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2013-2014 ICSID INVESTMENT TREATY CASES - KEY ISSUES

1. Executive Summary 1
2. Introduction 2
3. 2013/2014 ICSID Caseload Statistics 3
4. ICSID decisions on key issues in international investment arbitration 3
(a) Jurisdiction 4
(b) Definition of investor/investment 4
(c) Fair and equitable treatment 6
(d) Expropriation 7
(e) Umbrella clauses 7
(f) Most favoured nation clauses 7
(g) Procedural requirements – domestic litigation and exhaustion of local remedies 8
(h) Provisional measures 9
(i) Damages 9
(j) Disqualification of arbitrators 9
(k) Confidentiality 10

1. Executive Summary

Disputes under bilateral investment treaties continue to be brought in the international investment sphere. In 2013/2014, arbitral tribunals constituted under the rules of the International Centre for Settlement of Investment Disputes handed down a number of decisions in which they considered key definitions and legal issues in the context of such disputes.

Those decisions examined, amongst other things, the definition of investor and investment, the requirement to comply with procedural pre-conditions before In addition, 2013 also saw the first successful challenge to an ICSID arbitrator. Other important findings by ICSID tribunals included:

- that an ICSID tribunal would have to apply national law to some of the issues in dispute was not a bar to jurisdiction;
- if a Claimant was an investor within the terms of the relevant BIT, then no further requirements (ie, need for real and effective control) could be added;

- compliance with the laws of the host State and good faith are not elements of an objective definition of "investment", but States may choose to limit treaty protection to investments made in accordance with the laws of the host State;
- significant legal insecurity in respect of the claimant's investment could not amount to an expropriation of the claimant's investment where, for the moment, the claimant had not been deprived of the use and benefit of his investment (even where such deprivation appeared imminent);
- tribunals should adopt a considerable degree of caution in awarding "moral" damages to a corporate investor, and discretionary moral damages should not be awarded solely on the grounds of an inability to prove actual economic loss;
- although the ICSID Convention and Arbitration rules contain no general rule imposing a duty of confidentiality on the parties, public statements by an arbitrating party may violate the duty of good faith not to exacerbate the dispute or affect the integrity of proceedings.

2. Introduction

Bilateral investment treaties ("BITs") are bilateral agreements entered into between two sovereign states which establish the terms and conditions for private investment by nationals and companies of one contracting state in the other contracting state.

Such treaties include a number of protections for investors, including the right to fair and equitable treatment, protection from expropriation and full protection and security, and recourse to an independent arbitral tribunal in the event any dispute arises between the investor and the host state. Many such treaties are linked to multilateral treaty based systems such as the ICSID Convention (1965) and the Energy Charter Treaty (1994).

Since the first BIT was entered into in 1959 (in the wake of the Cold-War and nationalisations which exposed the lack of effective protection for foreign investors), almost 2800 BITs have now been agreed, with China and Germany entering into the most BITs (over 130 each).

Normally, arbitration arising out of BITs are administered by ICSID (although a large number are also subject to UNCITRAL arbitration and rules) – the International Centre for Settlement of Investment Disputes – an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States with over one hundred and forty member States. The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes.

For more detail on bilateral investment treaties, please see our paper "BITs – The Essentials" **here**

3. 2013/2014 ICSID Caseload Statistics

- 40 new cases were accepted by ICSID in 2013 (a drop of 20% on 2012). 14 cases have been accepted this year as at 30 June 2014.
- 63 % of ICSID cases are based on bilateral investment treaties for jurisdiction
- 27% of cases concern South American state parties and 24% concern Eastern Europe/Central Asia state parties
- 26% of cases are in the oil, gas and mining sector, with 13% and 10% in the electrical power & energy and transportation sectors respectively
- 65% of cases have led to an award (35% of proceedings have been settled or otherwise discontinued).
- 64% of cases have led to an award on the merits. 25% of awards have declined ICSID jurisdiction
- 68% of arbitrators in ICSID cases are from North America and Western Europe
- The top 3 nationalities for ICSID arbitrator appointments are US - 167; French- 163; and British - 140.

(Statistics taken from The ICSID Caseload – Statistics (Issue 2014-2) available at http://icsid.worldbank.org/)

4. ICSID decisions on key issues in international investment arbitration

In 2013/2014, over 30 cases were concluded by ICSID, either by final award or by being dismissed on the grounds of lack of jurisdiction.

The same key issues arise repeatedly in ICSID cases, both in relation to jurisdiction and the merits of disputes. In respect of jurisdiction (and related procedural requirements), arbitral tribunals are frequently asked to consider the definition of investor and investment, the existence of disputes, and pre-conditions to a referral to arbitration, along with the operation of "most favoured nation" provisions. In connection with the merits, tribunals analyse the requirements of fair and equitable treatment and expropriation. Decisions have also considered confidentiality, provisional measures, and the disqualification of arbitrators.

This note provides a summary of some of the key decisions handed down by ICSID tribunals over 2013/2014 in respect of the following issues.

- Jurisdiction
- Definition of investor/investment
- Fair and equitable treatment
- Expropriation
- Umbrella clauses
- Most favoured nation clauses
- Procedural requirements – domestic litigation and exhaustion of local remedies
- Provisional measures

- Damages
- Disqualification of arbitrators
- Confidentiality

(a) Jurisdiction

Before considering the merits of a dispute, an ICSID tribunal must first establish whether it has jurisdiction. Such consideration will also involve procedural issues and pre-conditions (see procedural requirements and "most favoured nation" clauses, below).

- *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (ICSID Case No. ARB/10/20) (Award, 12 February 2014) - In order for an ICSID tribunal to have jurisdiction over a dispute, four conditions must be satisfied:
    - the dispute must involve a Contracting State and a national of another Contracting State;
    - the dispute must be a legal dispute arising directly out of an investment;
    - the Contracting State and the investor must consent in writing that the dispute be settled through ICSID arbitration;
    - the ICSID Convention must have been applicable at the relevant time.

- *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (Award, 12 February 2014) (ICSID Case No. ARB/10/20) – the assignment of the right to ICSID arbitration is not a fact of which a third party would need notice, and a failure to register such an assignment would therefore not prevent an ICSID tribunal from having jurisdiction over a dispute.

- *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23) (Award, 19 December 2013) – that an ICSID tribunal would have to apply national law to some of the issues in dispute was not a bar to jurisdiction as the question that the tribunal ultimately had to determine was whether the respondent's behaviour constituted a breach of the minimum standard of treatment under international law.

(b) Definition of investor/investment

The terms "investor" and "investment" are crucial in establishing whether an ICSID tribunal has jurisdiction, and have been the subject of many past decisions by tribunals. Both terms will be defined in the relevant BIT (although the precise definition often varies between BITs) and a claimant's status as to "investor"/"investment" is often challenged by the respondent.

Investor

- *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8) (Award, 17 October 2013) - if a Claimant was an investor within the terms

of the relevant BIT, which provided that a legal entity constituted under the laws of one country was an investor, without the need for any further requirements, then no further requirements (ie, need for real and effective control) could be added.

- *ConocoPhillips Petrozuata B.V. and Ors. v Bolivian Republic of Venezuela* (ICSID Case No. ARB/07/30) (Decision on Jurisdiction and Merits, 3 September 2013) – a tribunal may reject a respondent's argument that a claimant company is a "corporation of convenience" created for the sole purpose of gaining access to ICSID – in this case, the restructuring at issue had been carried out before any claims had been made or were a prospect (contrast this with *Tidewater Inc. et al v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Jurisdiction, 8 February 2013 - restructuring investments only in order to gain jurisdiction under a BIT may result in a denial of jurisdiction where it constitutes abuse).

Investment

- *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8) (Award, 17 October 2013), factors that may suggest that there is no investment include no contribution in relation to the investment (or evidence of ability to make such an investment in future); that the claimant had no funds of significance, other than a small amount to pay administrative expenses; the purchase of the investment at an undervalue and failure to actually pay for the shares; absence of risk, particularly where payment for the investment was made by way of loans, no security was given for those loans, and eventually the loans were written off and the lenders liquidated; and the intended short duration of the investment (even if circumstances – in the present case the financial crisis – meant that the shares were in fact held longer than intended).

- *Ambiente Ufficio S.p.A. and others v. Argentine Republic (formerly Giordano Alpi and others v. Argentine Republic)* (ICSID Case No. ARB/08/9) (Decision on Jurisdiction and Admissibility, 8 February 2013) – considering the territoriality requirement of the relevant bilateral investment treaty and how that applied to the investment at issue (sovereign bond instruments issued by Argentina and sold in the international markets, and security entitlements in which had been purchased in the Italian market), a majority of the tribunal dismissed Argentina's argument that the investment was not made "in the territory" of the respondent as required by the BIT. The tribunal found that "looking at the investment operation at stake as a whole and in terms of its economic realities, it is hard to imagine the investment's situs to be elsewhere than in Argentina." Instruments such as sovereign bonds did not compare to a "single commercial transaction", and should be protected if and to the extent that the contracting parties to the BIT intended those investments to be protected.

- *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) (Decision on Jurisdiction,

2 July 2013) – the definition of investment "covers a wide range of economic operations confirming the broad scope of its application", although States have the ability to restrict the definition of "investment" in treaties.

- *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (Award, 4 October 2013) – compliance with the laws of the host State and good faith are not elements of an objective definition of "investment", but States may choose to limit treaty protection to investments made in accordance with the laws of the host State. In the present case, "*implemented in accordance with the laws and regulations*" only required the investment to comply with local laws at the time of establishment (jurisdiction was denied in that case as the claimant had made payments to officials at the relevant time in breach of national anti-corruption laws).

(c) Fair and equitable treatment

"Fair and equitable treatment" generally requires States to maintain stable and predictable investment environments consistent with reasonable investor expectations. However, there is substantial room for exercise of discretion by the arbitral tribunal in each particular case.

- *Rompetrol Group N.V. v Romania* (ICSID Case No. ARB/06/3) (Award, 6 May 2013) - the cumulative effect of a series of wrongful acts were capable of amounting to a treaty breach even if, taken individually, they did not.

- *Renée Rose Levy de Levi v. Republic of Peru* (ICSID Case No. ARB/10/17) (Award, 26 February 2014) - The legitimate expectations of an investor are linked to the standard of fair and equitable treatment. For an investor to make a decision on an investment, an important element usually considered is the stability of the country's legal system, although this does not mean a freezing of the legal system or making it impossible for the State to reform laws and other regulations in force at the time the investor made the investment.

- *Micula et al v. Romania* (ICSID Case No. ARB/05/20) (Award, 11 December 2013) - the respondent's conduct does not need to be egregious to amount to a violation of the "fair and equitable treatment" standard, and such a clause should not be seen as equivalent to a stabilisation clause – the state's conduct will not contravene the standard where an investor's legitimate expectations are protected and the respondent's conduct is substantially and procedurally proper. Conduct that would violate the "fair and equitable treatment" standard includes that which is substantially improper (for example, conduct that is arbitrary, manifestly unreasonable, discriminatory or in bad faith). Transparency and consistency duties arising out of the "fair and equitable treatment" standard should be based on the circumstances in each case.

(d) Expropriation

Expropriation may be direct or indirect. The general rule is that investment shall not be expropriated or nationalised or subjected to measures having the effect equivalent to expropriation or nationalisation except for a public purpose, in a non-discriminatory manner, in accordance with due process and with prompt, adequate and effective compensation.

- *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6) (Award, 16 January 2013) – contractual rights are capable of being expropriated. In order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt – "legitimate contractual responses" to contractual breaches will not suffice.

- *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) (Decision on Jurisdiction and Merits, 3 September 2013) – while compensation for expropriation is not required at the moment of expropriation, parties must engage in good faith negotiations to fix the compensation in terms of the standard set if a payment satisfactory to the investor is not proposed at the outset.

- *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) (Award, 8 April 2013) - Significant legal insecurity in respect of the claimant's investment could not amount to an expropriation of the claimant's investment where, for the moment, the claimant had not been deprived of the use and benefit of his investment (even where such deprivation appeared imminent).

(e) Umbrella clauses

Umbrella clauses are often used by investors as a "catch all" provision to found a claim where a host state's actions do not otherwise breach the provisions of the BIT. Such a clause may provide, "Either party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other party."

- *Micula et al v. Romania* (ICSID Case No. ARB/05/20) (Award, 11 December 2013) – depending on the language used in the BIT, the umbrella clause may cover obligations of any nature, regardless of their source (both contractual and non-contractual obligations).

(f) Most favoured nation clauses

A "most favoured nation" clause requires the host state to provide no less favourable treatment to investors under that treaty than they provide to investors under other treaties or domestic law. The precise scope of the "most favoured nation" clause will depend on the

exact wording of the clause in the relevant BIT, and is a controversial issue in investment treaty arbitration.

- *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20) (Decision on Jurisdiction, 3 July 2013) – "most favoured nation" clauses are "a fiercely contested no-man's land in international law". Conflicting decisions are common (contrast, for example, *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20) with *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan* (ICSID Case No. ARB/10/1)).

- *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan* (ICSID Case No. ARB/10/1) (Award, 2 July 2013 cf Separate Opinion of William Park, 20 May 2013) - there is debate over whether a "most favoured nation" clause goes to a tribunal's jurisdiction or the admissibility of the claimant's claims.

(g) Procedural requirements – domestic litigation and exhaustion of local remedies

Some treaties require that a claimant must comply with certain procedural requirements before commencing arbitration under the BIT, such as attempting to resolve the situation amicably or through negotiation, or exhaustion of local remedies (ie, commencement of proceedings in the domestic courts). Whether such provisions have been complied with is often a subject of much dispute if an arbitration is commenced, particularly if a claimant has opted not to commence or complete the obligation on the grounds that they feel it would be futile.

- *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Uruguay* (ICSID Case No. ARB/10/7) (Decision on Jurisdiction, 2 July 2013) – "dispute" must be interpreted broadly when considering the procedural requirements (including the "domestic litigation" requirement). The dispute before domestic courts does not need to have the same legal basis or cause of action as the dispute brought in the subsequent BIT arbitration, provided that both disputes involve substantially similar facts and relate to investments as this term is defined by the BIT. Further, the domestic litigation requirement can be met by actions occurring after the date the arbitration was instituted.

- *Ömer Dede and Serdar Elhüseyni v. Romania* (ICSID Case No. ARB/10/22) (Award, 5 September 2013) - In considering whether domestic litigation is the same as the proposed BIT arbitration dispute, disputes brought before the national courts must be "of a nature that permits resolution to substantially the same extent as if brought before an international arbitral tribunal pursuant to an investment treaty."

- *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), (Decision on Bifurcated Jurisdictional Issue, 5 March 2013) – compliance with a requirement to seek consultations and negotiations for one year

until date of notification of the dispute was not a "mere statement of aspiration" but was an essential element of the respondent's consent to arbitration, and therefore a pre-condition to the jurisdiction of the tribunal under the terms of the relevant BIT.

(h) Provisional measures

Article 47 of the ICSID Convention and Article 39 of the ICSID Arbitration Rules grant an arbitral tribunal the authority to recommend provisional measures, with or without the consent of the parties, if the tribunal deems it necessary to preserve either party's rights.

- *Lao Holdings NV v The Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6) (Ruling on the Motion to Amend the Provisional Measures Order, 30 May 2014) – The modification of a non-aggravation order to which the respondent consented at a previous hearing had to be based on changed circumstances, which make it urgent and necessary to adopt a new decision on provisional measures (particularly where the respondent had agreed to the original provisional measures order).

(i) Damages

For either breach of the fair and equitable standard, or an expropriation, the most likely remedy to be awarded by the tribunal is damages. The exact quantum of the claim will depend in part on the valuation measure chosen by the Tribunal.

- *Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3) (Award, 6 May 2013) – although there had been a breach of the "fair and equitable treatment standard", no damages would be award due to the claimant's failure to demonstrate any loss stemming from that breach. The application of the "event study method" (which is an empirical technique used to measure the stock price impact of a specific event, such as a company's earnings announcement) was inherently questionable – a more appropriate method would be one which allowed for an objective comparison between the status quo and the claimant's position at the time the claim was commenced.

- *Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3) (Award, 6 May 2013) – tribunals should adopt a considerable degree of caution in awarding "moral" damages to a corporate investor, and discretionary moral damages should not be awarded solely on the grounds of an inability to prove actual economic loss.

(j) Disqualification of arbitrators

Article 14(1) of the ICSID Convention provides that persons designated to serve as an arbitrator in an ICSID proceeding "shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment." Under Article 57 of the ICSID Convention, an arbitrator

may be challenged on the grounds of "of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14".

- *Blue Bank International & Trust (Barbados) Ltd. v Venezuela* (ICSID CASE No. ARB/12/20) (Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013) – arbitrators must be both impartial and independent. Impartiality refers to "the absence of bias or predisposition towards a party"; independence "is characterized by the absence of external control." The applicable legal standard was an "objective standard based on a reasonable evaluation of the evidence by a third party".

- *Blue Bank International & Trust (Barbados) Ltd. v Venezuela* (ICSID CASE No. ARB/12/20) (Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal , 12 November 2013) – an evidence of obvious appearance of lack of impartiality could be shown by the links between different offices of a global international law firm (including the sharing of a corporate name, the existence of an international arbitration steering committee at a global level, and the dependence of remuneration "primarily" but not exclusively on the results achieved by a different office), and the similarlity of issues to be discussed in the cases in which the abriartor was sitting.

- *Burlington Resources Inc. and the Republic of Ecuador* (ICSID Case No. ARB/08/5) (Decision on the Proposal for Disqualification, 13 December 2013) – where an application for disqualification of an arbitrator is not made promptly, this may be grounds for rejecting such an application. In the present case, Ecuador had sufficient information to file its Proposal for Disqualification on the basis of repeat appointments and non-disclosure of such appointments, and other grounds, well before it did so - accordingly, these challenges were not raised promptly and the proposal for disqualification was dismissed to the extent that it relied on these grounds of challenge. The arbitrator was instead disqualified on the basis of statements that he made in his response to the proposal for disqualification, demonstrating the latitude the ICSID Chairman has in determining whether to disqualify an arbitrator.

- *Repsol.S.A. and Repsol Butano S.A. v Argentina* (ICSID No. ARB/12/38) (Decision, 13 December 2013) – arbitrator disqualified based on other appointments, alleged bias based on previous decisions, and links with one of the law firms involved in the case.

(k) Confidentiality

The ICSID Convention and the Arbitration Rules contain no general rule imposing a duty of confidentiality on the parties.

- *Churchill Mining v. Indonesia (Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40) (Procedural Order No.

3 on Provisional Measures, 4 March 2013) – although the ICSID Convention and Arbitration rules contain no general rule imposing a duty of confidentiality on the parties, arbitrating parties are bound by a duty of good faith not to exacerbate the dispute or affect the integrity of proceedings, and public statements by an arbitrating party may violate this duty.

Please note that the information contained in this paper is not intended as and does not constitute legal advice and should not be acted on as such. Should you need legal advice in relation to any of the issues raised in this note, please contact the Office Manager.

25 August 2014