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Studying International Investment Treaties and Investor-State Disputes through a Central Asian Lens

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In recent years, international investment law and the investor-state dispute settlement ('ISDS') system have arguably reached their melting point, with an increasing number of participants having diverging interests and perspectives. Many of these issues have come to the surface through the discussions ongoing at UNCITRAL Working Group III. In this context, the experiences of the five Central Asian states – Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan – present a unique case study for developments in the field.

A program held on February 21, 2023 in Washington, DC, titled *Hot Topics in Investor-State Disputes in Central Asia* and hosted by The George Washington University ('GW') Law School's International and Comparative Law program and the GW Law International Arbitration Students Association, sought to explore these issues in depth. This post presents highlights from the program, as well as additional insights.

The program commenced with welcome remarks by Associate Dean Rosa Celorio (George Washington University Law). Kiran Nasir Gore (Independent Counsel and Arbitrator; GW Law) then introduced the newly published book that had inspired the program, *International Investment Law and Investor-State Disputes in Central Asia: Emerging Issues*, which she co-edited with Elijah Putilin, Kabir A.N. Duggal, and Crina Baltag.

Ms. Gore set the stage by highlighting the relevance and significance of studying international ISDS through a Central Asia-focused lens. Approximately 200 Bilateral Investment Treaties ('BITs') involve states in the region, of which approximately 160 are presently in force. Meanwhile, the Central Asian states have been party to a significant number of investor-state disputes which have resulted in decisions and awards that have been influential in the trajectory of the field of ISDS, including for example, *Metal-Tech Ltd. v. Republic of Uzbekistan*, *Spentex v. Uzbekistan*, and *Gold Pool v. Kazakhstan*, just to name a few. In this regard, the Central Asian region presents a unique case study in social, economic and political contexts. The book is organized topically, with 17 chapters authored by a 21 individuals, and draws on the Central Asian states' experience to comment upon the broader international investment regime and ISDS system.

Investment Legislation in Central Asian States

Diora Ziyaeva (Dentons) drew upon her contribution to the book to examine the evolution of the foreign investment legislation of the states in the region from the 1990s to present. She noted that, while each of the Central Asian stateshas its own laws, each state's domestic legislation originates from the investment legislation existing in the USSR regime in the early 1990s. According to Ms. Ziyaeva, the underlying purpose of such domestic legislation was to attract investment. Though aimed at attracting all types of investment, the domestic legislation ultimately did not bring the desired result of economic growth, which led to governments becoming more selective, focusing their efforts on attracting and directing foreign investment to the industrial infrastructure and agriculture sectors. In parallel, the Central Asian states created agencies to facilitate investment in developing sectors of the economy. Toward the first decade of the twenty-first century, an advanced stage of investment legislation emerged in Kyrgyzstan, Kazakhstan, Tajikistan and Uzbekistan, maintaining general legislation along with industry-specific legislation.

Ms. Ziyaeva noted, however, that the domestic legislation in each of the five Central Asian states still lacks something that investors want, i.e., a single legislative act that defines investment-related provisions and also acts as an exhaustive framework for what to expect. Notably, the Central Asian states' domestic legislation prioritizes resolution of disputes through mediation or litigation. Importantly, though, several ISDS tribunals (e.g., *Metal-Tech v. Uzbekistan*) have found that such legislation lacks the relevant state's consent to arbitration and therefore the tribunals have found that they lack jurisdiction. On the other hand, it is notable that some tribunals have confirmed state consent to arbitration in their investment law, such as in *Penwell v Kyrgyzstan*, where the tribunal found Kyrgyzstan's consent to arbitrate in Article 18(2) of the Kyrgyz Investment Law – after which the Kyrgyz legislature amended Article 18(2) to limit the finding of jurisdiction again.

Ms. Ziyaeva concluded that, in spite of the work that is required in domestic legislation to render the Central Asian states ideal investment environments, the region remains attractive as an investment destination. She foresees that foreign and domestic investments in Central Asian states will increase in the coming decade, which likely will inspire further development in the countries' domestic legislative frameworks.

The Importance of Applicable Law and Interpretive Tools

Henry Defriez (Dechert) and David Attanasio (Dechert) drew upon their two co-authored chapters in the book to examine sources of applicable law and the interpretation of treaties in ISDS cases.

Mr. Defriez first delved into questions of the law applicable to ISDS in Central Asia and the interplay between domestic and international law. He noted that the vast majority of BITs do not specify the applicable law, and that 47 of the 63 arbitration cases analyzed by Mr. Attanasio and him in the book arose under investment treaties that do not contemplate applicable law. Mr. Defriez explained that, typically, both domestic and international law may play a role in ISDS decision-making, and application of one does not always exclude the application of the other. He highlighted that sometimes domestic law, pursuant to the terms of a BIT, plays a subsidiary role in assessing whether the BIT's jurisdictional requirements have been met, including determination of whether the investor has the required nationality or whether the investment was made as per domestic laws. On the other hand, international law provides a framework for the interpretation and application of investment treaties. Tribunals have also relied on customary international law to supplement or fill in gaps in investment treaties, for example, in *Metal-Tech Ltd. v. Republic of*

Uzbekistan and *Kim and others v. Uzbekistan* (relying on the prohibition against corruption in international law). Lastly, Mr. Defriez highlighted that the Vienna Convention on the Law of Treaties ('VCLT') is an important tool in the interpretation of Central Asian investment treaties. In fact, cases from this region have provided unique fodder for the application of Article 33 of the VCLT ("Interpretation of treaties authenticated in two or more languages") in particular – most notably, *?çkale v.Turkmenistan*, *Çap v. Turkmenistan*, and *K?l?ç v. Turkmenistan*.

Mr. Attanasio expanded on the topic of applicable law by noting that in practice, tribunals often do not have much trouble in deciding which laws to apply. When asked by Ms. Gore whether any best practices in treaty drafting could be employed by states to support tribunals in resolving questions of applicable law, Mr. Attanasio commented that there are endless combinations of language that drafters could adopt for applicable law clauses. Thus, determining a single combination which would be appropriate in most or all situations would be challenging. More than identifying which bodies of law may be applied, the real challenge is identifying formulations that specify which specific body of law should be applied to which issue.

Looking Ahead – Issues in ISDS

Stanimir Alexandrov (Independent Arbitrator; GW Law) offered praise for the book and made remarks centered on emerging issues in ISDS generally, all of which are also important for the Central Asian region. He opined that such challenges are inevitable as the drafters of legislation and negotiators of BITs cannot account for every possible future issue that may arise. The significant issues of concern were enumerated as follows:

1. **Transparency** – Parties to a BIT may be hesitant to agree on a provision relating to transparency once disputes have arisen in cases where the BIT does not already provide for the same. Thus, there need to be specific provisions promoting transparency in BITs and legislation to ensure that parties to ISDS do not conduct themselves in an opaque manner.
2. **Corruption in Investment** –In recent years, states have used corruption in the acquisition or operation of investment as a defense against a claim by an investor. Tribunals have taken a consistent view that corruption is against public order and investment obtained through corruption does not deserve protection. However, by dismissing a claim of an investor on grounds of corruption, tribunals punish only the investor and not the state that has indulged in benefits of corruption. Tribunals thus need to evaluate what measures the state may have taken against the corrupt act or corrupt officials before allowing the state to benefit from such a defense.
3. **Multiple Claims** – Multiple claims, through procedural tools that provide for joinder, consolidation, or mass claims, are increasingly being filed by investors and this requires ISDS tribunals to render determinations on the propriety of such approaches. Though there are practical reasons for a state to prefer defending against and a tribunal to prefer adjudicating one mass claim as opposed to 100 claims, it is important to ascertain whether the BIT allows the same. On the other hand, multiple small investors who may not have the means to submit claims independently may be empowered to join claims and reduce their costs making it possible for them to seek relief through the ISDS system.
4. **Third-Party Funding** – This developing practice may support small and medium-sized businesses in accessing dispute resolution opportunities and, ultimately, justice.

Concluding Remarks

This program comprehensively touched on various issues elucidated above and further considered them through the lens of ICSID's recently modernized rules and the reform of ISDS being undertaken in the European Union. The speakers offered their opinions, complemented by their own firsthand experiences in practice, while emphasizing the importance of the book's findings for current and future practitioners in the field of arbitration.

The promo code 20ILI2023 offers a 20% discount on the retail price of International Investment Law and Investor-State Disputes in Central Asia: Emerging Issues in the Wolters Kluwer eStore. The code is valid through October 31, 2023.

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