

An introduction to investment treaty arbitration

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Scope of this presentation

- Investment treaty arbitration a huge, growing and politically charged topic. Even an introduction can't avoid dealing with complex issues and major controversies. So...
- Context: locate BIT arbitration in framework of international trade instruments and dispute-resolution methods. Focus on Asia developments.
- Basic anatomy of a BIT and the ICSID system
- Lightning tour of hot topics:
 - Substantive issues: interpretation of State obligations
 - The ICSID process: jurisdiction, challenges to arbitrators; quantum, costs, review/annulment...
 - Where are we going? Denunciation , renunciation, reform



Context (1): Asia, BITs and international trade

- BITs a subset of international trade instruments: IIAs/FTAs (ASEAN, NAFTA...); sector-specific multilateral treaties (Energy Charter...). Liberalise/encourage trade – in case of BITs, foreign direct investment (FDI) – on assumption of mutual benefit.
- BITs – investor confidence – assumptions about behaviour of capital-importing governments and effectiveness of national remedies. Trend (until recently): strong State support for BITs providing investor-state arbitration. Huge increase in use in Asia.
- Treaties concluded:
 - 2012: globally 2,833 BITs, 331 IIAs
 - BITs – Asia (UNCTAD 1991): China 28, S Korea 14, India 1, Singapore 9
 - BITs – Asia (SIAC 2014): China 128, S Korean 90, India 82, Singapore 21
- Disputes Asia/Oceania 1987-2013 (M. Maguire, Dec 2013):
 - for whole period 1987-2002, 23 disputes with a AO party; 173 in 2013
 - Singapore – never respondent (with Brunei); 3 Singapore claimants against other AO States

Context (2): the nature of BIT law

- How does it relate to other systems of law? How does it differ from international commercial arbitration?
- Agreement between States, so belongs to PIL:
 - In contrast to commercial arbitration, public policy centre-stage
 - Treaty itself primary source of law, but in interpreting/applying, ICSID tribunal applies “the law of the Contracting State party... and such rules of international law as may be applicable” (Conv [42(1)]).
- BIT drafting technique and approach to interpretation contrasts with common law tradition of national legislation and private contracts
 - Similarities with other instruments conferring rights on private parties, eg. human rights treaties (ICCPR, ECHR...)
 - Open-textured language requiring extensive interpretation – likely to be dynamic not static
 - “Autonomous concepts” -- eg whether a charge is a “tax”. Domestic law not decisive.
 - But no central interpretative authority. What are tribunals actually deciding?



Context (3): the function of a BIT

- Distinguish from underlying private law investment instrument
 - Can present difficulty esp where the investment counterparty is a public sector entity
 - In principle, BIT does not constitute State guarantor of success or value of (necessarily speculative) investment. Really about restraining abuse of sovereign power -- arbitrary/unlawful/discriminatory treatment etc. -- bearing in mind a foreign investor could be a soft target
 - Similar role to a State's own system of administrative law
 - State as “merchant” v. “sovereign”
- However...
 - How far the distinction holds in principle depends on approach of tribunals to scope/extent of “fair & equitable treatment”, “expropriation,” “no less favourable treatment” etc.
 - Umbrella clauses potentially erode the distinction completely



Anatomy of a BIT



- Three basic elements:
 - Definitions: what classes of investment/investor are covered?
 - Obligations of parties – esp. the State
 - Investor/State Dispute Settlement (ISDS) mechanism
- The Singapore/Pakistan BIT (1995) – key provisions:
 - Art 1, 2(1) “investment” – “specifically approved in writing “.
 - Art 1 “national” , “company” – essence is not domestic investor
 - Art 1(2) “fair and equitable treatment”
 - Arts 4, 5 “most favoured nation” ; exception for FTA/regional trade agreements
 - Art 6 expropriation and measures having equivalent effect – unless...
 - Art 7 protection/compensation – no less favourable treatment where war etc.
 - Art 8 repatriation of capital and returns
 - Art 10 choice of governing law for investments
 - Art 11 permitted prohibitions and restrictions
 - Art 15 2nd limb – umbrella clause
 - Art 13 – ISDS – negotiation → conciliation → *ad hoc* arbitration

Overview of the ICSID system

- Not the only show in town – but principal act. About 50% of disputes.
- Offshoot of World Bank. Key instruments: Convention (1966); Institution Rules; Conciliation Rules; Arbitration Rules
- Consent – like any other arbitral institution
- Jurisdiction of the Centre
 - Conv [25] – “any legal dispute arising directly out of an investment, between a Contracting State... and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre. ...no party may withdraw its consent unilaterally.”
 - NB jurisdiction/competence of individual tribunal also raises treaty issues
- Law applicable to a dispute – Conv [42(1)] – As agreed, or law of Contracting State party to the dispute (inc. its conflicts rules) “and such rules of international law as may be applicable”.



Basics of ICSID arbitration (1)

- Panels of Conciliators and Arbitrators – Conv [12]-[15]
 - Each State can designate up to 4 who may but need not be its nationals
 - Chairman (= President of World Bank) can designate up to 10 – different nationalities
 - “Persons of high moral character and recognised competence... who may be relied on to exercise independent judgment.” [14(1)]
 - Chairman’s appointments to have due regard to representation of “principal legal systems of the world and the main forms of economic activity”.
 - Renewable 6-year terms
- Commencement and constitution of tribunal – Conv [36]-[40];
Institution Rules; Arbitration Rules
 - Notice in writing to Secretary-General
 - 90 days to appoint arbitrators – Chairman may then appoint
 - Majority of arbitrators must be non-nationals of either Contracting State (unless all appointments mutually agreed). National of either Contracting State may only be appointed at all if the other party agrees.
 - May appoint non-panellists provided they possess the Art 14(1) qualities

Basics of ICSID arbitration (2)

- *Kompetenz-Kompetenz* – Conv [41]. Tribunal may determine objection to jurisdiction as preliminary question or join to the merits.
- Tribunal may recommend “provisional measures... to preserve the respective rights of either party” – Conv [47]
- Written/oral phases of procedure – Arbitration Rules Chap. III
- Venue: seat of the Centre (Washington DC), alternatively the seat of the PCA (the Hague) “or other appropriate institution”, or “at any other place approved by the... Tribunal...” – Conv [63].
- Award:
 - Within 120 days after closure (+ power to extend 60 days) – r. 46
 - Unless agreed otherwise, Tribunal may determine “any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute” provided “within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre” – Conv [46]
 - Costs: tribunal “shall... assess the expenses incurred by the parties... And shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal... Such decision shall form part of the award.” – Conv [61(2)]

Basics of ICSID arbitration (3)

- Publicity/transparency:
 - Power to hear third-party intervention: Arbitration Rules r. 37
 - Centre “shall not publish the award without the consent of the parties” – Conv [48(5)]
 - But where one party withholds consent, practice of other party to publish elsewhere (with informal encouragement of ICSID Secretariat). And Arbitration Rules r. 48(4) – “Centre shall promptly include in its publications excerpts of the legal reasoning of the Tribunal”.
- Challenging an arbitrator -- Conv [57]; Arbitration Rules r. 9:
 - Party may challenge any individual or majority of tribunal “on account of any fact indicating a manifest lack of [the Art 14(1) qualities]”
 - must file a proposal “promptly and in any event before the proceeding is declared closed”.
 - NB waiver – r. 27
 - If challenge to one arbitrator, decided by unchallenged majority. If they disagree, or if challenge is to majority, the Chairman decides.

Basics of ICSID arbitration (4)

- Recognition and enforcement -- New York Convention bypassed:
 - Award “binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention” – Conv [53]
 - “Each Contracting State shall recognize an award... as binding and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that State” – Conv [54(1)]
 - Execution of award “governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought” – Conv [54(3)]
 - But Art. 54 not to be “construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.” – Conv [55]



Basics of ICSID arbitration (5)

- Omission, interpretation, revision, annulment
 - Party may within 45 days ask tribunal to decide omitted question; tribunal “shall rectify any clerical, arithmetical or similar error – Conv [49(2)]
 - Either party may request interpretation of the award; tribunal may stay enforcement in meantime – Conv [50]
 - Either party may apply for revision of award on ground of “discovery of some fact of such a nature as decisively to affect the award”, provided applicant’s lack of knowledge at time of award “not due to negligence”. Within 90 days of discovery, 3-year long-stop – Conv [51]
 - Conv [52] -- Either party may request annulment on grounds:
 - (a) tribunal was not properly constituted
 - (b) tribunal has manifestly exceeded its powers
 - (c) corruption on part of a member of the tribunal
 - (d) serious departure from a fundamental rule of procedure
 - (e) awards has failed to state reasons.

Time limit 120 days (except corruption - 120 days/3 yrs)

Ad hoc Committee – Chairman appoints 3 persons - different nationalities from tribunal members, no nationals of either Contracting State or designated to Panel by either Contracting State. May annul whole of part of award. May stay enforcement pending decision.

Hot topics

- Substantive legal issues:
 - Fair & equitable treatment
 - Most favoured nation
 - Expropriation and measures having equivalent effect
 - Umbrella clauses
- The ICSID process:
 - Jurisdiction: approval; nationality and the corporate veil
 - Arbitrator identity and challenges
 - Quantum of compensation
 - Costs
 - Revision and annulment of awards
 - Transparency
- Where are we going?
 - Denunciation: some key criticisms
 - Renunciation: the State bites back. Prospects for future instruments? US-EU?
 - Reform?



Substantive legal issues (1)

- Fair and equitable treatment
 - In broad terms, a “rule of law” principle – protects legitimate expectation, due process, etc. But is it an “autonomous” standard, exceeding minimum standard of treatment of aliens in customary international law?
 - NAFTA position – simply codifies customary standard
 - No ICSID consensus: *Vivendi v. Argentine Arb/97/3* (2007) – greater protection. Cf. *ADF v. USA Arb/00/1* (2003) – treaty and customary standard both evolving
- Most favoured nation
 - Really “no less favourable” treatment. Does obligation apply to dispute-resolution procedures in third State BITs? If so, would enable investor to take advantage of State’s substantive obligation to claim more favourable ISDS provision than “own” BIT makes, eg. preconditions to submission of dispute to arbitration
 - Conflicting ISCID tribunal decisions (expressed as decisions on jurisdiction): *Siemens v. Argentina Arb/02/8* (2004) – yes. *Salini and Italstrade v. Jordan Arb/02/13* (2004) – no.

Substantive legal issues (2)



- Regulatory acts and expropriation
 - What is test for “indirect” expropriation/measures having equivalent effect?
 - Orthodox view (*Tippets v. Iran et al*): cannot include the factors listed as express exceptions to the State’s obligation. Hence questions of State’s purpose, whether non-discriminatory, etc., irrelevant – only issue is effect , esp. whether “substantial deprivation”. Thus risk that bona fide regulatory measure (“police power”) will amount to expropriation/equivalent , and can only go uncompensated if within express “prohibitions and restrictions” clause
 - Series of decisions culminating in *Methanex v. USA* (NAFTA 2005) and *Saluka v. Czech Republic* (2005) affirmed State’s “legitimate right to regulate and to exercise its police power in the interests of public welfare.”
 - Proportionality? Borrowed from ECHR - *Tecmed*. But may not assist State if tribunal itself is judge of whether less intrusive alternatives available: basis of *Occidental v. Ecuador* finding of liability.
 - *Philip Morris Asia v. Australia*?
- Umbrella clauses
 - Narrow v. broad approaches
 - Privity – strict view of corporate veil in *Burlington v. Ecuador Arb/08/5* (2012)

ICSID process points (1)



- Jurisdiction: “investment”
 - “Investment” – requirement for specific approval will be strictly construed. Tribunal will require evidence of actual approval. Unlikely to find “implicit” consent
 - *Yaung Chi Oo v. Myanmar* (2003) ASEAN Arb/01/1 (ASEAN Agreement 1987)
- Jurisdiction *ratione personae* – nationality of claimant
 - Can corporate veil be pierced where ultimate ownership of claimant is in respondent State? Tricky issue because (a) mirror-image of corporate veil point in relation to umbrella clauses/privity, and (b) Conv [25(2)(b)] – definition of “national of another Contracting State” – refers to the parties’ agreement to treat a legal person as a national of another State.
 - Tribunal split in *Tokios Tokeles v. Ukraine* Arb/02/18 (2004) – 99% of claimant company controlled by nationals of respondent State. Majority took formalistic view of nationality and accepted jurisdiction. Dissenting member held that approach inconsistent with object and purpose of Convention. And resigned.
 - But objective approach in *Vacuum Salt v. Ghana* Arb/92/1 – reality of Ghanaian control ownership despite Ghana’s agreement under Art 25(2)(b).

ICSID process points (2)

- The arbitral village: who is being appointed in disputes with an Asian party?
 - M. Maguire, Dec 2013 – figures for 1987 to 2013, appointments to tribunals and ad hoc annulment committees for disputes with an AO party:
 - Top 3: US 28, UK 24, France 13
 - To find anyone from outside N America or W Europe you have to go to 12th and 13th place -- Colombia and Egypt on 4 each.
 - Asians: India 3, Singapore 3, Thailand 3; Bangladesh, China, Malaysia, Pakistan, Philippines 1 each.
 - Appointments by region and party: Asians 4 appointments by claimant, 16 by respondent, 11 as chair. Cf. “other” 128 claimant, 102 respondent, 111 chair. Above stats imply lion’s share of “other” are from N America or W Europe.
 - Individual arbitrators feature repeatedly. Among the 38 who have received 4 or more appointments, you reach no. 12 before leaving N America/W Europe – no. 12 is N Zealander (8), then no. 18 Australian (6). Asia not reached until no. 38, a Singaporean (4).
 - Same research found no correlation between nationality (AO or not) and decision (uphold/dismiss claim): but disastrous for perception.

ICSID process points (3)

- Bias challenges – how not to do it:
 - *Burlington v. Ecuador* – decision of Chairman (Dec 2013) on respondent challenge to Prof. Orrego Vicuña. Dissented on jurisdiction and liability (inc. the umbrella clause issue) and had neglected to disclose repeat ICSID appointments by same law firm. However, challenge upheld on sole basis of ill-judged remarks in last paragraphs of response to challenge itself.
 - Met high threshold of facts which “manifestly evidence an appearance of lack of impartiality”
- Quantum of compensation
 - History of unscientific quantification, often undercompensating in comparison with approach taken in commercial arbitration
 - Pendulum now swing in opposite direction: *Occidental v. Ecuador* - US\$1.77 billion (US\$2.3 billion inc. interest).
 - Though not clear award any less unscientific – 25% reduction for contributory negligence
- Costs
 - Order to meet advance of whole of tribunal costs where claimed third-party funded - *RSM v. St Lucia* ICSID Arb/12/10 (Dec 2013)

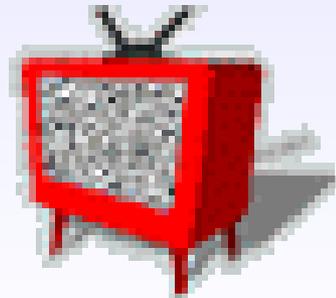
ICSID process points (4)

- Annulment: how are the Art. 52 grounds interpreted?
 - CMS v. Argentina - “manifest errors of law” insufficient to annul award of S\$133million.
 - Would it make a difference if the error were jurisdictional?
- How extensive is the tribunal’s own power of review?
 - Existence of express (and limited) powers to correct/revise award (Conv [49], [51]) incompatible with implied power of ICSID tribunal to reconsider a non-final decision: *ConocoPhillips Petrozuata BV v. Venezuela* (March 2014).
- Relationship with national courts:
 - Exclusivity – ICSID Conv [26], [53]
 - Does that leave a role for adjudication by national courts on merits of dispute or validity of ICSID/UNCITRAL award?
 - *Argentina v. BG Group* (2012) 665 F 3d 1363
 - The *Chevron v. Ecuador* saga – is it part of the arbitral role to assign State responsibility for judicial acts?



ICSID process points (5)

- Transparency
 - Reforms in ICSID system – esp third party intervention – driven by other systems esp. NAFTA. Chap. 11 Tribunal in *Methanex v. USA*, applying UNCITRAL Arbitration Rules, received an amicus brief from IISD. Followed in *UPS v. Canada*, prompting FTC to make a statement formalising the process.
 - ICSID Arbitration Rules. R. 37 gives tribunals discretion. Tribunal in *Biwater Gauff v. Tanzania* disclaimed a general rule of either transparency or confidentiality but noted the “overall trend... towards transparency.”
 - NAFTA: Canada and US now indicating standing consent to public hearings
 - UNCITRAL Transparency Rules (in force 1.4.14) likely to prompt further openness



Where are we going?

- Denunciation: key criticisms
 - Scale of awards prompts renewed analysis of legitimacy and transparency of process
 - Perception of geopolitical bias towards developed countries
 - Lack of certainty/consistency – views of individual tribunals/arbitrators in absence of a central referee. Consent called into question.
- Renunciation: the State bites back
 - Indonesia, Australia, Venezuela
- Impact on FTA proposals? The EU-US saga
 - Intention to conclude in 2014 – if concluded would cover 46% of world GDP! 3 pillars: (i) customs duties esp. agriculture; (ii) non-tariff trade barriers; (iii) investor-State arbitration
 - Real problem likely to be (ii) – totemic issues inc. environmental regulation, GM foods, fracking...
- Reform?

