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Investor-to-State Dispute Settlement: What Can We Learn?

Introduction

Cross-border investment has been increasing at a rapid rate, as has been the signing of treaties, bilateral and regional, which provide for investor-to-state dispute settlement. The option for investors to sue governments at international tribunals is being put to increased use, which is reflected in the increasing number of cases brought for arbitration over the last decade. Of the 100 or so cases brought before the International Centre for Settlement of Investment Disputes (ICSID) in its 38-year history, 60 percent have been brought in the last five years alone!

Given the increased flow of investments, ever-swelling number of investment agreements with investor-to-state dispute settlement and the rising number of cases brought for arbitration, there is a pressing need to look into the issues raised before various investment tribunals.

Investment agreements are often signed to display the good relations between two countries and the countries' welcoming attitude towards foreign investments, though little attention is given to the investors' rights created through the agreements. Although this is changing, implications of earlier agreements are yet to become clear as lawsuits are brought against governments under their provisions. Governments and the public need to be well aware of what they are committing to when signing investment agreements, especially in the context of a possible international investment framework being negotiated at the WTO.

This briefing paper examines the "investors rights" that international investment agreements (IIAs) create by looking at some examples of investment disputes, and the nature of dispute settlement under investment agreements. It analyses controversial standards of treatment and provides some examples of the issues raised by dispute settlement.

How does Investor-to-State Dispute Come About?

States sign investment agreements to project themselves as safe investment destinations, or to ensure protection for their investments abroad. These agreements may be bilateral (Bilateral Investment Treaties, or BITs), regional, as in the case of the North American Free Trade Agreement (NAFTA) Chapter 11 on investment protection, or sector-specific, such as the Energy Charter. In these agreements, states agree to grant foreign investors certain standards of treatment and commit not to act in a way that would infringe upon the investor's "rights". Investors are then given the option to enforce their rights by suing host states at an international forum in a case of "investor-to-state arbitration". If the investors are able to prove that their rights have been infringed upon, they can demand compensation (damages) from the host country.

Enforceable investor rights granted to private parties were in the past uncommon in International Law, which dealt with the rights and obligations of the states. However, in the last 50 years, there have been a variety of international legal instruments that grant or confirm the rights of individuals in relation to the state. For example, individuals have a right of petition to international courts under the European Convention on Human Rights and the Inter-American Commission in Human Rights. Traditionally, however, to examine the state action against a foreigner, International Law required intervention of the foreigner's home state, *i.e.*, exercise of the right of diplomatic protection. This meant that an investor could not bring a host state to trial by himself.

Because of the political nature of a state-to-state dispute settlement, this system proved to be unworkable as a way of protecting business interests in contemporary international economic life. Investor-to-state arbitration allows the true complainant—the investor—to face the true defendant—the host state. Today, virtually all IIAs contain provisions for this kind of arbitration. It has been argued that the real innovation of investment treaties lies in the effectiveness of their dispute resolution mechanisms rather than in the substantive protection they offer to investors.[1]

It is important to note that investment agreements do not grant rights to domestic investors to bring cases against the government, and therefore, allow states effectively to discriminate in favour of the foreign companies.

Ensuring Jurisdiction

Under the International Law, since every country is sovereign, a country needs to consent to the jurisdiction of an international investment tribunal before the tribunal can hear a case involving that country. Consent can be given in each specific case or can be given as "blanket consent" in the investment agreement. During the 1970s, blanket consents to arbitration came to be a regular feature of BITs.

States are sometimes reluctant to consent to the jurisdiction of international tribunals. The US, among others, has

demonstrated in its refusal to recognise the jurisdiction of the International Court of Justice or the jurisdiction of the International Criminal Court over the US nationals. The US has, however, given its blanket consent to international tribunals in cases brought by investors against the US government under the NAFTA and BITs. Without a method of enforcement, this consent is not meaningful and these bodies have a variety of enforcement conventions, with which they approach this problem.

Which Law is Used?

The applicable law used in settling investment disputes is usually found in the investment agreement, but can also be the domestic law of the host country or a specific contract between an individual investor and the host country. Since 1998, of the 36 cases submitted to ICSID under the ICSID Convention or Additional Facility (which covers states and foreign nationals, who fall outside the scope of the Convention), 28 were brought forward under BITs, while for the rest, NAFTA was the underlying treaty. Contracts and treaties may contain a forum selection clause, but the primacy of one forum selection clause over another may also be the subject of dispute, as in the Aguas del Aconquija vs. Argentina case, where the decision of the ICSID Tribunal not to consider a case, because it had not been pursued in local courts, was subsequently partially annulled. In another recent ICSID case over the construction of a highway, the State involved claimed that the contract provided for the jurisdiction of the administrative courts, while the Investor claimed that the clause in the BITs prevailed over the contract clause.[2]

Tribunals set to determine whether obligations set out in an international agreement have been met are often not required to assess whether those obligations, in turn, were in accordance with national laws. For example, a government cannot evade responsibility for breaching an agreement by claiming that the act under question was permitted by national laws, as these national laws need to conform to the standards set out in the IIA.

The arbitrators chosen to settle a dispute need to interpret the agreement and the scope of interpretation may be very wide, as treaties lack either a parliamentary history, which the arbitrators could draw on to deduce the "intent" of the agreement, or even records of the negotiations. However, the principles of treaty interpretation under the Vienna Convention do apply. Some agreements lack records of the negotiations, making interpretation more difficult. Having claimed that "*travaux preparatoires*" (the materials used for preparing an agreement) for NAFTA did not exist, 1,500 pages of documents, submitted by Canada during the Pope and Talbot case, eventually came to light in 2002.

The extensiveness of interpretation in tribunals' decisions has been a cause of concern. Though the tribunals often cite previous findings of investment dispute tribunals' findings as basis for their interpretation of an agreement, they are not bound by earlier tribunals' interpretations, as each tribunal is *ad hoc*. In addition, as the parties themselves choose the panellists of the tribunals (either by agreement or by appointing one panellist each and agreeing on the third member), there is a higher possibility of varying views of the panels than in comparison to other procedures.

In the case of NAFTA, a Free Trade Commission, comprising three NAFTA signatories—Canada, the US and Mexico—interprets its agreements, and can offer clarification to rules thereof. The interpretations of this Commission are a binding on all NAFTA tribunals.

Though investment agreements differ in scope and application, most of the substantive provisions are identical in the majority of IIAs (See Box 1). The treatment standards in NAFTA, which offer the highest standards of protection, are found in the model US BITs, and the recent Canadian BITs are, in turn, very similar to NAFTA's. Other BITs have less stringent standards, like the ones agreed upon and signed by China. Many of these treatment standards have been used for a long time in the International Law, and are, in fact, also prevalent in domestic laws. The real innovation of investment treaties, therefore, lies less in the substantive protection they offer as compared to the effectiveness of their dispute resolution mechanism.[3]

How Investment Disputes are Settled?

Investment agreements include rules on how investment dispute should be settled, if negotiations between the parties fail. This usually takes place at the International Centre for the Settlement of Investment Disputes (ICSID), at the World Bank, and United Nations Commission on International Trade Law (UNCITRAL) provides a set of rules that parties can use in case of a dispute.

ICSID and UNCITRAL offer procedural, not substantial, rules of dispute settlement. These procedural rules are modelled on the rules of commercial arbitration. One feature of commercial arbitration is that the proceedings are not public and none of the materials need to be made public. However, materials on some cases are voluntarily made available. This, in fact, is one of the major reasons why litigants chose arbitration over normal court proceedings.

However, in case of investor-to-state arbitration, the picture is not all that clear. Investor-to-state dispute settlement often includes issues of public concern, and many a time calling for greater transparency need. There is also a pressing need for transparency in the drafting of these agreements as well as in the negotiations between the investor and the state concerned for a specific contract.

Investor-to-state arbitration provides for award of damages if the tribunal finds it in favour of the investor. Arbitral tribunals, however, are not empowered to order a host State to revoke or modify legislation, as the World Trade Organisation (WTO) panels are able to do if they determine that the State has breached certain WTO obligations. Arbitral awards are normally final and binding and cannot be appealed against, though their validity may be challenged for judicial review.

Box 1: Treatment Standards in Investment Agreements

1. **Non-Discrimination:** An investor from a contracting party should be given the better of "National Treatment" (NT) — the same treatment as a national investor or "Most Favoured Nation–Treatment" (MFN) — treatment no less favourable than that accorded to investors from other countries, common to US/NAFTA-type agreements.
2. **Minimum Standard Treatment** (MST): An investor should be given treatment "in accordance with the International Law, including fair and equitable treatment and full protection and security". This minimum treatment is to be given irrespective of national treatment. It is an absolute and not a relative standard used in many agreements.
3. **Treatment when expropriating** or nationalising, directly or indirectly, or taking measures "tantamount to expropriation", has to follow certain rules. Expropriation is usually only allowed for a public purpose, on a non-discriminatory basis, in accordance with the due process of law and upon payment of compensation.

What can the Cases Tell Us?

Virtually all international agreements are expressed in general terms and it is, hence, difficult to determine the exact meaning of the various clauses and terms.[4] It is, therefore, useful to look at particular cases to see how the provisions of investment agreements have been interpreted even if the interpretations of later tribunals were somewhat different.

Considering the amount of foreign investment and the number of IIAs that provide for investor-to-state dispute settlement, there are very few published cases. The reason for this is two-fold: firstly, most cases are settled through conciliation, without the cases being brought before a panel, and secondly, information concerning such cases that are though brought forward, cannot be made public without the agreement of both parties. Under the controversial Chapter 11 of NAFTA, the small number of cases that have been adjudicated to date—three of which were subsequently substantially changed upon judicial review or by interpretations by the NAFTA Free Trade Commission—have given rise to considerable controversy but are not adequate to draw any strong conclusions about the implications of the agreement.

Box 2 cites examples of eight different investment disputes, four of which were settled under NAFTA and the rest under BITs or national investment laws. In some of the cases, the disputes arose out of contracts for joint ventures between the public and private sectors. Some cases—like Pope and Talbot, and SD Meyers—essentially concern trade regulations that have also had adverse effects on foreign investors. Other cases, like Metalclad and Azinian, concern the behaviour of municipalities in relation to investors. In the Azinian case, the investor failed to honour its contract, which was subsequently cancelled, while the well-known Metalclad case concerned the transformation of the land around the investment site into a natural reserve and, therefore, requirement of a permit for construction.

Investors have generally invoked their rights in relation to two standards of treatment: to resist expropriation, or to be granted "fair and equitable treatment". Similarly, out of all the cases filed under NAFTA, to date, the most common complaints are unfair and inequitable treatment, expropriation measures and "non-discrimination".

What is Investment?

The scope of most investment treaties lies in the definitions of the words "investor" and "investment". An investor is usually defined as a national of a party to the treaty, or a company or other judicial entity, either incorporated in that country or controlled by nationals or companies of that country. As for investment, it generally has in its ambit all the property, whether tangible or intangible. Even loans and promissory notes, after assignment by the initial creditors, have been held to be investments within the scope of certain investment treaties. Shares in companies incorporated in the state's party to the treaty are also likely to be considered as investments.[5]

These two definitions are important to determine whether the plaintiff has the right to sue (if he or she is an "investor" and has an "investment"), and secondly, whether the investor's loss include loss of "property" that would amount to expropriation. There have been some very wide interpretations of "investment" as in the SD Myers case, where the tribunal would have considered the company's market share, or the reasonable expectations of future profits stemming from this, as "investment".

SD Myers had no fixed investment in Canada, but was nevertheless able to show evidence of its business activity there. In Pope and Talbot, the Tribunal found that the investor relied on the US market in order to run its business and that this access could have been appropriated, though the quota regime implemented by Canada did not amount to expropriation of that property.

Expropriation and 'Regulatory Takings'

Almost all investment claims (See Box 2) include an allegation by the investor, pertaining to expropriation. Hence, treatment standards for expropriation are one of the most contentious parts of the investment agreements. However, in the cases considered here, only the tribunals in the Metalclad and the Goetz cases found that expropriation had taken place.

In Metalclad, an Ecological Decree, which would have made the investors' investment unusable, was found to amount to expropriation. In Goetz vs. Burundi, the withdrawal of incentives granted by Burundi was considered to be expropriation. In other cases, the tribunals found that the measures taken by states did not amount to expropriation, because the action taken did not eliminate the investor's benefit from the property (Tradex) or were temporary in nature (Myers).

Some investors have tried to argue that problems under contracts with government authorities or the annulment of the contract amounts to the expropriation of their expected benefits. The investors in both the Azinian case and the Aguas del Aconquija case argued this, but the tribunals found that although rights granted under a contract can indeed be considered, normal contractual problems do not amount to expropriation if they can be dealt with in local courts. Mafezini tribunal observed in this context: "BITs are not insurance policies against bad business judgements"[6].

However, the more contentious issue is defining "indirect expropriation", actions "tantamount to expropriation", or "creeping expropriation". These refer to cases, in which actions by the State, like the implementation of new regulations, reduce the value of an investor's assets. For example, the tobacco company, Phillip Morris, was planning to sue Canada for the forthcoming prohibition of the word "light" in cigarette advertisements. As Phillip Morris owns the trademark "Marlboro Light", regulation prohibiting the use of this word, even if applied in a non-discriminatory manner, diminishes the value of that Phillip Morris trademark[7]. They were also concerned that "plain packaging laws" would further undermine the value of their brands.

In many national laws, private parties cannot seek compensation from governments for implementing new regulations. Even in the US, the jurisdiction with one of the strongest protections of private property, it is extremely difficult to prove a regulatory taking unless the court finds that a regulation has destroyed 100 percent of the value of a property[8]. Similarly, within the NAFTA framework, regulatory takings have also been found to constitute expropriation, as in the Metalclad case. In this case, the tribunal ruled that regulation to designate a region as a natural reserve amounted to expropriation. However, in the Pope and Talbot case, the tribunal spelt out that only a regulation that interferes with business activities in a way that is so restrictive as to have the effect of taking an investor's poverty in whole or in part, outright or in stages, can constitute an expropriation, for which compensation needs to be paid[9].

Even if investors fail to prove that a regulation amounts to expropriation, the possibility of having to compensate investors for regulatory takings may create a "regulatory chill", in which governments avoid the implementation of new rules or force a regulatory reversal. Governments might feel threatened by the prospect of a case being brought against them, forcing them to weigh up the potential social or environmental benefits of a new regulation carefully against the losses to investors. A famous example of reversal is the NAFTA's Ethyl Company case. The

Ethyl Company filed a suit against Canada for a forthcoming law to restrict the use of gasoline additive MMT. Canada settled the case by revoking the ban on MMT and paid compensation even before the NAFTA tribunal had issued a final ruling.

What is 'Fair and Equitable Treatment'?

One of the most contentious issues is defining the term "fair and equitable treatment". Provisions, like "each party shall accord investors…treatment in accordance with International Law, including fair and equitable treatment and full protection and security"[10], have also proved quite difficult for the tribunals to interpret in the absence of case law or legislative history. Yet these clauses have been widely used by claimants as a last resort. Violations of "fair and equitable treatment" may even include the ways, in which government officials have dealt with the investor. For example, in the Pope and Talbot case, the behaviour of a bureaucrat, which resulted in the revoking of the company's quota, was found to deny the investor a fair and equitable treatment.

In the Mafezini case, it was found that state's influence over bank lending was contrary to the principle. However, unfair treatment cannot be expanded to include all administrative problems. The tribunal in the Azinian case clarified that NAFTA was not intended to provide investors with a blanket protection against difficulties in dealing with public authorities[11].

The case law is, at best, unclear in defining "fair and equitable" treatment, and this vagueness risks becoming a catch-all for any investor grievance.

What is an Act of State?

The background to the cases of Metalclad, Aguas del Aconquija and Tradex, was public outrage against the presence and actions of the specific investor in case, and in some cases, this took the form of "spontaneous" land invasions and non-payment campaigns among consumers. The investors later tried to hold the state responsible for failing to prevent these kinds of actions that had been taken by the public at large.

However, the tribunals did not uphold these claims and governments were not held to be responsible for problems caused by public protests etc. Tradex, for example, claimed that land invasion by villagers amounted to expropriation and that certain speeches given by politicians had encouraged villagers to occupy land[12]. However, the tribunal in the case rejected this argument, stating that expropriation had to involve an infringement of rights, which is *attributable* to the state[13].

As discussed extensively in Mafezini, an investment agreement is a binding on all levels of government, not only the central government, and regulates all conducts of governmental authorities exercising public power. In the Mafezini case, the investor complained about the actions of an enterprise, which was a joint venture between the Spanish State and a private party. The tribunal found that in those cases, where the joint venture was in fact discharging a public function, the acts of the venture constituted "acts of state".

Future of Investor-to-State Dispute Settlement

Considering the number of new IIAs, providing for investor-to-state dispute settlement, it seems clear that this kind of arbitration is becoming more firmly established. In addition, the MFN clauses in most IIAs imply that once a country signs a single treaty with one set of treatment standards, they will have to extend these treatment standards to all other countries, with which investment agreements with MFN clauses have been signed. For example, Spain has BITs with Argentina, wherein it is stated that an investor could only bring a case to arbitration after having first turned to the local Spanish courts. However Spain has a BITs with Chile, which does not have this limitation. Mafezini was successful in claiming that due to the MFN clause in the Spain-Argentine BITs, he could follow the more liberal rules of the Spain-Chile BITs[14]. Hence, due to the MFN clauses, if two agreements set different standards, the one that is "most favourable" to the investor, will be applicable, although there are exceptions for regional economic arrangements etc. Business[15] and lawyers[16] are increasingly seeing the opportunities that investment agreements give to investors.

There is also considerable activity at the multilateral level. Under the General Agreement on Trade in Services (GATS) of the WTO, some countries have committed to extending MFN treatment to investors in certain sectors. However, MFN is subject to exceptions and it is unlikely that investor protection that has been granted in a bilateral treaty would have to be extended to investors from other countries in a sector liberalised under GATS.

The investor-to-state dispute settlement procedures have received a lot of criticism, especially in the NAFTA context. One major problem is the lack of transparency during the negotiation phase of investment agreements. These agreements create internationally-binding obligations, which involve public interest concerns and, therefore, should be subject to public scrutiny and debate.

There are encouraging examples of this taking place. In the US, for example, following the intense retrospective debate over the NAFTA investment chapter, other similar agreements are receiving more scrutiny. In the US investment deal with Chile, the US has dealt with investor-state disputes in a new way — by tabling proposals on the public availability of documents, open hearings and *amicus* submissions.[17]

Allowing *amicus curiae* (friends of the court) submission means that the tribunal allows a non-party actor (such as NGOs or the public at large) to comment on a matter and to tell the tribunal how they think the case should be settled. The NAFTA Free Trade Commission has addressed the criticism of the closed-door process in an interpretative note, and in one of the ongoing NAFTA disputes, the tribunal has agreed to the submission of *amicus* briefs, following a successful campaign by North American NGOs. Governments and civil society are also voicing concern over the inclusion of NAFTA-style investment provisions in any Free Trade Agreement of America, showing that the experience with NAFTA has left many countries wary of signing similar agreements.

Conclusions and Recommendations

States are signing investment agreements like never before. One of the commentators suggested that over the past years, governments have acted "like teenagers with a new credit card…[they] continue to sign on the dotted lines, blissfully unconcerned with the future consequences".[18] However, governments need to appreciate the fact that ambiguous, open-ended treatment standards, coupled with broad definitions of "investors" and investor-to-state dispute settlement, opens the opportunity for a foreign investor to challenge a range of government actions.

Governments signing investment agreements need to consider the following:

- **Regulatory chills and reversals:** The pressure of potential legal battle may make states hesitant to introduce regulation in the public interest that would adversely affect a foreign investor. Any standard for expropriation, therefore, needs to delineate clearly and respect the "right to regulate" of the state, which forms a significant component of investment policy, particularly in the developing countries.
- **Minimum treatment standards clarification:** Standards, such as "fair and equitable treatment", are entrenched in International Law but may be unclear. Though interpretation of these standards has so far been reasonable, it would be worthwhile to specify their meaning in more detail.
- **Transparency in disputes settlement:** The fiercest critique of investor-to-state dispute settlement mechanisms is its lack of transparency. As the ICSID and UNCITRAL rules do not provide for this, rules to ensure transparency need to be incorporated in the investment agreements themselves.
- **MFN clauses be made subject to exceptions:** Governments should consider carefully the ramifications of these clauses and make sure to include any necessary exceptions in their international commitments.

Civil society campaigning on investment issues should consider the following:

- When countries negotiate investment agreements, they are incurring obligations that may have a significant impact on the public interest. Civil society should keep track of these negotiations and create awareness about the implications of the agreements.
- Investment tribunals are open to *amicus* briefs under certain circumstances. If an investment dispute concerns public policy, civil society organisations should stand ready to offer their point of view.
- An investor's suit against a government is not the end of the matter. Public campaigns should draw attention to the role of foreign investors and dispute settlement provisions in investment treaties in discouraging environmental, social and other types of regulation.

Box 2: Some Investor-to-State Dispute Settlement Cases

Case Background	Violations claimed by investors	Tribunal's Finding	Comment
Metalclad Vs. Mexico: A US company, Metalclad, was planning to open and operate a hazardous waste facility in Mexico. Although the facility had been approved, the municipality required a construction permit and then refused the application after the facility had been built.	**Expropriation and MST:** The investor contends that Mexico, through its local governments, interfered with and precluded its operation of the landfill, which amounted to expropriation of the investment and a denial of MST.	**Expropriation and MST:** The local government's denial of the construction permit, coupled with the procedural and substantive deficiencies, was a failure to ensure transparency and, because of the lack of transparency, Metalclad was not given MST. The denial to Metalclad of the right to operate the landfill and the proposed creation of a nature reserve at the site of the landfill were measures "tantamount to expropriation".	The case exemplifies how a regulation that negatively affects an investor can amount to expropriation.
Pope and Talbot Vs. Canada: A US firm was manufacturing and exporting lumber from Canada when Canada, under the Softwood Lumber Agreement, established a quota scheme for producers in certain provinces. The quota system hit the US company especially badly.	**NT**: The quota system discriminated against the foreign investor. **MST:** The allocation of new export quotas was unfair. **Expropriation:** The quota system expropriated the investors access to the US market. **Performance requirements:** The quota system amounted to illegal performance requirements.	**MST:** Most of the ways, in which new quotas were neither unfair nor inequitable, did not discriminate it against foreign investors, but an official misled the company about his authority to make demands concerning the conduct of the audit and misled his minister.	Discrimination can be both specifically provided for in a government measure (*de jure* discrimination) or the result of a measure that is non-discriminatory on its face but results in different treatment (*de facto* discrimination).
SD Myers Vs. Canada: A US company was planning to export the chemical PCB from Canada to its plant in the US, when Canada put a ban on PCB exports, which affected the company badly.	**NT**: The export ban discriminated against the US investor. **MST:** Because the ban discriminated against the US investor, it was a denial of fair and equitable treatment. **Performance requirements:** The export ban meant that the company had to dispose of its PCB using Canadian services only, and was therefore an illegal performance. **Expropriation:** The export ban rendered the investment useless.	**NT and MST violation:** The export ban did not amount to expropriation, as it was temporary and did not involve the transfer of ownership, neither was it an outlawed performance requirement. However, the measure was *de facto* discriminatory and in breach of the NT, as it was introduced to ensuring the viability of the Canadian industry and it hit only the US investor. In this case, the breach of the NT established a breach of the MST.	The president of the US firm, Dana Myers, was also president of the Canadian company and was found to be in control of the investment, even though the US company did not own the investment in Canada. The finding that a breach of the NT established a breach of the MST was later changed in a NAFTA interpretive.

Contd...

Case Background	Violations claimed by investors	Tribunal's Finding	Comment
Azinian Vs. Mexico: A Mexican company had been awarded a contract to operate a landfill and waste management system in Mexico. When the Mexican authorities terminated the contract, US shareholders sued Mexico.	**MST Expropriation:** The termination of the contract was an expropriation of the company's contract rights and hence an indirect expropriation of the company itself.	**No violation:** As the termination of the contract had been upheld by three levels of Mexican courts, and the claimant could not claim anything wrong with the court proceedings, the termination of the contract was not expropriation. In this case, if there was no expropriation, then there was also no violation of MST.	
Aguas del Aconquija Vs. Argentina: A French company signed a contract with an Argentinean province to manage its water and sewage facilities. Disputes in the province led to public protests and consumer non-payment campaigns. After three years of conflict, the contract was rescinded.	**MST:** The province obstruction and harassment was denial of MST.	**No violation:** The tribunal could not separate Tucuman's responsibility under the concession contract from Argentina's responsibility under the BITs. Since the claimant had not proved that they did not have access to Argentinean courts, they could not prove they had been treated unfairly or that their "property" under the Concession Contract was expropriated.	The award was partially annulled in 2002 by an *ad hoc* committee. In the original award, the tribunal had found that it had jurisdiction, establishing the primacy of forum selection provisions in the concession contract over the BITs, while the committee found that the treaty and contract were two separate issues. The alleged conduct could have been in breach of the BITs and that the Tribunal should not have dismissed the case.
Goetz Vs. Burundi: A French investor had been offered certain incentives, when investing in an Export Processing Zone in Burundi. These incentives proved too costly for Burundi and were withdrawn.	**Expropriation:** The withdrawal of the incentives amounted to expropriation.	**Expropriation:** The tribunal ruled that withdrawal of the certificate of free zone constituted a measure tantamount to expropriation, defined in Article 4 of the BITs as a "measure depriving of or restricting property rights". However, Burundi would be declared liable only if it did not provide adequate and fair compensation or issued a new certificate.	The case is interesting, as it shows that incentive (free zone certificate) is a property or "investment" and its withdrawal can constitute expropriation. The investment was the intangible asset of the incentive. The case should offer some caution to countries eager to offer expensive incentives to attract foreign investment.
Mafezini Vs. Spain: An Argentinean investor set up a joint venture with a Spanish state entity. The venture ran into financial difficulties and delays due to an Environmental Impact Assessment (EIA). Some funds were transferred from the investor's private account to the joint venture.	**MST:** The faulty advice given by the Spanish enterprise, the delay due to the EIA and the transfer of money from the investor to the joint venture was unfair and inequitable.	**MST violation:** The tribunal found that since an act of the state entity was attributable to Spain, giving bad advice was not an action where the state entity was discharging a public function. Therefore, a faulty advice does not contravene the MST. However, in influencing a private bank to transfer money from the investor, the state entity acted against the MST.	The tribunal emphasised that BITs are not insurance policies against bad business judgements. In addition, in this case, the claimant was able to use the MFN clause of a Spain-Argentine BITs to secure the better treatment awarded in a Spain-Chile BITs.
Tradex Vs. Albania: A Greek company entered a joint venture with an Albanian state entity, which owned land that the joint venture would use. Following land occupations, part of the land was expropriated and transferred to villagers.	**Expropriation:** The expropriation of the land as well as the land occupation, which rendered the land useless, amounted to expropriation of the investment.	**No violation:** The tribunal found that none of the occupations were attributable to the state, and despite expropriation of the ownership of the land, the joint venture still had the same ability to use the land as before; hence the expropriation did not constitute expropriation of the Greek company's assets.	The case is interesting because the claimant failed in its attempt to make the state liable for its inability to protect the investor from civil unrest.

Endnotes

1 *New opportunities for resolving disputes involving Asian states,* By John Savage, 16 December 2002 FinanceAsia.com
2 *ICSID, Investment Treaties and Arbitration: Current and Emerging Issues* by Eloise Obadia, ICSID News, Vol.18, No.2, Fall 2001
3 *New opportunities for resolving disputes involving Asian states* by John Savage, 16 December, 2002 FinanceAsia.com
4 J. Anthony van Duzer *NAFTA Chapter 11 to Date; The Progress of a Work in Progress*
5 *New opportunities for resolving disputes involving Asian states* by John Savage, 16 December, 2002 FinanceAsia.com
6 Amilio Agustin Mafezini vs. The Kingdom of Spain ICSID Case No. ARB/97/7, para 64
7 *Multinational Monitor*, Vol.23, No.4, April 2002
8 Vicki Been and Joel C. Beauvais *The Global Fifth amendment: NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine,* New York University Law Review, April 2003
9 Pope & Talbot Interim Award para 99-102
10 NAFTA Art 1105
11 Azinian vs. Mexico (ICSID Case No ARB (AF)/97/2) Award para 83
12 Tradex para 144, 147
13 Tradex para 144, 147
14 Mafezini Vs. Spain para 21
15 See e.g. *Joint Business Coalition Letter on Investment Dispute Settlement* from US Council for International Business (available at www.uscic.org/index.asp?documentID=1860)
16 See e.g. *New opportunities for resolving disputes involving Asian states* By John Savage, 16 December 2002 FinanceAsia.com
17 International Trade Daily 2002.10.03
18 Luke Eric Peterson *Investor Rights and Wrongs* In The Toronto Star June 14 2002

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