Kluwer Arbitration Blog

Diplomatic Friction

Luke Eric Peterson (Investment Arbitration Reporter) · Saturday, June 13th, 2009

At first glance, the Alien Torts Statute (ATS) doesn't have a lot to do with arbitration – which may explain why Roger Alford wrote about it over on Opinio Juris, rather than here.

(The ATS permits non US nationals to bring claims in the U.S. Federal Courts for alleged breach of the law of nations, and has led to a multitude of claims seeking to hold multinational corporations liable for their actions abroad)

Lately, I've been wondering why critics of the ATS raise the alarm about the negative diplomatic consequences of exposing important allies to embarrassing human rights lawsuits, while overlooking the potential for diplomatic friction to arise when business interests use arbitration mechanisms to embarrass those same sovereign allies.

In recent years, there has been no shortage of hand-wringing about the ATS' potential to complicate U.S. foreign relations. The Bush Administration argued strenuously for reining in the Statute – intervening in upwards of 10 different ATS cases – often citing the need to placate important allies in the War on Terror.

Business lobby groups such as the U.S. Council for International Business (USCIB) and the National Foreign Trade Council, have also pushed the "diplomatic friction" argument.

(Note that ATS cases are not directed at governments; rather, they tend to target former government officials or multinational corporations; thus sitting governments may be implicated or embarrassed only on a collateral basis by allegations raised in ATS proceedings.)

While there has been a great deal of concern expressed for the feelings of U.S. allies when pesky human rights suits are at issue, there has been no commensurate concern where businesspersons or corporations might be raising similarly inconvenient claims against staunch friends and allies.

On the view of the USCIB or various Bush Administration officials: if a U.S. corporation were to see its employees roughed up by foreign security forces, or its foreign factory razed to the ground, that corporation should enjoy the ability to bring a foreign government before an international tribunal and to seek a declaration of that

government's wrong-doing, as well as compensation.

Yet, if a group of plaintiffs were to accuse a U.S. corporation of complicity in the destruction of a foreign village, then ATS critics profess to be deeply solicitous of that foreign government's feelings – arguing that human rights suit should be dispensed with for reasons of comity.

But, if foreign relations with a given country are so delicate that they might be harmed by the fall-out from allegations directed against US corporations operating in that foreign nation, then can those foreign relations withstand direct allegations of fraud, abuse or other wrong-doing leveled *directly* at those governments by aggrieved business claimants?

Now, I grant that the ATS Statute and investment treaty arbitration operate in a different fashion – with the former cases heard in US courts, so that this *extraterritorial* reach can be a particular source of aggravation for U.S. allies. (The fact that arbitral awards may be recognized and enforced in the home state's courts perhaps muddies this distinction on occasion).

Yet, whatever the differences between ATS suits and investment arbitration, I think there is no denying that U.S. allies get annoyed with treaty-based investor claims, (whatever the undeniable merits of some such claims) and that these claims have the potential to aggravate foreign relations.

Think of Argentina. Former Argentine Justice Minister Horacio Rosatti was apoplectic when US energy companies had some success in suing Argentina under the U.S.-Argentine BIT for damages arising out of Argentina's response to an earlier financial crisis. In an interview some years ago with the American Lawyer magazine, he griped bitterly that the claims were an assault on Argentina's sovereignty.

Czech President Vaclav Klaus has also groused angrily about foreign companies who "abuse" treaties to raise claims "over whether this or that has been done well in our country".

And, of course, one need look no further than Ecuador, which has threatened in recent days to withdraw from ICSID, expressing annoyance that arbitrators are ordering the Government to refrain from actions which the government deems to be within its sovereign purview. (The latest decision to annoy Ecuador was rendered under the France-Ecuador BIT, but the government has long complained about claims under the U.S.-Ecuador treaty).

To be sure, home governments are on the sidelines of these arbitrations, so the diplomatic friction is less than in cases of diplomatic protection claims. But, for all of the talk of the depoliticized nature of arbitration, there is still scope for diplomatic blow-back from investor claims. Indeed, foreign allies may be so annoyed with arbitral claims that they want to tear up bilateral treaties, or re-negotiate broader broader trade and cooperation agreements which contain investment provisions.

This is not to say that foreign investors (and human rights victims) may not have legitimate beefs with foreign governments.

However, solicitude for the feelings of allies should be consistent across different areas of the law.

While the US Executive has intervened in various ATS cases, asking the Federal Courts to dismiss claims that could complicate foreign relations, we have not seen a similar tidal wave of concern about the potential for treaty-based arbitrations to generate diplomatic friction.

Indeed, have there been any instances where a home government has begged arbitrators to not hear a particular investment treaty claim?

On occasion, NAFTA governments have intervened in NAFTA Chapter 11 arbitrations to advance legal arguments that assist the state-respondent, rather than their own nationals.

However, off the top of my head, I can't think of instances where home governments have gone further and argued that particular BIT claims should not be heard at all (even if arbitrators would likely shrug off such requests).

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