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Notable 2012 policy developments in International Investment Protection

Luke Eric Peterson (Investment Arbitration Reporter) · Thursday, January 31st, 2013

In an earlier post, I'd highlighted five notable legal highlights from 2012. Below, and somewhat belatedly, I offer my post-mortem on some key policy developments from 2012.

1. Venezuela and South Africa beat a retreat

Venezuela's exit from ICSID was perhaps the most visible policy story of 2012. The move could bolster the caseload of the Permanent Court of Arbitration over the next few years. However, Venezuela has much unfinished business at ICSID – with 28 claims still pending there as of this writing. So, it remains to be seen whether the government will swallow its pride and honor any award emanating from the Washington-based Centre.

While Venezuela's retreat from ICSID got a lot of attention in the mainstream media, the Republic of South Africa has taken steps that could be of much greater consequence: moving to phase out a whole string of BITs with various European trading partners.

In the post-Apartheid era, South Africa signed off on many boilerplate treaties without any real consideration of their domestic policy implications. The casualness with which South Africa approached these BIT commitments is all the more surprising given that the country was engaged in an exhaustive contemporaneous discussion about the proper degree of constitutional protection to be accorded to property rights under domestic law.

Sooner or later, the South African government was bound to wake up to the fact that these BITs permit large swathes of foreign investors (and even savvy domestic ones with an offshore address) to opt out of the constitutional compromise that was struck – and to bypass the local courts altogether.

Now that South Africa has decided to get rid of these first-generation BITs, the critical question is what comes next?

It's unlikely South Africa will sign new (but more circumscribed) BITs with individual EU countries. After all, the EU is now taking the lead on external investment negotiations, which means that South Africa and the 27 member EU will need to reach a compromise on a suitable template.

The South African authorities are touting investor protections that will be built into *domestic* law.

But, given the recent clamouring for outright nationalization in Southern Africa, and given that South Africa and its neighbours have recently presided over the neutering of the tribunal of the Southern African Development Conference, it might be nice to see some protective framework beyond what domestic law offers for European investors (even if this were a *narrow* safety-valve that can be accessed only after exhausting domestic remedies).

In the mean time, European investors will likely be looking to restructure their holdings so as to bring them under the roof of one the several dozen investment treaties that South Africa has no (current) plans to terminate.

2. The U.S. and China stick to their guns

Not every government is in retreat from international investment law commitments. In fact, the two most significant countries in the world are eagerly negotiating BITs on multiple fronts – and are in advanced talks with each other on a bilateral pact.

In a recent commentary, Karl Sauvant and Huiping Chen have speculated that, if China and the United States can reach a compromise, the resulting BIT could become a template for a future multilateral agreement. Personally, I'm not sure how a U.S.-China BIT would get through a ratification vote in the U.S. Senate – not least as a major negotiating goal for China is to roll back restrictions on outward investment by Chinese state-owned enterprises. My hunch is that the US and China might need to bring on board a raft of other governments so as to multi-lateralize their talks before they are concluded; any resulting agreement could be pitched to the U.S. Senate as a more innocuous "multilateral" deal, rather than a lightning rod deal with China only.

Given that the EU is also gearing up for investment talks with China, a genuinely multilateral pact could gain a lot of momentum in a short amount of time if the EU, China and the US were to all get on the same negotiating page.

3. Extra-EU BITs dodge the guillotine

When the European Commission was handed a mandate in December of 2009 to negotiate external investment agreements on behalf of the 27 EU member-states, questions arose as to what to do with the 1000+ existing bilateral investment treaties already in force between individual EU governments with non-EU countries.

In 2010, the Commission's trade negotiations unit surprised with an ambitious plan to phase out these Extra-EU BITs within the near-term – even if new EU-level agreements were not ready to take their place immediately. That plan was quickly nixed, but the Commission's revised proposal also worried fans of the existing BITs status quo, not least as it called for the Commission to review extra-EU BITs to make sure that they conformed to a checklist of Commission priorities and concerns.

Fast-forward to May of 2012, and the final terms of a tripartite deal hammered out between the Commission, the European Parliament and the European Council, offered an even more watered-down plan. Under this compromise, the vast majority of extra-EU BITs are likely to remain in place until EU-level agreements are ready to replace them – and with no need for a "review" of each agreement. In the case of low-priority countries, that could mean that existing BITs stay in place for many years while the Commission works its way down its list of negotiating priorities.

4. The European Commission's ambitions for ICSID are scaled back

In mid 2011 a pair of internal discussion papers prepared by staff at the European commission's DG Trade crossed my desk. The papers offered a window into the thinking of DG Trade as it worked with the various EU member-states to agree on a negotiating template to be used in future EU investment agreements with external trading partners.

The paper on dispute settlement made clear that the Washington-based ICSID enjoyed greater "legitimacy" than private institutions such as the courts of arbitration of the International Chamber of Commerce and Stockholm Chamber of Commerce. The DG Trade proposed that ICSID administer all investor-state disputes arising under EU external investment agreements – including those arbitrated under the UNCITRAL or ad-hoc rules.

However, the DG Trade encountered push-back from member-states, with several advocating for references to one or more national arbitration venues. While yearning to pledge its fidelity to ICSID, the European Commission, had by mid-2012, reconciled itself to something more akin to an "open relationship" with the Washington-based facility: future EU investment agreements will likely permit investor-claimants to pursue arbitration under ICSID or UNCITRAL auspices, but will also give them the right to seek arbitration under any "other" rules provided that the relevant host-state gives its blessing

5. No consensus on wide application of UNCITRAL rules on transparency

The fight for greater transparency of investor-state arbitrations has been rumbling on at the UN Commission for International Trade Law for more than a half a decade – outlasting the process of revising the UNCITRAL rules themselves, as well as the attention-spans of many observers. But, while the transparency debate at UNCITRAL has receded from the headlines lately, it may be that 2012 proves to be a watershed year.

Delegations have made great strides in elaborating guidelines on transparency that would open up written and oral proceedings to public view. But, there is no consensus in favor of applying those guidelines to disputes arising under *existing* bilateral investment treaties that contain a generic reference to UNCITRAL arbitration. Indeed, many governments have pushed for wording which could limit the application of the transparency guidelines to those cases where parties "have agreed to their application."

Such an approach could foreclose the potential applicability of any UNCITRAL rules on transparency to disputes under the vast number of the thousands of bilateral investment treaties already in force.

A handful of governments, including Canada, the United States, and Australia have urged a more progressive approach, arguing that it should be left to tribunals to judge whether a "dynamic" interpretation of a given treaty permits the rules on transparency to be read as implicitly forming part of the arbitration bargain. However, at the most recent meeting of UNCITRAL Working Group II in Vienna, in October of 2012, there was no consensus in favour of this proposal.

Advocates for wider transparency in this context have recently warned that the protracted discussions may "lead to rules that are state of the art in terms of content and form, but that are in reality largely irrelevant because not applicable to the majority of investment disputes."

Barring a major reversal at next week's meeting of Working Group II in New York, 2012 may go down as the year that UN delegations made clear their limited appetite for sweeping transparency in investor-state arbitration.

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