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The United States' Non-Disputing Party Practice in Investment Arbitrations in 2019

John Blanck (US Department of State) · Tuesday, April 14th, 2020

In 2019, the United States ('U.S.') made six non-disputing Party submissions in investment treaty arbitrations, three of which took place under the NAFTA (*Lion Mexico Consol. L.P. v. Mexico*; *Vento Motorcycles, Inc. v. Mexico*; and *Tennant Energy, LLC v. Canada*), and one each of which took place under U.S. agreements with Korea, Peru and Panama (*Jin Hae Seo v. Korea*; *Gramercy Funds Mgmt. LLC and Gramercy Peru Holdings LLC v. Peru*; and *Bridgestone Licensing Servs. and Bridgestone Americas, Inc. v. Panama*). All six submissions are available on the U.S. Department of State's web site. (I drafted the *Bridgestone* submission, and helped review others.)

The six submissions provided the U.S. interpretive view of various provisions contained within the Investment Chapters of the four agreements. Five of the submissions were written; the sixth (in *Bridgestone*) was one of the few oral submissions made by the United States as a non-disputing Party. The *Jin Hae Seo* submission was the first submission the United States has made under its agreement with Korea.

The subject matter of the U.S. submissions included a wide range of topics found in the jurisdictional, merits and damages phases of investment arbitrations, as well as on other issues that do not necessarily fit neatly into one of these categories, such as the standard of proof in the case of alleged corruption; the proper interpretation of the expedited review mechanism found in many modern U.S. international investment agreements, and interim measures of protection. The U.S. files these submissions with the hope that they will assist the tribunals in interpreting the agreements, and some investment tribunals have held that such submissions may serve to form "subsequent practice" as used in Article 31(3) of the Vienna Convention on the Law of Treaties,[1)] requiring that treaty interpreters take such practice into account. This blog post will primarily focus on aspects of the 2019 interpretations which provided new insights into U.S. interpretive views.

Jurisdiction

Jurisdictional topics that the United States addressed in its 2019 non-disputing Party submissions included (i) the three-year limitations period found in the relevant agreements, (ii) the waiver of any right to pursue other dispute settlement procedures with respect to the challenged measures, and (iii) continuous nationality.

The United States made four submissions on applicable limitations periods (*Gramercy*, *Jin Hae Seo*, *Lion* and *Vento*). For the most part these submissions cover well-trodden ground. However, the *Gramercy* submission addressed the concept of "date of breach" in the expropriation context in more detail than other submissions, which is relevant to when the limitations period starts running. The U.S. explained that a breach of an international obligation occurs when the act of a State is not in conformity with the relevant obligation. If at the time of the expropriation a host State does not compensate or make provision for the prompt determination of compensation, the breach occurs at the time of the taking. However, when a State provides a process to determine adequate compensation, but then fails to promptly determine and pay such compensation, a breach may occur later than the time of the taking.

The U.S. submissions on waiver (*Gramercy* and *Lion*) generally repeated interpretations of previous years, explaining that a waiver has both formal and material requirements (the former being a written waiver that complies with the substantive waiver requirements, and the latter being conduct that is consistent and concurrent with the written waiver). In *Gramercy* the U.S. explained that the waiver requirement in the Peru agreement was a "no U-turn" waiver, which allows a claimant to pursue a remedy in domestic courts without relinquishing the right to pursue arbitration under the agreement (as long as the limitations period has not expired). This is different from a "fork in the road" provision, which typically does not allow a claimant to change its dispute settlement mechanism decision once made.

The only submission the U.S. made on "continuous nationality" was in *Vento*, where the U.S. explained that in order to submit a claim to arbitration under the NAFTA an investor must have been a national of a NAFTA Party at three dates and at all times between them: the time of the alleged breach, the submission of the claim to arbitration, and the resolution of the claim.

Merits

On merits issues the U.S. submitted interpretations of (i) the minimum standard of treatment (MST), (ii) expropriation, (iii) national treatment (NT), and (iv) most-favored-nation treatment (MFN).

The U.S. made submissions discussing the MST obligation in *Bridgestone*, *Gramercy*, *Lion* and *Vento*. All but the *Vento* submission discussed MST in the context of judicial measures. All three submissions discussing judicial measures explained that such measures must accord treatment to the relevant *investment* for there to be a breach (unlike, for example, the NT and MFN obligations, where treatment extended to an *investment or investor* could constitute a breach). Additionally, the *Bridgestone* submission explained that for a denial of justice claim related to an adjudicatory proceeding to succeed, a claimant must establish that it was a party to the proceeding, or that it sought to become a party to the proceeding but was denied the opportunity.

Two submissions (*Gramercy* and *Lion*) discussed the expropriation obligation, both of which explained that decisions of domestic courts acting in the role of neutral and independent arbiters of litigants' legal rights cannot give rise to an expropriation claim. If, however, the judiciary is not separate from other organs (executive or legislative) of a State and those organs direct or otherwise interfere with a domestic court decision so as to cause an effective expropriation, the executive or legislative acts could form the basis of an expropriation claim. Additionally, the

Gramercy submission discussed the "police powers" principle, explaining that a *bona fide*, non-discriminatory regulation will not ordinarily be deemed expropriatory. Further, the U.S. noted its view that this principle is a recognition that certain State actions do not engage State responsibility, and is not an exception that applies after an expropriation has been found.

The *Gramercy* and *Vento* submissions were the only two to discuss NT and MFN, both of which explained that these provisions are designed "only" to ensure a Party does not treat entities in like circumstances differently based on nationality. Further, the *Gramercy* submission discussed a provision that has not often been in dispute in arbitrations under U.S. agreements, a non-conforming measures (NCM) clause. NCMs are measures that are inconsistent with one or more Services or Investment Chapter obligations in the relevant agreement, and would thus constitute a breach of the agreement, except that by listing the NCMs in an annex, the Parties reserve the right to adopt or maintain such measures as specified in the annex. With respect to the MFN provisions of the investment and services chapters of the U.S.-Peru Trade Promotion Agreement (TPA), the Parties reserved the right to adopt or maintain measures according "differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force" of the TPA. Thus, a Party's application of a measure to an investor of a third State by virtue of an obligation in an older third-country treaty would not fall within the scope of the U.S.-Peru TPA. Additionally, the Gramercy submission clarified that a tribunal cannot ignore the MFN requirement that a claimant demonstrate that investors of another Party or non-Party "in like circumstances" were actually afforded more favorable treatment.

Damages

The *Bridgestone* and *Vento* submissions discuss damages, both of which explain that damages must be based on satisfactory evidence that is not inherently speculative and further that the agreements limit an investor's ability to recover damages it incurred in the territory of the breaching Party.

Standard of Proof when Alleging Corruption

In the *Bridgestone* submission, the United States explained that although the standard of proof in international arbitrations is generally a preponderance of the evidence, when allegations of corruption are raised, either as part of a claim or defense, the disputing party must establish the corruption through clear and convincing evidence.

Interim Measures of Protection

The *Tennant* submission was limited to discussing interim measures of protection, and it was the first non-disputing Party submission the United States has made on this topic. The *Tennant* submission explained that under the NAFTA, interim measures may be ordered to preserve the rights of a disputing party, including both existing rights and contingent rights. Two examples of contingent rights that a tribunal may protect by way of interim measures are the potential future right to have evidence disclosed (depending on the tribunal's authority under the

applicable arbitration rules to order such disclosure), and the potential future right to recover a disputing party's costs.

Expedited Review Mechanism

The *Jin Hae Seo* submission discusses the expedited review mechanism that the United States has included in its investment agreements concluded after the NAFTA. This mechanism authorizes a respondent to raise any objection that a claim is not one for which a tribunal may issue an award as a matter of law (similar to a Rule 12(b)(6) of the U.S. Federal Rules of Civil Procedure) and have it addressed in an expedited fashion.

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References

?1 *Canadian Cattlemen for Fair Trade v. United States of America* (NAFTA/UNCITRAL) Award on Jurisdiction ¶¶ 188-89 (Jan. 28, 2008); *Bilcon of Delaware et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages ¶¶ 52, 379 (Jan. 10, 2019). *Mobile Investments Canada Inc. v. Canada* (ICSID Case No. ARB/15/6) Decision on Jurisdiction and Admissibility ¶¶ 158, 160 (July 13, 2018).