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The Increasing Appeal and Novel Use of Bilateral Investment Treaties

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Over the last 20 years, bilateral investment treaties (BITs) have provided foreign investors with basic safeguards against expropriation and related risks and guarantee the right to bring claims before a neutral arbitral tribunal, such as the International Centre for the Settlement of Investment Disputes (ICSID),[1] or a tribunal established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).[2] There are more than 3,000 BITs and a number of multilateral instruments or free trade treaties (such as NAFTA and the 1994 Energy Charter Treaty) providing BIT-style protection within certain regions or industry sectors.

The appeal of BIT tribunals, coupled with the economic uncertainty of recent times, has triggered an increased use of BITs to resolve disputes in ways that previously had not been encountered by arbitral tribunals, and we expect this trend to continue. This article discusses the traditional strategies and more recent, innovative applications of BITs by businesses.

Traditional Strategies

BIT tribunals have proven an effective means for businesses to obtain redress against governments in two broad settings:

Expropriation: awarding damages to foreign investors where a government has, through direct nationalization or by indirect means, confiscated their assets. Examples include the 2012 award of $1.77 billion in damages against Ecuador for expropriation of Occidental's oil development rights,[3] the 2008 award of €8.2 million in favor of Dutch nationals whose farms were expropriated by the Mugabe regime[4] and the 2005 award of $269 million in damages against the Czech Republic based upon the *de facto* expropriation of a TV station (effected indirectly through measures that operated to force a Dutch investor to surrender its broadcasting license).[5]

"Unfair or inequitable treatment": awarding damages where a government measure, while stopping short of expropriation, nevertheless degrades the investment in a manner that violates international standards of "fair and equitable treatment." Examples include Argentina's "pesification" laws of 2002, which had converted all gas and electrical tariffs from dollars to Argentine pesos, leading to several awards of damages against Argentina.[6]

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1 ICSID is a specialist arbitral body affiliated with the World Bank. Its procedures and independence are guaranteed by an international treaty, the 1965 ICSID Convention.

2 Under either set of rules, BIT arbitration generally is held in a neutral location, such as Washington, D.C., London, Paris, Singapore or The Hague.

3 *Occidental Petroleum Corp. v. Ecuador*, ARB/06/11, Award ¶ 876 (ICSID 2012) (damages awarded under the U.S.-Ecuador BIT).

4 *Funnekotter v. Zimbabwe*, No. ARB/05/6, Award ¶ 148 (ICSID 2009) (damages awarded under the Netherlands-Zimbabwe BIT).

5 *CME Czech Republic B.V. v. Czech Republic*, Final Award ¶¶ 591, 609 (UNCITRAL 2003).

6 *See, e.g.*, *CMS Gas Transmission Co. v. Argentina*, No. ARB/01/8, Award (ICSID 2005) ($133.2 million awarded for breach of "fair and equitable treatment" guarantees in the U.S.-Argentina BIT after pesification of gas tariffs); *National Grid plc v. Argentina,* Award ¶ 296 (UNCITRAL 2008) (awarding $54 million for breach of U.K.-Argentina BIT after pesification of electrical tariffs).

While investment disputes have arisen in a variety of industries and situations, many of them have related to investments in politically volatile regions, including Latin America (particularly against Argentina, Bolivia, Ecuador and Venezuela), the former Soviet Union and Africa. A number of recent cases, however, have suggested that BIT strategies may be heading in a different direction.

Innovative Uses

In these instances, BITs have been deployed not as a means of challenging classic nationalization decrees but as a way to challenge government policies or practices in fields that historically have not been the subject of BIT jurisprudence. Notable examples include:

Tobacco Regulations. The first case was brought in 2004, when a group of Canadian investors belonging to the Six Nations of the Iroquois Confederacy (owners of the Seneca cigarette brand) brought treaty claims against the United States, arguing that the 1998 Master Settlement Agreement of numerous tobacco claims violated their investment rights under NAFTA. They claimed, for example, that because their tobacco enterprises had not been the subject of adverse judicial rulings, it was improper for them to be subjected to the terms of the 1998 settlement, and that this constituted "unfair and inequitable treatment" in breach of Article 1102 of NAFTA.

Although these claims were rejected in 2011 after a full merits hearing,[7] further BIT claims have arisen in the wake of "plain packaging" laws enforced in two countries (Australia and Uruguay). In those cases, the claimants, major tobacco brand owners, have challenged national laws that restrict the use of cigarette trademarks and otherwise regulate tobacco marketing. The claimants have alleged that the laws are expropriatory, unfair and inequitable, and thus violate their BIT rights.[8] The cases remain pending.

Sovereign Debt. Another cutting-edge use of BITs has arisen in the context of sovereign debt default, specifically the Argentine debt default of 2001-02. Many of Argentina's creditors reacted to the default by exercising their right to sue Argentina in a foreign court — in most cases, the federal courts of New York (the agreed exclusive forum for disputes as specified in many of Argentina's sovereign bonds). This led to a series of large money judgments against Argentina. Argentina meanwhile has sought to reduce its exposure through certain exchange offers made in 2005 and 2010, inviting its predefault bondholders to exchange their defaulted debt for new instruments to be issued by Argentina. The exchange offers met with an acceptance rate of more than 90 percent, with a small minority of bondholders electing to continue their efforts at judgment enforcement through the New York and other U.S. courts.

However, not all holdout bondholders have elected to take their claims to the courts. In the case of *Abaclat v. Argentina*, a group of approximately 60,000 Italian holdouts has brought ICSID arbitral proceedings against Argentina pursuant to the Italy-Argentina BIT. The *Abaclat* claimants allege that their bond instruments constitute protected investments under the BIT and the ICSID convention, and Argentina has violated its treaty obligations by, among other things, enacting legislation such as its 2005 "Lock Law" providing that bondholders who refused to accept an exchange offer were no longer entitled to receive principal or interest payments on their predefault bonds.

In 2011, an ICSID tribunal held that it had jurisdiction over the dispute in that the *Abaclat* claimants' bonds were investments susceptible of protection under the BIT, and thus enjoyed the protection of

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7 *Grand River Enterprises Six Nations, Ltd. v. United States*, Award at 63 (UNCITRAL 2011).

8 The claims are *Philip Morris Asia Ltd. v. Australia*, PCA Case No. 2012-12 (UNCITRAL, pending) (Hong Kong-Australia BIT) and *Philip Morris Brands Sàrl v. Uruguay*, No. ARB/10/7 (ICSID, pending) (Switzerland-Uruguay BIT).

the fair and equitable treatment, most favored nation and other clauses.[9] In a recent ruling in *Ambiente*, a parallel case, another ICSID tribunal upheld jurisdiction over another group of Italian bondholders making similar claims.[10] Both claims now are progressing toward merits hearings.

The *Abaclat* and *Ambiente* cases are controversial in some quarters, not only because they represent a relatively novel form of "mass arbitration" before ICSID, but also because the relationship between international law obligations (in a treaty) and the private law contractual obligations (such as those contained in a bond instrument) have not yet been fully articulated. For example, while the nonpayment of a debt obligation certainly would breach a private law obligation, it is not yet clear in what circumstances this could be held to constitute a treaty obligation.

Global Financial Crisis. The Argentine bond cases also have triggered new types of BIT claims in connection with the various bailouts and forced restructurings associated with the global financial crisis. In *Ping An Life Insurance Co. of China v. Belgium*,[11] a Chinese company (allegedly holding interests in Fortis Bank) has alleged that Belgium's financial restructuring measures of 2008 resulted in a violation of the China-Belgium BIT. BIT claims also have been threatened in the wake of the Greece bailouts and related laws, and may emerge following the recent Cyprus currency measures.

In this regard, one important aspect of the *Abaclat* and *Ambiente* decisions was the tribunals' suggestion that state measures that reduce or nullify existing creditor rights, such as the Argentine "Lock Law" or similar moratoria on repayment may violate BIT rights.[12] This may supply investors and creditors in other jurisdictions, particularly in the eurozone, with a basis for challenging similar measures.

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9 *Abaclat v. Argentina*, No. ARB/07/5, Decision on Jurisdiction (ICSID 2011).

10 *Ambiente Ufficio S.p.A. Argentina*, No. ARB/08/9, Decision on Jurisdiction and Admissibility (ICSID 2013). A further debt-related claim, *Alemanni v. Argentina*, No. ARB/07/8 remains pending before ICSID.

11 No. ARB/12/29 (ICSID, pending).

12 *See Ambiente* ¶ 543 ("the Tribunal considers that it was not so much the failure to pay, but the use of the Respondent's sovereign prerogatives when restructuring its debt, notably including the adoption of [the Lock Law], which qualify the Respondent's acts as potential breaches of the Argentina-Italy BIT and thus as treaty claims"); *Abaclat* ¶ *314 (indicating* that "arbitrary" or "discriminatory" restructurings might result in BIT liability).