Kluwer Arbitration Blog

Washington Arbitration Week: Using BITs to Protect Cryptocurrency Investments?

Sarah Chojecki, Fredrik Lindmark, Jose Antonio Rivas (Xtrategy LLP), and Munia El Harti Alonso (Robalino Abogados) · Thursday, March 3rd, 2022

The Second Edition of the Washington Arbitration Week took place from 29 November to 3 December 2021, hosting 16 panels, including two hybrid panels with both in-person and virtual attendees. This post highlights the panel on '*Investment Treaty Arbitration in the Digital Era: Using BITs to protect Cryptocurrency Investments?*' **Cristen Bauer** (U.S. Department of Commerce) moderated the panel consisting of **Ana Fernanda Maiguashca** (Private Competitiveness Council and former Board Member of the Central Bank of the Republic of Colombia), **Santiago Rodríguez** (Uria Menendez), **Sophie Nappert** (3VB), **David L. Attanasio** (Dechert LLP), and **Tom W. Walsh** (Freshfields Bruckhaus Deringer LLP).

Ms. Bauer opened the discussions by remarking on the cutting-edge nature of the legal questions brought by cryptocurrencies into international investment law. While cryptocurrency investments have been soaring in the past decade, governments and their regulators are still trying to determine the nature of crypto assets and whether and how they should be regulated, raising many questions about the potential implications for investment treaty claims. The panel addressed various issues, including the definition of crypto assets, the ownership of such assets, whether investment treaties and conventions cover disputes involving crypto assets and, finally, the impending regulation of cryptocurrency investments.

Defining Crypto Assets

Whilst there is no universal definition of crypto assets, a common nomenclature is emerging. Mr. Rodríguez identified four categories of crypto assets, noting that whether they find protection under ISDS will depend on their nature, type, and the process through which they are created:

- **Payment tokens**, also called "digital money," are used to transact or store value. They include: (i) decentralized digital money like Bitcoin, whose value is tied to algorithms being "mined" by computers and the market's demand; (ii) stablecoins that use the same technology as Bitcoin, but whose value is tied to some underlying asset (*e.g.*, the U.S. Dollar for Tether); and (iii) central bank digital currencies ("CBDCs"), centralized digital money issued by governments, whose value is tied to a state's national currency or a state-owned asset such as oil or gold reserves.
- **Utility tokens**, digitized assets that enable the use of other digitized assets.

- **Asset tokens**, digitized assets that provide liquidity to certain physical assets.
- **Non-fungible tokens** or "NFTs," a relatively new form of digitized assets, which may have the characteristics of other digitized assets. In some cases, NFTs have been described as property rights within a blockchain application. (An overview of NFTs and property rights can be found here.)

Fractionary Ownership

Ms. Nappert noted that the tokenization of human activities, where individuals in peer-to-peer environments own a fraction of a larger investment, has radically transformed the field of investments by opening avenues of investment to the broader public such as gold reserves, real estate, art, or even an athlete's employment contract, prompting the rise of mass claims.

Ms. Nappert presented the impending Binance dispute, which she has also discussed in another blog post, as a case study of the novel types of issues that may also arise in ISDS. The dispute originated when on 19 May 2021 Binance, a Chinese-founded crypto-trading platform, shut down parts of its platform, allegedly causing multi-million-dollar losses for traders who had been prevented from making trades. Soon thereafter, a third-party funder based in Switzerland announced its plan to fund a mass claim seeking redress in a HKIAC "class-action style" arbitration. The dispute raises a number of novel issues that arise from the world of cryptocurrencies such as the identification of proper parties, how responsibility should be ascribed, the potential arbitrability of the dispute, and what law should govern it.

Protection under BITs and the ICSID Convention

Next, Mr. Attanasio discussed whether crypto assets are protected investments under investment treaties.

Mr. Attanasio noted that investment treaties tend to define the concept of protected investments broadly, and so there do not seem to be serious issues with accepting crypto assets as protected investments. Tribunals may find that many cryptocurrencies, stablecoins, and potential future CBDCs qualify as protected investments within the movable property category and, in the case of assets stored in a "wallet" controlled by another party, those investments may be protected as a claim to money or performance.

However, whether such assets will be considered located in a qualifying location for treaty protection is more problematic. *Abaclat v. Argentina* states, in the context of disputes over bonds, that "*the relevant criteria should be where and/or for the benefit of whom the funds were ultimately used, and not the place where the funds were paid out or transferred*."[1)] It may be hard to apply this test to crypto assets, as the locus of the investment may not be where the regulatory action affecting the investment took place. Nevertheless, it is possible that at least some tribunals will try to expand the test to find otherwise.

Next, Mr. Walsh addressed the various scenarios in which state actions could trigger claims under a treaty. He stressed the importance of looking at how investors use the different types of crypto

assets to get a sense of whether they will be protected. Although crypto assets belong to the digital world, in many cases the investments around them are more traditional. For example, companies across numerous industries are now heavily investing in the ability to transact in various digital coins exposing themselves to regulations that might someday prohibit or treat such transactions differently. Certain countries also give incentives to foreign investors to develop crypto mining within their borders, which could be later withdrawn as was the case in the solar energy cases filed against Spain. Similarly, crypto exchanges that are located and operate within a particular State, are subject to that State's regulations and therefore are akin to traditional investments.

Regulating the Crypto Industry?

Ms. Maiguashca noted that attempting to effectively ban crypto activities could prove nearly impossible, considering their prevalent digital existence. Further, she questioned to what extent the regulation of crypto assets is desirable. Even if one accepts that some form of protection is needed, the object of the protection must be clearly defined. For instance, by their nature, crypto assets present high risk and returns and investors should not be protected against those risks. However, regulations should sufficiently address other issues such as money laundering risks, which are particularly relevant to crypto asset exchanges.

Furthermore, Ms. Maiguashca challenged the general assumption that crypto activities are financial in nature, which is disputable since the conception that cryptocurrencies are currencies can be challenged. Fiat money, in addition to being accepted as means of payment, must be able to serve as storage of value and a unit of value. Most crypto assets do not serve those objectives since their supply and demand are not controlled, and they are not government-backed. Therefore, the regulations applicable to financial assets may not be the most appropriate for regulating crypto assets.

Further Thoughts and Conclusion

The panel highlighted that crypto assets present a range of cutting-edge issues in the field of investment arbitration. The era of crypto assets has brought with it a mass mobilization of smaller investors across the globe, and the rapid development of crypto assets will have consequences in the area of investment arbitration in the years to come. Some aspects of crypto assets raise completely novel legal issues that are challenging to gauge absent guidance from jurisprudence, e.g. novel fractionary ownership structures, the elements of risk and contribution of crypto assets and their territorial nexus, and potential challenges to enforcement of arbitration awards arising from crypto-related disputes.

In our view, the panel's discussion on crypto assets also illustrates that disputes arising from investments in technology may define the next chapter of investment treaty disputes. The incredible speed at which technology, including crypto assets and activities, has been developing has left States grappling to understand and manage the potential risks that they bring.

Given that advancements in blockchain technology will increasingly open up avenues for fractionary ownership structures in underlying assets—both tangible and intangible— it is possible that traditional shareholder ownership structures in investments may strongly influence the

concepts of “investor” and “investment” in future. Further, as blockchain-based technology continues to flourish, the physical location of investments—both investments in blockchain technology and investments located on the blockchain—will continue to present arbitrators with new challenges. For example, if an investment has no clear territorial link, the question arises as to whether the investment was made in the State that ultimately destroyed the investment through its regulation or other governmental acts.

Conceptually, there is a paradox between a virtual asset having an identifiable location, and its decentralization and absence of its ties to the physical world. As discussed by the panel, States need to carefully consider whether and to what extent they should regulate crypto activities. A necessary precursor to that would be consideration of where such activities should be deemed to take place and, consequently, whether and how they can be effectively regulated by the State in question.

References

?1 *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, para 374.

This entry was posted on Thursday, March 3rd, 2022 at 8:19 am and is filed under BIT, Blockchain, Cryptocurrency, ICSID Convention, Washington Arbitration Week
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.