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Addressing the Problem of the ‘Unknown’ Claimant in Investor-State Arbitration

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As Mariel Dimsey has observed, a key challenge posed by investment treaties is that – at the point of ratification – they expose States to arbitrations of ‘as-yet-unknown scope and against as-yet-unknown claimants’. Gus van Harten and Martin Loughlin argue that this feature differentiates investment disputes from those heard in other fora, transforming investment disputes into something akin to ‘domestic judicial review of state conduct’. In light of such potential implications, it is important to consider whether the ‘unknown claimant’ really is a problematic feature of investment treaty arbitration and – to the extent that it is – what has or might be done about it.

Scope of the Problem

At the outset, it must be observed that the issue of the ‘unknown claimant’ arises only in respect of particular categories of dispute. The issue will not arise, for example, where the dispute concerns alleged interference by a host State with particular investments or investors with whom it has a pre-existing legal relationship. A host State is on notice at the time of concluding a concession contract with a foreign investor, for example, that that investor might ultimately come to file a claim under an investment treaty (should there be one available). In that sense, the class of claimants is known or knowable before the host State assumes international obligations in respect of the investor. For other types of dispute, however, the class of claimants is less easily identifiable and – in many cases – only identifiable at the point at which a claimant files a claim. This is particularly so where general measures form the basis of an investment treaty claim. A host State implementing a general legislative program, for example, may not necessarily know or be able to find out which protected investors or investments may be affected by that legislation. Here, the issue of the ‘unknown claimant’ becomes relevant because the measures are not directed towards particular investors or investments.

A Problem in Need of Solution?

The extent to which the ‘unknown claimant’ is a problem depends upon what an investment treaty seeks to achieve and what obligations it imposes upon a host State. To the extent that an investment treaty imposes upon a State an obligation to ‘consult…foreign investors and properly take into consideration the impact of proposed domestic policy changes on them‘, for example, it would evidently be of utility to a host State to know in advance the investors it must consider or with which it must consult.

In addressing the issue of the 'unknown claimant', States (as well as investors) may secure a range of benefits. From the perspective of good governance, foreknowledge of the interests at stake may result in better informed policy-making, including a greater capacity to actively consider how proposed policies might be brought into compliance with treaty obligations. Foreknowledge as to the investors who may be impacted might also result in there being greater scope for disputes to be settled prior to the initiation of costly or protracted arbitral proceedings. Even to the extent that claims are not settled, identification of the specific investors which might be affected by a policy decision would at least allow States to identify potential claimants and to proactively prepare themselves to defend potential claims at an earlier stage than they otherwise might. Finally, upon commencement of arbitral proceedings, greater *ex ante* transparency about the identity of investors and the scope of their investments might support tribunals to assess threshold issues concerning, for example, the nature and scope of an investor's investment, claims of abusive nationality planning, or claims of 'double dipping' by investors with overlapping investment interests.

Making the Unknown Investor Knowable

The best means of addressing the issue of the 'unknown claimant' is to ensure that an investor notifies the host State in some way of its investment at the point of acquiring it. Conceivably, there are at least four ways in which such a situation might be achieved.

First, the class of investments protectable under an investment treaty could be specifically limited to those in which the 'unknown claimant' issue does not arise. Thus, for example, the class of investments protected under a treaty might be restricted to those based upon contractual or concessionary arrangements. As noted above, such arrangements do not raise the problem of the 'unknown claimant'. Instead, like commercial investment disputes, they raise only uncertainty as to the timing and amount of any future claim.

Second, States might address the issue of the 'unknown claimant' by imposing treaty requirements of admission or registration. By admitting or registering investments through some formal process, States are better able to identify in advance the investors which may be affected by proposed measures. There are a range of means through which a registration or admission requirement could be imposed. For example:

- the investments protected under the treaty could be limited to those interests which can *only* be obtained through registration (for example, land holdings, or certain types of intellectual property rights); or
- the definition of investment could impose a requirement that an investment be 'admitted' or 'registered' in compliance with host State law.

This latter option has already been adopted by many States. The ASEAN Investment Agreement, for example, stipulates in Article II that:

> This Agreement shall apply only to investments…*which are specifically approved in writing and registered* by the host country…

This provision was successfully invoked in *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar*, the Claimant having failed to gain approval of its investment from the host State. By contrast, in *Desert Line Projects LLC v Yemen*, whilst noting that the investor had failed to obtain a required 'investment certificate', the Tribunal upheld jurisdiction. It considered that insisting on the registration requirement would be 'artificial' because the provision's purpose had been achieved: the investor had made its investment 'at the request and with the approval of the President and the Cabinet'. The capacity of such provisions to address the issue of the 'unknown claimant' will thus turn to a significant degree on the clause's precise wording. 'Admission' and 'registration' requirements differ, for example, to provisions requiring that investments be 'made' in accordance with host State law. This latter type of provision was invoked in *Mytilineos Holdings S.A. v The State Union of Serbia and Montenegro and Republic of Serbia*. In that case, the Respondents contended that the Claimant's investment had not been 'made' in accordance with domestic law, which required registration and approval by the federal government. The Tribunal rejected that argument, finding that there was no evidence that the Claimant's investment was 'illegal' and thus holding that it had been 'made' in accordance with domestic law. The Tribunal specifically distinguished the provision from that in *Yaung Chi*, noting that it did not "require any approval on the part of the host States".

Third, investors might be encouraged to make themselves known to States should they see benefit from doing so. Thus, for example, a State proposing to adopt a general measure may itself overcome the issue of the 'unknown claimant' by undertaking a consultation process.

Finally, investors also be encouraged to register their investments should registration be required under domestic law, even if the applicable investment treaty itself is silent as to the relevance of such registration. For example, the UK has recently announced plans to introduce requirements for foreign companies to disclose details of all their land and property holdings in the UK. Such a proposal – which targets foreign holdings – has scope to play a role in investor-State proceedings. In particular, the fact of registration – as well as details of an investor's nationality and the size of its investment – may ultimately come to be invoked as an element of proof in the context of jurisdictional submissions in cases concerning the investors or investments identified on the register.

Appraisal

While there is much to be gained by addressing the issue of the 'unknown claimant', there are also a number of potential pitfalls. As most of the above options depend upon the creation of accurate registration systems, there is scope for administrative overburdening of States and the creation unnecessary red-tape. In fact, in light of pre-investment commitments contained in many treaties, errors or delays in the administration of registration systems might themselves result in investor-State claims! Another potential pitfall is presented by the sheer number of investments that would need to be registered, as well as the possibility that policy agencies may not themselves be involved in administering (or even aware of the existence of) registration databases. Conversely, such requirements – where used overly officiously – might result in a greater potential for regulatory chill. Finally, it would be necessary to guard against the risk that a host State might misuse such requirements, including by unilaterally de-registering investments in order to escape liability.

Whilst remaining cognisant of these potential pitfalls, it is evident that the issue of the 'unknown claimant' is not being neglected by States. As these solutions come to be considered more frequently by arbitral tribunals, States may gain further insights into how best to balance the pitfalls in order to better address this issue of the 'unknown claimant'.

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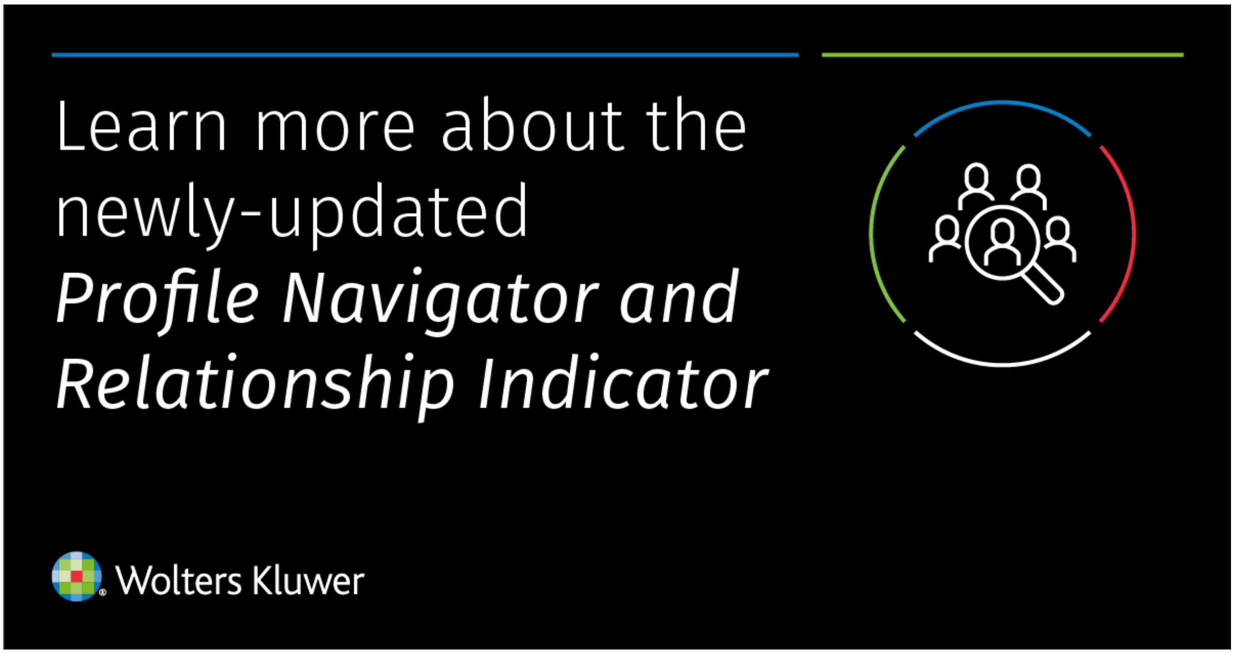

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