LAWASIA Conference on Trade

in Co-operation with the CHINA LAW SOCIETY

May 18-21, Shanghai PRC

ARBITRATING CLAIMS UNDER INVESTMENT PROMOTION AND PROTECTION TREATIES

by Louise Barrington[1]

ABSTRACT

Over the past three decades, as commerce becomes more global, most countries have seen the benefits of attracting foreign investment in order to bolster their own economic development. In the hope of attracting investors who will bring capital, equipment and expertise, host countries have signed agreements with countries likely to provide foreign direct investment (FDI). First came bilateral treaties (BITs) and multilateral agreements or treaties on investment (MAIs and MITs). Some of these agreements foster – among other provisions – reduced tariffs and trade barriers. Others, such as NAFTA, commit essentially to freeing trade among neighbours. The European Union can be seen as an evolved MIT. Generally speaking their purpose is to foster trade and to reduce the risks of investing in a foreign jurisdiction. They are long-term commitments often for periods of fifteen years or more, and sometimes without an end date. In the Asian region we have SAARC and ASEAN, and both of their members have signed such agreements among themselves. Generally, these can be referred to as Investment Promotion and Protection Agreements, or IPPAs. Over 2000 IPPAs exist today. Hong Kong alone currently has 14 in force and China Mainland continues to negotiate and sign them.

IPPAs generally provide the following terms between Contracting Parties:

- Broad definition of investment and investor
- Protection of shareholders from expropriation
- Fair standard of treatment (most favoured nation or national treatment)
- Repatriation of profits and capital
- Compensation due to war or national emergency

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[1] Louise Barrington, LLB (Toronto), Maitrise (Paris II), FCIArb, Chartered Arbitrator, Member of Bars of Ontario and New York, Solicitor (non-practising) of England & Wales. Assistant Professor at the School of Law of City University of Hong Kong. Chair, LAWASIA International Trade & Arbitration Section. E-mail: lwbar@cityu.edu.hk

Just last month at the Asia Pacific Business Forum in Shanghai, international business operators from Korea, Singapore, China and other nations around the region, called for the establishment of an Asia Pacific Free Zone Area. As business, governments and citizens contemplate such a vast endeavour, a necessary component is the resolution of disputes.
The major difference between the modern IPPAs and the old accords is that now, an unhappy private investor does not depend on his own country's government to promote his case, (either through diplomacy or by inter-state arbitration). A disgruntled investor can now institute directly a legal claim against a sovereign nation. The whole concept blurs the distinction between public and private law. People espousing such an idea would have been burned for heresy less than a century ago.

Dispute resolution may be by any method the Contracting Parties agree to, including letting the eventual disputants decide. However, the default position is invariably international arbitration, usually under UNCITRAL Rules or ICSID arbitration procedures.

One of the hallmarks of international arbitration, whatever its form or rules, is the relative ease of enforcement of awards under the New York Convention.

Arbitration is a consensual procedure. However, modern IPPAs usually contain a provision by which the host state binds itself in advance to submit disputes to arbitration. An unhappy investor is then deemed to consent, for its part, by bringing an arbitration claim against the host state. This has been called "arbitration without privity". What's more, the jurisdiction of the arbitral tribunal is quite often broadly expressed, so that it may encompass more than direct breaches of an IPPA.

In recent years there has been a global explosion in the number of arbitration cases initiated under IPPAs. Most of ICSID's cases now involve IPPA disputes.

The effects of some of the arbitration cases have been surprising, as host nations find themselves having to compensate investors for losses caused by – or sometimes simply permitted by – their own state agencies and policies.

This has given rise to some serious criticisms of IPPAs by persons who see them as incursions (usually by companies from rich, industrialized investor-nations) into the sovereignty of the host countries.

Questions arise as to the unequal bargaining power of giant multinational enterprises (MNEs) who want to obtain maximum protection (and financial benefit) for their investments, as they negotiate with the governments of often cash-poor, less-developed states who desperately need the FDI. Are IPPAs simply one more weapon in the already loaded armory of the West?

Lately however, a new breed of claims is awakening. Host states are now looking at IPPA dispute resolution provisions as an avenue for forcing "bad" investors to pay for the damage they create in the host states. If a foreign investing company claims against a host state on the grounds that the host has expropriated or unfairly taxed its investment, might the host state then counterclaim for human rights abuses or for environmental damage caused by the foreign company? It could of course sue in its own courts, but if it proceeds in the context of the IPPA arbitration, any eventual award would be enforceable under the New York Convention.

As China's trade and industry develop by leaps and bounds, and as China signs more and more IPPAs, its government and indeed eventually its investors, will find themselves increasingly involved in this kind of question. The agreements creating the Asia-Pacific Free-Trade Zone, if and when it materializes, will undoubtedly include an IPPA-type formula for the resolution of disputes among its members and their citizens. As the people of Asia forge ahead to create stronger economic links, we would be well-advised to keep in mind the potential ramifications of IPPAs on the future of our business and indeed our economic well-being.