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# BITs – recent developments – Khawar Qureshi QC[1]

Bi-lateral Investment Treaties (BITs**)** provide considerable protection to Investors. There has been a huge increase in the number of arbitration claims being brought based upon BITs against States.

In this paper, part (A) headlines recent developments. In part (B) statistical data showing BIT claim related trends are summarized. In part (C), an overview is provided of some emerging issues which reflect a growing debate – are the Arbitral Tribunals which deal with BIT claims an appropriate means of resolving such matters?

## (A). <u>The Headlines:</u>

- Two cases before the English Courts pursuant to the Arbitration Act 1996 underpinned by (failed) challenges to the jurisdiction of arbitrators involving BITs[2]

- Bolivia and Ecuador seek to dis-engage from the ICSID Convention, and Venezuala threatens to denounce its BITs[3]

- UNCITRAL's Working Group on Arbitration in February 2008 effectively side-steps amendment of the UNCITRAL Rules to include general provisions concerning confidentiality/transparency issues vis-à-vis Investor State Arbitration (on the basis that the said Rules had primarily been drafted for commercial arbitration) - any such provisions to be contained in a separate instrument, not the UNCITRAL Rules themselves[4]

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[1] Professor Khawar Qureshi QC is Head of Chambers at McNair Chambers, and recognised as one of the top International Arbitration and Public International Law specialists from the UK

[2] *Ecuador v. Occidental* [2007] EWCA Civ 656 (4/7/07) (s. 67 AA 996 Challenge rejected. CA upheld Aikens J. decision that arbitrators had jurisdiction to make an award in a dispute under the US/Ecuador BIT involving matters of taxation. *Czech Republic v. European Media Service* [2007] EWHC 2851 (5/12/07) – Simon J. rejected a challenge pursuant to s. 67 AA 96 vis the jurisdiction of a Tribunal to determine (as well as quantify) compensation for expropriation pursuant to the terms of a BIT.

[3] Bolivia submitted a Notice of Denunciation of the ICSID Convention (pursuant to Article 71 thereof) on 2nd May 2007. On 4th December 2007 Ecuador submitted a notification under Article 25(4) of the ICSID Convention (attempting to exclude certain classes of dispute from ICSID jurisdiction). Venezuala has hinted that it may seek to denounce specific BITs.

[4] See the Report of the UNCITRAL Working Group (29/2/08) (A/CN.9/646) (paras. 54-69), and the article by Jonathan Sutcliffe and Anibal Sabater "UNCITRAL Arbitration: New Rules on Transparency?" (23/No.5) (May 2008) Mealey's International Arbitration Report. Two Issues dominate this question: (1) Whether the UNCITRAL Rules should contain specific provisions applicable only to BIT cases (2)

- Arbitral decisions on the question of the existence/use as justification of the Public International Law doctrine/BIT provision relating to the "State of Necessity"[5]

- Arbitral decisions addressing the meaning/scope of provisions within BITs, such as the "investment" "Investor""umbrella clause" "unfair/inequitable treatment" and "expropriation"[6]
- A model draft BIT presented by the Norwegian Government on 19th December 2007

**(B). <u>The Key Trends[7] - the year 2007:</u>**

- 35 new BIT cases filed (27 at ICSID) (in 2006 a total of 26 cases were filed)[8]. Of these new cases, 17 were against Developing Countries, 7 against Eastern European States and 11 against Developed Countries

- The total number of known BIT cases reached 290 (ICSID – 182, UNCITRAL - 80, SCC – 14, ICC – 5, ad hoc – 5. Cairo Regional Centre – 1, PCA – 1, exact venue unknown – 2)

- At least 73 Governments (44 developing world, 15 developed countries, 14 Eastern Europe) have faced BIT claims. Argentina has faced the highest number 46 (44 of which relate to its currency crisis of late 2000), followed by Mexico (18 known claims) and the Czech Republic (14 known cases)

- 6 countries faced arbitration proceedings for the first time in 2007 (Armenia, Bosnia and Herzegovina, Costa Rica, Guatemala, Nigeria, and South Africa)

- Around 39% of the know cases concerned the services sector (electricity distribution, telecommunications, debt instruments, water services and waste management)

- At least 28 Awards (24 of which are in the public domain) were rendered by Tribunals in 2007. 10 Awards on jurisdiction issues (6 upheld jurisdiction). 10 Awards on the merits (7 upholding the investor's claim). Almost 40% of known Awards in 2007 contained dissenting opinions by an arbitrator.

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Whether proposed new Rules in this regard relating to transparency should provide for public access to information/proceedings concerning BIT arbitral disputes under the UNCITRAL Rules. See, inter alia, "the Milan Declaration" (40 international arbitrators signed a document on 12th October 2007 suggesting an "opt in" process for transparency related UNCITRAL provisions)

[5]. See, inter alia, the case of *Sempra Energy v. Argentina* (28/9/07) [ICSID/ARB/02/16]

[6] See the UNCTAD Report "Latest Developments in Investor-State Dispute Settlement" (2008) ("the Report") at pages 3-9

[7] The Report pp. 1-3.

[8] Given that only ICSID maintains a public registry, the number of cases may be higher

- Of 7 known awards in 2007 dealing with expropriation claims, 2 upheld such claims. In 3 of the 5 remaining cases, the FET standard was held to have been violated

- Out of a total in known awards of $1.838 billion claimed in damages, $615 million was awarded (approximately 33% of the amount claimed)

- The (known) total score vis Arbitral Decisions so far – 42 for the State, 40 for the Investor, 37 settled amicably. 154 pending

**(C). <u>Some Emerging Issues:</u>**

**1. <u>Transparency/Confidentiality</u>**

Is there a detectable migration towards UNCITRAL Rules based process by parties commencing BIT claims, as opposed to ICSID? Why?

Pros/Cons of (i) maintaining Confidentiality (ii) Greater Transparency

**2. <u>Re-negotiation/denunciation of BITs</u>**

Are Bolivia, Ecuador and Venezuala signalling an emerging trend in their attempts to extricate themselves from the ICSID process and/or re-negotiate BITs?

**<u>Does the Norwegian Draft Model BIT reflect such a trend?</u>**

Its key provisions include:

**<u>Preamble</u>:**
Importance of corporate social responsibility (Article 32 "encourage" investors to comply with OECD guidelines for Multinational Enterprises)
Combatting corruption/bribery

**Article 1** – Investor "engaged in substantive business operations in the territory" of the Host State

**Article 2 –** Investment – In order to qualify as an investment an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk

**Article 16** – Award – to be made publicly available

**Article 18 –** Amicus written briefs
**Article 19 –** Documents submitted to Tribunal to be publicly available unless confidentially is asserted (and acceded to or upheld by the Tribunal). Public Hearings

**Article 31 –** Transparency – Laws/judicial decisions/regulations which may affect the operation of the BIT to be publicly available

## 3. Investment Treaty Arbitration and Public Law

An increasing number of academic commentators are analyzing the BIT regime with reference to Public Law considerations. The dominant theme advances the (uncontroversial) contention that BIT based arbitration is a revolutionary development in international adjudication. However, it is further (and more controversially) contended that BIT based arbitration is creating an "enclave " affording special protection to "investors" and thus undermining the rule of law[9].

The simple answer to such contentions may well be that States have "consented" to BITs, and as such, BITs reflect the application of the rule of law on the international law plane (essentially rooted in the International Law principle of Diplomatic Protection of nationals).

Nevertheless, in a thought provoking book, Gus Van Harten's *"Investment Treaty Arbitration and Public Law*" (OUP) (April 2007) contends as follows:

- Unlike any other form of international arbitration, BIT based arbitration is a method of Public law adjudication, in that it is used to resolve regulatory disputes between "investors" and the Host State as opposed to reciprocal disputes between private parties or between States

- The use of private arbitration in the regulatory sphere conflicts with principles of judicial accountability and independence – the integrity of the legal system is undermined by permitting "contracting out" of the judicial function in public law.

- In various respects, the BIT Tribunal arbitrators are more powerful than Judges because:

    1. These arbitrators have comprehensive jurisdiction to review sovereign acts by applying broadly worded standards of review that are open to a range of interpretations – giving them power to adjudicate upon core matters of public law (such as whether or not a State of Necessity existed in Argentina vis the "currency crisis" – conflicting ICSID Arbitral decisions CMS (15/5/05) - No. LG& E (3/10/06) – Yes, Sempra (28/9/07) – No )

    2. The system of enforcement underpinning BIT Awards (namely the New York Convention and the ICSID Convention) enable such adjudicative decisions on public law issues to be enforceable more widely

[9] See for example *"Revisiting Privatisation, foreign investment, international arbitration, and water*" Miguel Solanes and Andrei Jouravlev (SEPAL) (November 2007), *"Defecting on Development: Bilateral Treaties and the Subversion of the Rule of Law in the Developing World"* Ronald Daniels (23/3/04)

3. The laws of many countries have been revised to require domestic Courts to defer to foreign arbitration awards; as a result, arbitrators interpret and apply public law with limited Court supervision or other forms of accountability

4. Arbitrators are able to award damages as a public law remedy without having to apply the various limitations on State liability that evolved in domestic legal systems to balance the objectives of deterrence and compensation against the competing principles of democratic choice and governmental discretion

- It is contended that by signing up to BITs, States have enabled the use of privately contracted adjudicators to determine the legality of sovereign acts and to award public funds to businesses that sustain loss as a result of government regulation – undermining the basic hallmarks of judicial accountability, openness, and independence

- It is further contended that the lack of security of tenure of BIT Tribunal arbitrators in a one-sided system of State Liability, in which only investors bring the claims and only states pay damages for breach of the BIT, makes the arbitrator dependent upon prospective claims and thus exposed to the perception of bias – an arbitrator will only receive an appointment if an investor makes a claim. It is thus said that the "arbitrator community" might be perceived as having a financial stake in interpreting investment treaties so as to expand the system's compensatory promise for investors. Whilst domestic Courts may be seen in some situations to be biased in the Investor/State context, it is far worse to replace them with arbitrators who are dependant on private interests in ways that tenured Judges are not

- The author argues that consensual arbitration is broadly suitable as a means to settle commercial disputes between companies or between states, but it is fundamentally inadequate as a substitute for the public courts in the regulatory domain. A Court (and only a Court) should (it is argued) have the final authority to interpret the law that binds sovereign power and to stipulate remedies for sovereign wrongs that lead to business loss

## (D). <u>Concluding remarks:</u>

Whether one agrees or disagrees with Dr. Harten's analysis, the very existence of a developing debate as to the suitability of (what will be in in most cases) a privately constituted Arbitral Tribunal to deal with matters which are underpinned by Public Law may well partially reflect why there is increasing attention being paid to the questions of transparency and Non-Justiciability in the Investor State Dispute resolution process.

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