

UTPR and infringement of bilateral investment treaties

Is the UTPR in Pillar 2 compatible with international law obligations?

Seminar 31st March 2023
13-15:30 CEST

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Hypothetical investment dispute



The GloBE proposal is implemented, and the UTPR applies since there is no IIR in this scenario.



However, TGI has net assets of only USD 1 million, which means that either other subsidiaries within TechGlobal Corp. must bear the additional tax burden and transfer it to TGI (or TGI will face bankruptcy).

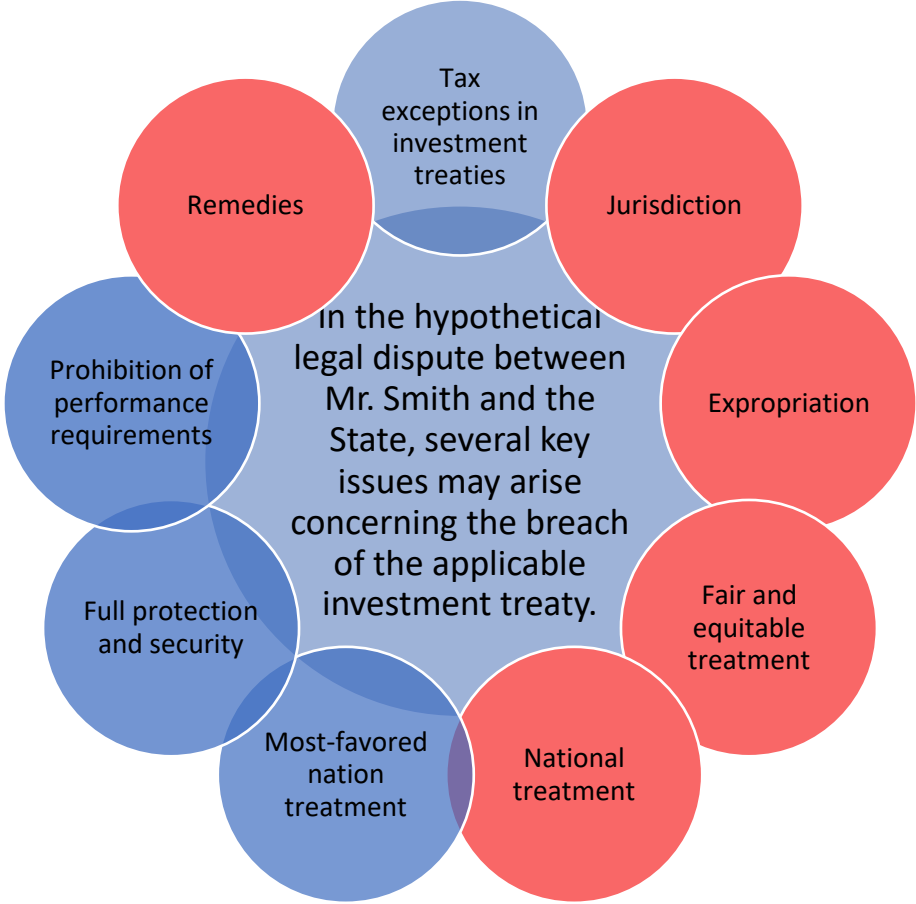


Mr. Smith, a foreign investor from Country X, owns 30% of TGI's shares, while TechGlobal Corp. holds the remaining 70%.

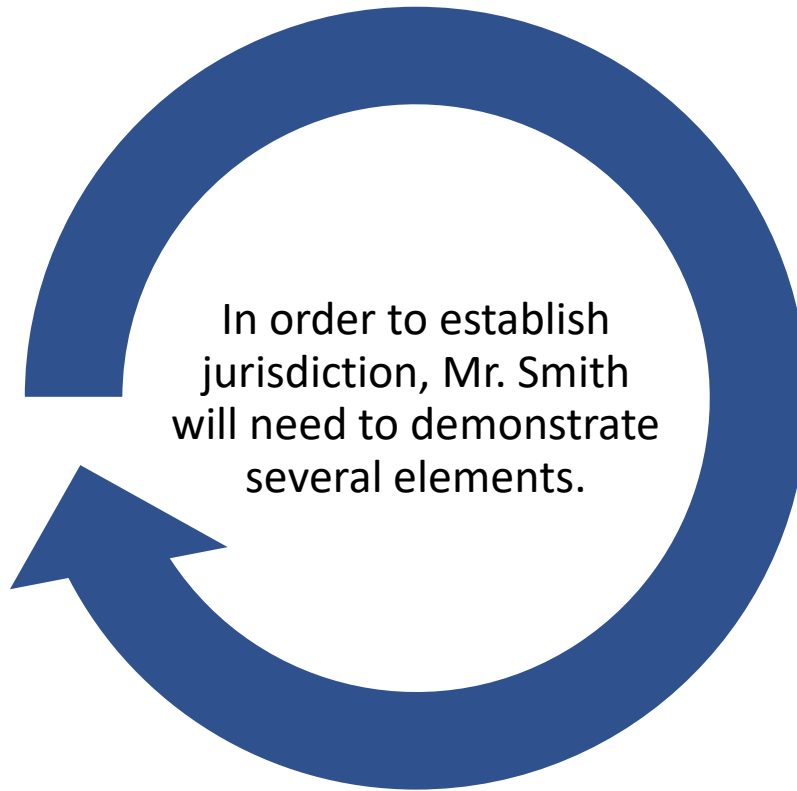
- TechGlobal Corp.'s overall profits, excluding TGI, amount to USD 100 million, and the tax rate for GloBE purposes is 5%.
- The UTPR burden is calculated as 10% of USD 100 million, resulting in USD 10 million.

For Mr. Smith, this situation would be a *de facto* expropriation because value of his investment in TGI would be significantly impacted.

The International Law of Investment Claims



Jurisdiction



- Investor status.
- Investment status.
- Temporal scope.
- Ratione materiae (subject matter).
- Dispute resolution provisions.

Expropriation Claim

Mr. Smith's Legal Arguments for Indirect Expropriation

- Mr. Smith needs to show that the UTPR's impact is **akin to a direct taking of his investment without formal transfer of title or outright seizure**.
- Argument: UTPR is not justified by a legitimate public purpose or is applied in a discriminatory manner.

Relevant Evidence and Precedents

- Relevant evidence includes financial statements and valuation reports, State's decision-making process, and comparisons to the UTPR's impact on domestic investors or investors from other countries.
- Relevant awards such as *Tecmed v. Mexico*, *Metalclad v. Mexico*, and *Philip Morris v. Uruguay*.

Fair & Equitable Treatment Claim

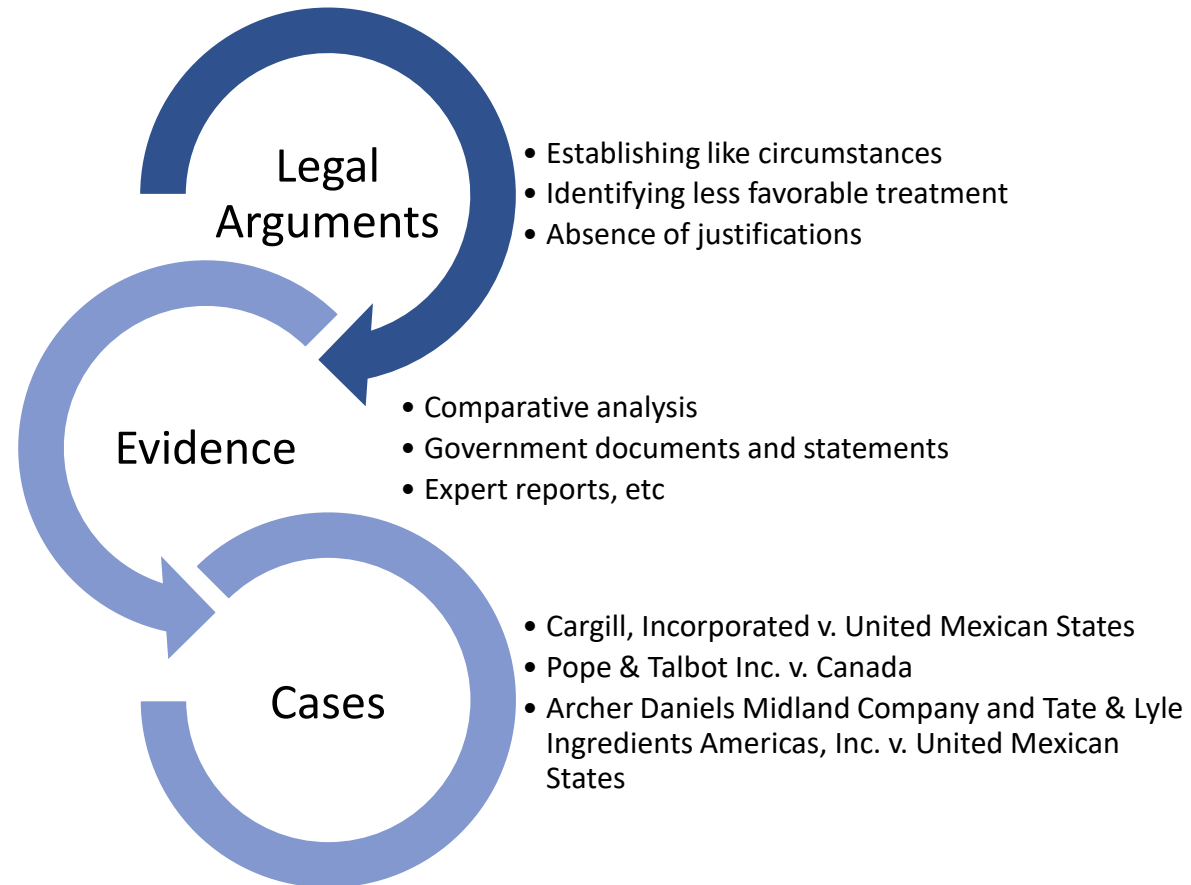
Mr. Smith's Legal Arguments for Breach of FET

- State breached the FET standard by implementing the UTPR, **resulting in disproportionate consequences for his investment in TGI.**
- Mr. Smith could also argue that the **State frustrated his legitimate expectations, failed to act transparently, and imposed an excessive burden on TGI compared to the policy objectives.**

Relevant Evidence and Precedent for Breach of FET

- Documentation of Mr. Smith's investment decision-making process, lack of transparency or consultation in implementing the UTPR, and expert reports demonstrating disproportionality of the UTPR's impact.
- Legal precedents include cases such as Tecmed v. Mexico, Occidental Petroleum v. Ecuador, and Electrabel v. Hungary.

National Treatment Claim



Other Potential Claims

Most Favored Nation Treatment Claim.

- MFN standard requires the State to treat foreign investors from different countries no less favorably than investors from any other country.
- Impregilo S.p.A. v. Argentina (ICSID Case No. ARB/07/17).

Full Protection & Security Claim.

- Implementation of the UTPR created a legal and regulatory environment that exposed investment to an “unreasonable level of risk” = potential bankruptcy of TGI.
- State's implementation of the UTPR breached FPS by exposing investment to an unreasonable level of legal and regulatory risk.

Claim for the Breach of Performance Requirements Prohibition.

- Plausible but unlikely
- ADM v. Mexico Award (Nov 21, 2007) found a breach in relation to a tax that discriminated between users of sweeteners depending upon the type of sweetener

Remedies for Breaches of Investment Treaty

If Mr. Smith successfully demonstrates one or more breaches of the investment treaty by the State, the issue of remedies becomes key.

Mr. Smith could argue for compensation, restitution, or other forms of relief as allowed under the investment treaty and international investment law.

Compensation (Actual or potential)

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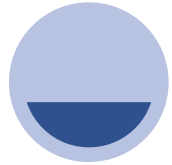
“cost of UTPR for States”

Smith’s 30% stake in TGI was initially worth USD 300,000 (i.e. TGI’s net assets were USD 1 million), and the implementation of the UTPR caused TGI’s net assets to decline by 50%, Mr. Smith’s share would be worth USD 150,000.

In this case, the compensation could be *at least* the difference between the initial value and the diminished value (USD 300,000 - USD 150,000 = USD 150,000).

NB: Smith might also claim compensation for lost profits and other financial harm resulting from the breach etc.

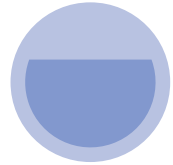
Conclusion



Main Finding

The hypothetical scenario suggests that Mr. Smith could potentially win an ISDS

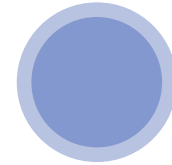
Need to present strong legal arguments and evidence, considering the potential breaches of the investment treaty, such as expropriation, FET, NT, MFN treatment, and FPS.



Cautious Note

NB1: Specific real-world foreign investors or companies that closely match the hypothetical scenario are challenging to identify, given the complexity of MNE tax structures, industries, and jurisdictions.

NB2: Understanding each claim's assessment and Mr. Smith's overall success will be subject to the interpretation and discretion of the arbitral tribunal handling the dispute.



Game changer?

If the UTPR were codified into a multilateral international treaty and binding on the State?

Smith would need to prove that the UTPR or the underlying international treaty breaches other provisions of international law to succeed.

Range of remedies that Mr. Smith could seek in an ISDS process may be limited due to the imposition of UTPR by international law.

Keep in touch



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Research Interests

- International Economic Law
- Commercial and Investment Contracts
- Special Economic Zones
- Arbitration and Dispute Resolution
- Cyberlaw (ICANN, domain names, trademarks)
- Transborder Data Flows and Data Privacy Law

