

Presentation to Seminar regarding the Protection and Promotion of Investment Bill

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For Parliamentary Committee on Trade
and Industry

10 Things to Know About B18-2015

- Some Overview Questions to Ask
- Lessons from the SA Review
- FDI Obligations 101
 - Procedural
 - Substantive
- Three Bricks in the Wall
- Procedural Fairness & Internat'l Investment Law (IIL)

10 Things about B18-2015 (continued)

- Int'l Law and two super-regions
 - The Atlantic & The Pacific
- SADC FI Protocol (2006) and Model BI Treaty (2012)
 - From FET to FAT
- Tripartite times Two: Integration of Investment with Regional Trade and Competition
- Clayton/Bilcon v. Government of Canada (NAFTA)
- The African Origins and Future of Intl Invest Law

Some Overview Questions to Ask

- Do BITs help investment?
 - Probably not (though BITs do not hurt inward flows of capital).
 - See Yackee 2008
- Is SA government pursuing important public policy objectives with the PPIB?
 - Yes, giving protection for inward and outward SA investments and retaining policy space; providing a good investor institutional environment; aiming for a legal and policy framework for investment attuned to sustainable development and inclusive growth.
- Is the PPIB the right way to do this? What are the costs to this modality?
 - This is one of the ways; SA has chosen to largely withdraw from BITs; SA could have gone the Brazilian route of BITs with different content (CIFAs)
 - The legislative PPIB route has a proactive advantage of legislative clarity and influence (even beyond SA borders); see regional discussion

Lessons from the SA Review

- Lessons from the SA Review
 - “BITs, particularly early generation treaties, contain provisions that are imprecise and when subjected to international arbitration, leave wide scope for inconsistent and unpredictable outcomes. There is also growing awareness of deficiencies in ISDS, including with respect to its ad hoc nature, its fragmentation and a perceived lack of transparency and legitimacy.”
 - “In 2010 the South African government concluded a three-year review of its BITs. ... Overall, the review ... suggested that the current system opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration that may constitute direct challenges to legitimate, constitutional and democratic policy-making.”
 - “Equitable relationships between investors and government, based on respect for human rights, the rule of law and due process, and security of tenure and property rights, will continue to be pursued within the framework established by the constitution.”

Lessons from the SA Review

- Policy Reasons supporting SA's policy shift away from ISDS (prevalent in BITs)
 - There are constitutional guarantees that mitigate the risks to foreign investors
 - There is a constitutionally mandated need to reclaim policy space from BIT practice
 - There is an unacceptably high level of unpredictability of interpreting BIT provisions
 - There is at best ambivalent empirical evidence on the importance of IIAs in attracting FDI
 - It is important to be developing local institutions
 - Klaaren & Schneiderman (2009)

FDI Procedural and Substantive Obligations 101

- Procedural
 - Some commitment to a dispute settlement system: Investor-state-dispute settlement (ISDS); state-to-state arbitration; domestic dispute resolution; global tribunal
 - ISDS common with BITs
- Substantive
 - Nat'l treatment (treat foreigners alike with nationals)
 - Most favoured nation treatment (MFN) (treat any nation as well as any other nation)
 - Expropriation threshold and compensation standard
 - After the clear area of direct expropriation, there is a grey area (in IIL) regarding the thresholds and compensation for indirect/regulatory expropriation
 - Fair and equitable treatment (FET)
 - Additional obligation; prevalent with BITs
 - Unclear meaning, especially as applied in diverse arbitration tribunals

Three Brics in the Wall

- SA: Policy Framework Review, SADC Model BIT, PPIB
- Brazil: Cooperation and Investment Facilitation Agreements (CIFAs) (long refusal to join ISDS)
 - Now, setting up ombudsman for settling disputes within agreement framework
 - 2015: Angola-Brazil; Mozambique-Brazil. Negotiating with Malawi (concluded), Algeria, Chile, Colombia, Morocco, Nigeria, Peru, South Africa and Tunisia.
 - Unlike traditional BITs, which are geared towards investor protection, the CIFAs focus primarily on cooperation and investment facilitation. They promote amicable ways to settle disputes and propose state–state dispute settlement as a backup; notably, they do not include provisions on investor–state arbitration.
- India: Model BIT (2015) abandons FET altogether – “the heart of the issue”

Procedural Fairness and IIL

- Procedural fairness in the domestic jurisdiction approach (e.g. giving investors procedural protections the right to be heard in the domestic jurisdiction) is superior to the arguments usually given in favour of fairness at int'l level
 - Superior to: fairness via BIT bc states are self-interested and will claw back the investment (“obselescig bargain”)
 - Superior to: fairness via BIT bc need for foreign investor participation rights bolstering arguments – foreign investor can have rights in domestic jurisdiction; SA does
- Only a jurisdiction like SA that truly has a robust approach and implementation to procedural fairness in its domestic jurisdiction can take this route; SA does

Trend towards norms and institutions in regions

- TTIP (USA and EU) and CETA (Canda)
- Trans-Pacific Partnership negotiations
 - Move away from bilateral and from global/multilateral (with stalled WTO rounds)
- In economic North, these generally include ISDS and FET
 - However, the controversy over their inclusion is growing
 - Texts not finalized

SADC: Protocol, Model BIT, and Institutions

- SADC FI Protocol (2006)
 - Regional approach; FET; MFN; ISDS = BIT approach
- SADC Model Treaty (2012)
 - Open question regarding ISDS (drafters' preference against it)
 - From Fair and Equitable Treatment to Fair Administrative Treatment
 - Influence of Global Administrative Law (GAL)?
- Regional Institutional Jurisdiction Issues
 - Old SADC Tribunal included ISDS (e.g. Mike Campbell case)
 - New Tribunal has State-to-State arbitration only
 - Pending litigation (including SA Law Society)
 - Shifting evolution involving human rights jurisdiction?
 - See e.g. work of J Gathii (with L Helfer and K Alter and iCourts) (detailing move from economic courts to HR courts in Africa)

Tripartite times Two

- Tripartite FTA (10 June 2015)
 - SADC, COMESA, EAC
 - 26 countries, more people than NAFTA or the EU
 - Aiming for regional integration, increasing intra-regional trade from current 10% (cf EU, Asia at 60%)
- Trade but also investment, competition, movement of persons, sector regulation, and infrastructure development
 - Issues of economic development cannot be addressed solely outside the borders

Clayton/Bilcon v. Government of Canada

- Bilcon, a Delaware corporation, proposed to build a rock quarry, together with a processing and ship loading facility, on sensitive coastline in Nova Scotia for export to New Jersey. The review panel recommended that the Canadian federal and Nova Scotia provincial government reject Bilcon's proposal because of its adverse environmental effects to the land, marine, and human environments, advice was followed by both levels of government.
- Rather than seeking a review of the decision in Canadian courts, the USA investors elected (2008) to pursue an award for damages before a NAFTA investment tribunal. They won. Though it purported to be applying principles associated with FET, the tribunal's reasons were that the environmental panel's decision failed to comply with Canadian law and so was 'arbitrary' (2015, para. 548): The Tribunal finds that the conduct of the joint review was arbitrary. The JRP effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out the mandate defined by the applicable law, including the requirement under the CEAA to carry out a thorough "likely significant adverse effects after mitigation" analysis.
 - Procedural fairness (judicial review) reasoning
- Dissent: (1) Concerned that tribunal had awarded damages for breach of Canadian law in a case where Canadian courts would not have done so. (2) Canadian courts were fully competent to review these alleged procedural defects but were never given a proper opportunity to do so. (3) Tribunal's attitude will likely give rise to a 'chill' on future environmental review panels. (4) Tribunal takes on this judicial review function for itself, under the guise of applying the standard of FET.
- Liability for actions taken in the domestic policy space and in the public interest?
 - <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/diff-diff/clayton.aspx?lang=eng>

The African Origins and Future of International Investment Law

- Some are reconsidering the prevalent ahistorical assumption that international law began with the Treaty of Westphalia. Levitt (2015).
 - One may gather considerable historical evidence to conclude that the ancient world, particularly the New Kingdom period in Egypt or Kemet from 1570-1070 BCE, deployed all three of what today we would call sources of international law.
 - African states predating the modern European nation state by nearly 6000 years engaged in treaty relations (the Treaty of Kadesh), and applied rules of custom (the MA'AT) and general principles of law (as enumerated in the Egyptian Bill of Rights).
 - While Egyptologists and a few international lawyers have acknowledged these facts, scholarly attention to the ancient origins of contemporary international law has been sporadic and at times openly hostile to the proposition that international law may have originated in Africa and not in Europe.
 - Challenging the Eurocentric mythology of international law's origins upends traditional verities and forces us to reconsider whether contemporary international law owes as much to Africa as it does to far more recent developments, including the colonial encounter.
- Our AU system is still evolving; it will clearly need a certain degree of consistency between our domestic systems and the continental one; the opportunity is for South Africa to continue to lead and influence the evolving system in route that is both fair and aligned with South Africa's capital-exporting and importing-interests.

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