

## The SADC Protocol on Finance and Investment: An Underused Investment Protection Tool in Southern Africa

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# The SADC Protocol on Finance and Investment: An Underused Investment Protection Tool in Southern Africa

A recent report published by African Development Bank Group has confirmed that Africa is now the world's fastest growing economy, with around one third of its countries experiencing annual growth of over six percent.<sup>1</sup> The private sector continues to be Africa's main engine for growth<sup>2</sup> and the region is expected to remain an attractive destination for foreign investment for years to come.

With such opportunities come risks. Investors in Africa will be well aware of the legal and political risks that continue to be endemic to many of Africa's economies. An important challenge for foreign investors is how to mitigate these risks to the maximum extent possible.

There are many ways by which investors can — and should — mitigate such risks. Careful contract drafting and the use of international arbitration clauses are essential. Investments should also be structured to take advantage of protections available under public international law, notably under bilateral investment treaties (BITs). Additionally, domestic investment laws and regional treaties often contain a further layer of investment protection of which investors are frequently unaware.

The purpose of this article is to consider the legal protections contained in the Protocol on Finance and Investment (the Protocol) of the Southern African Development Community (SADC), a regional organization comprising Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The Protocol is an important legal instrument that is little known and rarely invoked.<sup>3</sup> The protections contained in the Protocol resemble, but in important respects differ from, legal protections typically contained in BITs. Although the protection under the Protocol should not be considered an effective substitute for BIT protection, if an investor in the SADC Region faces adverse State interference but lacks BIT protection, the investor should seriously consider remedies which may be available under the Protocol. Importantly, the Protocol provides investors with the ability to enforce their rights directly against the host State through binding international arbitration, which may result in an award for damages that may be enforced against assets of the State in question.

## The legal protections contained in the SADC Protocol

SADC was established by the SADC Treaty which was signed on 17 August 1992.<sup>4</sup> Article 4 of the Treaty confirms that "SADC and its Member States shall act in accordance with" certain principles, including "the rule of law" and the "peaceful settlement of disputes". To these ends, the Treaty created a permanent tribunal, the SADC Tribunal, which had the mandate "to ensure adherence to and the proper interpretation of the provisions of [the] treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it."<sup>5</sup>

The SADC Member States subsequently agreed a series of protocols with the aim of implementing the general objectives set out in the SADC Treaty. One of those protocols is the Protocol, which addresses a wide range of areas related to finance and investment.<sup>6</sup>

Article 3 of the Protocol provides that "State Parties shall co-ordinate their investment regimes and cooperate to create a favourable investment climate within the Region as set out in Annex 1." Annex 1 accordingly sets out the core investment protections. These include substantive protections along with, crucially, a provision that entitles investors to institute arbitration proceedings directly against host States to enforce their rights under the Protocol. The Protocol's scope of application, main substantive protections and dispute settlement clause are considered below. These provisions resemble equivalent provisions frequently contained in BITs, but with some important differences.

## The scope of application of Annex 1 to the Protocol

The scope of application of Annex 1 to the Protocol is not clearly circumscribed. There is no provision expressly addressing its scope of personal or substantive application. The lack of clarity is caused in part by the fact that the terms "investments" and "investors" are less precisely defined than is usually the case in BITs.

"Investment" is defined in broad terms as "the purchase, acquisition or establishment of productive and portfolio investment assets," including (but not limited to), moveable and immovable property, shares in companies, claims to money, intellectual property rights, and rights conferred by law or under contract. This broad asset-based definition is, however, qualified in that the Annex expressly states that any State Party may exclude "short-term portfolio investments of a speculative nature or any sector sensitive to its development or which would have a negative effect on its economy," provided that the State Party that has invoked this provision shall notify the SADC Secretariat "within a period of three (3) months" (presumably, from the date of the Protocol).

“Investor,” on the other hand, is very generally defined as meaning “a person that has been admitted to make or has made an investment.” This definition does not limit protected investors to nationals or companies incorporated in particular States, for example, the SADC Member States. This definition contrasts with equivalent provisions found in bilateral or multilateral investment treaties which typically contain precise definitions of investors by reference to their nationality or place of incorporation or corporate seat.

## **The substantive protections contained in Annex 1 to the Protocol**

The main substantive investment protections are contained in Articles 5 and 6 of the Annex, which provide:

### “Article 5: Investment Protection

Investments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation.

### Article 6: Investors of the Third State

1. Investments and investors shall enjoy fair and equitable treatment in the territory of any State Party.
2. Treatment referred to in paragraph 1 shall be no less favourable than that granted to investors of the third State.”

Article 5 corresponds to the customary international law standard that States may only expropriate foreign property if certain conditions are satisfied, notably the payment of compensation measured in accordance with the “*Hull* formula” (*i.e.*, “prompt, adequate, and effective compensation”). This appears with minor variations in most BITs. Unlike typical BITs, Article 5 does not expressly cover “indirect expropriation,” for example, by reference to measures “having effect equivalent to”<sup>7</sup> or “tantamount to”<sup>8</sup> nationalization or expropriation. However, it is probable that a tribunal would interpret Article 5 to extend to “indirect” expropriations, for example, to encompass the situation where an investor retains legal title but otherwise loses control of his or her investment as a result of conduct attributable to the host State.<sup>9</sup>

Article 6(1) contains the “fair and equitable treatment standard,” a key provision which has been the focus of substantial debate and analysis. A discussion of the scope of this standard falls outside the scope of this article, but a distinguished tribunal recently identified the following relevant factors in determining whether there has been a breach of this standard, namely: “whether the State made specific representations to the investor”; ‘whether due process has been denied to the investor’; ‘whether there is an absence of transparency in the legal procedure or in the actions of the State’; ‘whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State’; and ‘whether any of the actions of the State can be labelled as arbitrary, discriminatory or inconsistent’”.<sup>10</sup>

Article 6(2) appears to correspond to a Most-Favored Nation clause, in guaranteeing that the treatment of investors shall be no less favorable than that accorded to investors of third States (“third State” is defined as “any state that is not a State Party”). This clause, although unfortunately drafted, could have important repercussions, since it could be interpreted to import into the Annex more favorable protections contained in investment treaties entered into between the host State and third States.

The main substantive protections contained in Articles 5 and 6 are qualified by other provisions in the Annex.

For example, Article 7 confirms that “State Parties may in accordance with their respective domestic legislation grant preferential treatment to qualifying investments and investors in order to achieve national development objectives,” and that States “undertake to eventually harmonize their respective domestic policies and legislation within the spirit of non-discrimination as set out in Article 6.” Article 14 states that “Nothing in this Annex shall be construed as preventing a State Party from exercising its right to regulate in the public interest and to adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.” Although arguably this latter provision adds little to the general principle that a State has, in any event, the right to regulate in the exercise of its “police powers”,<sup>11</sup> this inherent right is expressly maintained in the Annex.

## **The dispute settlement provisions contained in Annex 1 to the Protocol**

As regards the enforcement of investors’ rights, Article 27 of the Annex provides generally that: “[...] investors have the right of access to the courts, judicial and administrative tribunals, and other authorities competent under the laws of the Host State for redress of their grievances in relation to any matter concerning any investment [...].” Accordingly, if an investor is denied access to the domestic courts, this would constitute a breach of the Protocol.

However, it is Article 28 which is of key significance. This provision entitles investors to refer disputes to international arbitration. Article 28(1) provides:

“Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.”

Accordingly, investors have the right to resort to arbitration provided (a) that the dispute relates to an “admitted investment,” (b) local remedies have been exhausted and (c) six months have lapsed since the State was notified of the claim.<sup>12</sup>

These preconditions to arbitration are not clearly circumscribed, and may well give rise to disputes. First, the Annex is unclear as to what constitutes an “admitted” investment. Article 2(1) requires that each State Party shall “admit such investments in accordance with its laws and regulations” and Article 2(2) and (3) refers generally to “authorisations,” although it is doubtful that a tribunal would interpret Article 2 to limit the scope of Article 28 to investments that had been granted any such “authorisation.”<sup>13</sup> Second, the requirement that investors first exhaust domestic remedies (which is rarely found in BITs) constitutes perhaps the greatest disadvantage of the Protocol as compared to other international investment protection instruments. Generally, such clauses are subject to the “futility exception,” namely that “[l]ocal remedies do not need to be exhausted where [...] [t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress.”<sup>14</sup> Subject to this exception, in principle, investors must first submit disputes to local courts before being able to resort to international arbitration. Third, the six-month “cooling off” requirement (a provision frequently found in BITs) is not particularly burdensome, but, in any event, tribunals often take a pragmatic approach to the application of such provisions.<sup>15</sup>

As regards the different *fora* before which an investor may initiate proceedings, Article 28(2) states that the investor and State Party may agree to:

- (a) The SADC Tribunal
- (b) The International Centre for the Settlement of Investment Disputes (ICSID), a body affiliated with the World Bank, or the ICSID Additional Facility Rules
- (c) Arbitration under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL Rules)

Article 28(3) provides that, in the absence of any agreement, the parties shall submit the dispute to arbitration under the UNCITRAL Rules. The ability of an investor to initiate arbitration under the ICSID or UNCITRAL Rules is important. These are the most commonly used arbitration rules for the settlement of investment disputes. If an investor succeeds in an arbitration and obtains a favorable award for damages, it may be able to enforce that award against assets of the host State under the 1965 Washington Convention (in respect of ICSID arbitrations) or the 1958 (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (in respect of UNCITRAL arbitrations).

### **The *Mike Campbell* case and the demise of the SADC Tribunal**

In practice, the choice of dispute settlement *fora* will be limited to arbitration administered by ICSID or under the UNCITRAL Rules (which are generally used in non-institutional arbitrations). This is because the SADC Tribunal has effectively been dismembered following the case of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*.

This case was brought under the SADC Treaty (as opposed to the Protocol) by a group of companies and individuals with ownership interests in commercial farms in Zimbabwe, led by the late Mike Campbell, who challenge Zimbabwe’s compulsory acquisition of their agricultural lands. The applicants (who included white farmers) alleged that: the compulsory acquisitions were unlawful; they had been denied access to the courts to challenge the acquisitions; and they had suffered racial discrimination.

In a judgement rendered on 28 November 2008,<sup>16</sup> the SADC Tribunal upheld its jurisdiction over the claims and accepted the applicants’ claims on the merits. The Tribunal found that the applicants had been “deprived of their lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, and [...] consequently [...] that the Respondent has acted in breach of Article 4(c) of the Treaty.”<sup>17</sup> The Tribunal went on to hold that, since the implementation of the land reform legislation “affects white farmers only and consequently constitutes indirect discrimination or *de facto* or substantive inequality”,<sup>18</sup> Zimbabwe had “discriminated against the Applicants on the basis of race and thereby violated its obligation under Article 6(2) of the Treaty.”<sup>19</sup> The Tribunal further held that the applicants were entitled to “fair compensation,” although such compensation was not quantified in the judgment.

Zimbabwe objected strongly to this decision and the issue was ultimately elevated to the diplomatic level. On 20 May 2011, at an extraordinary summit of Heads of State and Government of SADC, the SADC Member States decided not to reappoint or replace SADC Tribunal members and to bar the SADC Tribunal from hearing new cases; the SADC Tribunal was effectively suspended.<sup>20</sup>

## Concluding Remarks

Aside from the practical consequence that investors in the SADC region now do not have the option of initiating proceedings before the (African) SADC Tribunal, the circumstances surrounding the fate of the SADC Tribunal highlight the general nature of the risks foreign investors face in certain parts of Africa. Respect for the rule of law cannot be taken for granted, and it is of paramount importance that investors ensure their investments enjoy the maximum legal protections available.

As noted above, contracts should include carefully drafted international arbitration clauses and investments should be structured to benefit from the protections available under a modern BIT. However, if an investor does not have these protections in place and encounters adverse State interference, the investor should consider whether other forms of investment protection are available. If investing in the SADC Region, investors should consider the important — if overlooked — SADC Treaty and Protocol.

by [Charles Claypoole](#)

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### Recent Amendments to the Hong Kong Arbitration Ordinance

**The Legislative Council of Hong Kong passed the Arbitration (Amendment) Bill 2013 (Bill) on 19 July 2013.**

The Bill introduced a major amendment, implementing the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards (Arrangement) which had been concluded between Hong Kong and Macau in January 2013. Prior to the conclusion of the Arrangement, Hong Kong and Macau — both special administrative regions of China — did not reciprocally recognize and enforce arbitral awards. A Macau award was not considered a foreign award in Hong Kong and parties could not rely on the New York Convention. The amendments will rectify this situation by providing that awards made in Macau are enforceable in Hong Kong either by action in the Court of First Instance or with leave of the court.

Furthermore, the Bill also includes new provisions on:

- **Enforcement of emergency relief:** Hong Kong courts will be allowed to enforce relief granted by an emergency arbitrator under any arbitral rules to which the parties agree, whether such relief was made inside or outside Hong Kong. This amendment was prompted by the anticipated revision to the Hong Kong International Arbitration Centre Administered Arbitration Rules due to take effect in November this year, under which an emergency arbitration procedure will be introduced.
- **Taxation of costs of the arbitral proceedings:** s. 75 of the Arbitration Ordinance is amended so that if the parties have agreed that the costs of the arbitration are to be “taxed” by the court, they will be taxed on a “party to party” basis. The Arbitration Ordinance uses the term “taxation” of costs to refer to the assessment of costs to be paid by one party to the other at the conclusion of the matter. After the court has rendered a decision on taxation, the arbitral tribunal must make an additional award for costs reflecting the result of such taxation. Previously, the Arbitration Ordinance did not specify the basis on which the court could award costs.
- **Inclusion of new State parties to the New York Convention:** Five new jurisdictions are added to the Schedule to the Arbitration (Parties to New York Convention) Order. These additions are: Fiji, Liechtenstein, Myanmar, Sao Tome and Principe and Tajikistan, all of which have recently acceded to the New York Convention.

The amendments took effect on 19 July 2013, with the exception of the provisions in relation to the implementation of the Arrangement between Hong Kong and Macau, which will come into force at a later date to be notified in the Hong Kong Government Gazette.

by [Chi Ho Kwan](#)

## American Federal Judicial Center Publishes the International Commercial Arbitration Guide for US Judges

On 15 July 2013, the Federal Judicial Center published the “International Commercial Arbitration: A Guide for U.S. Judges” (Guide).

The Guide comes as an increasing number of international commercial arbitration matters are pending before US courts. It is intended to help US judges navigate the frequently complex issues brought before them, which involve the interaction between US and international law, as well as the “jurisdictional interplay between U.S. courts, foreign courts and the arbitral tribunal.” The Guide emphasizes in particular how arbitral issues fit into the dispute resolution system as a whole.

In its introductory sections, the Guide outlines basic concepts of international commercial arbitration, before addressing specific matters frequently put to the courts on a motion-by-motion basis. These specific matters include, for example: motions to stay, compel, or assist arbitration; motions for discovery or challenges to arbitrators; and motions to enforce interim awards and final awards, or to vacate awards. Each motion is accompanied by a discussion of the appropriate statute or treaty that judges should reference in making their decision, the underlying law and other relevant considerations judges should take into account in reaching a decision. One particularly relevant consideration is the favorable treatment that the Federal Arbitration Act affords arbitration.

The Guide should provide a useful resource for both US practitioners and foreign counsel in understanding how US courts will approach arbitration issues.

by [Sara Myers](#)

## New ICSID Caseload Statistics Reveal A Number of New Developments

On 31 July 2013, the International Centre for Settlement of Investment Disputes (ICSID) published its bi-annual caseload statistics for the period of 1 July 2012 to 30 June 2013.<sup>21</sup> The statistics revealed a number of interesting changes and developments, particularly in relation to ICSID’s current case load.

The number of arbitrations had been growing steadily since 2008, reaching a record high last year with 50 newly registered cases. While the number of newly registered cases in comparison to the previous reporting period rose from 36 to 43, only 14 new cases were registered between 1 January and 30 June 2013, marking a considerable drop in ICSID’s caseload for 2013.

Amongst the cases which ended in the reporting period, are a growing number of unfounded claims and settlements. Claims by investors were dismissed in their entirety in 63 percent of all cases decided in fiscal year 2012/2013 (in comparison to the total percentage of dismissed cases of 53 percent). In addition, one fourth of the cases which ended in this period were settled or discontinued due to failure to act (13 percent) or failure to pay the required advances (12 percent). This considerable growth compares to only one and nine per cent of cases discontinued for these reasons respectively overall.

Regarding the subject matter of disputes, the number of disputes originating from the financial sector has doubled. While historically only seven percent of all ICSID arbitrations related to this economic sector, 14 percent of the newly registered cases in the last reporting period did so.

The next years will show whether these developments were particularities of fiscal year 2013 or the beginning of a new trend.

by [Jan Erik Spangenberg](#)

## CIETAC Allows Tribunals Composed Entirely of Non-Chinese Arbitrators

In a recently instituted China International Economic and Trade Arbitration Commission (CIETAC) arbitration seated in Shanghai, all three members of the tribunal are non-Chinese nationals. Whilst non-Chinese arbitrators are now commonly appointed as party-nominated arbitrators or as chairman in a CIETAC arbitration, this is thought to be one of the first cases in which a tribunal is composed entirely of non-Chinese arbitrators.

The case is viewed as a positive step and may boost foreign parties' confidence in arbitration in China, just one year after CIETAC updated its arbitration rules. According to CIETAC's previous 2005 arbitration rules, disputing parties had the right to nominate arbitrator(s) from outside CIETAC's panel of arbitrators, subject to confirmation of CIETAC's Chairman. The parties could also recommend up to three candidates to act as tribunal chairman. The current version of the CIETAC arbitration rules (effective since 1 May 2012) (2012 Rules) allows each party to recommend up to five candidates to act as chair.

Further, in cases in which the chair is to be appointed by the Chairman of CIETAC, the 2012 Rules set out the criteria that the Chairman of CIETAC should consider when making the appointment. In addition to the governing law of the contract and the place and language of the arbitration, the Chairman may also take into account the "nationalities of the parties."

Similar provisions can be found in the arbitration rules of some other international arbitration institutions in China, such as the Beijing Arbitration Commission and Shanghai International Economic and Trade Arbitration Commission (previously known as the Shanghai Sub-Commission of CIETAC before its declaration of independence), which allow parties to select arbitrators from outside the panel.

Notably, in this recent case, the arbitrators' appointment reportedly was in accordance with the arbitration clause, which provided for all three arbitrators to be appointed from outside CIETAC's panel of arbitrators. This case demonstrates that if parties have any specific requirement as to the nationalities of any or all of the member(s) of the tribunal, they should expressly state those requirements in the arbitration clause. To say the least, potential users of CIETAC arbitration rules can be reassured that their agreement in this regard will be respected.

by [Tina Wang](#)

## Global Round-up of New Arbitration Rules and Laws

A number of jurisdictions and arbitral institutions have recently amended their arbitration rules or laws. Many of these amendments have come into effect in the last several months or are due to come into effect before the end of 2013. This article provides a brief round-up of these new arbitration rules and laws.

### Vienna International Arbitration Centre

On 1 July 2013, the new arbitration rules of the Vienna International Arbitration Centre (VIAC Rules) came into effect. Key changes brought about by the new VIAC Rules (which can be found [here](#)) are:

- Joinder of third parties, which is now expressly allowed at the discretion of the tribunal "after hearing all parties and the third party to be joined as well as considering all relevant circumstances" (Article 14(1))
- Consolidation of claims, which can now be ordered by the Board of the VIAC in certain circumstances (Article 15)
- The creation of an expedited procedure for arbitration proceedings, which the parties to a dispute can agree to apply (Article 45)

### Abu Dhabi Commercial Conciliation and Arbitration Centre

The Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) also updated its arbitration rules. The new rules — which are generally perceived to be a significant improvement on the existing rules — are expected to come into effect on 1 October 2013. The key changes are:

- The Centre's staff, the arbitrators, tribunal-appointed experts and members of the ADCCAC Committee cannot be held responsible "for any action, act or inadvertence related to the arbitration taken or arising in good faith" (while no such exclusion of liability exists under the civil procedure rules of the UAE)

- The arbitral award is expressly stated to be confidential (while no such confidentiality is provided for under the civil procedure rules of the UAE)
- The arbitrator(s) may now issue provisional and precautionary measures in the form of provisional awards
- A schedule of arbitrators' fees has been included
- The new rules have not yet been made publicly available but are expected to be released on or shortly before 1 October 2013.

## International Institute for Conflict Prevention and Resolution – Administered Arbitration Rules

On 1 July 2013, the International Institute for Conflict Prevention and Resolution (CPR) launched its new Administered Arbitration Rules. The new rules can be found [here](#).

Although CPR has revised its rules before, this is the first time CPR is offering administered rules for domestic arbitration. Previously, CPR offered only non-administered arbitrations. While it continues to do so, it now offers, as an alternative, administered rules overseen by its highly trained staff. Whether the user selects administered or non-administered arbitration, the CPR Panels of Distinguished Neutrals remain available to arbitrate a party's dispute.

## Belgian Arbitration Law and the Belgian Centre for Mediation and Arbitration

Belgium's Council of Representatives approved a draft bill amending the arbitration provisions of the Belgian Judicial Code on 16 May 2013. The new arbitration provisions came into force on 1 September 2013. These legislative amendments come within six months of amendments to the arbitration rules and mediation rules of the Belgian Centre for Mediation and Arbitration (CEPANI), both of which entered into force on 1 January 2013. The 2013 CEPANI Arbitration Rules will be used in this year's Vis Moot Court.

The new arbitration provisions of the Belgian Judicial Code can be found [here](#) and the new CEPANI arbitration rules [here](#).

## Previously Reported

As previously reported, the London Court of International Arbitration (LCIA) is also in the process of updating its arbitration rules can be found [here](#). The most recent draft LCIA rules – released since publication of our last International Arbitration Newsletter – has dropped the proposed new emergency arbitrator procedure. Amendments to the Dutch Arbitration Law are also expected to come into force in the fall can be found [here](#).

A summary of the recent changes to the Hong Kong Arbitration Ordinance reported in this Newsletter can be accessed [here](#). by [David McLean](#), [Jade Laktineh](#) and [Catriona Paterson](#)

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## US Court of Appeals Upholds Arbitrator's Power to Exclude Evidence

**Two recent US Court of Appeals decisions have upheld an arbitrator's power to exclude evidence.**

In *Doral Financial Corporation v. Calixto García-Vélez; Carmen T. García-Vélez*,<sup>22</sup> decided in July 2013, the appellant claimed that the arbitral tribunal engaged in misconduct by refusing to issue broad subpoenas to a third-party because the deadline for such requests had passed. The First Circuit explained that vacatur of an arbitral award on such a ground is only appropriate when the refusal to hear evidence deprived a party of a fair hearing. The appellant was found to have had adequate procedural safeguards such as notice and an opportunity to present evidence. Further, nothing indicated that, had the subpoenas been issued, the outcome of the hearing would have been different. The appellant's request to vacate the arbitral award was accordingly rejected.

The Second Circuit came to a similar conclusion, also in July 2013, in *LJL 33rd Street Associates, LLC v. Pitcairn Properties Inc.*<sup>23</sup> In the underlying arbitration, the tribunal refused to hear hearsay evidence relating to the valuation of the property at issue. The Court of Appeal noted that while arbitrators are not bound by the rules of evidence on hearsay, they do not necessarily have to hear all hearsay evidence. Arbitrators may exclude such evidence "especially when (a) the evidence could be presented without reliance on hearsay and (b) its hearsay nature is unfairly prejudicial to the adversary." The



court found that the evidence presented to the arbitral tribunal could have been introduced by presenting those making the statements as witnesses that the appellant could cross-examine. Therefore, the court held that it was within the arbitrator's authority to exclude the hearsay evidence.

by [Sara Myers](#)

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## New US-EU and US-China Investment Protection Treaties on the Horizon

**Negotiations have recently been launched between the US and each of the EU and China with a view to entering into trade and investment treaties.**

On 12 July 2013, the US and China agreed to re-launch negotiations for a bilateral investment treaty (BIT). The two States first entered into negotiations in 2008, however they failed to reach agreement on a number of issues, including in particular on restrictions on investment in China into certain protected sectors. The deadlock now appears to have been broken, after China recently agreed that the BIT could apply in principle to all sectors of the economy, unless specifically excluded. A US-China BIT is seen in some quarters as an important step to dismantling barriers to investment in certain industry sectors in China.

Parallel negotiations were also launched in July 2013 between the US and the EU to conclude an EU-US Transatlantic Trade and Investment Partnership (TTIP). If successful, the TTIP is expected to cover an ambitious range of issues, including tariff and non-tariff barriers to trade, investment, government procurement and liberalisation of trade in services. According to data from the European Commission Directorate-General for Trade, the EU and US economies currently account for approximately half of the world's GDP and a third of the world's trade flows. Further negotiations are scheduled to take place before the end of this year.

by [Catriona Paterson](#)

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## Successful and Unsuccessful Jurisdictional Objections: Recent ICSID Decisions in *Philip Morris v. Uruguay* and *Burimi v. Albania*

**In two recent decisions, tribunals established under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) have examined and decided jurisdictional objections raised by respondent States.**

In *Philip Morris Brands Srl & Ors. v. Uruguay*,<sup>24</sup> the Claimants have claimed damages for alleged breaches of the Switzerland-Uruguay bilateral investment treaty (BIT) in relation to packaging regulations Uruguay has implemented for tobacco products. These include certain plain packaging rules and a requirement to include prominent health warnings on tobacco products. In its 2 July 2013 decision, the tribunal found jurisdiction to hear the dispute. The decision provides useful guidance on a number of important jurisdictional issues, including in particular on the application of certain pre-conditions to arbitration and the interpretation of "investment" in light of political motives.

First, Uruguay objected to jurisdiction, *inter alia*, on the basis that the Claimants had not pursued their claims before the Uruguayan courts for a period of 18 months, as required by the BIT.<sup>25</sup> While the Claimants had submitted a dispute to the national courts, Uruguay objected that the dispute was not the same as the dispute submitted to arbitration. The tribunal held that the local litigation requirement should be interpreted broadly. The submission of a domestic law claim to Uruguayan courts would satisfy the domestic litigation requirement, provided that the submission was based on substantially similar facts and subject matter as the later BIT claim submitted to arbitration. In addition, if this pre-condition to arbitration was not satisfied on the date of the Request for Arbitration, this could be remedied during the course of the arbitration proceedings. To require the Claimants to start over and re-file the arbitration would be "a waste of time and resources."

Second, Uruguay objected that the Claimants did not have an investment within the meaning of Article 25 of the ICSID Convention because the negative health effects arising from the consumption of tobacco products had an overall negative effect on economic development. The tribunal rejected this argument, adopting a flexible approach to the definition of “investment” and concluding that no basis existed for finding that the Claimants’ activities in Uruguay did not qualify for protection.

In contrast to the above decision, in a 29 May 2013 award in *Burimi SRL and Eagle Games SH.A v. Republic of Albania*,<sup>26</sup> a tribunal unanimously dismissed all of the Claimants’ claims for lack of jurisdiction. The dispute arose from the Claimants’ purported investment in the Albanian gambling industry and Albania’s introduction of a new regulatory environment for this industry. The Claimants sought damages for alleged breaches of the Italy-Albania BIT.

The tribunal held that Eagle Games — a company incorporated in Albania and majority-owned by a dual Italian-Albanian national — could not be treated as a “national of another Contracting State” under Article 25(2)(b) of the ICSID Convention. Finding that the ICSID Convention does not allow a dual national to invoke one of his two nationalities to establish jurisdiction over a claim brought in his own name under Article 25(2)(a), the tribunal concluded that this principle should apply equally to the use of dual nationality of shareholders when determining the nationality of corporate persons in Article 25(2)(b). The tribunal therefore lacked jurisdiction *ratione personae* over Eagle Games. With respect to the second Claimant, Burimi, the tribunal found that the Claimant did not have a protected “investment” because its only asset was a private, contractual loan agreement between Burimi and an Albanian national, which was unaffected by any government measures.

by [Jan Erik Spangenberg](#)

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## Philippines-China Arbitration to Proceed with China *in Absentia*

On 27 August 2013, the arbitral tribunal established to hear the Philippines-China maritime border dispute issued its first procedural order, which sets out the procedure and schedule for the arbitral proceedings. The order is of particular interest as China is not participating in the arbitral proceedings.

The dispute relates to the “maritime jurisdiction of the Philippines in the West Philippines Sea” (or South China Sea). The Philippines gave notice of arbitration to China on 22 January 2013 pursuant to Annex VII to the United Nations Convention on the Law of the Sea. China has, however, thus far refused to participate in the arbitration proceedings. On 19 February 2013, China delivered a *Note Verbale* to the Philippines in which it rejected the arbitration proceedings. The State re-iterated its position in a subsequent *Note Verbale* on 1 August 2013 delivered to the Permanent Court of Arbitration, which is acting as the registry in the proceedings, stating that it “does not accept the arbitration initiated by the Philippines.”

According to the procedural order, the Philippines has until 30 March 2014 to submit its Memorial. The arbitral tribunal will thereafter determine the schedule and procedure for the remainder of the proceedings. In addition, the procedural order sets out the procedure to be followed in the event that one party to the dispute does not participate in the proceedings.

This will not be the first time an arbitration involving a State has proceeded with a State party *in absentia*. In the investment treaty context, disputes involving Tajikistan, Belize and Moldova have all progressed to final resolution notwithstanding the State’s failure to participate in the proceedings.

by [Catriona Paterson](#)

## Permanent Court of Arbitration Host Country Agreement with Argentina to Enter into Force

A Host Country Agreement (HCA) between the Permanent Court of Arbitration (PCA) and Argentina is due to enter into force on 21 September 2013. Initially signed on 12 May 2009, Argentina recently fulfilled all its internal and legal requirements paving the way for the HCA to enter into force.

The PCA — an intergovernmental organization seated in The Hague — was established in 1899 to facilitate the resolution of international disputes, in particular those involving a State party. Although the PCA does not itself hear disputes, it provides registry services and secretariat support to *ad hoc* arbitral tribunals.

In recent years, the PCA has entered into a number of HCAs, which are intended to make the PCA's services more widely available by creating the legal framework for the conduct of PCA-administered arbitrations in the host State. These agreements address both practical aspects of an arbitration, such as securing meeting space, as well as legal aspects, such as the grant of certain privileges and immunities to the participants in an arbitration.

The HCA with Argentina comes at a time when the PCA is administering an increasing number of disputes involving a Latin American party. The PCA reports that over 10 percent of its current cases involve a Latin American State.

In addition to Argentina, the PCA has signed HCAs with Costa Rica, Lebanon, Mauritius, Singapore, South Africa, India and Chile.

by [Catriona Paterson](#)

## 2013 ISDA Arbitration Guide Published

On 9 September 2013, the International Swaps and Derivatives Association, Inc. (ISDA) published its 2013 ISDA Arbitration Guide. The decision to introduce optional arbitration clauses for the 1992 and 2002 ISDA Master Agreements follows a consultation process that started in 2011 with ISDA's memorandum on the use of arbitration under an ISDA Master Agreement.

ISDA's guide is intended to help users and practitioners when including an arbitration clause in either the 1992 or 2002 versions of the ISDA Master Agreement. The 1992 and 2002 ISDA Master Agreements are the international industry standard agreements for the documentation of derivative transactions traded over-the-counter (OTC) rather than on an exchange. The ISDA Master Agreements are widely used around the globe for all types of OTC derivative transactions such as interest rate swaps, foreign exchange derivatives, equity derivatives, credit default swaps, commodity derivatives, etc.

Whereas financial institutions historically took a more conservative approach — clearly preferring litigation in state courts over arbitration — the introduction of the optional arbitration clauses represents yet another milestone showcasing that the financial industry is discovering arbitration as an alternative to litigation. Parties are especially choosing to arbitrate when dealing with counterparties seated in emerging countries where enforcing a foreign judgment is difficult or practically impossible. In contrast, a foreign arbitral award would be possible under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

ISDA's guide provides a high-level overview and introduction to some of the relevant concepts and benefits of using arbitration clauses.

The guide also offers 11 different model arbitration clauses, referring to the arbitration rules of the following seven prominent arbitration institutions:

- (1) International Chamber of Commerce (via inclusion of ICC Rules)
- (2) London Court of International Arbitration (via inclusion of LCIA Rules)
- (3) American Arbitration Association-International Centre for Dispute Resolution (via inclusion of the AAA-ICDR Rules)
- (4) Hong Kong International Arbitration Centre (via inclusion of the HKIAC Rules)
- (5) Singapore International Arbitration Centre (via inclusion of the SIAC Rules)

(6) Swiss Chambers' Arbitration Institute (via inclusion of the Swiss Arbitration Rules)

(7) Panel of Recognized International Market Experts in Finance Arbitration Rules (via inclusion of the P.R.I.M.E. Finance Rules)

The last was inaugurated as an international facility for resolving complex financial disputes in 2012. As there are options for some of the basic clauses regarding seat and/or the applicable governing law, the guide provides for a total number of eleven different clauses.

- The ISDA Master Agreement documentation, in essence, consists of:
- The form of master agreement itself
- A schedule thereto to be negotiated among the parties
- Annexes for the delivery of collateral (if applicable)
- Trade confirmations which may incorporate any applicable set of transaction type specific definitions such as the 2006 ISDA Definitions, the 2011 ISDA Equity Derivative Definitions, the 2003 ISDA Credit Derivatives Definitions, etc.

Within this architecture the model arbitration clauses published by ISDA are intended to form part of the schedule to the ISDA Master Agreement.

ISDA's move towards arbitration was in part prompted by an increasing diversity in the counterparties and jurisdictions involved in derivatives and a recognition that arbitral awards may frequently be more easily enforced than court judgments, particularly in certain emerging markets. The recent inauguration of P.R.I.M.E. and the rise of financial disputes registered with the ICSID demonstrate the growing need for arbitration as a dispute resolution mechanism in the financial industry.

by [Christine Gärtner](#) and [Frank Bierwirth](#)

## Endnotes

- <sup>1</sup> African Development Bank Group, *Annual Development Effectiveness Review* (2013). The review is available at <http://www.afdb.org/en/>. See in particular page 1.
- <sup>2</sup> Page 3.
- <sup>3</sup> In May 2013, *Investment Arbitration Reporter* reported that Swissborough Diamond Mines had brought an UNCITRAL arbitration under the Protocol on Finance and Investment against Lesotho. This is the first publicized arbitration brought under the Protocol.
- <sup>4</sup> As stated in Article 41 of the SADC Treaty, the treaty entered into force 30 days after the deposit of the instruments of ratification by two thirds of the signatory States.
- <sup>5</sup> Article 16.
- <sup>6</sup> The Protocol was signed by the heads of State or Government of the following States on 18 August 2006: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. According to the SADC website, it entered into force on 16 April 2010. See: <http://www.sadc.int/documents-publications/show/1009>.
- <sup>7</sup> As found, for example, in Article 5 of the United Kingdom – South Africa BIT.
- <sup>8</sup> As found, for example, in Article III of the United States of America – Mozambique BIT.
- <sup>9</sup> See, for example, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Second Edition, 2012 (Oxford University Press), p. 102.
- <sup>10</sup> *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, para. 212.
- <sup>11</sup> "Restatement of the Law Third, the Foreign Relations of the United States," American Law Institute, Volume 1, 1987, Section 712, Comment g.
- <sup>12</sup> Article 28(4) limits the temporal scope of this article, stating: "The provisions of this Article shall not apply to a dispute, which arose before entry into force of this Annex."

- <sup>13</sup> See, for example, the discussion regarding the BIT definition of “investment” that included the requirement “for which an investment certificate is issued” which was at issue in *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, at paras. 97-123.
- <sup>14</sup> As cited in *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 608.
- <sup>15</sup> For example, the tribunal in *Biwater Gauff v. Tanzania* found that a similar six-month requirement was procedural and directory in nature, rather than jurisdictional and mandatory. *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 343-347.
- <sup>16</sup> The judgment is available at: <http://www.saflii.org/sa/cases/SADCT/2008/2.html>.
- <sup>17</sup> P. 41 of the judgment.
- <sup>18</sup> P. 53 of the judgment.
- <sup>19</sup> Page 54 of the judgment. Article 6(2) of the SADC Treaty provides: “SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability.”
- <sup>20</sup> See Luke Eric Peterson, *Southern African Governments Move to Rein in International Tribunal; Passing Judgment on Zimbabwe has Led to Political Backlash Against SADC Tribunal*, Investment Arbitration Reporter, 22 May 2011.
- <sup>21</sup> The ICSID Caseload – Statistics are available for download at: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics> (last accessed on 9 September 2013).
- <sup>22</sup> No. 12-1519, 2013 U.S. App. LEXIS 15636 (1st Cir., July 31, 2013).
- <sup>23</sup> No. 11-5425-cv, 12-1382-cv, 2013 U.S. App. LEXIS 15625 (2d Cir., July 31, 2013).
- <sup>24</sup> (ICSID Case No. ARB/10/07), Decision on Jurisdiction, 2 July 2013.
- <sup>25</sup> A special procedure for litigation of BIT claims in Uruguay’s courts has been set forth in Law 16,110 of 25 April 1990, which had been passed to ratify Uruguay’s BIT with Germany.
- <sup>26</sup> (ICSID Case No. ARB/11/18), Award, 29 May 2013.
- <sup>27</sup> [2013] EWCA Civ 642.

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Latham & Watkins International Arbitration Newsletter is a regular publication produced by the firm’s global International Arbitration team designed to highlight important news, legal issues and developments in a practical and informative way.

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