISAs can take a variety of forms, including, among others, concession agreements, joint venture agreements, production-sharing agreements, licensing agreements, and legal stabilization agreements.

ISAs are often signed before the investment is made, but they can also be signed after the relevant project has already started, or once specific conditions in the market change (for example, in the context of supplemental investments, acquisitions, or privatizations). Although in many instances the terms of an ISA can be the subject of negotiations between the investor and the State, some of them (for example, many of the contracts that are entered into in a context of public tender proceedings, such as licensing or concession agreements) can be contracts of adhesion, in which the terms of the contract are established by the public entity or agency, with little or no latitude granted to the investor to seek modifications.

ISAs are often used by developing States as a mechanism to promote foreign direct investment. Another mechanism that has been used in recent decades is that of State-to-State international investment treaties.¹ One key difference between ISAs and investment treaties is that ISAs are governed by the domestic law of the host State, whereas investment treaties are governed mainly by international law. Furthermore, the parties to the ISAs are, on the one hand, the specific investors who will take part in the project at hand, and, on the other hand, the host State of the investment, or a particular agency or instrumentality thereof, or a State-owned entity. In contrast, the parties to an investment treaty are exclusively the States whose nationals will be protected by the treaty; thus, rather than being a party to such instruments, individual investors are merely potential or eventual beneficiaries of the rights that emanate from the treaty.

¹ Examples of such treaties are Bilateral Investment Agreements (“BITs”) and the investment chapters of Free Trade Agreements (“FTAs”). The latter include bilateral FTAs, or multilateral ones such as the North America Free Trade Agreement (NAFTA). Whether in fact these agreements have a positive impact in attracting foreign investment has been questioned. Foreign direct investment has been dropping in recent years, in LDCs in particular. According to United Nations Conference on Trade and Development (UNCTAD), in 2016, global flows of foreign direct investment fell by 2 per cent from the 2015 figures, to about \$1.75 trillion. Investment in developing countries declined even more, by 14 per cent, and flows to LDCs and structurally weak economies remain volatile and low. However, UNCTAD predicted a recovery of FDI flows in 2017–2018. See unctad.org/en/PublicationsLibrary/wir2017_en.pdf. The issue of whether FDI can be promoted by means of investment treaties and/or ISAs thus remains a relevant one.

The ISAs allocate rights, risks, and responsibilities of the investor and State and/or State-owned entity that are the parties to the contract. ISAs usually also include dispute settlement provisions, and it is such provisions that are the focus of this paper.

1.1. Obligations Undertaken by the State Pursuant to ISAs

There are a wide range of potential obligations that the State can undertake pursuant to an ISA. It is common for the State to be responsible pursuant to ISAs for the “support” or “promotion” of the relevant project by assisting the investor in various ways, such as in obtaining permits from independent local agencies. By signing ISAs, States often also undertake obligations of a procedural nature, such as “dealing in good faith” or with “best efforts” in the pursuit of objectives required for the success of the project.

In some instances the State undertakes a so-called “stabilization” commitment, which is intended to insulate the investor from future changes in the legal framework that is applicable to the investment. Provisions of this nature include (i) “freezing clauses,” pursuant to which the domestic legislation or regulations concerning the project are fixed for the term of the project, such that the investor is exempted from any change in the relevant legislation or regulations; (ii) “economic equilibrium clauses,” pursuant to which a change of legislation does indeed apply to the investor, but the host State agrees to indemnify the investor for any adverse consequences suffered by the latter as a result of such changes; and (iii) “hybrid clauses,” which consist of some combination of the preceding two clauses. Stabilization clauses are attractive to investors because they help reduce the investor’s risk, by establishing clear “rules of the game” and enabling the investor better to adapt to new circumstances that may arise during the life of the contract, thereby reducing the “surprise factor” of sudden changes to the legal framework.

In some instances, ISAs also incorporate certain legal obligations that are more typically found in investment treaties. Such obligations involve the adoption by the State of certain “standards” of treatment designed mainly to protect investors against unfair, arbitrary, unreasonable and/or discriminatory actions or omissions by the host State of the investment. Such standards of treatment can include one or more of the following:

(i) “fair and equitable treatment,” which prohibits the State from engaging in arbitrary, unreasonable, or abusive treatment; from thwarting an investor’s legitimate expectations concerning the project; and from incurring in denials of justice or significant violations of due process which adversely affect the foreign investor. The fair and equitable treatment standard is an absolute standard of protection, which means that its application does not depend on the treatment that the host is giving to investors of third States, or to its own nationals.

(ii) “most favored nation treatment,” which prohibits discrimination of a foreign investor as compared to a similarly situated third-party national. This standard is not an absolute one, but rather a relative one, since it depends on a comparison of the treatment of the foreign investor with the treatment of investors from one or more third States.

(iii) “national treatment,” which requires the host State to give the foreign investor treatment no worse than that which it confers upon its own nationals. This standard, too, is a relative rather than absolute one.

1.2. Potential Liability by the State

A State could be held liable for a breach of a contractual obligation contained in an ISA, either because the State has failed to perform an obligation that it has contractually undertaken to perform under the ISA, or because the State has failed to comply with a guarantee concerning another entity's performance under the ISA. The relevant contractual claim would be governed by the applicable law of the contract (typically, the law of the host State of the investment).

Importantly, however, the State can be held responsible not only under domestic law for breach of the contract, but also potentially under the international law principles that govern the responsibility of States, since an investor may be protected not only by the ISA but also by an international treaty, such as a bilateral investment treaty (BIT) or the investment provisions of a free trade agreement (FTA). Certain BITs and FTAs contain what is known as an "umbrella clause," which creates an obligation for the State under the treaty to observe whatever commitments it may have undertaken with respect to the investor or investment (including — many observers would argue — purely contractual commitments).

2. *Dispute Resolution Clauses in Investor-State Agreements*

2.1. What type of dispute resolution mechanism should be included in an ISA?

The effectiveness of the dispute resolution clause in an ISA will depend on a number of factors, including the nature of the dispute resolution method selected (*e.g.*, litigation or arbitration), and the degree to which the dispute resolution procedures have been tailored to address the necessities of the case at hand, and the governing law. A "multi-step" or "multi-tiered" dispute resolution clause that features a direct negotiation phase, and possibly a mediation phase, can be useful in resolving certain disputes (especially minor ones) at an early stage.

States and State-owned entities often prefer to include in ISAs dispute resolution clauses that provide for litigation in the host State's courts, since that can be the most practical form of dispute resolution for the State from a bureaucratic and political perspective. Moreover, local judges are well trained in the interpretation and application of the host State's laws and regulations, and are generally more sympathetic to the State's cause.

Investors, on the other hand, generally prefer international arbitration as the method of dispute resolution for ISAs, for different reasons. First, international arbitration removes the dispute to a neutral forum, away from the sphere of the domestic courts (which foreign investors often suspect of bias, or view as susceptible either to interference or pressure from government authorities, or to corruption, or both). Second, arbitration allows the parties at least some role in the selection of the arbitrators, which enables them to conform a tribunal with knowledgeable experts who are able to handle the legal and technical difficulties of the case. Third, arbitral proceedings are generally confidential, which can help prevent disclosure of the investor's commercially sensitive information to the public (including potential competitors). Fourth, unlike domestic litigation (which normally provides for two or more levels of appeal of first-instance judicial decisions), an arbitral award is final once issued, and is typically not subject to appeal.² Finally, arbitration

² Arbitral awards are, however, subject to annulment or set-aside, on certain limited grounds. The feature of finality has the obvious advantage to the investor of providing a swifter determination in the event of disputes. However, many multinational companies dislike the fact that there is no recourse of appeal if, for example, the tribunal has

gives the parties some control over the rules that will govern the arbitral procedure, and over other practical aspects of the arbitration which can be important to a foreign investor, such as the language of the proceeding.

Accordingly, whether a State should include in its dispute resolution clause a provision for international arbitration (which is generally more appealing to foreign investors) or one for domestic litigation (which can be more favorable to the State) can depend on the degree of “leverage” that the State has vis-à-vis the investor, and/or the degree to which the State wishes to appeal to the interests of the foreign investors as a way to induce their investment. If international arbitration is selected, the State can take certain steps to minimize the disadvantages thereof, as discussed below.

2.2. If international arbitration is selected, what type of arbitration should it be?

The type of international arbitration that is selected for the dispute resolution clause in an ISA can significantly affect whether the clause will prove beneficial or detrimental to the interests of the State. There are several threshold determinations that a State must make with respect to the type of international arbitration it will select for an ISA.

First, the clause can provide either for *institutional arbitration* (in which the arbitral proceeding is administered by a dedicated international arbitral institution, such as the International Chamber of Commerce (ICC), or the International Centre for Settlement of Investment Disputes (ICSID)), or for *ad hoc arbitration*, in which the parties themselves administer the arbitration. There can be a substantial difference in cost for the parties between institutional and *ad hoc* arbitrations, since the arbitral institutions charge fees that can be significant, especially in complex and long-running disputes. On the other hand, a complex and long-running dispute can be quite difficult to manage from a practical and logistical perspective, so it is often well worth the expense for the parties to have an arbitral institution handle the proceedings. For relatively simple or smaller scale disputes, often an *ad hoc* proceeding will suffice.

The other major choice that must be made is whether to submit the disputes to *investment* arbitration or to *commercial* arbitration. Some ISAs provide for consent by the parties to investment arbitration, for example by agreeing that any dispute relating to the investment that is the subject of the contract can be submitted to arbitration at ICSID, which is the world’s leading investment arbitration entity. For the first few decades of ICSID (which was founded in 1966), the majority of the disputes that were heard at that institution were brought pursuant to ISAs. This has drastically changed, as most arbitrations at ICSID nowadays are asserted pursuant to investment treaties and the investment chapters of free trade agreements.

The implications of this choice — investment v. commercial arbitration — can be significant, both from a practical perspective (because in some instances litigating at ICSID can be somewhat more expensive than doing so in other fora, and the proceedings can last somewhat longer), and also from a legal perspective (including because (i) an award issued by an ICSID tribunal is not subject to modification or annulment by any national court (which implies a certain loss of control by the State), and (ii) an ICSID award is subject to a special enforcement regime delineated in a multilateral treaty to which over 150 States are a party — the ICSID Convention).

made a mistake, minimum due process guarantees of the parties were not observed, or the arbitral procedure had other flaws.

Further, there are certain provisions that States can include in an ISA dispute resolution clause that can help limit the overall cost of any eventual arbitral proceedings, even in instances in which a body of international arbitral rules (such as those of the ICC, or of the United Nations Conference on International Trade Law (UNCITRAL)) will apply. For example, in the dispute resolution clause, the ISA can provide that the relevant arbitral proceedings will be administered by a locally-based arbitral institution or chamber of commerce, rather than by an international institution (even if such local institution or chamber is directed to apply a set of international arbitral rules). By having a local entity administer the arbitration, the State can avoid the often steep costs charged by the major international arbitral institutions (although there is sometimes a significant difference in the quality of the services provided by the institution).

Another way in which the State can help minimize the disadvantages of international arbitration as the dispute resolution mechanism in an ISA is to establish that the seat of the arbitration will be a specified city in the host State (as opposed to one of the more commonly designated seats for international arbitration, such as Paris, London, Geneva, New York, Singapore, and Hong Kong). The seat of the arbitration not only determines which country's law will govern procedural aspects of the arbitration, but it is also generally where the arbitral hearings take place. Further, the seat determines the jurisdiction in whose courts annulment or set-aside of an award can be sought once the award is issued. Therefore, having such seat be a city in the host State can help the State (i) limit the costs of the arbitration, since it obviates the need for the State's counsel team to travel internationally, and to hire lawyers in foreign jurisdictions to handle procedural issues governed by national law (such as compulsion of witness testimony and production of evidence), (ii) avoid annulment or set-aside proceedings in a foreign jurisdiction, once the arbitral award is issued.

2.3. Examples of different types of dispute resolution clauses in ISAs

Set forth below are examples of a variety of dispute resolution clauses that are frequently incorporated into ISAs, including in particular international arbitration clauses, domestic arbitration clauses, "multi-tiered" dispute resolution clauses, and "hybrid" dispute resolution clauses. These are intended merely to illustrate different ways in which ISA dispute resolution clauses can be framed, so that such clauses can be assessed in the light of the practical considerations and recommendations identified in this paper.

2.3.1. International Investment Arbitration Clauses

2.3.1.1. ICSID Model Clause:

Under the ICSID Convention, consent to arbitration can be given in advance of a dispute, with respect to a defined class of future disputes. Clauses relating to future disputes are a common feature of ISAs. The model ICSID clause of this nature for ISAs reads as follows:

"The [Host State] (hereinafter the "Host State") and the Investor (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the following dispute [...]"³

³ See <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/model-clauses-en/7.htm>. Note also that Article 26 of the ICSID Convention provides as follows: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State

2.3.1.2. Peru - Legal Stability Agreement:

“It is the intention of both parties that any problems that may arise in connection with the performance of this Agreement shall be settled in the most expeditious manner possible. As from this moment, it is agreed that any litigation, controversy or claim among the parties, in connection with the construction, performance, enforcement or validity hereof, shall be submitted to the International Center for the Settlement of Investment-Related Discrepancies, to be solved through international de jure arbitration under the Conciliation and Arbitration Rules set forth in the Covenant for the Settlement of Investment-Related Discrepancies among States and Nationals from Other States, approved by Peru through Legislative Resolution 26210.”⁴

2.3.2. International Commercial Arbitration Clauses

2.3.2.1. ICC model clause:

The International Chamber of Commerce (ICC) has the following model arbitration clause that is often used in international contracts, including in ISAs:

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”⁵

2.3.2.2. Bolivia clause:

“Within the framework of Article 69 of the Hydrocarbons Law, any dispute regarding or relating to this Agreement that cannot be resolved in accordance with the procedure established in Clause 22.2 will be resolved by arbitration, in accordance with the provisions of the Law of Arbitration and Conciliation No. 1770 of March 10, 1997. The number of arbitrators shall be three (3), one appointed by YPFB, one appointed jointly by the Participating Company or the Participating Companies party to the dispute and the third one by the two appointed arbitrators previously appointed, with the consent of the Parties to the dispute. If the third arbitrator is not appointed within a period of sixty (60) days from the appointment of the second arbitrator, or if one of the Parties does not appoint an arbitrator, then that arbitrator shall be appointed in accordance with the provisions of the Regulation mentioned below. The seat of the arbitration will be the city of La Paz, Bolivia. The applicable laws will be the laws of the Republic of Bolivia. The arbitration shall be conducted in accordance with the procedure and the Arbitration Rules of the International Chamber of Commerce (ICC). The arbitration shall be conducted in Spanish. In the event that an arbitration related to this Agreement and an arbitration under the

may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.” See ICSID Convention Regulations and Rules https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf.

⁴ See Award, *Aguaytia Energy LLC v. Republic of Peru*, ICSID Case No. ARB 06/13, dated 11 December 2008, at para. 44 (available at https://www.mef.gob.pe/contenidos/inv_privada/sicreci/c_arbitrales/Laudo_Aguaytia.pdf). The Tribunal cited the translation of the Legal Stability Agreement furnished by the Claimant Aguaytia Energy LLC.

⁵ See International Chamber of Commerce, Arbitration Clause, <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>.

Guarantee of Compliance refer to the same matter, such arbitrations shall be consolidated and treated as a single arbitration before the same Arbitral Tribunal.”⁶

2.3.2.3. Panama clause:

“Any dispute, or claim arising out of, relating to or in connection with this Agreement, including, but not limited to, any matter relating to the existence, validity, performance, interpretation, termination, and / or compliance, will be resolved by arbitration under the law and in accordance with the Arbitration Rules of the International Chamber of Commerce (the "ICC") and will be administered by the ICC. The arbitral tribunal (the "Tribunal") shall be composed of three arbitrators. An arbitrator shall be appointed by the party initiating the arbitration (the "Plaintiff") in the Claimant's Request for Arbitration. The second arbitrator shall be appointed by the respondent (the "Respondent") in Respondent's Response. The arbitrators appointed by the parties shall select a third arbitrator, who shall preside over the Tribunal. If within thirty days after the appointment of the arbitrator of each party, said arbitrators have not reached an agreement with respect to the third arbitrator, said third arbitrator shall be appointed by the ICC. The place of arbitration shall be in Miami, State of Florida, United States of America and the law of the Republic of Panama shall apply. The minutes of the arbitration shall be conducted in Spanish but with simultaneous translation into English and all arbitrators shall be fluent in Spanish and English. All submissions must be submitted in English and Spanish, with their respective translation. Witnesses may testify in a language other than Spanish, provided that a simultaneous translation into Spanish and / or English is provided by the party that brings the witness to the procedure. Each party will cover translation costs for its own witnesses and documents. Any award of the Tribunal shall be final and binding upon the Parties, their successors and assignees without the possibility of appeal, or review. Any such decision may be enforceable, if necessary, by any court of competent jurisdiction. The costs of the arbitration, including reasonable attorney's fees, costs and expenses, shall be borne by the losing party or pro rata in accordance with the Tribunals decision in the event of a compromise decision.”⁷

2.3.3. Domestic Arbitration Clauses

2.3.3.1. Peru Clause:

“Any dispute, or claim, concerning the interpretation, execution or validity of this agreement, will be resolve through arbitration according to law. The arbitration shall be carried out in the city of Lima, by an arbitral tribunal made of three members, of which each of the parties shall appoint one, and the two of them will to appoint the third. The arbitrators are expressly authorized to determine the material controversy of the arbitration. The arbitration process shall not exceed sixty (60) working days, counted from the date of designation of the last arbitrator and shall be governed by the provisions of the Legislative Decree No. 1071 [...]”⁸

⁶ See Operation Contract between Yacimientos Petroliferos Fiscales Bolivianos, Repsol YPF E&P Bolivia S.A., BG Bolivia Coporation and PAE, E&P Bolivia LTD. <https://www.scribd.com/doc/249821355/40-A-CONTRATO-DE-OPERACION-YPFB-REPSOL-BG-BOLIVIA-PAE-pdf>.

⁷ See Law Approving Contract No. 36-2017, Republic of Panamá and Banapiña de Panamá S.A. http://www.asamblea.gob.pa/proyley/2017_P_488.pdf.

⁸ See Investment Contract, Republic of Perú and APM Terminales Callao S.A., http://www.investinperu.pe/RepositorioAPS/0/1/JER/CONTRATOS_INVERSION_2010/00024.pdf. See also
Legislative Decree Regulating Arbitration,

2.3.4. “Multi-tiered” Dispute Resolution Clauses

2.3.4.1. Colombia Statutory Provision:

Act No. 80 of 1993 -

Art 68: “The entities referred to in article 2 of this statute and the contractors will seek to solve in an agile, fast and direct manner the differences and discrepancies arising from the contractual activity. To this end, once the differences arise, they will use the mechanisms for the solution of contractual disputes provided for in this Act and conciliation, amiable composition and settlement.

Art. 70: “State contracts may include an arbitration clause in order to submit to the arbitrators' decision any differences that may arise due to the conclusion of the contract and its execution, development, termination or liquidation. The arbitration shall rule according to law. In contracts with foreign persons (as well as in those with a national person), and in which long-term financing and payment systems are contemplated by means of the exploitation of the object constructed, or operation of goods for the celebration of a public service, it may be agreed that disputes arising out of the contract shall be subject to the decision of an International Arbitral Tribunal.”⁹

2.3.5. “Hybrid” Dispute Resolution Clauses

2.3.5.1. Chile Statutory Provision:

Law for the Concessions of Public Works –

Article 36: “Any discrepancies of a technical or economic nature that may occur between the parties during the execution of the concession contract may be submitted to the consideration of a Technical Panel at the request of any of the parties. The Technical Panel, which shall not exercise jurisdiction, shall issue, in accordance with the public procedure established in the regulations, a duly substantiated technical recommendation, within a period of 30 calendar days, extendable once, from the date of filing of the discrepancy . The recommendation shall be notified to the parties and shall not be binding on them. The recommendation of the Panel shall not preclude the authority of the concessionaire to proceed subsequently to the Arbitral Commission or the Court of Appeals of Santiago, even if the dispute rests on the same facts. In such case, the recommendation may be considered by the Arbitration Commission or the Court of Appeals as a precedent for the issuance of its judgment. [...]”

Article 36 bis: “Disputes or claims arising as a result of the interpretation or application of the concession contract or its execution, may be brought by the parties to the knowledge of an Arbitral Commission or the Court of Appeals of Santiago. The Ministry of Public Works may only appeal to the Arbitration Commission once the final commissioning of the work has been authorized, except for the serious declaration of non-compliance

http://portal.osce.gob.pe/arbitraje/sites/default/files/Documentos/Legislacion_aplicable/DL-1071-ley-que-norma-el-arbitraje.pdf.

⁹ See Act No. 80 of 1993, http://www2.igac.gov.co/igac_web/UserFiles/File/web%202008%20/ley%2080-93.pdf (emphasis added).

referred to in Article 28, which may be requested at any time. The technical or economic aspects of a dispute may be brought to the knowledge of the Arbitration Commission or the Court of Appeal, only when they have previously been submitted to the Technical Panel's knowledge and recommendation. The Arbitration Commission will be composed of three university professionals, of which at least two will be lawyers and one of them will preside. The members will be jointly appointed by the parties from two rosters of experts, the first of which will be composed of lawyers and made for the purpose by the Supreme Court, and the second, composed of professionals appointed by the Court of Defense of the Free Competition, by means of public competitive examination, based on objective, transparent and non-discriminatory conditions. Both the Supreme Court and the Court of Defense of Free Competition, must verify the suitability of the professionals chosen and the absence of disabilities and incompatibilities that affect them. The process must comply with the procedure established in the regulations of this law, and be developed within a maximum period of 60 calendar days.”¹⁰

3. *Conclusions and Recommendations for States on Dispute Resolution Clauses in ISAs*

Investor-State Agreements, or investment contracts, typically include dispute resolution clauses, although the contents of such clauses vary widely, depending on the nature of the investor and investment, and the purpose of the contract. Such dispute resolution clauses generally provide for resort to litigation in the courts of the State of the investment — *i.e.*, the host State — or to international arbitration, but in some instances they provide for multi-tiered dispute resolution, in which a negotiation-based mechanism (such as friendly consultations, conciliation, or mediation) precedes an adversarial mechanism (such as domestic litigation, international arbitration, or domestic arbitration).

In many instances it can be less expensive and more advantageous (including in terms of the substantive outcome) for a State to have the ability to resolve disputes in its own judicial system. Accordingly, it can be tempting for the State to include a domestic litigation clause in its ISAs. However, foreign investors prefer international arbitration, amongst other reasons because it inoculates them from the bias that they sometimes face when seeking to redress injury in the domestic courts of the very State against which they are seeking recourse. Arbitration can also prove beneficial to small and medium-sized enterprises, which often lack the resources to litigate in the judicial courts. Accordingly, an international arbitration clause in an ISA can help make the investment more attractive to a foreign investor.

If for this reason the State opts to elect to include an international arbitration clause in its ISA, there are many aspects that the State should consider in order to maximize the benefits, and minimize the risks and disadvantages, posed by such clauses. For example, while institutional arbitration can be more prudent for the State (as well as the investor) for complex disputes, *ad hoc* arbitration should be considered for simpler or lower-value disputes, as such form of arbitration can be less expensive than institutional arbitration.

States should also consider whether they wish to subject to investment arbitration as opposed to commercial arbitration. In many instances, investment arbitration can be more expensive than commercial arbitration, and also can have certain implications for the State in terms of legal

¹⁰ See, Law for the Concessions of Public Works, Decree No. 900, October 31, 1996 <https://www.leychile.cl/Navegar?idNorma=16121>.

recourses, which in certain contexts are different for an investment arbitration context than for a commercial arbitration (for example, with respect to the ability to seek annulment or set-aside of the arbitral award by a national court).

Finally, in selecting an international arbitration clause for their ISAs, and to avoid protracted and potentially expensive disagreements between the parties once a dispute has already arisen, States should make sure to address in the international arbitration clauses of their ISAs certain key issues, such as the seat of the arbitration, the governing law, the language of the arbitration, the number and method for selection of the arbitrators, and the arbitral rules that will apply.

The challenges of investment negotiations in small economies: the case of Myanmar

Kyi Kyi Than Aung

Myanmar is now moving forward towards a democratic transition and implementing a market oriented system for economic development. Economic and legal reforms are being implemented by the Government to support sustainable economic development based on the rule of law. Foreign Direct Investment is one of the main driving forces for economic development, and there has been growing international interest in investing in Myanmar, with its untapped markets and rich natural resources. However, as a small and emerging economy, Myanmar faces challenges in negotiating and resolving disputes in the area of investment, particularly because of capacity and resource constraints.

Responding to new opportunities to promote investment and economic development, Myanmar has made progress towards reforming and modernizing the legal framework related to international investment treaties and disputes. A new Foreign Investment Law was enacted together with key changes in 2012 and was further improved by the 2016 Investment Law,¹ marking some significant milestones for Myanmar. The investment regime draws on the World Bank Guidelines on the Treatment of Foreign Direct Investment,² with key reforms designed to encourage foreign investment, including provisions relating to mode of investment, dispute resolution and international treaty protection.

In the area of dispute settlement, Myanmar introduced a new Arbitration Law in 2016³ in line with international standards in order to create a new more investor friendly climate. With the changing economic circumstances, new arbitration rules that are used internationally are required. Thus, the Government of Myanmar issued instructions that UNCITRAL Arbitration Rules are to be used for all commercial contracts that include foreign parties and Myanmar Ministries.⁴ Myanmar also entered into the United Nations Convention on the Enforcement of Foreign Arbitral Awards (New York Convention) in 2013.⁵

For the purpose of investment promotion and protection, Myanmar has concluded a number of bilateral treaties, including with the United States, Philippines, Vietnam, China, Laos, Thailand, India, Kuwait and Japan.⁶ As Myanmar opens up to greater foreign investment during the

¹ The Foreign Investment Law, The Pyidaungsu Hluttaw Law no. 21/2012, enacted on 2nd November, 2012, available at: http://www.burmalibrary.org/docs15/Foreign_Investment_Law-21-2012-en.pdf. The Foreign Investment Law is repealed by the Myanmar Investment Law of 18 October 2016.

² See “Guidelines on the Treatment of Foreign Direct Investment”, in World Bank, Legal Framework for the Treatment of Foreign Investment, Volume II, 1992, available at <http://documents.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf>.

³ The Arbitration Law, The Pyidaungsu Hluttaw Law No.5/2016, enacted on 5th January, 2016, available at <http://www.newyorkconvention.org/national+arbitration+law+-+myanmar>.

⁴ Internal departmental guidelines.

⁵ The 1958 Convention relating to the Recognition and Enforcement of Foreign Arbitral Awards. Myanmar acceded on 16 April 2013. (See further at: <http://www.newyorkconvention.org/countries>).

⁶ See further at: <http://www.dica.gov.mm/en/investment-agreements>.

democratic transition and takes steps to reform and update its laws accordingly, there is high interest from other countries, particularly regional actors such as Singapore, to enter into bilateral investment agreements. These provide important opportunities to support Myanmar's sustainable economic development during a time of great change in the country. At the same time, however, Myanmar experiences challenges in terms of its capacity to respond to this increased demand, and to negotiate with States that have more experience with these processes and greater technical expertise.

The main challenges facing Myanmar relate to capacity and relevant expertise. There is a need for greater knowledge and expert legal advice on international practices and key considerations in negotiating investment agreements, including both substantive law on key clauses and practical skills. There is also uncertainty regarding the best approach for Myanmar in terms of international arbitration, including whether it is advisable to sign up to the ICSID Convention, and the need to develop further substantive knowledge on this topic. In relation to investment dispute settlement, it is still necessary to develop experience and knowledge related to investor-state arbitration. There is also some concern regarding the impact and application of past agreements, which may include terms less favorable for Myanmar.

Given these challenges, Myanmar has identified the need for international support to build capacity and receive expert legal assistance with negotiating international investment agreements and managing disputes. Two government agencies play a key role in the negotiation and drafting of international investment agreements: the Union Attorney General's Office (UAGO), to review and provide legal advice, and the Directorate of Investment and Company Administration (DICA), to negotiate the agreements. Both have expressed high interest in and the need for ongoing support with these processes.

The main needs are: 1) receiving capacity development training to build knowledge and skills in this area, including the development of a practical handbook for negotiators; and 2) to receive specialized legal advice on negotiation of specific agreements and disputes, potentially including development of a model BIT or model clauses.⁷

In conclusion, the UAGO is serving as a law office at the national level with responsibility for providing legal advice to the Government. As I am involved in vetting investment agreements, negotiating with foreign investors and tendering legal advice to the Government Ministries and organizations, it is my earnest desire to expand legal co-operation and technical support which can address the challenges and needs of Myanmar with a view to strengthening its sustainable development.

⁷ In this regard, IDLO has been providing Myanmar with technical support to negotiating current agreements through a pro bono legal expert, and capacity development assistance, for example an initial introductory training course on international trade agreements for UAGO and DICA officials.

The Challenge of Investment Arbitration for the LDCs: A Review of the Case Law

*Grant Hanessian and Kabir Duggal**

Introduction

International investment law is a significant development in international law because it provides a foreign investor with a series of protections that can be enforced directly before an international arbitral tribunal.¹ A foreign investor is entitled to these protections through a vast array of international investment agreements, both bilateral and multilateral, signed by sovereign states.² There are currently over 3,000 such agreements in force.³ Although the international investment regime did not produce any significant case law until the 1990s,⁴ it has recently attracted a lot of attention because of the potential far-reaching powers of an arbitral tribunal to award significant damages, sometimes reaching billions of dollars.⁵ This article examines the challenges for investment arbitration for LDCs in the light of the case law.

Attracting foreign investment in LDCs has been a consistent goal at the United Nations. For example, the 2011 United Nations “Programme of Action for the Least Developed Countries for the Decade 2011-2020”, adopted in Istanbul, Turkey identified the following “goals and targets”:

(a) Attract and retain increased foreign direct investment in least developed countries, especially with the aim of diversifying the production base and enhancing productive capacity;

(b) Enhance initiatives to support investment in least developed countries.⁶

Similarly, in order to give effect to the UN Sustainable Development Goal 10 (“Reduce Inequality within and among countries”) by 2030, the United Nations General Assembly suggested the following action:

Encourage official development assistance and financial flows, including foreign direct investment, to States where the need is greatest, in particular least

* The views expressed in this article are personal and do not reflect the views of the Firm or its clients. The information stated in this article is current as of 22 September 2017.

¹ See generally Dolzer and Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (Oxford University Press 2012), Chapter 1.

² See generally Andrew Newcombe and Lluís Paradell, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (Wolters Kluwer 2009) 1 (“The international legal framework governing foreign investment consists of a vast network of international investment agreements (IIAs) supplemented by the general rules of international law.”).

³ See generally *Bilateral Investment Treaties and Investor-State Dispute Resolution: Six Key Facts*, United States Council for International Business, http://www.uscib.org/docs/ncs_key_messages.pdf (accessed Sept. 15, 2017) (“There are more than 3000 international investment agreements in force internationally”).

⁴ See, e.g., Dolzer and Schreuer (supra, n. 1), p. 11 (“Until the early 1990s international investment law had not produced any significant case law. In the meantime this situation has changed dramatically.”).

⁵ See, e.g., *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, Final Award, PCA Case No. AA 227, July 18, 2014 (where the tribunal awarded the investor US \$50 billion plus interest and costs).

⁶ United Nations, “Programme of Action for the Least Developed Countries for the Decade 2011-2020,” A/CONF.219/3/Rev.1 (May 23, 2011), ¶ 121.

developed countries, African countries, small island developing States and landlocked developing countries, in accordance with their national plans and programmes.⁷

Despite these goals, the economic reality remains that global FDI has seen a decline in 2016-2017. This decline has had a particularly negative impact on LDCs.⁸

Keeping this background in mind, the paper will now discuss the challenges of LDCs in the investment arbitration regime.

An Overview of LDC Participation in the Investment Arbitration Regime

As of May 2017, there have been a total of 767 investor-state cases that are available in the public domain,⁹ 76 of which involve a LDC as respondent.¹⁰ Of these 76 cases, 29% (*i.e.*, 22 cases) are currently pending. The overwhelming majority (93%) of these cases against a LDC has been administered by the International Centre for Settlement of Investment Disputes (ICSID).¹¹ ICSID, which has handled 619 arbitrations since its inception in 1972, registered 48 such cases in 2016 alone.¹²

Arbitrations involving an LDC country represent only about 11% of ICSID's total cases.¹³ There have been two ad hoc cases under the United Nations Commission on International Trade Law (UNCITRAL) Rules and another two cases administered by the Permanent Court of Arbitration (PCA). Additionally, one arbitration involving Benin was handled by the Stockholm Chamber of Commerce (SCC). It is important to note that these numbers might not reflect all the cases brought against an LDC; they only reflect the cases that are in the public domain.

Of the 47 LDC countries, 60% have participated in at least one investment arbitration. The 19 LDCs that have not been involved in any publically-known investment arbitration include: Afghanistan, Angola, Bhutan, Chad, Comoros, Djibouti, Eritrea, Guinea-Bissau, Haiti, Kiribati, Malawi, Nepal, Sao Tome and Principe, Sierra Leone, Solomon Islands, Somalia, Tuvalu,

⁷ *Transforming our World: The 2030 Agenda for Sustainable Investment*, General Assembly Resolution A/RES/70/1 (October 21, 2015), ¶ 10.b to Goal 10.

⁸ See, e.g., *Global FDI Flows Slip in 2016, Modest Recovery Expected in 2017*, UNCTAD Global Investment Trends Monitor No. 25 (Feb. 1, 2017) 5 (“Slowing economic growth and falling commodities prices weighed on FDI flows to developing economies in 2016. Inflows to these economies fell 20% (to an estimated US\$600 billion) in the year, because of significant falls in Developing Asia and in Latin America and the Caribbean. ... FDI flows to Africa also registered a decline (-5% to US\$51 billion), with the region sharing similar external vulnerabilities with Latin America. The low level of commodity prices continues to have an impact on resource-seeking FDI. Flows to Angola more than halved after surging in 2015. Mozambique saw its FDI fall 11%, but the level was still significant at an estimated US\$3 billion.”).

⁹ Investor-State Dispute Settlement: Review of Developments in 2016, UNCTAD IIA Issue Note 1 (May 2017) (“The rate of new treaty-based investor-State dispute settlement (ISDS) cases continued unabated. In 2016, 62 new cases were initiated pursuant to international investment agreements (IIAs), bringing the total number of known cases to 767.”).

¹⁰ See Annex 1 for a list of cases involving LDCs.

¹¹ See *About ICSID*, available at <https://icsid.worldbank.org/en/Pages/about/default.aspx> (accessed Sept. 20, 2017) (“ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank’s objective of promoting international investment. ICSID is an independent, depoliticized and effective dispute-settlement institution.”).

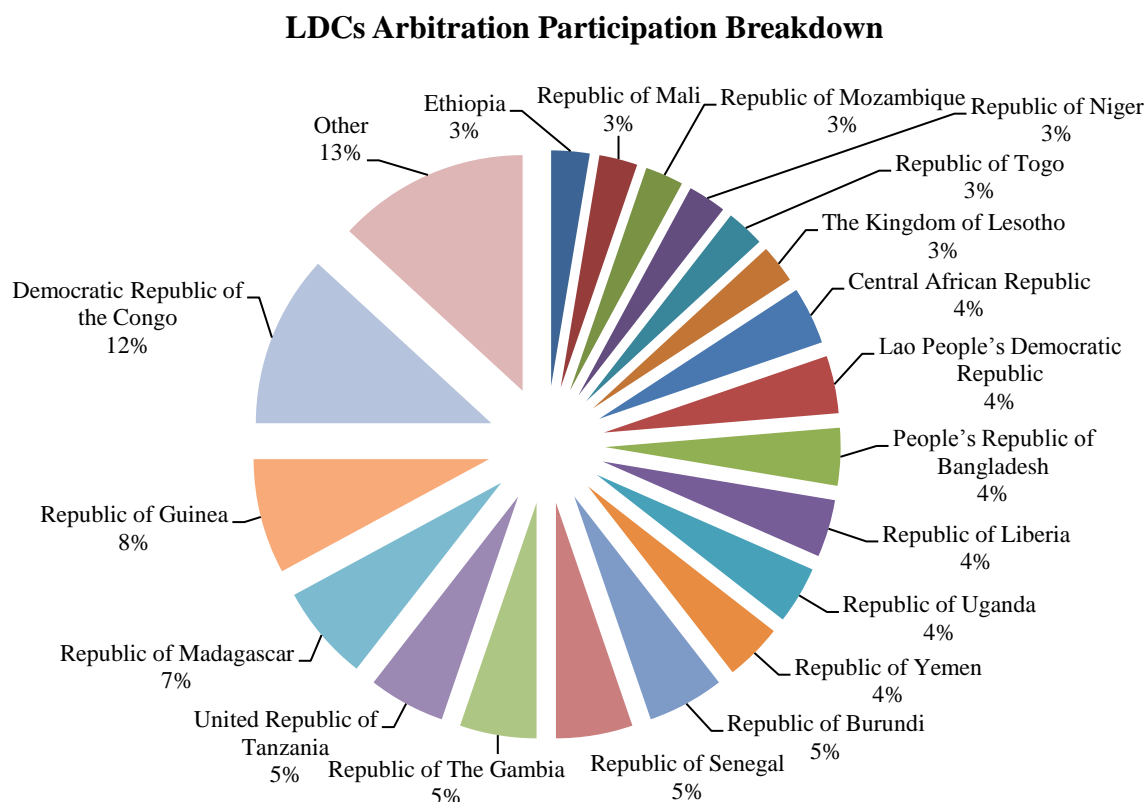
¹² INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, *THE ICSID CASELOAD - STATISTICS* (2017), [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf).

¹³ *Id.*

Vanuatu, and Zambia.¹⁴ Of the LDCs that have been involved in investment arbitration disputes, 75% have been involved in three arbitrations or less. The Democratic Republic of Congo has been the most active, having been involved in 9 arbitrations. The Republic of Guinea is in second place, with a total of 6. The Republic of Madagascar is third, with a total of 5. Burundi, Senegal, Gambia, and Tanzania were each involved in 4 arbitrations. Central African Republic, Lao, Bangladesh, Liberia, Uganda, and Yemen were each involved in 3 arbitrations.

Figure 1 is a chart illustrating the involvement of LDCs as respondents in investment arbitration:

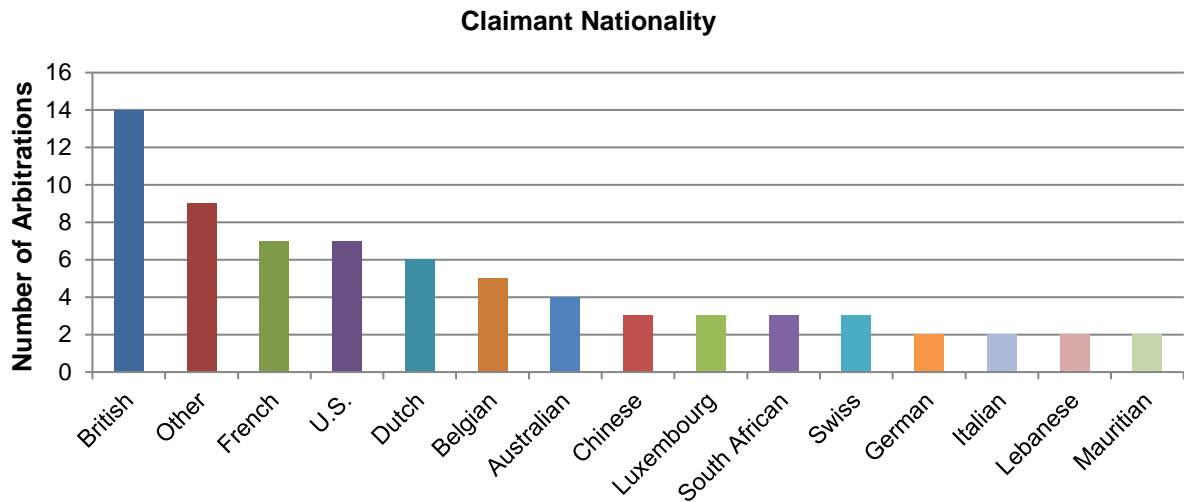
Figure 1



In terms of the nationality of investors, the majority of the investors hailed from the developed world. The largest number of investors are British (14), French (7), U.S. (7), and Dutch (6) entities. Belgian investors were involved in 5 arbitrations. See Figure 2 for a chart illustrating the nationality of the foreign investors involved in an arbitration. There are also several domestic entities that were deemed to be “foreign” because they were foreign-owned or foreign-controlled and were part of the case against the LDC as claimant. For the purposes of Figure 2, those companies have been excluded.

¹⁴ This may be, in part, explained by the fact that most of these countries do not have many investment treaties. UNCTAD lists only 3 BITs for Afghanistan, 10 BITs for Angola (7 of which are not in force), 0 BITs for Bhutan, 13 BITs for Chad (10 of which are not in force), 6 BITs for Comoros (4 of which are not in force), 10 BITs for Djibouti (6 of which are not in force), 4 BITs for Eritrea (3 of which are not in force), 2 BITs for Guinea-Bissau (one of which is not in force), 8 BITs for Haiti (5 of which are not in force), 0 BITs for Kiribati, 7 BITs for Malawi (4 of which are not in force), 6 BITs for Nepal (2 of which are not in force), 2 BITs for Sao Tomé and Príncipe (none of which are in force), 3 BITs for Sierra Leone (1 of which is not in force), 0 BITs for the Solomon Islands, 3 BITs for Somalia (1 of which is not in force), 0 BITs for Tuvalu, 2 BITs for Vanuatu (none of which are in force), and 13 BITs for Zambia (7 of which are not in force). See UNCTAD International Investment Agreements Navigator, available at <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu> (accessed Sept. 20, 2017).

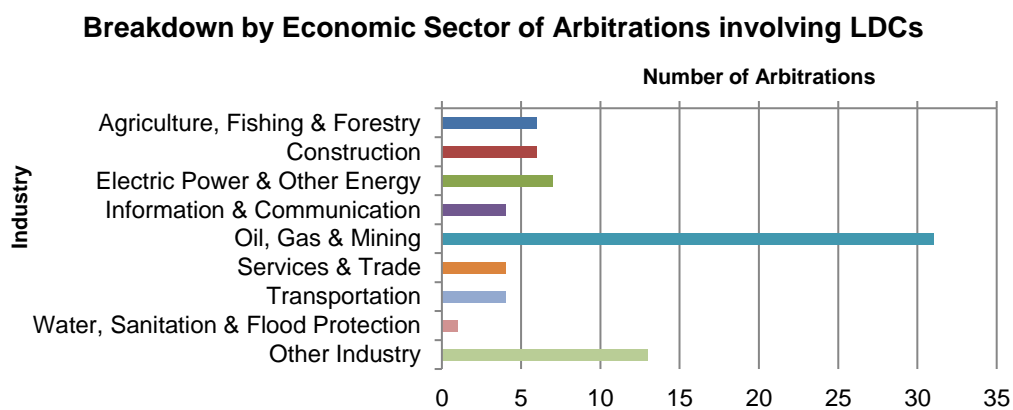
Figure 2



Claimant nationality in order from most to least number of arbitrations. Some arbitrations involved more than one nationality on the claimant side. Each nationality was counted separately for the purposes of this analysis. Nationalities involved in only one arbitration were included as Other. Those nationalities include: Bahamian, Jordanian, Maltese, Norwegian, Omani, Seychelles, Singaporean, Swedish, and United Arab Emirates.

With regard to the subject matter of the dispute, about 41% are related to the Oil, Gas, and Mining economic sector. The other major arbitrations are more evenly divided among the following sectors: Electric Power & Other Energy (9%), Agriculture, Fishing & Forestry (8%), Construction (8%), Information & Communication (5%), Services & Trade (5%), Transportation (5%), Water, Sanitation & Flood Protection (2%). 17% of the cases fall within the “Other” or Miscellaneous category, and includes sectors such as gaming industry, textile enterprise, and beverage production. See Figure 3 below.

Figure 3



The clear majority involve Oil, Gas & Mining (31/76 or about 41%). Disputes included in Other Industry (13/76 or about 17%) involved beverage production enterprise, electron goods and home furnishing facilities, the gaming industry, groundnut enterprises, manufacturing and trading enterprises, real estate projects, textile enterprises, and tobacco.

LDCs in Investment Arbitration: Case Studies

LDCs have been involved in a wide array of investment disputes and many of these cases have raised interesting legal questions. In order to provide an overview of the kinds of issues that have come up in the cases involving LDCs, discussed below are certain representative cases that demonstrate the challenges that LDCs face in investment disputes.

The first type of challenge pertains to the jurisdiction of a tribunal. In many of the cases involving LDCs, states have challenged a tribunal's jurisdiction. Two representative cases are presented below to show the types of issues that come up.

The first set of challenges relates to the definition of an "investment." This is particularly important in the context of disputes initiated at ICSID. This is because the ICSID Convention (also referred to as the Washington Convention) does not define the term "investment" and, therefore, tribunals have developed an "inherent" meaning of the term "investment."¹⁵ For an ICSID tribunal to possess jurisdiction, the investor will need to establish the existence of an "investment" both under the investment treaty and according to this inherent meaning under the ICSID Convention.¹⁶ The lack of a clear definition of "investment" under the ICSID Convention has, however, led to several conceptions of what an "investment" is¹⁷ and particularly whether an "investment" must contribute to the "economic development" of a host state as a part of the definition of "investment."¹⁸

Since "economic development" of LDCs is particularly significant, this issue has come up in cases involving LDCs. The decision in *Mitchell v. Democratic Republic of the Congo* (DRC) is a good representation of this.¹⁹ Patrick Mitchell, a U.S. citizen, had a law firm in the DRC. By

¹⁵ See, e.g., Dugan, Wallace, *et al.*, *INVESTOR-STATE ARBITRATION* (Oxford University Press 2008), pp. 256, 258 ("[The ICSID Convention] gives no definition of *investment* . . . In the end, however, a textual analysis of the convention and institution rules reveals, and commentators now agree, that there is an objective boundary to the definition of *investment* for purposes of ICSID jurisdiction, which is not different from other jurisdictional issues.").

¹⁶ See, e.g., *id.*, 259. (In *Salini v. Morocco* the tribunal clarified the distinct roles of these dual requirements for the purposes of obtaining ICSID jurisdiction. First, the claimant must establish that the transaction underlying the parties' dispute falls within the scope of the consent to arbitration, whether contained in a contract, national investment law, or international investment treaty. Then the claimant must also establish that the transaction falls under Article 25 of the Washington Convention. As noted earlier there is no definition of investment under the Washington Convention. Thus the claimant must look into other criteria to prove that its activity is an investment within the meaning of the convention.").

¹⁷ See, e.g., McLachlan *et al.*, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (Oxford University Press 2008) 164 ("The absence of any clarification in the ICSID Convention means that, within a wide area of discretion, the parameters of what constitutes an investment fall to be supplied by the parties' consent and ultimately by tribunals.").

¹⁸ See, e.g., *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 16, 2001), ¶ 52 ("The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.") (internal citations omitted). But see *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (July 14, 2010), ¶ 111 ("The Tribunal is not convinced, on the other hand, that a contribution to the host State's economic development constitutes a criterion of an investment within the framework of the ICSID Convention. Those tribunals that have considered this element as a separate requirement for the definition of an investment, such as the *Salini* Tribunal, have mainly relied on the preamble to the ICSID Convention to support their conclusions. The present Tribunal observes that while the preamble refers to the 'need for international cooperation for economic development,' it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording. In the Tribunal's opinion, while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment.").

¹⁹ *Patrick Mitchell v. The Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Award (Feb. 9, 2004), ¶ 102.

an order of the Military Court of the DRC, Mr. Mitchell's law firm's premises were put under seal by the army. In addition, documents were seized, and two lawyers from his practice were imprisoned for approximately 9 months. In an award rendered on February 9, 2004, an ICSID arbitral tribunal noted that the DRC had violated the obligations under the U.S.-Zaire/DRC BIT and, awarded US\$750,000 plus interest as damages to Mr. Mitchell.²⁰ The DRC then filed an application for annulment of the award pursuant to Article 52 of the ICSID Convention.²¹

The primary purpose of the DRC's challenge was that the activity of Mr. Mitchell's law firm did not constitute an "investment" under the ICSID Convention because the activities of the law firm did not contribute to its economic development.²² The ad hoc committee (constituted to review the findings of the original arbitral tribunal) agreed with the DRC that contribution to the economic development of a host state was an "essential — although not sufficient — characteristic or unquestionable criterion of the investment."²³

The ad hoc committee further noted that the award by the arbitral tribunal was "incomplete and obscure as regards what it considers an investment. . . . Such an inadequacy of reasons is deemed to be particularly grave, as it seriously affects the coherence of the reasoning and, moreover, as it opens the door to a risk of genuine abuses."²⁴ Indeed, the committee observed that the tribunal did not sufficiently explain how the legal services as an "investment" contributed to the economic development of the State "or at least the interests of the State, in this case the DRC, [should] be somehow present in the operation."²⁵ Therefore, the award was found to be "tainted by a failure to state reasons, in the sense that the inadequacy of reasons is such that it seriously affects the coherence of the reasoning as to the existence of an investment" and was annulled.²⁶ This case, therefore, highlights how the original tribunal and the ad hoc committee differed on what constitutes an "investment" for the purposes of the ICSID Convention.

LDCs have also been respondents to cases under multilateral investment treaties and jurisdictional issues under such agreements have also often been the basis for a challenge by a state. In *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar*,²⁷ a joint venture agreement was concluded on November 29, 1993 between Myanmar and the investor (YCO), a Singapore corporation. The Agreement provided for the creation of a joint venture company for the manufacture and distribution of beer and soft drinks.²⁸ The initial term of the agreement was for five years, with a provision for renewal for further five-year terms subject to the approval of the Foreign Investment Commission. At the time of conclusion of the Joint Venture Agreement, Myanmar was not a member of ASEAN. However, in 1997 Myanmar applied for ASEAN membership and on July 23, 1997 acceded to a number of ASEAN agreements, including the

²⁰ *Patrick Mitchell v. The Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award (Oct. 27, 2006). Article 52 of the ICSID Convention permits a party to seek annulment of an award on any of the following grounds: "(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it."

is based.

²¹ *Id.*, ¶ 67.

²² *Id.*, ¶¶ 55-56.

²³ *Id.*, ¶ 33.

²⁴ *Id.*, ¶ 40.

²⁵ *Id.*, ¶ 39.

²⁶ *Id.*, ¶ 41.

²⁷ *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award (March 31, 2003).

²⁸ *Id.*, ¶ 4.

1987 ASEAN Agreement and the Framework Agreement for the ASEAN Investment Area, October 7, 1998 (the “Framework Agreement”).

In the meantime, a number of problems had occurred in the relationship between the parties. YCO alleged that (i) armed agents of Myanmar seized its joint venture brewery in Mandalay; (ii) the accounts of its investment, its directors, and its employees were frozen; and (iii) an inspector was appointed and on September 29, 1999, proceedings to wind up the joint venture company commenced.²⁹ YCO commenced arbitration under Article X of the 1987 ASEAN Agreement.

Myanmar objected to the tribunal’s jurisdiction raising a series of objections. It contended that YCO had not brought an “investment” from Singapore into Myanmar, having instead acted as “a front for other investors who were probably Myanmar nationals.”³⁰ Therefore, the question was whether the claimant had made a foreign investment in Myanmar. The tribunal dismissed this objection noting that “the relevant issue for the purpose of jurisdiction under the 1987 ASEAN Agreement is whether there was an investment brought into Myanmar by a Singapore corporation.”³¹ Since there were capital contributions and contributions of equipment and supplies from a Singaporean corporation (YCO) to Myanmar and paid for from the Singaporean corporation’s resources, there was a “substantial inward direct investment” into Myanmar and this was the only requirement under the Agreement.³²

Myanmar also argued that YCO was not subject to “effective management” in Singapore “at all material times” as required by Article I(2) of the 1987 Agreement.³³ The tribunal rejected this argument noting that YCO was effectively managed in Singapore before it entered into the Joint Venture Agreement, and that despite its principal shareholder having relocated to Myanmar to effectively manage the joint venture, YCO still retained important elements of effective management in Singapore, including, *e.g.*, continuous procurement from Singapore. Accordingly “there [was] a presumption that ‘effective management’ once established is not readily lost, especially since the effect will be the loss of treaty protection.”³⁴

Finally, Myanmar argued that the investment had not been subject to a distinct act of approval and written registration as required by Article II(3) of the 1987 ASEAN Agreement.³⁵ On this point, the tribunal observed that investments on the date of entry into force of the Agreement were not automatically protected, even if they were specifically approved in writing and registered because they had to meet the additional test of Article II(3) of obtaining “an express subsequent act amounting at least to a written approval and eventually to registration of the investment.”³⁶ Since YCO’s investment did not meet this additional requirement, it “does not qualify as such under Article II(3) of the 1987 ASEAN Agreement.”³⁷ For these reasons, the tribunal concluded that it lacked jurisdiction. This case highlights the importance of following the jurisdictional requirements stated in an investment agreement.

²⁹ *Id.*, ¶¶ 7-8.

³⁰ *Id.*, ¶ 44.

³¹ *Id.*, ¶ 45.

³² *Id.*

³³ *Id.*, ¶ 46. Art. 1(2) of the ASEAN Agreement states: “the term ‘company’ of a Contracting Party shall mean a corporation, partnership or business association, incorporated or constituted under the laws in force in the territory of any Contracting Party wherein the place of effective management is situated.”

³⁴ *Id.*, ¶ 52.

³⁵ *Id.*, ¶ 55. Under Article II(1) of the 1987 ASEAN Agreement the investment must be “specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.”

³⁶ *Id.*, ¶ 60.

³⁷ *Id.*, ¶ 63.

LDCs have also been involved in construction and infrastructure disputes. These disputes are of particular importance because LDCs often require investment in heavy infrastructure. Due to the long nature of these infrastructure projects, disputes relating to such investments often arise. In *Desert Line Projects LLC v. Republic of Yemen*,³⁸ for example, Desert Line Projects LLC (“DLP” or “Claimant”), a company constituted under the laws of Oman, entered into several contracts with the Yemeni government (“Respondent”) to build roads in Yemen.³⁹ DLP completed the work on all but two of the contracts.⁴⁰ When DLP tried to recover the amounts due under the contracts, the Yemeni government refused to pay. The parties, then, entered into an arbitration agreement and submitted their dispute to arbitration in Yemen.⁴¹ The Yemeni arbitral tribunal issued an award and declared, among other things, that DLP was entitled to receive approximately YR18 billion (US\$ 100 million) for its work as well as additional sums for other costs.⁴² The government, however, did not make any payments, instead attempting to annul the Yemeni arbitration award before Yemeni courts, arguing, *inter alia*, that the arbitration agreement was invalid.⁴³ DLP initially protested but, under pressure, ultimately relented, signing a settlement agreement that accepted a substantially reduced amount of YR 3.5 billion, which was paid.⁴⁴

Thereafter, DLP filed a request for arbitration before ICSID alleging a breach of the fair and equitable treatment (FET) clause in the Oman-Yemen BIT.⁴⁵ Yemen objected to jurisdiction, arguing that DLP did not have an “investment” within the meaning of Article 1(1) of the BIT because: (a) the government never ‘accepted’ DLP’s investment under the Yemeni laws; and (b) DLP failed to obtain an investment certificate, both of which were included as requirements under the BIT.⁴⁶ The arbitral tribunal rejected both of these jurisdictional challenges: It held that, *first*, there was no requirement under the BIT that an investment had to be accepted by the host State and, therefore, this argument was as “unpersuasive as it was unattractive.”⁴⁷ *Second*, Yemen’s argument that DLP had failed to acquire an investment certificate was rejected since the BIT did not contain language requiring such a formality. The project, it was found, was generally endorsed by the “highest level of the state.”⁴⁸

On the merits, the tribunal concluded that the actions of Yemen in requiring a settlement agreement when the investor was under “financial and physical duress” violated the FET obligation in the BIT.⁴⁹ The settlement agreement was therefore deemed ineffective and the Yemeni arbitration award was reinstated.⁵⁰ In light of the validity of the Yemeni arbitration award, DLP was entitled to receive the outstanding amounts due under the award.

This award was also significant because of its treatment of the issue relating to “moral damages.”⁵¹ DLP sought moral damages and described its claim as follows: “The Claimant states

³⁸ *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award (Feb. 6, 2008).

³⁹ *Id.*, ¶¶ 3-15.

⁴⁰ *Id.*, ¶ 16.

⁴¹ *Id.*, ¶ 29.

⁴² *Desert Line Projects LLC v. Republic of Yemen*, ¶ 31.

⁴³ *Id.*, ¶ 36.

⁴⁴ *Id.*, ¶¶ 39, 45-46.

⁴⁵ *Id.*, ¶ 50.

⁴⁶ *Id.*, ¶ 92.

⁴⁷ *Id.*, ¶ 99.

⁴⁸ *Id.*, ¶¶ 117-119.

⁴⁹ *Id.*, ¶ 194.

⁵⁰ *Id.*, ¶¶ 195, 205.

⁵¹ Moral damages are damages that are awarded for “an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or his reputation.” See Borzu Sabahi, *COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION* (Oxford University Press 2011) 136 (citing the 1935 ruling in the *Lusitania* arbitration).

that it has suffered extensive moral damages as a result of the Respondent's breaches of its obligations under the BIT: the Claimant's executives suffered the stress and anxiety of being harassed, threatened and detained by the Respondent as well as by armed tribes; the Claimant has suffered a significant injury to its credit and reputation and lost its prestige; the Claimant's executives have been intimidated by the Respondent in relation to the Contracts."⁵²

The tribunal noted that "it is generally accepted in most legal systems that moral damages may be recovered" and there were "no reasons to exclude them."⁵³ The tribunal further noted that although it is "impossible to substantiate a prejudice of this kind" since "the physical duress exerted on the executives" was "malicious," it agreed to grant a "symbolic" sum of USD1,000,000 without interest.⁵⁴ This case remains one of the few instances where a tribunal was willing to award moral damages.⁵⁵

LDCs have also been involved in a series of disputes involving contracts that are entered into by state or state-entities. Differences in obligations under a contract may give rise to disputes under an international investment agreement when a state acts in its sovereign capacity. The *Biwater Gauff v. Tanzania* case is a good representation of this.⁵⁶ Biwater Gauff (Tanzania) Limited (BGT), a British company, and Tanzania entered into a series of contract to operate and manage a water and sewerage system in Dar Es Salaam. A few years into the project, BGT alleged that Tanzania repudiated the lease agreements, occupied its facilities, usurped management control, unilaterally cancelled BGT's Value Added Tax relief on purchases, and deported BGT staff which alleged breached the obligations under the U.K.-Tanzania BIT and Tanzania's foreign investment law.⁵⁷ In response, Tanzania argued that BGT had breached the lease agreement and that it had not caused BGT to lose economic value. It countered, rather, that BGT's current state was a result of its poor management and investment decisions—wholly outside of the State's responsibility.⁵⁸

Tanzania first challenged the tribunal's jurisdiction by arguing that BGT did not make an "investment" under Article 25 of the ICSID Convention because it was a "loss leader"⁵⁹ The tribunal found that BGT's activities qualified as an "investment and that even a losing investment is an "investment" for the purposes of ICSID.⁶⁰ Tanzania also challenged the tribunal's jurisdiction under the BIT because the investor failed to comply with the six month settlement period required under the BIT.⁶¹ The tribunal also noted that observance of the six-month settlement period was not "a strict jurisdictional condition" and "[i]ts purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding."⁶² The

⁵² *Desert Line Projects LLC v. Republic of Yemen*, ¶ 286.

⁵³ *Id.*, ¶ 289.

⁵⁴ *Id.*, ¶¶ 289-291.

⁵⁵ See generally Irmgard Marboe, *CALCULATIONS OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW* (Oxford University Press 2009) 308 ("The [*Desert Lines*] award is remarkable not only for its approval of moral and consequential damages but also for taking the physical duress exerted on managers and executives into account which in previous arbitrations has not been the case, such as for example, in *Biloune v. Ghana*, where the claimant also suffered from detention and maltreatment.").

⁵⁶ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 18, 2008).

⁵⁷ *Id.*, ¶ 354.

⁵⁸ *Id.*, ¶¶ 419-50.

⁵⁹ *Id.*, ¶ 307.

⁶⁰ *Id.*, ¶¶ 320-21.

⁶¹ Art. 8(3) of the U.K.-Tanzania BIT: "if any such dispute should arise and agreement cannot be reached within six months between the parties to this dispute through pursuit of local remedies or otherwise, then . . . either party may institute proceedings by addressing a request to that effect to the Secretary General of the Centre . . .". *Id.*, ¶ 260 (ellipsis in original).

⁶² *Id.*, ¶ 345.

tribunal concluded, however, that it did not have jurisdiction over claims arising under Tanzania's Investment Act of 1997 since it was not established that Tanzania had provided a unilateral consent to resolve such disputes through ICSID arbitration.⁶³

On the merits, although the tribunal agreed that termination of the lease agreement was inevitable, it still determined that Tanzania's actions amounted to expropriation, breach of the FET standard, and its obligation to provide full security and protection.⁶⁴ Significantly, however, the tribunal ultimately did not award BGT any damages, finding the appropriate remedy to be declaratory in nature.⁶⁵ BGT could not prove that Tanzania's actions were the actual and proximate cause of its loss, especially given that BGT's investment already had no fair market value at the time these alleged acts took place.⁶⁶ The tribunal concluded in this regard:

(a) that the Republic's wrongful acts (e.g. seizure of City Water's business and premises) caused injury to City Water (by depriving it prematurely of the use and enjoyment of its property); but that

(b) as a matter of evidence, BGT failed to prove that there was any monetary value associated with the injury that it suffered, or in other words, the monetary value of the injury was zero. On this basis, it is said that BGT's claim fails as a matter of quantum, but not causation.⁶⁷

The *Biwater v. Tanzania* case is, therefore, significant because even though the tribunal found a breach of the obligations under the BIT, it did not award any damages.

Finally, LDCs have also been involved in disputes that relate to political situations in host States that, as they unfold, impact foreign investments. In *American Manufacturing & Trading, Inc. v. Republic of Zaire*,⁶⁸ a dispute arose in the context of riots and looting by unpaid Zairian soldiers. American Manufacturing & Trading, Inc (AMT), a company incorporated in the United States, was, through the Zairian corporation Société Industrielle Zairoise (SINZA), engaged in the production and sale of automotive and dry cell batteries, as well as the importation and resale of consumer goods and foodstuffs. In September 1991, Zairian armed forces destroyed property within SINZA's industrial complex. The commercial complex was reopened in February 1992, but permanently closed following additional destruction.

AMT instituted arbitral proceedings against Zaire under the US–Zaire/DRC BIT. On the merits of AMT's claims, Zaire argued that (i) the BIT could not have the effect of derogating from local Zairian law; and (ii) AMT was not entitled to compensation because no other victims had received any compensation from Zaire for the damages caused as a result of the riots and lootings.

⁶³ *Id.*, ¶¶ 337, 493, 496. The relevant article of the Foreign Investment Law stated: "A dispute between a foreign investor and the [Tanzania Investment] Centre or the Government in respect of a business enterprise which is not settled through negotiations may be submitted to arbitration in accordance with any of the following methods as may be mutually agreed by the parties, that is to say —(a) in accordance with arbitration laws of Tanzania for investors; (b) in accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes; (c) within the framework of any bilateral or multilateral agreement on investment protection agreed to by the Government of the United Republic and the Government of the country where the investor originates."

⁶⁴ *Id.*, ¶¶ 451-519, 729-31.

⁶⁵ *Id.*, ¶ 807.

⁶⁶ *Id.*, ¶¶ 779, 787, 797-806.

⁶⁷ *Id.*, ¶ 801.

⁶⁸ *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award and separate opinion (Feb. 11, 1997).

On the merits, the tribunal found that Zaire had violated its obligations under Article II(4) of the BIT which stated:

Investments of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and may not be less than that recognized by international law.

The tribunal, therefore noted that the obligation of protection and security “is an obligation of vigilance” and that a state is “not permitted to invoke its own legislation to detract from any such obligation.”⁶⁹ On the facts the tribunal concluded that Zaire had breached this obligation “by taking no measure whatever [sic] that would serve to ensure that protection and security of the investment in question.”⁷⁰

Zaire was therefore ordered to pay to AMT US\$ 9 million, with interest accruing at the rate of 7.5 percent per annum from the date of the Award.⁷¹

A Few Concluding Remarks

The role of LDCs in the international arena cannot be underestimated because many of these countries are rich in resources and can potentially grow rapidly with foreign investment. From a review of the case law, the types of cases in which LDCs are involved are not significantly different from investment disputes involving other developing countries, however, the impact of a large investment award against an LDC can have a particularly significant consequence on its economy.

Because of the weight of these awards, LDCs are advised to pay special attention to the obligations that have been assumed in existing investment treaties. Further, with an eye towards the future, in the negotiations of any future treaties, LDCs can only benefit from careful drafting of provisions and incorporation of best practices. The Investment Support Programme for LDCs is a promising initiative as it seeks to provide assistance to LDCs involved in treaty negotiation and dispute settlement. This can help remove any asymmetries inherent in the investment law arena, and lead to more sustainable investment in the future.

⁶⁹ *Id.*, ¶ 6.05.

⁷⁰ *Id.*, ¶ 6.08.

⁷¹ *Id.*, Part V.

ANNEX 1: List of Known Cases involving LDCs (as of 22 September 2017)

| | Claimant | Respondent | Case Reference | Pending or Concluded? | Subject of Dispute | Economic Sector |
|----|--|--|------------------------------|-----------------------|---|---------------------------------|
| 1 | Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. | People's Republic of Bangladesh | ICSID Case No. ARB/06/10 | Concluded | Exploration, development, and production of natural gas | Oil, Gas & Mining |
| 2 | Saipem S.p.A. | People's Republic of Bangladesh | ICSID Case No. ARB/05/7 | Concluded | Gas pipeline project | Oil, Gas & Mining |
| 3 | Scimitar Exploration Limited | Bangladesh and Bangladesh Oil, Gas and Mineral Corporation | ICSID Case No. ARB/92/2 | Concluded | Oil exploration and development | Oil, Gas & Mining |
| 4 | Puma Energy Holdings SARL | Republic of Benin | SCC Case No. SCC EA 2017/092 | Pending | N/A | Electric Power & Other Energy |
| 5 | Société d'Investigation de Recherche et d'Exploitation Minière | Burkina Faso | ICSID Case No. ARB/97/1 | Concluded | Gold mining operation | Oil, Gas & Mining |
| 6 | Tariq Bashir and SA Interpétrol Burundi | Republic of Burundi | ICSID Case No. ARB/14/31 | Pending | Petroleum products supply | Oil, Gas & Mining |
| 7 | Joseph Houben | Republic of Burundi | ICSID Case No. ARB/13/7 | Concluded | Real estate project | Other Industry |
| 8 | Antoine Goetz and others | Republic of Burundi | ICSID Case No. ARB/01/2 | Concluded | Mining, banking and service enterprises | Oil, Gas & Mining |
| 9 | Antoine Goetz and others | Republic of Burundi | ICSID Case No. ARB/95/3 | Concluded | Mining enterprise | Oil, Gas & Mining |
| 10 | Cambodia Power Company | Kingdom of Cambodia | ICSID Case No. ARB/09/18 | Concluded | Electricity generation and distribution operations | Electric Power & Other Energy |
| 11 | Shareholders of SESAM | Central African Republic | CONC/07/1 | Concluded | Log production and processing enterprise | Agriculture, Fishing & Forestry |
| 12 | M. Meerapfel Söhne AG | Central African Republic | ICSID Case No. ARB/07/10 | Concluded | Tobacco industry | Other Industry |
| 13 | RSM Production Corporation | Central African Republic | ICSID Case No. ARB/07/2 | Concluded | Petroleum exploration and exploitation contract | Oil, Gas & Mining |
| 14 | International Quantum Resources Limited, Frontier SPRL and Compagnie Minière de Sakania SPRL | Democratic Republic of the Congo | ICSID Case No. ARB/10/21 | Concluded | Mining concessions | Oil, Gas & Mining |
| 15 | Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud | Democratic Republic of the Congo | ICSID Case No. ARB/10/4 | Concluded | Trading company | Services & Trade |
| 16 | African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. | Democratic Republic of the Congo | ICSID Case No. ARB/05/21 | Concluded | Construction contracts | Construction |
| 17 | Russell Resources International Limited and others | Democratic Republic of the Congo | ICSID Case No. ARB/04/11 | Concluded | Mining concession | Oil, Gas & Mining |
| 18 | Mimincoco LLC and others | Democratic Republic of the Congo | ICSID Case No. ARB/03/14 | Concluded | Diamond mining concessions | Oil, Gas & Mining |
| 19 | Ridgepointe Overseas Developments, Ltd. | Democratic Republic of the Congo and Générale des Carrières et des Mines | ICSID Case No. ARB/00/8 | Concluded | Cobalt and copper mining concessions | Oil, Gas & Mining |
| 20 | Patrick Mitchell | Democratic Republic of the Congo | ICSID Case No. ARB/99/7 | Concluded | Law firm | Services & Trade |

| | Claimant | Respondent | Case Reference | Pending or Concluded? | Subject of Dispute | Economic Sector |
|----|--|---|------------------------------------|-----------------------|---|---------------------------------|
| 21 | Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. | Democratic Republic of the Congo | ICSID Case No. ARB/98/7 | Concluded | Gold mining concessions | Oil, Gas & Mining |
| 22 | American Manufacturing & Trading, Inc. | Democratic Republic of the Congo | ICSID Case No. ARB/93/1 | Concluded | Manufacturing and trading enterprise | Other Industry |
| 23 | ICL Europe Coöperatief U.A. | Ethiopia | UNCITRAL | Pending | Mining concession | Oil, Gas & Mining |
| 24 | Compagnie International de Maintenance (CIM) | Ethiopia | UNCITRAL | Concluded | Railway maintenance | Transportation |
| 25 | African Petroleum Gambia Limited (Block A4) | Republic of The Gambia | ICSID Case No. ARB/14/7 | Concluded | Petroleum exploration, development, and production activities | Oil, Gas & Mining |
| 26 | African Petroleum Gambia Limited (Block A1) | Republic of The Gambia | ICSID Case No. ARB/14/6 | Concluded | Petroleum exploration, development, and production activities | Oil, Gas & Mining |
| 27 | Carnegie Minerals (Gambia) Limited | Republic of The Gambia | ICSID Case No. ARB/09/19 | Pending | Mining concession | Oil, Gas & Mining |
| 28 | Alimenta S.A. | Republic of The Gambia | ICSID Case No. ARB/99/5 | Concluded | Groundnut enterprise | Other Industry |
| 29 | BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL | Republic of Guinea | ICSID Case No. ARB/15/46 | Concluded | Mining concession | Oil, Gas & Mining |
| 30 | BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL | Republic of Guinea | ICSID Case No. ARB/14/22 | Pending | Mining concession | Oil, Gas & Mining |
| 31 | Société Civile Immobilière de Gaëta | Republic of Guinea | ICSID Case No. ARB/12/36 | Concluded | Development and operation of commercial property | Construction |
| 32 | Société Industrielle des Boissons de Guinée | Republic of Guinea | ICSID Case No. ARB/12/8 | Concluded | Beverage production enterprise | Other Industry |
| 33 | Getma International and others | Republic of Guinea | ICSID Case No. ARB/11/29 | Concluded | Port development project | Transportation |
| 34 | Maritime International Nominees Establishment | Republic of Guinea | ICSID Case No. ARB/84/4 | Concluded | Bauxite transportation joint venture | Oil, Gas & Mining |
| 35 | Atlantic Triton Company Limited | People's Revolutionary Republic of Guinea | ICSID Case No. ARB/84/1 | Concluded | Contract for the conversion, equipping and operation of fishing vessels | Agriculture, Fishing & Forestry |
| 36 | Sanum Investments Limited | Lao People's Democratic Republic | ADHOC/17/1 | Pending | Gaming Industry | Other Industry |
| 37 | Lao Holdings N.V. | Lao People's Democratic Republic | ICSID Case No. ARB(AF)/16/2 | Pending | Gaming Industry | Other Industry |
| 38 | Lao Holdings N.V. | Lao People's Democratic Republic | ICSID Case No. ARB(AF)/12/6 | Pending | Gaming Industry | Other Industry |
| 39 | Josias Van Zyl, The Josias Van Zyl Family Trust & The Burmilla Trust | The Kingdom of Lesotho | PCA Case No. 2016-21 (Second Case) | Pending | Diamond mining concessions | Oil, Gas & Mining |
| 40 | Swissbourn Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others | The Kingdom of Lesotho | PCA Case No. 2013-29 (First Case) | Concluded | Mining concessions | Oil, Gas & Mining |
| 41 | Diamond Fields Liberia, Inc. | Republic of Liberia | ICSID Case No. ARB/11/14 | Concluded | Mineral exploration operations | Oil, Gas & Mining |
| 42 | International Trust Company of Liberia | Republic of Liberia | ICSID Case No. ARB/98/3 | Concluded | Maritime registry | Transportation |
| 43 | Liberian Eastern Timber Corporation | Republic of Liberia | ICSID Case No. ARB/83/2 | Concluded | Forestry concession | Agriculture, Fishing & Forestry |

| | Claimant | Respondent | Case Reference | Pending or Concluded? | Subject of Dispute | Economic Sector |
|----|---|------------------------------------|--------------------------------------|------------------------------|---|---------------------------------|
| 44 | LTME Mauritius Limited and Madamobil Holdings Mauritius Limited | Republic of Madagascar | ICSID Case No. ARB/17/28 | Pending | Telecommunications enterprise | Information & Communication |
| 45 | (DS)2, S.A., Peter de Sutter and Kristof De Sutter | Republic of Madagascar | ICSID Case No. ARB/17/18 | Pending | Textile enterprise | Other Industry |
| 46 | Courts (Indian Ocean) Limited and Courts Madagascar S.A.R.L. | Republic of Madagascar | ICSID Case No. ARB/13/34 | Concluded | Electronic goods and home furnishing facilities | Other Industry |
| 47 | SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. | Madagascar | CONC/94/1 | Concluded | Textile enterprise | Other Industry |
| 48 | SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. | Democratic Republic of Madagascar | CONC/82/1 | Concluded | Textile enterprise | Other Industry |
| 49 | Société des Mines de Loulo S.A. | Republic of Mali | ICSID Case No. ARB/13/16 | Concluded | Gold exploration and exploitation project | Oil, Gas & Mining |
| 50 | Société d'Exploitation des Mines d'Or de Sadiola S.A. | Republic of Mali | ICSID Case No. ARB/01/5 | Concluded | Gold mining concession | Oil, Gas & Mining |
| 51 | Tamagot Bumi S.A. and Bumi Mauritania S.A. | Islamic Republic of Mauritania | ICSID Case No. ARB/14/23 | Pending | Iron ore mining project | Oil, Gas & Mining |
| 52 | CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch, and CMC Africa and CMC Africa Austral, LDA | Republic of Mozambique | ICSID Case No. ARB/17/23 | Pending | Highway construction project | Construction |
| 53 | Oded Besserglik | Republic of Mozambique | ICSID Case No. ARB(AF)/14/2 | Pending | Joint fishing operation | Agriculture, Fishing & Forestry |
| 54 | Yaung Chi Oo Trading Pte. Ltd. | Government of the Union of Myanmar | ASEAN I.D. Case No. ARB/01/1 (ICSID) | Concluded | Beverage production enterprise | Other Industry |
| 55 | AHS Niger and Menzies Middle East and Africa S.A. | Republic of Niger | ICSID Case No. ARB/11/11 | Concluded | Ground handling services | Services & Trade |
| 56 | TG World Petroleum Limited | Republic of Niger | CONC/03/1 | Concluded | Oil exploration concession | Oil, Gas & Mining |
| 57 | Olyana Holdings LLC | Republic of Rwanda | ICSID Case No. ARB/10/10 | Concluded | Tea company | Agriculture, Fishing & Forestry |
| 58 | Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. | Republic of Senegal | ICSID Case No. ARB/15/21 | Concluded | Ground handling services | Services & Trade |
| 59 | VICAT | Republic of Senegal | ICSID Case No. ARB/14/19 | Concluded | Cement manufacturing enterprise | Construction |
| 60 | Millicom International Operations B.V. and Sentel GSM S.A. | Republic of Senegal | ICSID Case No. ARB/08/20 | Concluded | Telecommunications enterprise | Information & Communication |
| 61 | Société Ouest Africaine des Bétons Industriels | Republic of Senegal | ICSID Case No. ARB/82/1 | Concluded | Construction of low-income housing units | Construction |
| 62 | Sudapet Company Limited | Republic of South Sudan | ICSID Case No. ARB/12/26 | Concluded | Exploration and production of hydrocarbons | Oil, Gas & Mining |
| 63 | Michael Dagher | Republic of the Sudan | ICSID Case No. ARB/14/2 | Pending | Wireless internet service enterprise | Information & Communication |
| 64 | Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC | Democratic Republic of Timor-Leste | ICSID Case No. ARB/15/2 | Pending | Fuel supply agreement | Electric Power & Other Energy |
| 65 | Togo Electricité and GDF-Suez Energie Services | Republic of Togo | ICSID Case No. ARB/06/7 | Concluded | Electricity concession | Electric Power & Other Energy |

| | Claimant | Respondent | Case Reference | Pending or Concluded? | Subject of Dispute | Economic Sector |
|----|--|-----------------------------|--------------------------|------------------------------|--|--------------------------------------|
| 66 | Togo Electricité | Republic of Togo | CONC/05/1 | Concluded | Electricity concession | Electric Power & Other Energy |
| 67 | Total E&P Uganda BV | Republic of Uganda | ICSID Case No. ARB/15/11 | Pending | Exploration and production of oil | Oil, Gas & Mining |
| 68 | Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited | Republic of Uganda | ICSID Case No. ARB/13/25 | Concluded | Petroleum exploration, development, and production activities | Oil, Gas & Mining |
| 69 | Tullow Uganda Operations PTY LTD | Republic of Uganda | ICSID Case No. ARB/12/34 | Pending | Petroleum exploration, development, and production activities | Oil, Gas & Mining |
| 70 | EcoDevelopment in Europe AB & others | United Republic of Tanzania | ICSID Case No. ARB/17/33 | Pending | Agribusiness project | Agriculture, Fishing & Forestry |
| 71 | Standard Chartered Bank (Hong Kong) Limited | United Republic of Tanzania | ICSID Case No. ARB/15/41 | Pending | Power purchase agreement | Electric Power & Other Energy |
| 72 | Standard Chartered Bank | United Republic of Tanzania | ICSID Case No. ARB/10/12 | Pending | Power purchase agreement | Electric Power & Other Energy |
| 73 | Biwater Gauff (Tanzania) Limited | United Republic of Tanzania | ICSID Case No. ARB/05/22 | Concluded | Water and sewer services concession agreement | Water, Sanitation & Flood Protection |
| 74 | Beijing Urban Construction Group Co. Ltd. | Republic of Yemen | ICSID Case No. ARB/14/30 | Pending | Construction of an airport terminal | Construction |
| 75 | MTN (Dubai) Limited and MTN Yemen for Mobile Telephones | Republic of Yemen | ICSID Case No. ARB/09/7 | Concluded | Operation of a global system for mobile communications (GSM) network | Information & Communication |
| 76 | Desert Line Projects LLC | Republic of Yemen | ICSID Case No. ARB/05/17 | Concluded | Road construction contract | Transportation |

LDCs' Unique Challenges of Getting the Composition of Arbitral Tribunals Right

Won Kidane

Introduction

Imagine for a minute that you are the Attorney General of a small African Country. Towards the end of one fateful day in your office, your administrative assistant brings a DHL package containing a Request for Arbitration (RFA) by one of the largest European investors in your country. You had heard rumors that business has not been very good for them lately.

The RFA says that your country violated some fundamental principles of international investment law contained in your country's bilateral investment treaty (BIT) with the home state of the investor, and seeks \$300 million dollars in damages. The RFA also contains the name of the arbitrator that the claimant has nominated. He is a partner at a large New York law firm. The RFA invites you to provide a preliminary response to the substantive allegations and also nominate your own arbitrator. It warns you that if you fail to nominate your arbitrator within 30 days, the appointing authority, to which you have agreed in the treaty, will appoint one for you, and that the two will eventually select a suitable chair. It further advises that if you fail to participate in the proceedings, the tribunal will hear the case in your absence and render an award. The award could be enforced against your country's assets around the world. Consider further that this is the first time ever that you had faced this problem since you assumed the position of the Attorney General in your country. Assume further that you know the claim is entirely false and that the company is trying to shift the risk of business loss to your government. You also know that it is not going to be easy to prove the falsity of the claim. What should you do?

The Challenges

The investor-state dispute settlement (ISDS) system has in recent years attracted acrimonious criticism not only because of allegations of pervasive conflict of interests and incoherent jurisprudence¹ but also because of evident representational deficit.²

¹ See e.g., EUROPEAN UNION COMMISSION CONCEPT PAPER, INVESTMENT IN TTIP AND BEYOND – THE PATH FOR REFORM, ENHANCING THE RIGHT TO REGULATE AND MOVING FROM CURRENT AD HOC ARBITRATION TOWARDS AN INVESTMENT COURT (2015) at 6-7 (“Currently, arbitrators on ISDS tribunals are chosen by the disputing parties (i.e. the investor and the defending state) on a case-by-case basis. The current system does not preclude the same individuals from acting as lawyers (e.g. preparing the investor's claims) in other ISDS cases. This situation can give rise to conflicts of interest – real or perceived – and thus concerns that these individuals are not acting with full impartiality when acting as arbitrators. The ad hoc nature of their appointment is perceived by the public as interfering in their ability to act independently and to properly balance investment protection against the right to regulate. It has also led to perceptions that this provides financial incentives to arbitrators to multiply ISDS cases.”)

Available at: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

² See e.g., ICSID Caseload Statistics (Issue 2017-1), at Chart 6: Geographic Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules, by State Party Involved (Western Europe (7%), Middle East and North Africa (10%), Sub-Saharan Africa (15%)). Compare, Chart 12: Arbitrators, Conciliators and *ad hoc* Committee Members Appointed in Cases Registered under the ICSID Convention and Additional Facility Rules –

Developing countries dread the arbitral process principally because they are called upon to answer charges of violations of indeterminate external legal standards³ before a group of total strangers – not a jury of their peers.⁴ They are frequently concerned that the arbitrators are not only biased against them (and in favor of private claimants) but more importantly, they fear that the arbitrators are often incapable of understanding them because of their cultural background.⁵ They know that in the arbitral process, the three people who make the decision are not necessarily the most informed three people in the room. In most cases, the parties and their counsel know exactly what transpired between the parties but they present evidence selectively not necessarily to aid the arbitrators to arrive at the correct result but to distort their vision and steer them to a result that would favor their client's position. In the words of Judge Gerome Franck, in the adversarial trial, what the lawyer does is “the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation.”⁶ Arbitration specialists have adopted the same culture.

It might be that, by agreeing to arbitrate, as U.S. Supreme Court Justice Stevens said in his Mitsubishi dissent, what parties have signed up for is “*a best approximation of the correct result*,”⁷ but the party who suffered injustice or the one who is falsely accused of perpetrating it, wants that approximation to be as close to the truth as possible. The most important agents of this approximation are the arbitrators. The way they are mixed makes a profound difference. For example, social science studies conducted in the United States have shown that mixed race jurors are more likely to get the facts right – that is because they educate each other and challenge each other's biases and predispositions.⁸

It is common knowledge that diversity on any decision making body improves the quality of justice, but in investor-state arbitration, it is difficult to appoint a group of diverse arbitrators because of the limited pool. The most important question that needs to be asked is thus: why is the pool of arbitrators so small? Why do you have three European arbitrators resolve a dispute between a Chinese company and an African State? The simple and obvious response is that it is

Distribution of Appointments by Geographic Region: Western Europe (47%), Sub-Saharan Africa (2%), Middle East and North Africa (4%). The most recent statistics (2017) is available on the official website of ICSID at: [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf)

³ For example, according to Stephan Schill “Fair and equitable treatment is the clearest example of how vague the standard clauses in international investment treaties are formulated. It is characterized by a lack of clarity concerning not only of its scope, but its underlying normative concept.” STEPHAN W. SCHILL, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT LAW *IN* INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS 157-58 (Tarcisio Gazzini and Eric De Brabandere eds. Martinus Nijhoff, 2012) 133-181.

⁴ See e.g., WON L. KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION 239-254 (OUP, 2017).

⁵ *Id.* at 254-261.

⁶ JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 85 (First Princeton Paperback ed. 1973). (“In short, the lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client's interest. Our present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation.”)

⁷ *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 656-7 (1985), Steven, J. dissenting. (“Arbitration awards are only reviewable for manifest disregard of the law and the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually unreviewable. Despotism decision making of this kind is fine for parties who are willing to agree in advance to settle for a *best approximation of the correct result* in order to resolve quickly and inexpensively any contractual dispute that may arise in an ongoing commercial relationship. Such informality, however, is simply unacceptable when every error may have devastating consequences for important businesses in our national economy.”)

⁸ See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90(4) J. PERSONALITY & SOCIAL PSYCHOLOGY 597-612, 598 (2006) (“Whites demonstrated a more complex thinking when assigned to a diverse group than when assigned to an all-white group.”)

the parties' choice; no body imposed it on them. That simple response, however, underappreciates the complexities of the appointment process.

Both the New York Convention and the ICSID Convention were actively promoted to developing countries with the promise that they would help modernize their laws and even attract investment and commerce. The New York Convention was promoted by the United Nations,⁹ and the ICSID Convention was actively promoted to developing countries by the World Bank.¹⁰ The United Nations had committed to assisting developing countries to acquire and develop expertise in this area. And indeed the records show that it was anticipated that such expertise would be developed within a relatively short period of time.¹¹ The United Nations relegated this task to the chambers of commerce in Europe resulting in the effective outsourcing of the administration of international economic justice to European capitals.

At the most basic level, the ICSID Convention permitted developing countries to designate arbitrators who are not their citizens. They naturally relied on experts from the developed world. In most cases, they appointed arbitrators they neither knew nor understood. Fifty years later, they continue to do the same because their citizens are still said to lack the required expertise. For more than half century, they appeared before ICSID tribunals in large numbers and answered charges of expropriation and denial of justice, among other things, before a limited number of mostly Western arbitrators. Regrettably, in investment arbitration, the composition of arbitrators today looks a lot like it looked fifty years ago. It is interesting to see that in a dispute between a Korean investor and the Chinese Government, all the arbitrators are Western.¹² If you look at the composition of the tribunals for all 22 investor claims against India, almost all are from the developed world of the West.¹³ The most recent publically available ICSID statistics show that, while cases against Sub-Saharan African states constitute approximately 15 percent, only 2 percent of arbitrators have been from Africa.¹⁴

Evidently, developing countries still face the exact same dilemma that they had faced fifty years ago. As I write in my book, *The Culture of International Arbitration*, fifty years is not an

⁹ See e.g., U.N. Secretary-General, Note on Consideration of Other Measures for Increasing the Effectiveness of Arbitration in the Settlement of Private Law Disputes (Item 5 on the Agenda) United Nations Conference on International Commercial Arbitration, U.N. Doc. E/CONF.26/6, at 6 (May 1, 1957), available at http://www.arbitration-icca.org/media/0/12734521657370/4281_001.pdf. (“The existence of such laws [laws implementing the New York Convention] and facilities may remove the obstacles to economic development created by misgivings which – rightly or wrongly – arise when foreign traders or investors are faced with the need to submit to jurisdictions of other countries.”)

¹⁰ See e.g., *Settlement of Investment Disputes, Consultative Meeting of Legal Experts*, in ICSID, 2-1 HISTORY OF THE CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND FORMULATION OF THE CONVENTION 236-255 (1968).

¹¹ U.N. Secretary-General, Note, at 7. Interestingly though, the Secretary-General believed that the technical assistance would resolve the problem within a short time. In his own words: “The technical assistance that may be required for the improvement of arbitration facilities in some countries could take the form of furnishing to or through the Government concerned experts competent to advise on the drafting of appropriate arbitration legislation and familiar with the problems relating to the setting up of arbitration institutions capable of providing adequate facilities for the requirements of international commerce. It would probably not be necessary to make available the services of such experts on a long term basis; *their presence in the country concerned for a few weeks or months might be sufficient in most cases.*” (emphasis added) U.N. Secretary-General, Note on Consideration of Other Measures for Increasing the Effectiveness of Arbitration in the Settlement of Private Law Disputes (Item 5 on the Agenda) United Nations Conference on International Commercial Arbitration, U.N. Doc. E/CONF.26/6, at 7 (May 1, 1957), available at http://www.arbitration-icca.org/media/0/12734521657370/4281_001.pdf.

¹² See *Ansung Housing Co. Ltd v. People's Republic of China*, ICSID Case No. ARB/14/25 (Award of March 9, 2017). Available at: <http://investmentpolicyhub.unctad.org/ISDS/Details/602>.

¹³ Basic information about all the cases against India is available at: <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2>.

¹⁴ See note 2 *supra*.

insufficient amount of time to study five provisions of the New York Convention or the principle of fair and equitable treatment.¹⁵ The problem is broader than the alleged lack of expertise in the developing world. It is a microcosm and function of the world's old economic decision-making hierarchy.

The pool of arbitrators is structurally kept small. This is not pure theory. Those of us who represent developing countries know it very well from experience and appreciate the challenges. Here is the structural problem and it lies in the default appointment authority.

In investment arbitration, under the ICISD Convention, if one party fails to appoint or the party appointed arbitrators fail to agree on a chair, the power of appointment goes to the Chair of the Administrative Council;¹⁶ needless to point out that the Chairman of the Administrative Council is the President of the World Bank. If it is UNCITRAL arbitration, the default appointing power goes to the Secretary General of the Permanent Court of Arbitration (PCA), a position always held by a Dutch national. These individuals make appointments out of a familiar circle not because they want to reward their friends but because they want to avoid the risk that comes along with unknown names. The safest choice is often the biggest name.

Similarly, in commercial arbitration, parties often incorporate institutional rules into their contracts. Their choice might at first appear innocuous but carries significant consequences. If, for example, they choose ICC Rules, by so doing, they empower the ICC Court of Arbitration in Paris to make the default appointment.¹⁷ Traditionally, they also choose familiar seats in Europe, which in turn influences not only the selection of the arbitrators but also frequently grants European courts a monopoly over annulment power,¹⁸ allowing them the opportunity to singularly shape the jurisprudence in the area.

It is within these structural constraints that developing countries choose their arbitrators. The perennial question is thus: How can they get the composition right? They know the statistics; they know who will make the default appointment; and they know who will be appointed as chair. Who must they choose as their party appointed arbitrator? If they choose someone who is likely to understand them, culturally and otherwise, someone they know very well, they fear that the best they could hope for is a great dissenting opinion. This is not because arbitrators from the developed world consciously conspire to exclude the outsider, but because of a broader cultural incommensurability problem. One has to be in that hearing room to understand the awkwardness and the power dynamics. It translates into issues of trust, respect, misunderstanding and even hierarchy. In that environment, the position of a minority arbitrator is not enviable. Developing countries have over the decades endured the anxieties of stranger justice.

To avoid that kind of awkwardness, most developing countries appoint arbitrators from within the small circle. To be sure, they do have allies within the circle. But they are again faced with another problem. This time, it is not cultural but ideological. The economics of privatized justice

¹⁵ KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION, *supra* note 4 at 288.

¹⁶ See ICSID Convention Art. 38. Information on the process is also available at: <https://icsid.worldbank.org/en/Pages/process/Arbitration.aspx>.

¹⁷ See ICC Arbitration Rules, art. 12(5). Available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_13.

¹⁸ Whether courts outside of the seat of the arbitration may have annulment power is a subject of dispute but the predominant view is that only the courts of the seat have principal jurisdiction for purposes of annulment. See e.g., *Karaha Bodas Co. v. Perus*, 364 F. 3rd 274 (5th Cir. 2004). (Acknowledging the theoretical possibility that under Article V(1)(e) of the New York Convention courts of two countries ("the country in which, or under the laws of which") could have principal jurisdiction.)

appears to put a downward pressure on the number of elite arbitrators on the host-state side of the ideological spectrum. They are outnumbered by many-folds by those on the other side of the ideological spectrum. So, appointing one of them carries a similar risk as appointing outsiders.

Developing countries also face a third set of problems in this regard: choosing counsel. Because they anticipate what the tribunal is going to look like based on the claimant's initial appointment, they often select someone who is likely to be acceptable to the tribunal. Counsel in turn influences the choice of the host state's appointment. It is fair to assume that Counsel, in principle, wants to win and advises the state to appoint someone that he/she deems appropriate. Depending on the Counsel's level of cultural competency, the attorney-client communication may or may not be sufficient to apprise the host state of the risks and benefits. In any event, counsel for the Respondent state shares the exact same dilemmas of the host state.

Is Getting the Composition Right Possible?

Recall the question presented to the hypothetical African Attorney General at the beginning of my remarks. I've had the privilege of advising Attorneys General who find themselves under these circumstances but I have not been able to resolve their dilemmas. Over the years, I have, however, offered some helpful thoughts that I considered could minimize bias and the possibility of a decently veiled corrupt outcome. There are two extremely important considerations:

First is the cultural familiarity and cultural competence of the arbitrators no matter what their background. Someone who has never been to Africa and had no interactions with Africans whatsoever would have considerable difficulty understanding witnesses who come from remote villages of Africa to provide testimony. The most culturally able arbitrators are often those who have in their practice days had the opportunity to work with culturally different groups. The communality of interest that representation necessarily imposes allows them to appreciate the client's perspectives. That perspective presumably remains to be an enduring life experience.

The second is a demand for gender and racial diversity on each tribunal. What justifies an all Western Male tribunal is the mythology of expertise. The pursuit of justice is not an incomprehensible scientific algorithm. As Professor John Crook usefully articulates, the arbitral process is essentially the identification and ascertainment of the applicable rules of law, the determination of fact, and the application of the law to the facts.¹⁹ If a Chinese claimant against an African state appoints a Chinese arbitrator because all of its documents and witnesses are going to be Chinese, it does not appear that the African state would have difficulty appoint an African arbitrator. If, on the other hand, the Chinese claimant appoints a preeminent European arbitrator, prudence counsels the African state to appoint someone who is likely to match the stature of the European arbitrator. It is not the work that demands such appointment but the power politics. That frequently leads to the small circle. The task of diversifying then rests on either the co-arbitrators or the appointing authority. If the co-arbitrators fail to agree, the developing state party to the dispute must always vigorously demand diversity on the tribunal. In crude terms it means gender, nationality, racial or other forms of cultural diversity. A diverse panel of arbitrators does not only garner better political legitimacy and a sense of inclusiveness, which

¹⁹ John Crook, *Fact-Finding in the Fog: Determining the Facts of Upheavals and Wars in Inter-State Disputes*, in CATHERINE A. ROGERS & ROGER P. ALFORD, *THE FUTURE OF INVESTMENT ARBITRATION* 313, 314 (2009). ("Should they pause to reflect, most international lawyers would likely accept the thought that the science and art of deciding legal disputes involves at least three inter-related components. The first two involve determining the relevant law and the relevant facts. There comes stage three—applying the law to the facts.")

increases the likelihood of enforceability of the award, but it is also more likely to be free of bias and prejudice and hence lead to the correct result.

Conclusion

Respondent states must reject the mythology of specialized knowledge that keeps the pool of eligible arbitrators artificially small and demand diversity on each tribunal. The key is to request appointing authorities to exercise their discretion in a genuine and respectful manner. Appointing authorities have not made a meaningful effort to diversify the pool of arbitrators in the last fifty years. Least Developed Countries may not be able ask for a jury of their peers but while they consider contemporary proposals for the establishment of investment court systems as possible replacements for ISDS, they must forcefully demand diversity on arbitral tribunals in each case through the arbitral, political, and diplomatic processes.

ADR and LDCs: when the alternative methods become real and effective

Maria Beatrice Deli

Investment arbitration: the many challenges to achieve an effective solution for investment disputes

It is of paramount importance that the methods of investment dispute settlement the LDCs may select are real and effective for their benefit, development and stability. International investment agreements and investment contracts offer several options to solve disputes. While bringing an action in front of a domestic court of one of the contracting parties in an international dispute - where the foreign investor is facing the host country - might generate several difficulties, recourse to Alternative Dispute Resolution (“ADR”) mechanisms seems to be the most convenient and neutral choice to achieve a settlement.

There are multiple alternatives for ADR that could be chosen by the parties entering into an investment contract, depending on the circumstances. ‘Soft’ instruments like conciliation and mediation can be provided as preliminary tools to dissolve a dispute, helping parties to find a common settlement ground, and preventing disputes from being exacerbated.

In case there is no provision in the contract for preliminary attempt to settle disputes or the attempt fails, investment contracts can provide for arbitration. Resorting to arbitration instead of to domestic courts brings a number of advantages: a more expeditious procedure, neutrality, an adjudicating tribunal composed of arbitrators who can be selected among experts in the field, and an easier reference to international law. Moreover arbitral awards rely on the favourable regime of recognition and enforcement set out by the New York Convention of 1958, a convention ratified by more than 150 States (and 30 out of 47 LDCs).¹ As a result, international commercial arbitration or international investment arbitration represent effective methods for settling a wide range of disputes, in many cases more efficiently than domestic courts.

In spite of such positive elements, in the most recent years investment arbitration has encountered a certain unpopularity, accused of being non democratic, non-transparent, and excessively costly. Some criticism to investment arbitration and investor-state dispute settlement (ISDS) has been raised by the European Institutions which are now trying to implement a new system for adjudicating investment disputes, based on the creation of a multilateral court.² Some countries, such as India and Indonesia, are renegotiating their investment treaties, including the provisions concerning the settlement of investment disputes. India's termination of its existing BITs has been followed by the introduction of a new Model BIT, which is strongly oriented at rebalancing the relative positions of the State and foreign investors also by limiting their right to commence arbitration and mandating a first attempt to exhaust local remedies for a period of five years.

Nevertheless, in 2016, the number of ICSID arbitrations remained substantially unchanged

¹ The list of the contracting States of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) is available at: <http://www.newyorkconvention.org/countries>.

² On 13 September 2017, the European Commission issued a recommendation for a Council decision authorizing the start of negotiations for a Multilateral Investment Court, COM(2017) 493 final.

compared to previous years, with a significant growth in the number of cases related to the tourism, construction, information-communication and transportation sectors, and a slight reduction in the concentration of cases in the oil, gas and mining sectors. Looking at the statistics analyzing the distribution of ICSID cases, a recent analysis shows that over 86% of disputes involve developing countries as defendants, while the cases initiated by developed nations account for almost 88% of ICSID caseload. Out of the 376 cases brought against developing States 326 were initiated by developed and 50 by developing countries respectively.³ Egypt, the Democratic Republic of the Congo, Guinea, Algeria, and Tanzania are the countries in the African region that have faced the highest number of investment arbitration claims.⁴

The pros of international investment arbitration are well known. Arbitration assures legal security through binding decisions. The advantages also extend to the host country, the most important one being an improvement in the overall investment climate. Indeed, through the provision of arbitration opportunities, host countries make themselves better prospective recipients of foreign investments and, in turn, the protection of investments encourages development – especially in the case of LDCs.⁵ Additionally, relying on arbitration may also protect the host country from international litigation and political pressure.⁶

However, it is important to consider that investment arbitration will maintain and increase its effectiveness only if its procedures are continuously improved, leading to enhanced transparency and neutrality of arbitrators, as well as a more balanced consideration for the rights of both foreign investors and host States. As a result, many countries, which continue to use ADR systems as methods for fostering FDI and their economic development, are focusing their reform efforts on the necessary and complex revisions of their internal codes and laws.

In addition, it is undoubted that parties to an investment contract have to carefully consider arbitration (as well as the other ADR methods) early on, long before a dispute is even conceivable. It is when the parties are negotiating the contract, that the provisions selecting the dispute settlement method are best set out. At that point particular issues have to be attentively considered: the possibility of a preliminary attempt of conciliation or mediation; the choice between *ad hoc* arbitration or institutional arbitration (and among the many institutions administering investment arbitration); the number of arbitrators (a sole arbitrator or a tribunal composed by three members); and the seat of the arbitration.

The freedom of the parties in negotiating the dispute settlement clause risks turning out counterproductive if the chosen rules and arbitrators do not best serve the dispute resolution objective. An incomplete or poorly drafted arbitration clause, along with inefficient selection of arbitrators have the potential to generate disastrous consequences in the management of a dispute.

An unclear arbitral clause could impede the arbitral tribunal to have jurisdiction from the very beginning and consequently authority to rule upon the dispute at stake. An imprecise choice of the applicable law and of the international law provisions that could be relevant in the case may bring to lengthy discussions between the parties before reaching an agreement or submitting the

³ U. Kollamparambil, *Bilateral Investment Treaties and Investor State Disputes*, ERSA Working Paper 589 (2016), p. 10 and 17.

⁴ Bryan Cave, *International Investment Arbitration in Africa: Year in Review 2016*, available at: <https://d11m3yrngt251b.cloudfront.net/images/content/9/3/v2/93577/International-Investment-Arbitration-YiR-Africa-2016.pdf>

⁵ N. RUBINS, N.S. KINSELLA, *INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE SETTLEMENT* (Oceana Pub. 2005), pp. xxviii-xxix.

⁶ H. Bashmill, *Foreign Investment Disputes Settlement under ICSID and the Protection of FDI*. J Internet Bank Commer (2016).

issue to the arbitral tribunal asking for a partial award on that matter. The violation of standards of investment protection recurrently claimed by the investors further demonstrate the need of drafting a detailed contract, possibly making a precise reference to international law.

Moreover, if a dispute arises and an arbitration is initiated, the qualifications of the arbitrators (or mediators) should be carefully considered each party selecting the 'right' arbitrator (or mediator) for his/her expertise, but also on the basis of his/her independence and impartiality. The absence of conflicts of interest with the matter at stake is one of the most fundamental and critical issues for a good arbitration.

Another sensitive aspect is the need for enhanced transparency, as the recent Mauritius Convention on transparency underlines.⁷ Ensuring more transparency holds the potential to attract investors' confidence and boost social acceptance of the arbitral mechanism, both in investment home and host countries.

Many other issues in the arbitral procedure require careful and skilled consideration for the best conduct and outcome of the arbitration. In particular the redaction of the parties' submissions, examination and preparation of experts and witnesses, and management of the hearings cause recurrent problems and might create obstacles for the parties, in particular those with more limited resources and in-house expertise.

Making expert counsel available to the LDCs may prove crucial in virtually all these areas, thus demonstrating the intrinsic value of a well-conceived Investment Support Programme for LDCs.

The turn of domestic legislation towards ADR

In recent times revisions of ADR legislation have been a rather common reform feature worldwide. In the last two years a third of the reforms has entailed approvals of entirely new codes of civil procedure involving ADR. Such far-reaching reforms have been implemented also in some LDCs (for instance in Niger).⁸

The Myanmar Parliament passed in 2016 a new Arbitration Law, reflecting the UNCITRAL Model Law and giving effect to the ratification of the New York Convention occurred in 2013, as well as a new comprehensive Investment Law,⁹ as part of Myanmar's strategy to attract foreign direct investment and stimulate its economy in accordance with international standards. The new investment law also includes a requirement to mediate before resorting to arbitration.¹⁰ Similarly, in order to strengthen its investment promotion strategies, Laos adopted in 2016 a new law on investment.¹¹ Cambodia established a more open and liberal foreign investment regime with a

⁷ United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency"), available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html.

⁸ For a review of arbitration reform in developing countries, see Pierre Guislain, Increased Relevance and Uptake of Arbitration Regimes in Developing Countries in BORZU SABAHI, NICHOLAS J. BIRCH, IAN A. LAIRD AND JOSÉ ANTONIO RIVAS, EDITORS, REVOLUTION IN THE INTERNATIONAL RULE OF LAW: ESSAYS IN HONOR OF DON WALLACE, JR. (Juris 2014), pp. 263-281.

⁹ E. Jabnoute, *Where is Myanmar Headed with the New Investment Law?* Kluwer Arbitration Blog (2017) at: <http://kluwerarbitrationblog.com/2017/08/25/myanmar-headed-new-investment-law/>

¹⁰ C. Chuah, G. Wanjing, *Myanmar*, Global Arbitration Review (2017), available at: <http://globalarbitrationreview.com/chapter/1141961/myanmar>.

¹¹ See Law on Investment Promotion No. 14/NA, replacing the previous regulation of 2009, which came into effect in April 2017, see unofficial translation made available by the Laos Ministry of Planning and Development at:

relatively pro-investor legal and policy framework, after being involved in an ICSID case.¹²

Some Asian countries were firstly hesitant toward ISDS mechanisms. More recently, however, and with growing FDI, they largely committed to treaties embodying ISDS mechanisms.¹³ In 2016 and 2017, some Asian States have continued entering into bilateral and multilateral investment treaties, as well as free trade agreements with investment chapters. Most of those instruments include an ISDS clause, which generally provides for international arbitration.¹⁴

In the African continent, several countries have taken initiatives to develop ADR mechanisms and reduce litigation in court, showcasing the momentum that ADR is gaining in the region. For instance, Tanzania has incorporated ADR into its legal system. Mozambique passed an Arbitration, Conciliation and Mediation Act and approved revisions to the commercial code which allows for resolution of business disputes through ADR¹⁵. Similarly, Ghana's Government has encouraged arbitration, mediation and conciliation, promoting a regulation for the enforcement of arbitration awards pursuant to the New York Convention.¹⁶ Given the potential for foreign investment in African countries, and the significant uptake of ADR across the continent, arbitration can be considered the predominant dispute resolution mechanism in the region, incorporated in the 542 investment treaties currently in force.¹⁷

It is also interesting to consider that at regional level, various existing institutions are now offering a wide range of effective ADR services in terms of transparency, time and costs of settlement procedures. In addition, new institutions for dispute settlement and ADR have been established.

The rise of mediation as a method for the settlement of investment disputes

The most recent negotiations related to trade agreements have demonstrated that States, investors and all relevant stakeholders are paying increased attention to mediation as an effective means for dispute resolution. Mediation has long been used to manage conflict arising in international construction projects,¹⁸ but much less frequently to settle international investment disputes.¹⁹

http://www.investlaos.gov.la/images/IP_Law_2016_PDF/Investment_Promotion_Law_amended_2016_Unofficial_translated-English.pdf.

¹² Cambodia Power Company v. Kingdom of Cambodia, ICSID Case No. ARB/09/18, available at: <https://www.italaw.com/cases/3445>.

¹³ J. Chaisse, *Assessing the Exposure of Asian States to Investment Claims*, Contemporary Asia Arbitration Journal, Vol. 6, No. 2, pp. 187-225 (2013), available at: <https://ssrn.com/abstract=2397655>.

¹⁴ L. R. Nottage, R. Weeramantry, *Investment Arbitration for Japan and Asia: Five Perspectives on Law and Practice*, in V. BATH AND L. NOTTAGE, FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA (Routledge 2011), pp. 25-52; N. Blackaby, N. Rubins, B. Kasolowsky, N. Lingard, E. Miller Rankin, N. Rawding QC, *International arbitration: 10 trends in 2017*, Freshfields knowledge (February 2017), available at: http://knowledge.freshfields.com/en/Global/r/1810/international_arbitration__10_trends_in_2017

¹⁵ EMILIA ONYEMA, THE TRANSFORMATION OF ARBITRATION IN AFRICA. THE ROLE OF ARBITRAL INSTITUTIONS, (Wolters Kluwer 2016).

¹⁶ See S. Ayangbah, L. Sun, *Comparative study of foreign investment laws: The case of China and Ghana*, Cogent Social Sciences (2017), 3, page 16 (available at: <https://www.cogentoa.com/article/10.1080/23311886.2017.1355631.pdf>).

¹⁷ A. R. Johnson, *Rethinking Bilateral Investment Treaties in Sub-Saharan Africa*, EMORY LAW JOURNAL, vol. 59, n. 4 (2010), p. 964.

¹⁸ In the construction industry, parties to a contract often agree not only to mediation as a process, but also to a specific mediator who will respond to disputes through the duration of the contract's execution. See J.W. Salacuse, *Mediation in International Business*, in STUDIES IN INTERNATIONAL MEDIATION, JACOB BERCOVITCH, ED. (2002), pp. 218-21.

¹⁹ P. E. Mason, *What's Brewing in the International Commercial Mediation Process: Differences from Domestic Mediation and Other Things Parties, Counsel and Mediators Should Know*, DISP. RESOL. J. (2011), at 64, 66.

Recently, however, the use of mediation as a dispute resolution process in international commercial disputes is gaining momentum: international institutions are carrying out several initiatives on mediation and States are increasingly negotiating treaties incorporating mediation as a form of ISDS.

The growing interest in investor-state mediation may be due to a number of factors, among which: a rise in the number of investor-State disputes; the costs of investment arbitration; some recent public criticism of ISDS, and the trend in the commercial sector, where mediation is often a preliminary step before a binding adjudication – whether in arbitration or litigation.

The advantages of mediation can be seen, if not in a binding decision, in a solution which is obtained – possibly – at an early stage, with the consequential benefit of maintaining or inspiring a friendly atmosphere which can support the investment at stake and maybe promote future investments.

As a result, mediation is increasingly chosen as a treaty-based ISDS mechanism. Indeed, the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, for instance, provides for mediation of investor-State disputes even including a precise timing.²⁰ The EU-Vietnam Free Trade Agreement, which is regarded as the most comprehensive and ambitious FTA that the EU has ever concluded with a developing country, assigns a considerable role to mediation for both state-state and investor-state disputes.²¹ The specific interest and trust in this method of dispute settlement in Vietnam is also demonstrated by the recently promulgated law governing commercial mediation, to be coordinated with a regime for enforcing mediated settlement agreements.

In South Africa, following the unilateral termination of its BITs with most of the EU Member States, the Department of Trade and Industry published a draft Regulations on Mediation Rules proposing a domestic investor-state mediation scheme.²² As to the use of international arbitration, it should be noted that the investor will not only need to exhaust all domestic remedies, but also have the State consent to the arbitration. The arbitration will then be conducted between the investor's State and the Republic of South Africa.²³

At regional level, the European Commission has declared that it will explore means to resolve intra-EU investment disputes through mediation and recently issued a proposal on this topic,²⁴ while the ASEAN Comprehensive Investment Agreement already incorporates mediation in its provisions.²⁵ Reportedly, mediation was also discussed in the South-East Asia/ Australasia

²⁰ See article 8.20 - Mediation (in Section F: Resolution of investment disputes between investors and states). The text of the agreement is available at: <http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf>. The EU-Singapore Free Trade Agreement also provides for voluntary mediation, see Art. 9.14, available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>.

²¹ See EU-Vietnam Free Trade Agreement, Annex 13-c: Annex III Mediation mechanism, available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

²² See *South Africa – New Mediation Provisions to Regulate Investment Disputes*, CIArb news (2017), available at: <http://www.ciarb.org/news/ciarb-news/news-detail/features/2017/03/03/south-africa-new-mediation-provisions-to-regulate-investment-disputes>.

²³ See *South Africa: Draft Regulations on Mediation Rules for investor-state disputes*, Two Birds (2017), available at: <https://www.twobirds.com/en/news/articles/2017/global/africa-newsletter-feb/south-africa-draft-regulations-on-mediation-rules-for-investor-state-disputes>

²⁴ See: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3735364_ga.

²⁵ Available at: <http://agreement.asean.org/media/download/20140119035519.pdf>

Regional Comprehensive Economic Partnership negotiations.²⁶

The links between arbitration and mediation are particularly evident in the investor-State field in terms of institutions. Currently, mediation is handled by the same institutions that administer investment arbitration, and such institutions are developing several initiatives specifically devoted to mediation.

Organizations, such as the World Bank²⁷ and the International Finance Corporation, are actively working to promote the use of mediation in resolving international commercial disputes,²⁸ and so is the International Bar Association's Mediation Committee, which has created a State Mediation Subcommittee whose main purpose is to propose concrete measures to promote the use of mediation for investor-state disputes.²⁹ In July 2016, the Energy Charter Conference adopted a *Guide on Investment Mediation*, to encourage States and investors to actively consider mediation for investor-State disputes.³⁰ The Secretariat of the Energy Community has recently established a Dispute Resolution and Negotiation Centre, focusing on negotiating and mediating investor-State energy disputes. The Secretariat noted that institutional mediation has an important role to play in the resolution of investment disputes at an early stage.³¹

The synergies between mediation and arbitration

Mediation may precede arbitration, playing a role in the “cooling-off” period after a dispute arises, during which the disputing parties try to negotiate an amicable solution. A similar circumstance took place in November 2016, when the World Bank Group urged India and Pakistan to agree to mediation under the 1960 Indus Waters Treaty in order to settle on a dispute regarding two dams under construction along the Indus rivers system. Responding to the States' separate request for proceedings, the Senior Vice President and World Bank Group General Counsel Anne-Marie Leroy declared that:

“The World Bank has a strictly procedural role under the Indus Waters Treaty and the treaty does not allow it to choose whether one procedure should take precedence over the other. What is clear, though, is that pursuing two concurrent processes under the treaty could make it unworkable over time and we therefore urge both parties to agree to mediation that the World Bank Group can help arrange. The two countries can also agree to suspend the two processes during the mediation process or at any time until the

²⁶ Norton Rose Fullbright, *International arbitration report* (2017), available at <http://www.nortonrosefulbright.com/files/international-arbitration-review-issue-8-148807.pdf>

²⁷ For instance ICSID hosted a wcourse for investor-state mediators. See: <https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/January%2017/Investor-State-Mediator-Training.aspx>. See in general Guislain, *supra* at note 8.

²⁸ S. I. Strong, *Beyond International Commercial Arbitration?: The Promise of International Commercial Mediation*, 42 WASH. U. J.L. & POL'Y (2014); T. W. Wälde, *Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation*, 22 ARB. INT'L 205 (2006).

²⁹ Information of the Mediation Committee of the International Bar Association can be found at: https://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx

³⁰ The Guide covers a wide range of issues, including the rules which may apply to mediation proceedings, the likely structure of a mediation, and the enforceability of any resulting settlement agreement, and assesses the key differences between existing mediation or conciliation rules. See: <http://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>

³¹ See: <https://www.energy-community.org/news/Energy-Community-News/2016/10/25.html>.

processes are concluded.”³²

Typically, investment treaties leave to disputing parties the choice of means by which this settlement might be achieved. In such context, States could introduce voluntary mediation provisions or binding mediation requirements into their treaties.³³

Mediation may also take place during an arbitral proceeding. This use of mediation can support disputing parties to reach a settlement of their dispute or, if no solution can be found, to refine or narrow the issues to be addressed in the arbitral proceeding. Currently, both the IBA Rules (Article 2(4))³⁴ and CETA (Article 8.20) expressly provide for this possibility.

In the *Achmea B.V. v. The Slovak Republic* case (2012) the Tribunal specifically encouraged the disputing parties to make this use of mediation, observing that “*the aims of both sides seem to be approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case.*” On this basis, it recommended that the parties might seek out somebody who might act as a mediator or reconciliator to settle the dispute.³⁵

Depending on the applicable rules, parties may be required to keep confidential documents already exchanged during mediation, the outcome or settlement terms, or even the fact that the mediation is taking place. In case of failure of the mediation, and notwithstanding the obligation to confidentiality, the discussions and exchanges of documents occurred between the parties in the attempt to mediate might be considered as detrimental to the arbitral procedure. In particular, mediation leads to the unveiling of the respective bargaining positions and as such can be viewed as complicating or even compromising the litigation strategies in the subsequent arbitral phase.

Mediation may also offer an alternative to arbitration. Mediation can be directly incorporated into investment treaties themselves, replacing arbitration. In a softer perspective, scholars advocate for dispute resolution clauses in investment treaties, including a default mediation option equivalent to court-connected mediation. As a consequence, before initiating arbitration, parties would be required to make a good-faith attempt at mediation, or to at least discuss the possibility of mediating their dispute. This option would certainly increase the incidence of mediation, and implementing such change would be possible by amending the relevant treaties.³⁶

In any event, considering mediation as an effective step for the settlement of disputes to be attempted preliminarily still raises some concern. In particular, there is one major difficulty in adopting mediation as a substitute for arbitration. It relates to the issue of the enforceability of mediation settlements, which do not benefit from the enforcement regimes under the ICSID Convention or the New York Convention. This gives reason to conclude that mediation is unlikely to replace arbitration in the near future.³⁷

³² See: <http://www.worldbank.org/en/news/press-release/2016/11/10/world-bank-urges-mediation-for-india-pakistan-over-indus>.

³³ N. Welsh, A.K. Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 Harvard Negotiation Law Review 71; Penn State Law Research Paper No. 31-2013 (2013).

³⁴ See 2012 International Bar Association Rules for Investor-State Mediation available at: https://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx

³⁵ Permanent Court of Arbitration, *ACHMEA B.V. V. THE SLOVAK REPUBLIC* (2012), paragraph 60, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf>.

³⁶ N. Welsh, A.K. Schneider, *supra*

³⁷ However, it should be noted that this has not been an obstacle to mediation in the commercial arbitration context, so mediation in the investment context may prove similar, particularly where parties have ongoing, long-term relationships.

The confidentiality of mediation makes it difficult to fully assess whether it is already playing a role in moving disputes away from arbitration. However, for the time being, arbitration and mediation can be best seen as complementary tools, rather than either-or choices. Parties may consider hybrid mechanisms – as are being explored in the commercial context – such as 'arb-med-arb', which result in an award by consent. This multistep approach may be particularly beneficial for LDCs, as it increases the 'menu' of options open to them in the area of investment-related dispute settlement.

Even more LDCs need to carefully assess, preferably with counsel assistance, which instrument is more effective and beneficial to use in light of their specific circumstances.

Protecting LDCs from Investor-State Litigation: Options and Roles for International Institutions

Robert Howse

Introduction

LDCs that have entered into international investment agreements that contain a binding provision for investor state dispute settlement (ISDS) face the risk of claims in the hundreds of millions of dollars where an investor is dissatisfied by the way in which the government has affected its business, and believes that treaty obligations have been violated. A large percentage of such claims relate to violations of “fair and equitable treatment”, a vague legal standard not consistently applied by arbitrators, while numerous others concern compensation for indirect expropriation, i.e. where it is claimed that a regulatory change by the government has such a scale of negative economic impact on the investor as to amount to a “taking.” While to date, only a relatively small percentage of ISDS claims pertain to LDCs, some of the recent suits that have been brought, in sensitive environmental and social contexts, heighten the risk. Moreover, even if the host state is in the end successful in defending a claim, the costs of doing so will typically amount to at least several million dollars.

There is thus an important interest in trying to avoid such claims, in early identification of disputes, and in attempting to settle them through means such as mediation, and when litigation is inevitable, insuring that LDCs have the know-how and resources to defend claims effectively. In this brief paper, I consider some of the ways in which the management of ISDS risk may be improved for LDCs, and what kind of role international institutions might have.

Planning to avoid a dispute

Most private firms but fewer governments extensively analyze the potential legal liability and litigation risk at the stage of planning major changes in their activities, and they try to design these activities ex ante to minimize such risk. In the case of ISDS, as Lauge Poulsen and others have documented, often governments never really considered the litigation risks from their international investment agreement (IIA) obligations until they got the first claim. Usually the political actors and officials who negotiate IIAs are not the same people who engage in the regulatory or policy making activities that may lead to ISDS litigation risk.

Compared to the millions of dollars that one LDC would need to defend one claim, not to even mention the hundreds of millions it might have to pay if found liable, the cost of a programme to sensitize LDC officials to ISDS litigation risk, and raise awareness of the means of mitigating this risk ex ante, may well be quite modest.

Some of the elements of such a programme could include:

- *ensuring the current government has a comprehensive inventory of its existing obligations to other states that could trigger ISDS and also an inventory of the existing foreign investments in the country that are potential claimants. This allows the government to know current potential risk exposure.

*preparing an inventory of ministries and senior officials who interact or are likely to interact with foreign investors and foreign investments.

*providing basic training (such as an interactive on line course with testing) to officials who interact or are likely to interact with foreign investors and foreign investments, in order to ensure a basic understanding of the government's potential risk exposure. This would aim at a general understanding of the main obligations in the IIAs, and awareness of the kinds of situations in the past that have led to liability for the host state in ISDS.

*sensitizing officials to the kinds of situations or "red flags" where dealings with the investor may have taken a turn of the kind where expert legal advice should be sought about potential ISDS liability before further interactions, or where the political level needs to be brought into the picture, because fundamental decisions may have to be taken about how to deal with the investor or investment going forward. (Sometimes ISDS disputes may emerge because working level officials do not feel they have the authority to adjust regulations or policies to deal with an investor's concern and thus they may simply ignore it, or behave obstructively even with no bad faith whatever).

*suggesting a set of best practices for record-keeping in matters related to foreign investors or investments that have rights that could lead to ISDS liability. Often even without admitting ISDS arbitrators may draw negative inferences from lack of recorded documentation or justification with respect to how officials have dealt with the investor or investment. The host state's side of what happened at a meeting in a ministry, for instance, may be hard to convey persuasively to the arbitrators if the host state does not have its own credible record of the proceedings. Awareness that the host state can account fully for the reasons and motivations for how it has dealt with the investor or investment may dissuade the latter from bringing a claim in the first place. With user-friendly information technology, taking and storage of such records should not be costly.

Possible agencies to work with LDCs to develop such a dispute avoidance strategy might include UNCTAD (which offers in other respects considerable advisory services to LDCs, among other developing countries) on investment issues, as well as the Multilateral Investment Guarantee Agency (a member of the World Bank Group), which has extensive experience with dispute avoidance in the political risk context.

"Litigation-Proofing" Public Policy

Considerable opportunity for reducing ISDS risk for LDCs lies in the building of capacity to identify the kinds of moves likely to affect foreign investors or investments in such a way as potentially to trigger an ISDS dispute and, most importantly, the kinds of adjustments to proposed policies that can lower ISDS risk. Here it is possible to draw on the patterns of past disputes, especially those that have been successful for the claimant in ISDS. Typical policy changes that incur ISDS risk exposure include changes to royalty and tax schemes for extractive industries; shifts in the basic regulatory framework for utilities or other highly regulated industries; decision by the government to return to public monopoly or public provision of some basic service, or narrow the extent of privatization; reduction in subsidies or other incentives provided to investors. If any of these kinds of policy shifts are contemplated by an LDC, this should trigger a review of ISDS risk exposure and a consideration of strategies to minimize such risk exposure.

The strategies could include:

1. When changing existing rules of the game, or government programs:

*grandfathering, or introducing gradually rather than suddenly, policy changes that negatively

affect foreign investors;

- *giving affected economic interests advance notice of contemplated policy changes, and an opportunity to comment on them;

- *ensuring that policy changes are introduced on a visibly non-discriminatory basis or, if it is necessary to fulfill the policy rationales in question, to make distinctions between enterprises, that any disproportionately negative impact on particular foreign investments is based on objective, neutral criteria;

- *providing judicial review, or other dispute settlement, ombudsman, etc. so that if an investor has concerns about the fairness or proper assessment of the applicability of the policies to their investment, they have an official avenue of recourse;

- *asking for confidential advice or assessment of planned major regulatory changes by an independent agency, such as the World Bank or a regional development bank, or a consulting firm. Such reports will provide credibility if later on the investor seeks to challenge the bona fides of the regulatory change;

- *where the government is either taking back some provision of public services or remonopolizing, giving the investor the possibility of alternative relevant economic activities in the country (such as sub-contracting with the government for provision of particular elements in public services);

- *providing, even where the constitution or the administrative law framework does not strictly require it, parliamentary debate and a vote on major regulatory or policy changes;

- *where a regulatory change is a response to a financial economic or other (e.g. environmental) emergency, frame the measure as a temporary one, subject to periodic review, and which is intended to be modified as conditions return to normality. Temporary impairments of an investment are much less likely to lead to successful claims for indirect expropriation;

- *consideration in some instances could be given to providing limited but immediate financial compensation to the most acutely affected foreign investors. Modest compensation that is prompt and voluntary could avoid an ISDS claim for a much greater amount (“full” market value compensation in addition to interest) down the road. What businesses will accept ex ante under uncertainty about the exact effects of regulatory change may be considerably more reasonable than what they demand in litigation once ISDS lawyers get involved. Once litigation is contemplated there are many incentives to inflate claims. Larger claims are good for lawyers as they justify larger fees, as well as for third-party funders who will typically be compensated by a percentage of the amount awarded.

Working on litigation-proofing strategies with LDCs could be a role for institutions such as the World Bank and regional development banks that have experience with regulatory reform, and have attempted to develop conceptions of good regulatory practice, applicable in among others LDC contexts. The UNDP may be another relevant agency.

2. When a new regulatory framework or policy initiative is launched:

- *LDCs may wish to highlight features of new regulatory frameworks or policy initiatives that are attractive to foreign investors, but one of the most common forms of ISDS risk exposure is the creation of “legitimate expectations” on the part investors that existing regulatory measures that the government has presented as favorable to the investor will continue or not become less favorable. ISDS tribunals have frequently found a violation of fair and equitable treatment where host states have changed regulations that investors have had “legitimate expectations” will continue to their benefit.

*when there are major new regulatory frameworks or policy initiatives LDCs should attempt to identify whether there is a significant impact on foreign investors or investments. There should be the possibility to get expert legal advice as to how to ensure that provisions are not worded in such a way to give rise to an open-ended expectation on the part of investors that beneficial features of the scheme will be continued.

*where an LDC government determines that it is important in order to attract investments to make specific regulatory or policy commitments, there may be ways of carefully limiting or qualifying the commitments, which would allow the possibility of change or adaptation of the measures in question without incurring the risk of an ISDS claim. Again, here at this stage, expert advice may be of help, based on past cases where states have been able effectively to limit their ISDS risk exposure in this way.

Risk Assessment of New or On-Going Investments

Social and environmental assessments, particularly of significant new investments are, arguably good practice from a sustainable development point of view. In the case of MIGA, the political risk insurance agency of the World Bank, pre-screening investments in this way, may have helped to avoid pitfalls that could lead to claims; MIGA has been remarkably successful in avoiding investment disputes as well as solving them at an early stage, without litigation or the need to pay out an insurance claim. More generally, MIGA's know-how in evaluation project-specific risk, including in LDCs, could be deployed more generally in helping LDCs devise, or in some instances perhaps obtain the technical support of international institutions in conducting, appropriate risk assessments, including social and environmental assessments of proposed new investments. Many past ISDS claims have resulted from situations where the environmental or other consequences of the investment for local communities (real and/or perceived) have led to a fraught relationship to the government, in some cases causing to take measures (unpredicted often in the investor's mind) that result in significant economic harm to the investment, or even shutting it down.

Early Warning Mechanisms

Again, learning from MIGA's practices, MIGA's insurance arrangements entail on-going monitoring of the investment and the government's interaction of it, based on various reporting requirements. While it may be unrealistic for LDCs to monitor continuously projects that may involve ISDS risk exposure, or to impose reporting requirements on investors, what may be possible is to analyze past ISDS claims to determine a list of what one might call early events, i.e. the kind of events that in retrospect could be regarded as early signs that a full-blown investment dispute might develop, with a risk of ISDS litigation against the host country. If one or more of these events occurred, this might be the trigger for bringing in legal and other relevant expertise at a stage well before the problem because of such a scale, or intractable or hard to reverse, such that it could be a basis for an ISDS claim.

Good Offices and Pre-Dispute ADR

Outside help may in some cases be useful in avoiding a full-blown dispute, especially where an LDC government has limited experience in managing relationships with foreign investments. LDCs could usefully have access to the services of the UN, the World Bank or regional development banks, intervening not in this context to try to settle an already well-established dispute but to avoid such a dispute from emerging. The application of wider experience and

expertise with regard to foreign investment in LDCs, may help diagnose properly what is going wrong and get on the table possible solutions that the parties might not have thought of. Even light-handed involvement of outside agencies may build trust, giving each side the confidence to explore compromises and pragmatic adjustments to the relation, assured that each side is not facing alone a party that often they do not know well, where its ultimate incentives and motivations may have become unclear.

Conclusion

This paper has shown that there is a range of options to reduce ISDS risk exposure that might be implemented with a view to preventing the emergence of a full-blown investment dispute and especially an actual ISDS claim. The program of legal assistance that is now being developed for LDCs when faced with investment negotiations or ISDS claims (the “Investment Support Programme for the LDCs”) can be instrumental in making available to the LDCs the legal expertise necessary to implement such dispute avoidance strategies.

Once a claim is filed it is often the case that the matter has become intensely antagonistic, making further settlement negotiations difficult. A new set of parties comes into the picture, lawyers, arbitrators, third party funders, who may have more of an interest in litigation than in settlement. Indeed, overall the evidence is that when a settlement does occur after a claim is filed, the host state ends up making very significant monetary payments or regulatory concessions to the investor; settlements post-filing may be less costly than the result of litigation, but they are still likely to place a significant burden on an LDC. For all these reasons, LDCs with the support of the relevant international institutions and programs, ought to consider a range of measures to avoid claims and reduce generally ISDS risk exposure. I have given illustrations of such possible options in this brief paper.

Concluding remarks*

Irene Khan

My organization, the International Development Law Organization (IDLO), was born out of the realization of the capacity gap that prevails in developing countries on legal issues. It began its life in 1983 as IDLI - the International Development Law Institute – and it then became, in 1988, an intergovernmental treaty-based organization, as governments realized the importance of investing in law in order to promote development. And this has, of course, now been “codified” in terms of policy in Sustainable Development Goal 16 of the 2030 Agenda for Sustainable Development.

Our starting point is really here: it is in the recognition of the law as a critical ingredient for successful trade and investment. As an organization that works on the ground in a number of LDCs around the world, we have seen the imbalance that prevails between international investors and the national and private sector entities in those countries negotiating the terms of these investments. Whether it is in the context of the extracting industry in Sub-Saharan Africa, or in relation to arbitral proceedings in Asia, we keep seeing a small number of government lawyers sitting across the table from scores of experts and well-resourced international law firms. There is clearly an imbalance of “arms” in these situations.

The 47 least developed countries have a combined population of almost a billion people and comprise the poorest and most vulnerable populations of the world. This is where the need is greatest, the demand is very high, but the supply remains very scarce. What are we discussing here is, in essence, how we can best meet that supply. LDCs possess tremendous potential in terms of human as well as natural resources. But, despite the fact that progress is being made, and that there is significant economic growth in several of the LDCs, there is still so much that needs to be done to overcome the barriers that prevent that potential from being unlocked and fully realized.

Law alone is obviously not the answer to all problems of trade and investment facing the LDCs. The challenges on the ground are many, and LDCs governments are fully aware of them. But law has certainly a very important role to play.

What is it then that is especially innovative in the conception of the Programme we are discussing here today?

First, the fact that it has been conceived very much as a genuine public-private partnership. A fundamental feature of the initiative is the endeavor to mobilize a strong pool of experts – to harness the services of international lawyers and of trade, investment and other experts committed to provide support to the LDCs on a pro-bono or reduced-fees basis.

The second important feature of the initiative is of course, that, it has been designed as a “bespoke service”, tailored to meet the specific needs of the LDCs. LDCs are a diverse group, and the challenges - both the legal and the development challenges – are very diverse. For this reason, we

* Drawn from remarks made by the Director General of IDLO Irene Khan at the conclusion of the high-level segment of the event held at the United Nations on 22 Sept 2017 for the presentation of the of the ISP/LDCs Programme.

intend to work closely with the countries and the entities requesting the services of the Programme to design contextually relevant and locally owned responses.

The third element I want to emphasize is that we must not, and will not, supplant national capacity, but seek to build it. This must be a key goal: to work together with the countries requesting the services of the Programme to strengthen their legal profession and reinforce the capacity and effectiveness of their institutions. As a lawyer, I know that legal problems don't disappear fast. So, if this Programme is to be sustainable, it must at the same time meet immediate needs, and invest in capacity development for the longer term.

Let me make another important point. As you know, I am a passionate advocate for women's rights. And we all know that, just as a bird needs two wings to fly, we need to invest in women as well as men when it comes to business, trade and economic development. I intend therefore, that the Programme pays particular attention to supporting businesses owned by women as well as individuals from marginalized and excluded groups.

We will have challenges. This is not the first time that initiatives of this kind have been tried. But you can never win anything unless you are ready to confront the challenges before you. Equally important, there are currently conditions that were not present in the past and that augur well for the success of this new initiative.

First, there is today a new environment for development where trade and investment are now at the heart of development policy. Secondly, as we heard from Justice Yusuf, the LDCs themselves are now acutely aware of the importance of legal capacity and of the need to build it. Thirdly, as I mentioned, there is today a much stronger commitment from the private sector to contribute to the development effort of the LDCs. The appreciation is growing that there is no conflict but a fundamental convergence of interests in supporting the LDC's pursuit of fair and sustainable foreign direct investments.

Last, but not least, there is now a new policy framework and a new dynamic for development that has been introduced by the 2030 Agenda for Sustainable Development. It is on this new policy environment, together with the renewed international commitment to support the development of the LDCs, that we pin our hope for the success of this initiative. However, success will ultimately depend on all of us working together. This is a partnership not just of the High Representative's office and IDLO; it is a partnership engaging private sector organizations, law firms, management consultancies and the different business groups that will choose to join it. And it is of course also a partnership with the LDCs themselves. So, in this sense, it is a new multilateral partnership between the public and the private sector that we are launching today.

Let me close with one thought: "Leaving no one behind" is what the 2030 Agenda is all about. The LDCs cannot be left behind; we need to make this journey together.

The 47 Least Developed Countries (LDCs) are Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Dem. Rep of the Congo, Djibouti, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Lao People's Dem. Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Sudan, Timor-Leste, Togo, Tuvalu, Uganda, United Rep. of Tanzania, Vanuatu, Yemen and Zambia.

The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States (UN-OHRLS) was established by the United Nations General Assembly in 2001. The Office advocates in favour of the LDCs and mobilizes international support for the implementation of the Programme of Action for the Decade 2011-2020 for the LDCs.

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