

# **Navigating Through Investor- State Arbitrations— AN OVERVIEW OF BILATERAL INVESTMENT TREATY CLAIMS**

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**T**he proliferation of direct foreign investments in developing countries and the increasing number of bilateral investment treaties (BITs) have resulted in the phenomenon called investor-State arbitrations brought by foreign investors against host States. As a result, States that are parties to BITs have had to defend government actions and policies in arbitration proceedings around

the world. The BIT arbitration trend, which began in the 1990s, is particularly evident in Latin America, where political and civil unrest, as well as economic crises, have left many foreign investors with BIT claims.

This article provides an overview of the main issues arising in disputes between host States and foreign investors. It covers the types of claims that can be filed, who can bring them, and issues concerning the applicable law. It also discusses jurisdictional challenges to BIT claims.

#### What are BITs?

BITs are treaties between two countries aimed at promoting foreign investments and providing reciprocal protections for foreign investors. The first BIT was signed in 1959 by Germany and Pakistan, but it was not until decades later that BITs became commonplace. Today, BITs are ubiquitous—over 2,000 of them have already been signed.<sup>1</sup>

In general, BITs cover four substantive issues: admission of foreign investors to the host State, equal treatment of investors, the problem of “expropriation” of an investment by the host State, and methods of settling disputes.<sup>2</sup>

BITs usually recite that the contracting States are committed to promoting investments made by citizens of one State in the territory of the other. They also provide that the host State will provide “fair and equitable treatment,” “full protection and security,” protection from expropriations and nationalizing actions except for a public purpose, and they extend “most-favored-nation treatment” to investments made by investors from the other State. A most-favored-nation clause typically provides that a foreign investor shall not be accorded treatment less favorable than that extended by each State party

to foreign investors of another country.<sup>3</sup> BITs also provide that each contracting State shall not institute discriminatory measures that would impair the management, maintenance, use, enjoyment or disposal of investments by investors from the other State.

BITs provide a mechanism whereby foreign investors can avoid filing a claim against the host State in its courts, where the State is likely to enjoy a “home court advantage.” For this reason, disputes that arise under BITs are generally resolved through arbitration.

Most BITs allow for *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). At the same time, most of them also provide for arbitration administered by the International Center for Settlement of Investment Disputes (ICSID), an arm of the World Bank in Washington, D.C.<sup>4</sup> BITs may also provide for administered arbitration by a variety of other institutions, like the International Centre for Dispute Resolution (ICDR), an arm of the American Arbitration Association, the International Chamber of Commerce (ICC),<sup>5</sup> or the Arbitration Institute of the Stockholm

Chamber of Commerce.<sup>6</sup>

At first glance, dispute settlement provisions in BITs may appear to be uniform. But they are not all the same. The applicable procedural and substantive laws are likely to differ, as will many other provisions. For example, some BITs require the parties to make an effort to amicably resolve the dispute before a claim is filed. An example is the United States-Trinidad and Tobago BIT.

Some BITs limit the time period before a claim can be filed (for example, the Argentina-Chile BIT), or require local remedies to be

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exhausted before arbitration can be commenced (as in the Argentina-Spain BIT). Further, some dispute settlement provisions, such as the definitions of the terms “investment,” “company” and “investor,” are very broad. The purpose seems to be to allow flexibility. But this can result in challenges to the arbitration proceeding.

### Exclusions from BIT Coverage

Certain types of international agreements are exempt from the protections of BITs. The majority of BITs commonly exclude customs agreements, “economic union” agreements to which either of the contracting States is or may become a party, as well as agreements or legislation relating to taxation.<sup>7</sup>

BITs also may expressly exclude specific activities and business sectors.<sup>8</sup> For example, the BIT between Argentina and Bolivia excludes bilateral agreements that provide for concessional financing, like the agreements between Argentina and Italy (Dec. 10, 1987) and Argentina and Spain (June 3, 1988). Thus, investments involving excluded sectors are not entitled to national<sup>9</sup> or most-favored-nation treatment.

### Claims Filed under BITs

Only an “investor” with an “investment” in the host State, as those terms are defined in the BIT, may file a BIT claim. The most contested issues in BIT arbitrations involve these terms—i.e., Is the foreign national an “investor” who has made an “investment” in the host State?

#### 1. Defining “Investment”

In the majority of BITs, “investment” is defined broadly to mean “every kind of asset invested by the investor of the Contracting Party in the territory of the other Contracting Party.” Many BITs provide a non-exhaustive list of examples, which usually includes traditional property rights, rights in companies, monetary claims and titles to performance, intellectual property, concessions and similar rights.<sup>10</sup> When a BIT lists examples, unless an investment falls squarely within the definition or the illustrative examples, the host State will challenge the propriety of the BIT proceeding, arguing that the investment is not covered by the terms of the BIT.

When the definition of an “investment” is raised, the tribunal usually will look beyond the BIT’s definition of the term to see how it is defined in international law or even in the host State’s laws and regulations.<sup>11</sup> For example, in *Mibaly International Corp. (U.S.) v. Democratic Socialist Republic of Sri Lanka*, the tribunal looked to such evidence in determining whether expen-

ditures the U.S. claimant made before the contract was signed would be considered an “investment” under the United States-Sri Lanka BIT.<sup>12</sup> The tribunal noted that the claimant did not provide any support from international law or from the laws of Sri Lanka “to the effect that pre-investment and development expenditures in the circumstances of the present case could automatically be admitted as ‘investment’ in the absence of the consent of the host State to the implementation of the project.” Accordingly, the tribunal found that these expenditures did not qualify as an “investment.”

The tribunal in *Lanco International v. Argentine Republic* looked beyond the definition of “investment” in the Argentina-United States BIT in finding that the investor could sue under the BIT for claims arising out of a dispute over a port terminal Concession Agreement signed by the Argentine Republic, the company that was granted the concession, and four other companies, including the claimant.<sup>13</sup> Specifically, the tribunal found that under the BIT’s definition of “investment,” one could determine that Lanco had certain rights and obligations under the Concession Agreement. As a result, the Argentine Republic could turn to Lanco for the performance of the obligations under that agreement. Basing its decision on an analysis of these facts and the concession agreement, the tribunal found that the broad language of the BIT covered this investment.

#### 2. Determining the Investor’s Nationality

The nationality of the foreign investor is a critical element of a valid claim under a BIT. A BIT is applicable only if the investor is a physical person or entity from one of the contracting States. In *Olguin v. Republic of Paraguay*, for example, the respondent challenged the claimant’s ability to assert a claim under the Paraguay-Peru BIT because the claimant had dual nationality and resided in the United States.<sup>14</sup> The respondent argued that under Peruvian law, domicile determined the rights of a person with dual nationality. The tribunal dismissed this argument, holding that Peruvian domestic law was irrelevant since the claimant was a Peruvian national and that was sufficient to claim the benefits of the BIT.

Jurisdictional challenges relating to a claimant’s nationality usually involve a claimant that is an entity, rather than a physical person. An entity (however structured) is considered a national of a State if one of the following conditions is satisfied:

- (1) it is incorporated in that State,
- (2) it has its seat in that State, or

- (3) it is controlled by investors from that State.

However, a number of countries have adopted special rules regarding the nationality of a business entity. For example, the U.S. Model BIT reserves the right to deny the benefits of a BIT between the United States and another State if the investing entity: (1) is incorporated in the United States but is owned or controlled by nationals of a third country with which the United States does not maintain normal economic relations, or (2) has no substantial business activities in the United States.<sup>15</sup> Switzerland, in some of its BITs, requires

***“Consent to international arbitration can be inferred from a country’s investment legislation or from BITs the country has negotiated and ratified.”***

Swiss companies to have their seat in Switzerland, as well as “effective economic activities” in Swiss territory in order to reap the benefits of these bilateral treaties.<sup>16</sup>

In the ongoing arbitration between Bechtel Corp. and the Republic of Bolivia, Bechtel took some creative legal steps so that its consortium would qualify to file a BIT claim for certain losses incurred in Bolivia.<sup>17</sup> The problem was that Bechtel’s consortium was registered in the Cayman Islands, which did not have a BIT with Bolivia. To obtain the nationality of a State that is a party to a BIT with Bolivia, Bechtel’s consortium shifted its registration to the Netherlands and filed a claim under the Netherlands-Bolivia BIT.<sup>18</sup>

### **Types of BIT Claims**

A BIT gives an investor an opportunity to assert specific types of claims. A common claim is that the host State failed to guarantee “fair and equitable treatment.” A claim of this nature was made under the United States-Estonia BIT in *Genin v. Republic of Estonia*.<sup>19</sup> In this case, the foreign investor alleged that the government’s action in revoking an Estonian bank’s license (in which the U.S. investor was a major shareholder) constituted a lack of fair and equitable treatment.

Under international law principles, “fair and equitable treatment” is a recognized legal standard separate from the host country’s domestic laws.<sup>20</sup> Explaining this standard, the tribunal in *Genin* said that a violation could be established by “acts showing willful neglect of duty, an insufficiency of action falling far below international

standards, or even subjective bad faith.”<sup>21</sup> It went on to reject the claimant’s claim. It found that the treatment complained of did not “rise to the level of violations of the international law standards of ‘fair and equal treatment’ and ‘non-discriminatory and non-arbitrary treatment’ of investment,” as those standards were reflected in Articles II(3)(a) and (b) of the United States-Estonia BIT.

In 2001, the North American Free Trade Commission concluded that “the concepts of ‘fair and equitable’ and ‘full protection and security’ [in the multilateral North American Free Trade Agreement (NAFTA)] do not require treatment in addition to or beyond that which is required by the customary standard of treatment of aliens.”<sup>22</sup> The arbitral tribunal in *Loewen v. United States*, an ICSID arbitration brought under the NAFTA by Canadian parties, said on June 26, 2003, that as a result of the Commission’s interpretation, “‘fair and equitable treatment’ and ‘full protection and security’ are not free-standing obligations. Rather, they constitute obligations of the host State only to the extent that they are recognized by customary international law.”<sup>23</sup> The *Loewen* tribunal explained that to the extent, if at all, NAFTA tribunals in other cases (for example, *Metalclad Corp. v. United Mexican States*, *S.D. Myers v. Government of Canada*, and *Pope & Talbot v. Government of Canada*) “may have expressed contrary views, those views must be disregarded.” This is the latest interpretation of the “fair and equitable treatment” requirement.

Another claim that can be asserted under a BIT is “expropriation” of an investment by the host State. Almost all BIT claims filed with the ICSID have alleged “host-State responsibility for some form of expropriation without compensation.”<sup>24</sup>

BITs do not prohibit all forms of expropriation. Expropriation is permitted for a public purpose, if conducted in a non-discriminatory manner and accompanied by “prompt, adequate and effective compensation.” For example, the BIT between Egypt and the United Kingdom provides that “investments are not to be nationalized or expropriated except for a public purpose ‘related to the internal needs’ of the host State and the State must pay ‘prompt, adequate and effective’ compensation.”<sup>25</sup>

If an expropriation has occurred, the issue of compensation must be addressed. In *Middle East Cement v. Republic of Egypt*, the tribunal found that the claimant’s chartered ship had been expropriated within the meaning of the Egypt-Greece BIT and awarded the claimant compensation and compound interest.<sup>26</sup> BITs provide various measures of compensation for expropriation, including market value,<sup>27</sup> the value of the investment imme-

diately before the expropriation became public knowledge (which might be different than the actual date of expropriation),<sup>28</sup> and the value of the investment at the time of expropriation.<sup>29</sup>

### Applicable Law in BIT Arbitrations

In BIT arbitrations it is necessary to determine both the procedural and substantive law. Determining the law governing arbitration proceeding is particularly important when the parties have selected *ad hoc* arbitration. It is less of a problem when they have selected administered arbitration in a well-known arbitral forum, such as the ICC or the ICDR, because the rules of the institution regarding these matters are available to the parties.

Determining the applicable substantive law is not an issue if the law is specified in the BIT. However, many BITs do not so specify and in those that do, the applicable law provisions tend to be broad and generic. For example, the Belgium-Burundi BIT provides that the national law of the Contracting Party on whose territory the investment was made should be applied.<sup>30</sup> However, the same clause provides that the provisions of the BIT apply, as do the specific obligations under the investment and “generally recognized rules and principles of international law.”<sup>31</sup>

Several BITs give the tribunal discretion to determine the applicable law. An example is the Netherlands-Poland BIT, which provides that “the tribunal shall decide on the basis of respect for the law ... including particularly this Agreement and other relevant agreements existing between the two Contracting Parties and the universally acknowledged rules and principles of international law.”<sup>32</sup>

The determination of the applicable law is based on the facts of the dispute, the choice-of-law provisions and the applicable arbitration rules. The ICDR International Arbitration Rules and the ICC Arbitration Rules provide that in the absence of an agreement by the parties as to the law to be applied, the tribunal has discretion to apply the law it deems appropriate.<sup>33</sup> The UNCITRAL rules provide that where the parties have failed to designate the applicable law, the tribunal will apply the law determined by the conflict-of-law rules that the tribunal considers appropriate.<sup>34</sup> Some rules provide that the tribunal shall take account of the provisions of the contract and relevant trade usages.<sup>35</sup> The ICDR rules, for example, provide that “in arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.”<sup>36</sup> The ICC rules also provide that the tribunal will “assume the powers of

an *amiable compositeur* or *decide ex aequo et bono*.”<sup>37</sup> By contrast, the UNCITRAL and ICDR rules provide that the tribunal shall not assume such powers unless the parties have expressly authorized it to do so.<sup>38</sup>

The ICSID Convention takes a different approach. It provides that, in the absence of the parties’ agreement, “the Tribunal will apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”<sup>39</sup> This provision is unique in that it identifies a country’s national laws as applicable in a dispute where the parties have not specified applicable substantive law in line with international law and the BIT.

In *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, the first ICSID arbitration under a BIT, the tribunal held:

[T]he Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether international law character or of domestic law nature.<sup>40</sup>

As noted by Antonio R. Parra, the ICSID’s Deputy Secretary-General, because BITs are an instrument of international law, “the arbitrators should have recourse to the rules of general international law to supplement those of the treaty.”<sup>41</sup> In the *Middle East Cement* arbitration, the BIT between Greece and Egypt stated that in addition to the rules of the BIT, “obligations for more-favorable-treatment stemming from the national law of the Contracting Parties or existing under international law between the Contracting Parties shall prevail.”<sup>42</sup> Since there were no additional obligations for most-favored-nation treatment, the ICSID tribunal concluded that the BIT’s applicable-law clause prohibited application of national laws that limit claims under the BIT. Accordingly, the tribunal indicated that it would consider Egyptian law where appropriate, but would not apply that law if doing so would limit claims that could be made under the bilateral treaty.

Because most BITs do not address the details of dispute resolution, such as the applicable substantive law, the issue of which law should apply remains a widely contested issue.

### Timing of a BIT Claim

Another issue present in many BIT arbitrations is the timing of the claim. A request for

arbitration claiming jurisdiction under a BIT must be filed after the BIT enters into force. Some BITs indicate that their provisions also apply to investments made prior to their entry into force. An example is the BIT between Albania and Greece, which was signed in 1991 and came into force on Jan. 4, 1995.

In *Tradex Hellas S.A. v. Republic of Albania*, *Tradex*, a Greek corporation, commenced an ICSID arbitration in October 1994 claiming expropriation by the Albanian government<sup>43</sup> in violation of the BIT between Greece and Albania. Albania challenged the ICSID tribunal's jurisdiction, arguing that the BIT did not apply because the alleged expropriation and the request for arbitration both occurred before the BIT entered into force. As a result, the tribunal addressed whether the later entry into force of the BIT could still provide a basis for jurisdiction. It noted that "[s]uch a conclusion would be unusual insofar as both in national and international procedural law jurisdiction must mostly be established at the time of filing the claim." Although the Greece-Albania BIT expressly provided that it also applied to investments made before the treaty entered into force, the tribunal interpreted this to mean that both governments intended to submit to ICSID jurisdiction "regarding alleged expropriations and requests for arbitrations occurring in the future, even if they concern investments made earlier." Since both the expropriation and the request for arbitration in this case were both made before the BIT came into force, the tribunal held that jurisdiction was lacking under the BIT.

The timing of disputes can become rather complex, as demonstrated in *Maffezini v. Kingdom of Spain*, an ICSID arbitration commenced by an Argentinean national under the 1991 BIT between Argentina and Spain.<sup>44</sup> Spain challenged the jurisdiction of the ICSID and the tribunal on the ground that the dispute arose before the BIT entered into force. (It also argued that the dispute arose before the entry into force of the BIT between Spain and Chile, whose more favorable provisions Maffezini argued were applicable.) The tribunal disagreed, finding that the ICSID had jurisdiction and that the tribunal was competent to hear the dispute in accordance with the Argentina-Spain BIT.

## Jurisdictional Challenges to Tribunals

### *Consent in ICSID Arbitration*

The parties' consent to international arbitration is essential to ICSID's jurisdiction over an investment dispute. But while Article 25 of the

ICSID Convention provides that there can be no arbitration in the absence of the parties' mutual consent, ratification of the ICSID Convention is not an adequate basis from which to infer a country's consent to international arbitration. The reason is that ratification only indicates a "willingness to make use of the ICSID machinery."<sup>45</sup> Consent to international arbitration is another matter, but it can be inferred from a country's investment legislation or from BITs the country has negotiated and ratified.<sup>46</sup> Under the ICSID Convention, once consent has been given, it cannot be unilaterally revoked.<sup>47</sup> As a result, if a contracting State gives its consent to arbitrate a claim, it cannot withhold that consent in a future arbitration.

### *Exhaustion of Local Remedies*

In ICSID arbitrations, there is no requirement in the ICSID Convention for the exhaustion of local remedies unless the State has conditioned its consent on the exhaustion of such remedies.<sup>48</sup>

Even though the majority of BITs provide for arbitration as the means to settle disputes, some BITs permit or require a dispute to be submitted to the courts of the host State before arbitration can be initiated. For example, the BIT between Pakistan and Italy provides that if a dispute cannot be resolved amicably within six months, the concerned investor has three options, one of which is to submit the dispute to the host State's courts that have territorial jurisdiction.<sup>49</sup> BITs that require exhaustion of local remedies may contain an "exit" or "opt out" provision, allowing arbitration if a national court has not rendered a decision within a specific period of time.<sup>50</sup>

Exhaustion of local remedies was a key issue in the *Maffezini* arbitration.<sup>51</sup> The BIT between Argentina and Spain contained two conditions precedent to the commencement of arbitration: First, the foreign investor had to exhaust all local remedies and, second, an 18-month period had to expire without issuance of a court decision on the merits. The tribunal in *Maffezini* agreed that a jurisdictional problem existed because the investor had not exhausted local remedies before initiating arbitration proceedings. However, this problem was not fatal because the tribunal found that the exhaustion-of-remedies clause was subordinate to the most-favored-nation clause. The tribunal explained that under the latter provision, "if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most-favored-nation clause." Because Spain's BIT with

Chile did not require exhaustion of local remedies, the tribunal found that Maffezini was entitled to the more favorable terms accorded to Chilean investors. Accordingly, the tribunal held that it had jurisdiction over the dispute.

A different type of exhaustion-of-remedies issue can arise when the claim arises out of a Concession Contract that requires resort to the courts. In *Lanco*, discussed above, the tribunal held that the investor could resort to ICSID arbitration under the BIT even though the Concession Contract had a forum-selection provision requiring claims to be brought before the federal administrative tribunals of the City of Buenos Aires.<sup>52</sup>

A somewhat different result obtained in *Compania de Aguas del Aconquija, S.A. and Compangie Generale des Eaux v. Argentine Republic*,<sup>53</sup> which arose out of a Concession Contract between an Argentine province and a French investor. The Concession Contract required the parties to submit contractual disputes to the exclusive jurisdiction of the administrative courts of the Argentine Province. However, the Argentina-France BIT gave foreign investors the option of submitting disputes to the courts of the host State or to ICSID arbitration.

The French investor sought to hold the Argentine government responsible for failing to prevent certain actions by the Argentine Province under the Concession Contract. However, the investor did not submit this claim to the courts of the Argentine Province, as this agreement required. Instead, it commenced an ICSID arbitration. As a result, Argentina argued that jurisdiction was lacking.

The tribunal determined that there was a close relationship between the jurisdictional issue and the merits, so it joined these issues and after a full presentation of the evidence, it held that it had jurisdiction to hear the French investor's claim for violation of the BIT. The tribunal stated, "Neither the forum-selection provision of the concession contract nor the provisions of the ICSID Convention and the BIT ... preclude[d] the French investor's recourse to an ICSID tribunal." However, the tribunal went on to dismiss the claim because it could not "determine which actions of the Province were taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the Concession Contract." The tribunal noted that much of the evidence "involved detailed issues of performance and rates under the Concession Contract," and "[t]o make such determinations, the Tribunal would have to undertake a detailed interpretation and application of the Concession Contract, a

task left by the parties to that contract to the exclusive jurisdiction of the administrative courts of Tucumán [the province]."<sup>54</sup>

The tribunal emphasized that it was not imposing an "exhaustion-of-remedies requirement" under the BIT because that would be incompatible with the BIT and the ICSID Convention. The tribunal said that the obligation to resort to the local courts was compelled both by the express terms of the Concession Contract and the "impossibility" of separating potential breaches of contract from BIT violations without interpreting and applying the concession contract—a task this contract assigned to the local courts.<sup>55</sup>

### Standing of the Claimant

Another common jurisdictional challenge is based on the standing of the claimant to bring a claim. For example, Article 25(1) of the ICSID Convention provides that ICSID has jurisdiction only over disputes arising directly out of an investment "between a *Contracting State* and a *national* of another Contracting State." (Italics supplied.) However, neither italicized term is defined in the ICSID Convention.

Thus, one issue is whether the claimant is an "investor" who has made an investment within the definition of the term "investment." In *Maffezini*, for example, Spain argued that the ICSID tribunal lacked jurisdiction under the ICSID Convention because the claimant brought the action in his personal capacity on behalf of a Spanish company in which he was a major shareholder. The claimant countered that since he was an Argentine national, he had a right to protect his investment in the Spanish company. He argued that the BIT broadly defined "investments" to cover all types of rights in and to property, including investments made or acquired in the host State.

The tribunal rejected Spain's argument. It found that the BIT covered capital investments and that individual investors who have the nationality of one of the Contracting States who made a capital investment in the other Contracting State are entitled to "claim the protection of the BIT." The tribunal also noted that Article 25 of the ICSID Convention had to be read in conjunction with the relevant provisions of the BIT.

Spain also argued that the claimant lacked standing to file a claim under the BIT because his dispute was with a private company, not a government entity. The claimant responded that the entity whose acts and omissions he complained of was owned and operated by Spain and under its

control. In determining whether the company was a state entity for the purpose of the jurisdictional issue, the tribunal looked to standards in international law, since neither the ICSID Convention nor the Argentina-Spain BIT helped on this question. The tribunal found that Spain owned over 88% of the capital of the company and that its intent when the company was formed was for the company to carry out governmental functions. Consequently the tribunal ruled that the claimant made a *prima facie* case that the company was a state entity acting on behalf of the Spanish government.<sup>56</sup>

Similarly, in *American Manufacturing & Trading v. Republic of Zaire*, Zaire argued that American Manufacturing did not have standing to bring a claim under the Zaire-United States BIT because it was merely a shareholder in a Zairian company. The tribunal rejected this argument, finding that “AMT acts in its own name and in its capacity as an American enterprise having invested in Zaire, that is to say, a national of a State party having a dispute with another State party which has welcomed his investments on its territory.”<sup>57</sup>

### Conclusion

The extensive network of BITs allows investors to manage the risk associated with investing in a foreign country. A BIT allows the investor to commence a litigation in a neutral forum against the foreign country where the investment is located in order to seek compensation for breach of the BIT.

However, BIT arbitrations have their shortcomings, including the lack of precedent and the possibility of conflicting awards arising out of the same dispute. As more BIT claims are filed, these shortcomings are likely to becoming more apparent.

Recently, the Czech Republic defended two arbitration proceedings arising out of the same dispute, which were brought under two different BITs in two different arbitral forums. The two proceedings produced consistent results on the

issue of breach of the treaty but opposite results on damages. Ronald Lauder filed a claim in London against the Czech Republic under the United States-Czech Republic BIT, alleging that by abrogating a television license granted to his company, Central European Media (CME), the Czech Republic violated the Czech-Netherlands BIT. CME, which was incorporated in the Netherlands, filed a separate claim in Stockholm against the Czech Republic. Both arbitral tribunals found that the Czech Republic had breached the BIT in question. However, the London tribunal did not award damages to Lauder, finding the breach too remote to qualify as the cause of the harm. The Stockholm tribunal, however, awarded CME the fair market value of the company’s investment in the Czech Republic, in the amount of \$350 million.

Some practitioners were alarmed by the results of these arbitrations. Nevertheless, we believe that BITs still offer benefits to both host countries and investors, the former desiring to attract foreign investment and the latter desiring a means of managing investment risk.

In the next few years the World Trade Organization plans to draft a multilateral investment treaty that would theoretically eliminate the need for individual BITs between two State parties. The prospect for such an overarching approach is unclear. It is also unclear what impact such a

treaty would have on existing BITs. BITs usually specify the duration of the agreement but simultaneously provide for the continued renewal of the agreement until one of the contracting parties terminates in accordance with the provisions of the BIT. For example, the United States-Cameroon BIT provides that it will remain in force for 10 years and will continue to remain in force until one of the parties terminates with a one-year written notice.

In the meantime, it can be expected that the number of global investors seeking to recoup losses through BIT arbitrations will increase in the coming years. ■

**“Determining the law governing the arbitration is less of a problem when the parties have selected administered arbitration in a well-known arbitral forum.”**



## ENDNOTES

<sup>1</sup> The United Nations Conference on Trade and Development estimates that about 2,099 bilateral investment treaties have been concluded as of Jan. 1, 2002.

<sup>2</sup> Admission provides for the entry of foreign investors into host countries. Usually, non-U.S. treaties stipulate that the host country will create favorable conditions for the investors of the other State. U.S. treaties usually provide that the host country will permit investment on the basis of national treatment. See Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* 49 (Kluwer Law 1995). National treatment is an obligation of a country not to treat foreign investors any less favorably than it would treat domestic investors.

<sup>3</sup> See *Maffezini v. Kingdom of Spain*, Award (Jan. 25, 2000), ICSID Case No. ARB/97/7. Some ICSID awards can be accessed on the Worldbank Web site at [www.worldbank.org](http://www.worldbank.org).

<sup>4</sup> ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in 1966. To date 139 states have signed and ratified the ICSID Convention. See About ICSID available at [www.worldbank.org/icsid/about/about.htm](http://www.worldbank.org/icsid/about/about.htm). ICSID jurisdiction would extend to any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to ICSID. It was not until the mid-to late-1980s that countries began to conclude that BITs contain consent to ICSID arbitration. See Margrete Stevens, "Experience in Arbitrations under ICSID Rules Pursuant to Bilateral Investment Treaties," *Int'l Bus. L.* (Sept. 2001). See also C. Schreuer, *The ICSID Convention* (2000).

<sup>5</sup> See the U.S.-Haiti BIT and the Algeria-Spain BIT.

<sup>6</sup> See Czech/Slovak-U.K. BIT.

<sup>7</sup> *Id.*

<sup>8</sup> See U.S.-Morocco BIT.

<sup>9</sup> See n. 2 regarding the meaning of "national treatment."

<sup>10</sup> See *e.g.* Argentina-Bolivia BIT art. 1(1); see also Ecuador-Paraguay BIT art. 1(1).

<sup>11</sup> See *supra*, BITs cited in ns. 6 and 10.

<sup>12</sup> See Award (Mar. 15, 2002), ICSID Case No. ARB/00/2.

<sup>13</sup> See Preliminary Decision on Jurisdiction of the Arbitral Tribunal, 40 I.L.M. 457 (2001) (ICSID Case No. ARB/97/6).

<sup>14</sup> See Decision on Jurisdiction (Aug. 8, 2000) and Award (July 26, 2001) ICSID Case No. ARB/98/5.

<sup>15</sup> See U.S. Model BIT, art. XII.

<sup>16</sup> Giorgio Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection," in *Collected Courses of the Hague Academy of International Law 1997*, at 318.

<sup>17</sup> See *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3—the case is pending; the claimant was supposed to file its rejoinder in opposition to jurisdiction and in support of production of evidence on Oct. 6, 2003.

<sup>18</sup> Steve Seidenberg, "Legal Business Tangles in Latin America; Governments are Facing Big Arbitration Claims," *National L.J.* (Mar. 17, 2003).

<sup>19</sup> See ICSID Award (June 25, 2001) ICSID Case No. ARB/99/2.

<sup>20</sup> Fair and equitable treatment is a standard set by international law. Each State is required to offer fair and equitable treatment with regard to the property of foreign nationals. "The standard required conforms in effect to the 'minimum standard' which forms part of customary international law." See "Commentary of 1967 OECD draft Convention on the Protection of Foreign Property," 7 *I.L.M.* 117 (1968). BITs in large part codify customary international law. It was NAFTA's Article 1105, which in 1993 incorporated the requirement of "fair and equitable" treatment. The governments of capital-exporting countries have for a long time relied on the standard of "fair and equitable" treatment as giving expression to the rules of customary law which have evolved to protect alien property.

<sup>21</sup> *Supra*, n. 19.

<sup>22</sup> See *Loewen v. the United States*, Award, ICSID Case No. ARB(AF)/98/3, ¶ 125.

<sup>23</sup> *Id.* Award, ¶ 128.

<sup>24</sup> See Stevens, *supra* n. 4, at 378.

<sup>25</sup> See Bernard Kishoian, "The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law," 14 *Nw. J. Int'l & Bus.* 327, 355 (1994) (citing the Agreement for the Promotion and Protection of Investments, June 11, 1975, U.K.-Egypt, art. 5, G. Brit. T.S. No. 97 (Cmd. 6638)).

<sup>26</sup> See Award (April 12, 2002), ICSID Case No. ARB/99/6.

<sup>27</sup> See Egypt-U.K. BIT.

<sup>28</sup> See Sri Lanka-Switzerland BIT.

<sup>29</sup> See France-Zaire BIT.

<sup>30</sup> See Article 8(5) of the Belgium-Burundi BIT, as cited in *Goetz v. Republic of Burundi*, Award (Feb. 10, 1999), ICSID Case No. ARB/95/3.

<sup>31</sup> *Id.*

<sup>32</sup> See Article 12(6) of the Netherlands-Poland BIT (1992), as cited in *Sacerdoti, supra* n. 16, at 432.

<sup>33</sup> See ICDR rule, art. 28 and ICC art. 17(1).

<sup>34</sup> See UNCITRAL rule, art. 17(2) and (3).

<sup>35</sup> See ICC rule, art. 17(a) and UNCITRAL rule, art. 33(3).

<sup>36</sup> ICDR rule, art. 28(2).

<sup>37</sup> ICC rule, art. 17(3).

<sup>38</sup> ICDR rule, art. 33.3 and UNCITRAL rule, art. 33(2).

<sup>39</sup> See ICSID Convention, art. 42(1).

<sup>40</sup> 30 *I.L.M.* 577 (para. 21)(1991).

<sup>41</sup> See Antonio R. Parra, "Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties," 17 (no. 2) *ICSID News*.

<sup>42</sup> See n. 26 *supra*.

<sup>43</sup> Decision on Jurisdiction (Dec. 24, 1996) and Award (Apr. 29, 1999), ICSID Case no. ARB/94/2.

<sup>44</sup> See *supra* n. 3.

<sup>45</sup> See Georges R. Delaume, "ICSID Arbitration: Practical Considerations," 1 *J. Int'l Arb.* 101 (1984).

<sup>46</sup> See Stevens, *supra* n. 4.

<sup>47</sup> See *id.* (citing the example of Jamaica, which had given consent in *Alcoa Mineral of Jamaica/Kaiser Bauxite Co./Reynolds Jamaica Mines and Reynolds Metals Co. v. Government of Jamaica*, ICSID Case No. ARB/74/2,3,4, some years later notifying ICSID of its intention to exclude from its consent disputes that arose out of an investment relating to mineral and other resources. ICSID held that the notification could not be given retrospective effect). Article 25 of the ICSID Convention allows a State to notify ICSID of a class or classes of disputes that it would not consider arbitrable under ICSID.

<sup>48</sup> See ICSID Convention, art. 26 ("Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy." However, a State may condition its consent to the "exhaustion of local administrative and judicial remedies.")

<sup>49</sup> See Taing Hassan, "International Arbitration in Pakistan—A Developing Country Perspective," *J. Int'l Arb.* (2002).

<sup>50</sup> See, *e.g.*, Switzerland-Sri Lanka BIT (art. 9(2)), Switzerland-Peru BIT (art. 9(3)), and Switzerland-Paraguay BIT (art. 9(3)). See generally, Jean-Christophe Liebeskind, "State-Investor Dispute Settlement Clauses in Swiss Bilateral Investment Treaties," 20 *ASA Bull.* 27-58 (2002).

<sup>51</sup> *Maffezini v. Kingdom of Spain*, Procedural Order No. 2 [request for provisional measures] (Oct. 28, 1999), Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000), Award (Nov. 13, 2000), ICSID Case No. ARB/97/7.

<sup>52</sup> See *supra* n. 13.

<sup>53</sup> See Award (Nov. 21, 2000) ICSID Case No. ARB/97/3, 40 *I.L.M.* 426 (2001).

<sup>54</sup> See *id.* at ¶ 50-55.

<sup>55</sup> See *id.* at ¶ 81.

<sup>56</sup> See generally, *Maffezini, supra* n. 51.

<sup>57</sup> Award (Feb. 21, 1997) ICSID Case No. ARB/93/1.