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Bilateral Conventions of Establishment: An Illustration of their Potential Application in Contemporary Practice

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This post examines an illustrative case of a successful diplomatic protection claim under an old Bilateral Convention of Establishment (BCE). These were early precursors to Bilateral Investment Treaties (BITs), which aimed to encourage and protect foreign investments. While revisiting Switzerland's unlawful expropriation of Italian-owned real estates, the post proposes an alternative solution to that case by using the same instrument that was relied upon in combination with BITs. The post argues that through a combined use of BCEs with BITs, these long-forgotten instruments have practical and novel applications.

The case

In 1983 Switzerland enacted the 'Lex Koller' whereby it imposed a series of restrictions on the purchase of real estate by non-resident foreigners. Under the law, such foreigners were required to apply for special authorizations to purchase real estate, with only a limited number of such authorisations being granted. In enforcing this law, the Canton of Grisons Canton confiscated property belonging to some Italians.

In 1991, Italy reacted by granting diplomatic protection and alleging that Switzerland had violated the 1868 Switzerland-Italy BCE. This BCE grants full property rights on a reciprocal basis and full protection and security to the Contracting States' nationals and their assets, especially in relation to the disposal – both by acquisition and sale – of real estate. Italy threatened recourse to international arbitration based on the 1924 Italy-Switzerland Conciliation and Judicial Settlement Treaty, if no friendly solution could be reached.

Lured by the prospect of millions of Swiss francs worth of attachable real estate owned by foreigners, the Swiss Canton proceeded to confiscate the property at issue on the basis of Swiss Federal Tribunal decisions upholding the confiscatory measures. Consequently, Italy sent another diplomatic note whereby it warned Switzerland that it should keep from worsening the dispute.

In 1992, a settlement was reached under Italy's veiled threat of forbidding Swiss nationals to acquire real estate in Italy by suspending the application of the Italy-Switzerland BCE (in conformity with Article 60 of the VCLT). Thanks to the settlement, the expropriated properties were returned to the legitimate Italian owners.

This case represents an example of a successful exercise of diplomatic protection, where the 1868 BCE provided for the substantive rights and the 1926 Conciliation Treaty laid out the procedural framework. That being said, could there have been an alternative avenue? Could the affected Italians have invoked the breach of the Italy-Switzerland BCE through an investment arbitration, by relying on one of the dozen BITs ratified by Switzerland?

Bilateral Conventions of Establishment

BCEs were concluded between the 19th and 20th centuries to establish and safeguard the rights of foreign investors. These treaties, together with Friendship, Commerce and Navigation Treaties (FCN treaties), are the ancestors of the more modern BITs. However, unlike the FCN treaties (that dealt predominately with trade and shipping), the BCEs were meant to encourage mutual investments between two States by creating foreign investors' rights. In the words of Professor and US Diplomat Herman Walker Jr. – contrasting BCEs to FCN treaties – "*Here the context is different: "investment" rather than trade and shipping*". He knew this well as he personally helped draft the 1959 France-United States Convention of Establishment.

BCEs were not focused exclusively on foreign investment protection. They had a broader scope than BITs, covering for instance also consular rights, a subject now commonly dealt with in separate treaties. Investment was nevertheless at the forefront in these earlier instruments and so they planted the seed for today's BITs. The main object and purpose of BCEs is echoed in that of BITs.

Some of the typical substantive standards of protection of BITs can also be traced back to these BCEs. This includes – with exactly the same wording – the full protection and security standard (see, for example, Article 6 of the 1868 Switzerland-Italy BCE) or the fair and equitable standard (see, for example, Article 1 of the Franco-American BCE), or the prohibition of expropriation without compensation (see, for example, Article 4 of the 1951 France-Italy BCE).

Drafted in a period of more liberal economic policies – straddling the dawn of the second industrial revolution and the aftermath of WWII – some BCEs offered even higher guarantees with respect to foreign investments when compared to BITs. This includes rights to market access and unfettered national and most-favored-nation treatment.

Thus, BCEs – with overlapping objects and purposes and interchangeable provisions with existing BITs – were and remain relevant for the protection of foreign investments to the extent that they are *still in force* or not expressly superseded by BITs. Overlooked or forgotten by contemporary literature and practice, these instruments are a secret weapon for foreign investors.

Renewed relevance

By operation of the broadly phrased MFN clause found in many BCEs (*e.g.* Article 10 of the Switzerland-Italy BCE), these treaties may be used in combination with their more modern versions, *viz.* BITs, to attract the latter's dispute resolution mechanism, notably investor-State arbitration.

Taking the combination of the 1868 Switzerland-Italy BCE with the 1983 Switzerland-Panama BIT as an example, this would meet the guidelines set forth in the 1978 ILC Draft Articles on MFN clauses. In keeping with the *ejusdem generis* rule, the benefits extended by the granting State to a third State in the so-called "third-party treaty" (in this example, the BIT) apply as an MFN obligation to the matters that fall within the scope of the treaty containing the MFN clause (the BCE, referred to as the "basic treaty").

In the *Ambatielos II* case, the Commission of Arbitration – while interpreting an FCN Treaty of 1886 – held that an MFN clause may provide a foothold to rely on more favorable procedural remedies for the protection of traders' rights (being those provided in a treaty on commerce). Applying this finding to a BCE could lead to the conclusion that an MFN clause in a BCE may attract a more favorable procedural remedy for the defence of investors' rights from a BIT. Access to impartial arbitration for the prosecution of investors' rights as guaranteed by modern BITs is a potentially more favorable procedural remedy than access to domestic courts or diplomatic protection, as guaranteed by BCEs.

An MFN clause of a treaty can attract the more favorable procedure contained in another treaty, provided that both treaties cover the same subject, following the maxim of 1913 French Court of Cassation in *Braunkohlen Briket Verkaufsverein Gesellschaft c. Goffart*. As shown above, BCEs cover the same subject as their successor BITs. Therefore, the MFN clause of a BCE could be invoked to access a more favorable procedure contained in a BIT, and vice versa. It is important to point out that BITs, on one hand, and BCEs, on the other, have different names. One should nevertheless not be misled by such variance. Much like a contract, the name of an international instrument is not decisive in determining its nature. The focus is rather on its content, as set forth in Article 2(1)(a) of VCLT. The titles of treaties vary greatly and practice fluctuates over time. The relevant focus must be upon the interpretation of the treaties, focusing on their substance not their labelling. Therefore, as long as the two treaties share similar contents, it is possible to use an MFN clause in a BCE to attract more favorable treatment from a BIT, notwithstanding that the two treaties have different names. To state otherwise, a country could circumvent its MFN obligations simply by naming each treaty it ratifies in a different way.

In *Ambatielos I*, the ICJ itself – while recognizing the principle that a State may not be compelled to submit its disputes to arbitration without its consent – extended the consent to arbitrate a certain category of disputes given by a State from one treaty to another. This corroborates that once a State has given its consent in one treaty to arbitrate a certain category of disputes – be it trade or investment disputes – it is possible to obligate that State to arbitrate the same category of disputes arising not from the treaty containing the State's consent, but from a different treaty.

Similarly, in the ICSID case Ali-Alyafei v. Kingdom of Jordan, a Qatari Claimant relied on a MFN clause contained in the 1980 Unified Agreement for the Investment of Arab Capital in the Arab States (the "Unified-Agreement") to import the dispute resolution clause contained in the 1996 Italy-Jordan BIT. Notably, the Unified-Agreement does not express advance consent of States to arbitration. The ICSID Secretary-General nonetheless registered the Request for Arbitration, implying that the dispute was not outside ICSID jurisdiction, despite there being no dispute resolution clause in the Unified-Agreement providing States' consent to arbitration.

Although the application of an MFN clause to dispute settlement mechanisms is a much- debated issue, the broad phrasing of the MFN clause of many BCEs may insulate them from this discussion. The Switzerland-Italy BCE, for instance, expressly authorizes the import of any

"advantage" from any "special treaty". This appears to cover any advantages a State has extended or will extend to any third State's nationals with respect to the matters addressed by the BCE. BITs can be regarded as *special treaties* with respect to the Switzerland-Italy BCE: they are *specialized* vis- à-visthe protection of foreign investment (while BCEs have a broader scope). The term "advantage" – rather than "privilege" or "protection" – appears to cover both substantive and procedural rights, such as the right to file an investment arbitration, which is an undisputed *procedural advantage*.

Such formulation differs considerably from the sometimes more narrowly drafted MFN clauses contained in modern BITs. Notably, in *Plama vs Bulgaria*, the tribunal viewed the term "privileges" as covering only substantive protection to the exclusion of procedural advantages.

Going back to our example, this means that the Italians could have benefitted from the more favorable procedural advantage in the Switzerland-Panama BIT and filed an investment arbitration by operation of the MFN clause of the BCE.

Conclusion

There is reason to expect that BCEs could be used in conjunction with BITs entered into between a host-country with a third-State to supplement or extend the protection provided by the latter. Where there is a BIT in force between the two countries offering lower protection than applicable BCEs, that BIT's protection may be enhanced by virtue of the BIT's MFN clause importing those BCEs' provisions. This is why the history of BITs may have a bearing on their future application.

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