Bilateral Investment Treaties and Disputes

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Bilateral Investment Treaties (BITs) have greatly proliferated in the last two decades, and play an increasingly significant role in global trade and investment protection. Proponents argue that BITs, like multilateral investment agreements, serve to broaden global economic security and development. Although there has been much opposition to multilateral agreements by civil society, BITs have largely avoided similar scrutiny, despite the fact that they are far more widespread and contain essentially the same components.

The basic features common to BITs have changed little since their inception. The main provisions cover the scope and definition of foreign investment; admission of investments; national and most-favored nation status; fair and equitable treatment clauses; compensation guarantees for expropriation, war and civil unrest; guarantees of fund transfers and the recuperation of capital gains; subrogation of insurance claims; and dispute settlement provisions.

Because the fundamental critique of unregulated investment is widely understood, this memo will limit its analysis to dispute processes in the context of BITs.

The number of BITs quintupled in the 1990's, from 385 at the end of the 1980's to 1,857 at the end of 1999. By the end of 1999, 1,013 (55%) were between western countries and either developing or Central and Eastern European countries. Except for the 11 between western nations, the remaining were concluded between developing and Central and Eastern European countries (CEE). As the United Nations Conference on Trade and Development (UNCTAD) reports, BITs constitute "the most important protection of international foreign investment" to date. The fact remains, however, that 13% of the world's countries (so-called "developed" countries) have concluded a majority of the world's BITs, and arbitration and dispute resolution processes continue to favor their interests.

In a letter from President Clinton to the Senate regarding the UD-Uzbekistan BIT, he wrote that the agreement creates "conditions more favorable for U.S. private investment" and is designed to "protect U.S. investment," which reinforces the notion that BITs, like NAFTA and other multilateral agreements, serve primarily the interests of western nations and corporations. Clearly, the US's underlying goal is not intended to facilitate investment of Uzbekistan in the U.S., but rather, to enable U.S. interests to more easily extract raw materials and take advantage of cheap labor with a binding agreement that appears fair on the surface.

Investment treaties have increasingly been concluded between developing nations as a way to ensure the security of foreign direct investments generally, but the structures that have been developed to litigate disputes arising from such agreements reflect neither the interests of developing countries nor the greater democratization of international institutions. The entire process of arbitration and dispute resolution remains shrouded in secrecy, and only western models constitute its development.

Although resolution of disputes arising from BITs are considered voluntary and private matters, the majority of treaties designate the World Bank's International Center for the Settlement of Investment Disputes (ICSID) as the arbitral body. In the absence of international forums for binding resolution of disputes or otherwise adjudicative processes, this supra-national and private transnational organization has been given the responsibility to adjudicate virtually all investment disputes without democratic structures or transparency.

The necessity for greater transparency and democratic structures in the arbitration of investment disputes is most clearly demonstrated by the fact that, of the fifty concluded ICSID arbitration cases, 48 were filed against developing or Central and Eastern European nations, and the remaining two were filed between western nations. Of the 30 cases pending before ICSID tribunals, only four have been filed against western nations, including three against the US.

Many BITs specify the way in which investments are protected, and require them to be made in accordance with the laws and regulations of the host government. Treaties routinely expressly apply to investments made both before and after their entry into force, however, most BITs expressly exclude disputes which **have arisen** before their entry into force.

In almost all treaties, the duty of the host government to admit investments of investors of the other state party is subject to the laws and regulations of the host government (See, e.g., El Salvador-Switzerland, Article 2(1)).

One substantive guarantee commonly found in BITs is that the host-state must observe any private obligations it has entered into in regard to covered investments. Such a provision makes a contractual or obligatory breach simultaneously a breach of the investment treaty. Thus, failure by an investor (whether corporate or individual) that is a party to an investment in one of the countries party to the investment treaty will result in a complaint against the country, in addition to any complaints regarding the contractual breach. The result of this dual obligation is that the government, in addition to the enterprise, is held responsible for the insolvency of multinational partnerships.

Some BITs provide for the arbitration of investment disputes under the condition that the investor has not first had recourse to local courts. The US typically uses this technique, known as the "fork in the road" method.

A growing number of treaties' provisions prohibit the investor's home state from making representations through diplomatic channels in regard to disputes which are submitted to international arbitration as provided for in the treaty. Attempts to reconcile disputes must be made by the investors through the relevant arbitral body, e.g. the World Bank or ICC.

Article 42(1) of the ICSID Convention states that "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, The Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable." This article gives the arbitral tribunal broad powers to interpret and adjudicate international laws and their applicability to investment disputes, thus setting precedent for and legitimizing arbitrary and biased international decision making.

In addition to enjoying the arbitrary responsibility of settling international investment disputes, the World Bank's ICSID's and the International Chamber of Commerce's (ICC)

International Court of Arbitration have developed rules for both conciliation and arbitration that ignore much of the world's wealth of experience in settling disputes. Asian rules of arbitration, particularly those of China, offer a significant counterbalance to western methodologies.

The traditional western view is that arbitration and conciliation processes should remain separate, and that the same persons who act as conciliators should not act as arbitrators in the same dispute. It is thought that disclosures of confidential information and offers to compromise made during (and essential to) the conciliation process might affect the ability of the conciliator to act as an arbitrator in the same dispute. Since conciliation is considered to be a completely voluntary process that can be terminated by either party at any time, information acquired by the conciliator during the course of investigation could bias the outcome of an official and binding arbitration. In the western conception of dispute resolution, such information only is discovered through a mutual endeavor to resolve the dispute amicably, and therefore, should be regarded as inadmissible. The United Nations Commission on International Trade Law (UNCITRAL) Rules of Conciliation actually prohibits the combined roles of arbitrator and conciliator.

On the other hand, Asian cultures frequently seek a harmonious solution that tends to preserve the relationship of the parties involved. Their form of dispute resolution is not adversarial, so any information that is discovered through either conciliation or arbitration should be helpful in determining the most appropriate outcome.

Although many Asian countries use this combined process to varying degrees, the China International Economic and Trade Association's (CIETAC) Arbitration Tribunal may conciliate cases in the process of arbitration outright. Depending on its circumstances and complexities, a case could conceivably move between conciliation and arbitration several times. This is a unique arbitration practice in China, know as the Combination of Arbitration with Conciliation.

Hong Kong has developed a hybrid system for conciliation and arbitration, where, by agreement of the parties, a conciliator may act as an arbitrator and an arbitrator as a conciliator. Its ordinance provides that information received in confidence by persons who act as both arbitrators and conciliators during the conciliation embedded in the combined process must be disclosed upon termination of attempts at conciliation, to the extent the arbitrators/conciliators deem such information to be material. If conciliation begins as a separate proceeding without agreement of the parties beforehand for the conciliator to act as an arbitrator, then the confidentiality requirements characteristic of western conciliation remain in force.

Even if international models of dispute resolution and arbitration were designed according to other than western perspectives, complete lack of transparency would continue to undermine their legitimacy and effectiveness in the international arena. Perhaps the most important step yet to be taken in regard to international investment treaties will be civil society demanding that the proceedings disputes arising from BITs be open and accessible for the common good.

Because the World Bank considers investments to be private matters, it feels it must provide the utmost confidentiality when investment disputes arise. However, because dispute resolution by ICSID or the ICC is commonly specified in treaties, and since nearly all defendants are governments, international arbitration of investment disputes should be public. It should also be considered an international judicial function, particularly in consideration of

Article 42(1) of the ICSID Convention and the fact that, of the 173 countries involved in bilateral investment treaties, 148 have signed the ICSID Convention.

In summary, international arbitration processes should be redefined to include other than western ideologies, their proceedings should be publicly available, and it should be recognized that they are serving an international judicial function governed by treaty and international law, not voluntary and private international law.

Sources:

The American Society of International Law, http://www.asil.org/resource/Home.htm

"The Asian Concept of Conciliator/Arbitrator: Is it Translatable to the Western World?," ICSID Review - Foreign Investment Law Journal, pages 120-128, 1996

"Bilateral Investment Treaties 1959-1999," United Nations Conference on Trade and Development, January 2000,

"Deal Mediation: How ADR Techniques Can Help Achieve Durable Agreements in the Global Markets, L. Michael Hager and Robert Pritchard, ICSID Foreign Investment Law Journal, pages 1-15, 1999.

International Centre for Settlement of Investment Disputes, http://www.worldbank.org/icsid/index.html

"International Conciliation and the ICC," Eric A. Schwartz, ICSID Review - Foreign Investment Law Journal, pages 98-119, 1995-96.

"Introductory Note on Bilateral Investment Treaties Recently Concluded by Latin American States," ICSID Review - Foreign Investment Law Journal, pages 87-93, 1995-96.

Letter from President Clinton to the Senate on bilateral investment treaty with Uzbekistan, The White House, Office of the Press Secretary, February 28, 1996,

http://www.hartford-hwp.com/archives/53/019.html

The United Nations Commission on International Trade Law (UNCITRAL),

http://www.uncitral.org/en-index.htm