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International Commercial Arbitration
Autumn 2011 – Lecture II

Investment Treaty Arbitration: Special Features
Summary and picking up the thread from last time

- Two procedural frameworks of investment arbitration:
  - The ICSID Convention – specific procedure for investment disputes
  - The New York Convention – ordinary framework of ICA

- Main significance:
  - Provides a basis of enforcement of arbitral awards against a state under the municipal law of other states
Investment Arbitration under the NY Convention

• Ordinary framework of ICA – i.e. based at the outset on a municipal law

• Subject to challenge under the lex arbitri
  – Cf. CME v Czech Republic (Stockholm) Occidental Petroleum v Ecuador (London), Metalclad v Mexico (British Columbia))

• Awards against states and state entities are in principle enforceable under the NY Convention
  – But subject to municipal arbitrability and ordre public in the lex fori
What about state immunity?

- An agreement to arbitrate will be construed as a waiver of immunity

- But does not apply to state immunity against execution
  - Relative to the asset in question – commercial vs public purpose
Arbitration under the NY Convention (Cont.): Applicable Law

• Main principle is party autonomy – tribunals are not strictly bound to apply a specific municipal law, cf the term «rules of law» in most arbitration rules

• In most cases the applicable law will be the host state law

• Can an ordinary commercial arbitral tribunal apply international law?
  – Requires state consent?
  – Or implicit competence (cf ICSID article 42)?
    • Cf. Revere Copper v OPIC (56 ILR 258) and SPP v Egypt (ICC case, 3 ICSID Rep 112)
  – Relation to enforceability under the NY Convention
    • Art V (1) c) – excess of competence and art V (2) – arbitrability and ordre public
Investment **Treaty Arbitration**: Overview

- Right of *individual* investors to make claims against host states under investment treaties
  - Bilateral – more than 2500 BITs in existence worldwide
  - Multilateral – the Energy Charter Treaty, NAFTA
  - To be included in CETA, TTIP, TPP?

- Treaty based dispute resolution mechanism utilizing the *model* and *framework* of international commercial arbitration
Theoretical perspectives

• Fundamental issue: is or is the investor made into a subject of international law by virtue of access to arbitration?
  – The distinction between ’direct’ or ’derivative’ rights

• Not only a theoretical issue:
  – Can the home state waive the rights of the investor?
    • Cf the Joint Interpretative Statement of the NAFTA Free Trade Commission (Mondev v US, Pope & Talbot v Canada)
    • Significance of the ’contract’ construction based on ICA – the investor’s acceptance of the state’s offer as the basic criterion?
  – Can the host state identify the investor with its home state for the purpose of sanctions?
Common Structure of a Bilateral Investment Treaty (BIT)

• Limitation of scope (the notions of ‘investor’ and ‘investment’)
• (Pre-)Admission requirements (usually not subject to investor-state arbitration)
• Common substantive standards of protection (i.e. post-admission)
  – Non-discrimination (national and most favoured nation treatment)
  – Fair and equitable treatment and full protection and security
  – Prohibition of direct or indirect expropriation without full compensation
  – Freedom of transfer, key personnel etc.
• Dispute settlement – investor-state (ISDS), also state-state but usually less important
Arbitral procedures often referred to

- Most common reference: ICSID
- But alternatively ICSID Additional Facility, assumes enforcement under the NY-convention
- Other common or possible references, assuming enforcement under the NY-convention:
  - Ad hoc based on the UNCITRAL rules
  - The Court of Arbitration of the ICC
  - Arbitration Institute of the Stockholm Chamber of Commerce
  - LCIA
  - PCA
The ’Mutual Consent’ Requirement Applied to BITs

• **ICSID art 25 / NY Conv art II**
• Does a unilateral offer in a BIT constitute «agreement (…) in respect of a defined legal relationship»?
• ’Offer and acceptance’ model relied on in arbitral practice
• Dependent on interpretation of the individual treaty clause whether it constitutes an offer
• Can the offer be revoked?
  – Compare ICSID art. 25 i.f.
Jurisdictional requirements: Overview

- The claimant must constitute an ”investor” – nationality requirement

- The claim must concern an ”investment” covered by the treaty

- Sometimes limited to treaty claims

- Distinction between jurisdiction and admissability
The Notion of ’Investor of the Other Contracting Party’

• Nationality requirement
  – Individuals – the law of the home state
  – Corporations – incorporation or seat as the main rule
  – Requirement of economic or substantial link?

• Exception – jurisdiction over local subsidiaries
  – Control by foreign shareholders as alternative nationality criterion – ICSID art 25 (2) b)
  – Alternatively: Right to make claims ’on behalf of’ a local company
Subject matter jurisdiction (*ratione materiae*): The Notion of ’Investment’

- In reality two requirements:
  - ICSID art 25 - ’any legal dispute arising directly out of an investment’
  - ’investment in the territory of’ as a common (or inherent?) limitation of the BIT scope of reference

- Definition of ’investment’ in the individual BIT
  - ’any asset’ including but not limited to ’movable and immovable property,’ shares, contracts, licenses etc

- Need for a substantial restriction – the distinction between investment and ’ordinary commercial transactions’

- The *Salini* criteria
  - (i) ’Contribution,’ (ii) ’duration of performance’ (iii) ’participation in the risks of the transaction, and (iv) ’contribution to the economic development of the host state
'Subject matter’ jurisdiction (cont.): contract claims vs treaty claims

- Depends on the wording of the treaty reference to arbitration – two main kinds of clauses
  - ‘Any dispute concerning an investment’
  - ‘Disputes concerning a breach of this treaty’

- The distinction made in arbitral practice between ’treaty claims’ and ’contract claims’

- What about umbrella clauses?
Admissibility requirements – exhaustion of local remedies

• General requirement under general international law before exercise of diplomatic protection
• ICSID art 26 - may be required by host state as a condition of its consent
• What about BITs in general, i.e. if no reference to ICSID?
  – Arbitration often stipulated to be equal alternative to municipal court litigation, may also be mutually exclusive (‘fork in the road’ clauses)
  – But probably nevertheless implicit assumption of offer to arbitrate
• Waiver requirement as alternative to exhaustion, cf NAFTA
  – If arbitration is limited to claims based on the treaty, the investor may give up rights by waiving its right of access to the local courts, cf. Waste Management v Mexico (the first case) available at http://italaw.com/
Admissibility (cont.): Overlapping Contract and Treaty Jurisdiction

• Agreement on dispute resolution in an individual agreement between the state and the investor
  – Can the investor waive its right to investment treaty arbitration under a BIT?

• The analogy to Calvo clauses in the old claims commissions
  – *North American Dredging Company case* (1926)

• Significance of the distinction between ’contract claims’ and ’treaty claims’