

Toward a sustainable legal system of international investment



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I. Shortcomings of the current system

A. Seen from the Investor side

1. Difficult enforcement
2. Inconsistent jurisprudence

B. Perceived by the Host-State side

1. Public policy concern
2. State of emergency

II. Toward a sustainable system

A. What we do not have to do

1. To be preoccupied with a false problem
2. To take up a mission impossible

B. Pressing issue: Necessity of policy coherence

1. A role of the system: enhancement of good governance
2. Toward an impartial good governance

1. Difficult enforcement

- non-ICSID cases

subject to

- the law of the place of enforcement
- the NY Convention on the recognition and enforcement of Arbitral Awards (more than 150 States parties)

i.e.

- further litigation **possibly before domestic courts of the host State**



- I. Shortcomings of the current system > A. Seen from the investor side
> 1. Difficult enforcement > non-ICSID cases

Noga v. Russia

- Award at the Stockholm Chamber of Commerce in February 1997 (unpublished)

(amount of the damages unknown: Noga claims 1.5 billion USD)

- Noga tried to seize Russian military airplane MiG-29 at the Paris air show in 2001



- Noga finally succeeded in seizing 1,185 million CHF (=1.2 billion USD) deposited in Switzerland by the Russian Central Bank (arrêt du Tribunal fédéral du 10 janvier 2008)

I. Shortcomings of the current system > A. Seen from the investor side

> 1. Difficult enforcement

- ICSID cases



- no review by domestic courts
 - possible annulment by ICSID's ad hoc committee
- generally implemented so far
- **Argentinean problem**

☆ Art. 54 (3) of the ICSID Convention

“Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.”

2. Inconsistent Jurisprudence

- gradual formation of case-law
 - “fair and equitable treatment”
 - expropriation
- **areas of conflict**
 - applicability of most-favored-nation clause to dispute settlement provisions
 - clause of the observance of commitments (“umbrella” clause)



I. Shortcomings of the current system > B. Perceived by the host-State side

1. Public policy concern

- environment
 - Ethyl (1998)
 - Metalclad (2000)
 - Santa Elena (2000)
 - S.D. Myers (2001-2004)
- cultural property
 - pyramid case (1992)



“Down with a Nippo-Korean BIT!”

“The treaties [BITs] emphasise liberalization and protection of foreign investment. They uniformly discard concern about environment and human rights. This is despite the fact that multinational corporations which take foreign investment into developing countries are known to do so because environmental standards and human rights standards are lax in these countries.” (M. Sornarajah, “A law for need or a law for greed?” *International Environmental Agreements*, vol. 6, 2006, p. 329, p. 338.)

I. Shortcomings of the current system > B. Perceived by the host-State side

2. State of emergency

- Argentinean financial crisis



“The Tribunal has no doubt that there was a severe crisis, and that in such a context it was unlikely that business could have continued as usual. Yet, the argument that such a situation compromised the very existence of the State and its independence, and thereby qualified as one involving an essential State interest, is not convincing.”

“[T]here has to some extent been a substantial contribution of the State to the situation giving rise to the state of necessity, and that it therefore cannot be claimed that the burden falls entirely in exogenous factors.”

(**Sempra v. Argentina**, ICSID ARB/02/16, Award of 28 September 2007, paras. 348, 354)

“Argentina would not be entitled to invoke necessity to unilaterally revoke vested rights (e.g., a dollar denominated tariff and economic equilibrium) designed precisely to operate in situations where a run on the currency would lead to a situation of emergency.”

(**BG v. Argentina**, UNCITRAL, Final Award of 24 December 2007, para. 409)

1. To be preoccupied with a false problem:

- a power-game déjà-vu -
- Resistance of the “Haves” (2007-)
 - Bolivia: withdrawal from the ICSID
 - Ecuador: “partial withdrawal” from the ICSID jurisdiction
 - Venezuela: denunciation of the BIT with the Netherlands
- Continuing race for capital
 - CEEC resisting the European Commission (pending before the ECJ)



2. To take up a mission impossible

- creation of an international system of enforcement of awards

United Nations Convention on Jurisdictional Immunities of States and Their Properties

(signed in 2004, not yet entered into force)

Article 19: State immunity from post-judgment measures of constraint

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated: [...]

(ii) by an arbitration agreement or in a written contract; [...]

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

1. A role of the system:

enhancement of good governance

- “fair and equitable treatment”
 - transparency
 - procedural propriety / due process
 - non-discrimination
 - freedom from harassment
- expropriation
 - proportionality

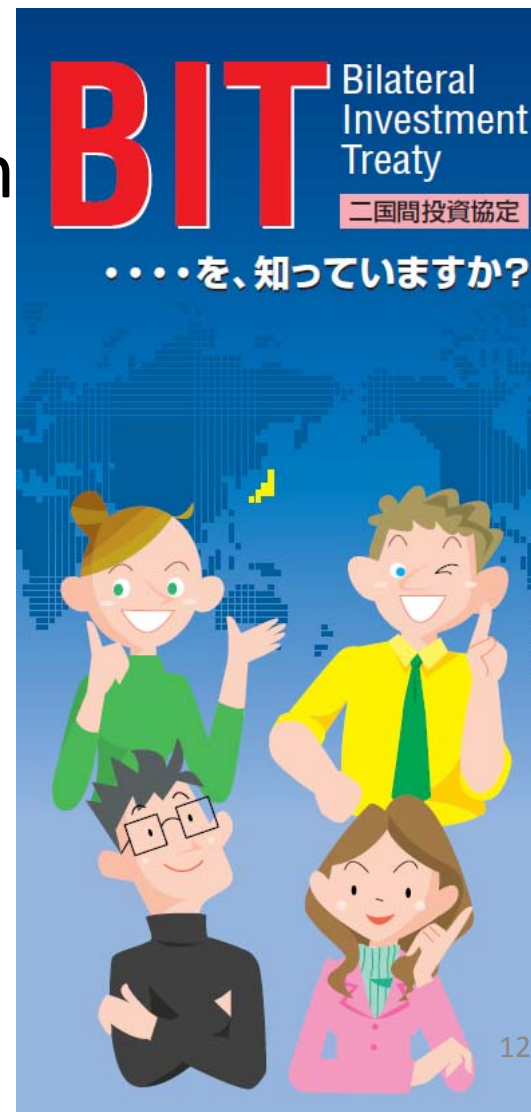
“investment arbitration as global administrative law” (Gus van Harten)

“contrôle de la légalité internationale du comportement étatique” (Emmanuel Gaillard)

“Investment arbitration as a discipline for good governance” (Thomas Wälde)

2. Toward an impartial good governance

- integration of public policy considerations into the system
- through **treaty-making**
 - emergency clause
 - FET
 - denial of benefits
 - definition of investor
 - respect of domestic law
 - ...



II. Toward a sustainable system > B. Pressing Issue: Necessity of policy coherence

> 2. Toward an impartial good governance

- integration of public policy considerations into the system (cont.)

- through **jurisprudence**

- financial regulation (Genin v. Estonia (2001))

- environmental regulation (Methanex v. USA (2005))

- anti-corruption (WDF v. Kenya (2006))



To conclude:

Arbitration is but an option.

- not a panacea or the root of all evil
- the last resort
- still only a part of the process