



AN ONLINE JOURNAL ON INVESTMENT LAW AND POLICY FROM A SUSTAINABLE DEVELOPMENT PERSPECTIVE

ISSUE 3. VOLUME 11. OCTOBER 2020



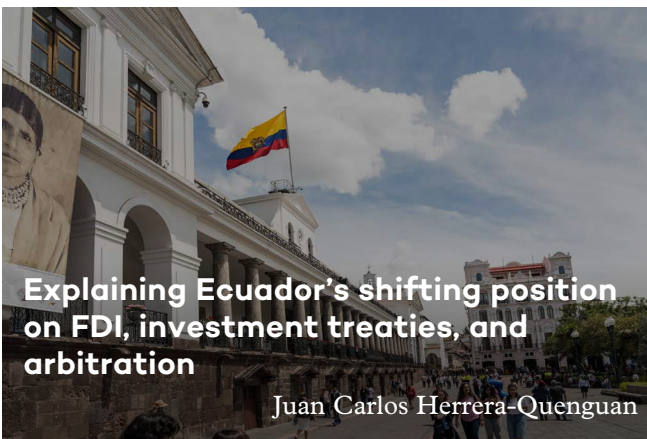
Investment Negotiations at the WTO and the IIA Regime: Anticipating unintended interactions

Nathalie Bernasconi-Osterwalder and Jonathan Bonnitcha



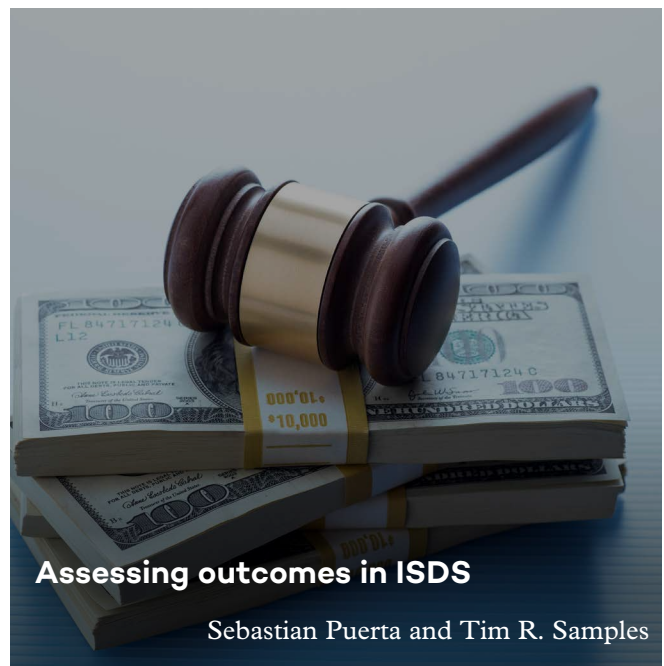
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LIST OF ACRONYMS

ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
COMESA	Common Market for Eastern and Southern Africa
CPTPP	Comprehensive and Progressive Trans-Pacific Partnership
CSR	Corporate Social Responsibility
EAC	East African Community
EC	European Commission
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECT	Energy Charter Treaty
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA	International Investment Agreements
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
ISDS	Investor–State Dispute Settlement
ITN	Investment Treaty News
MFN	Most-Favoured Nation
MIC	Multilateral Investment Court
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PPP	Public–Private Partnership
RCEP	Regional Comprehensive Economic Partnership
SADC	Southern African Development Community
SCC	Stockholm Chamber of Commerce
SDG	Sustainable Development Goal
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USMCA	United States–Mexico–Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization



INSIGHT 1

Investment negotiations at the WTO and the IIA regime: Anticipating unintended interactions

Nathalie Bernasconi-Osterwalder and Jonathan Bonnitcha¹



The Joint Statement Initiative (JSI), launched by a group of WTO Members to develop a multilateral framework on investment facilitation (MFIF), could substantially alter the field of international investment governance, exacerbating existing fragmentation in this area of law and policy. The initiative, launched nearly three years ago on the sidelines of the WTO's Eleventh Ministerial Conference, will transition into negotiating mode in September 2020. Its stated primary objective is to facilitate cross-border investment by increasing the transparency and predictability in the capital-importing host state. The preparation of an MFIF Streamlined Text² in January 2020, an Informal Consolidated Text in April 2020, and a revised Informal Consolidated³ Text in July 2020, provide an idea of what this proposed framework could look like.

From the outset, JSI signatories acknowledged that the relationship and interaction between the MFIF and IIAs needed to be clarified and wished to prevent new disciplines in the MFIF from being subject to ISDS under IIAs. The concern stems from the fact that ISDS provides a mechanism for foreign investors to obtain

compensation if states fail to live up to their treaty commitments. In contrast, the MFIF does not envisage the possibility of investors bringing claims against states alleging non-compliance with MFIF disciplines, or the award of compensation for breach of these disciplines. The fact that ISDS tribunals have a history of interpreting obligations broadly raises further concerns that these tribunals might interpret the substantive obligations in the MFIF in ways that state parties had not intended.

Signatories expressly stated that discussions toward an MFIF “shall not address market access, investment protection, and Investor–State Dispute Settlement.”⁴ They have tried to reflect this intention in the draft text by including a provision stating that the framework “shall not cover: a. investment protection rules; and, b. investor–state dispute settlement.” Since the effectiveness of this provision and its precise meaning are not clear, some JSI signatories have recently submitted proposals, described below, with the objective of insulating the framework from the broader IIA regime. These proposals seek to preclude investor claims for breach of MFIF disciplines in ISDS.

This article highlights three key areas where WTO Members need to be wary about unintended interactions between the proposed MFIF and IIAs. It also comments on the effectiveness of proposed attempts to separate the MFIF developed by the trade community from the broader IIA regime, the reform of which is being coordinated and led within the United Nations through UNCTAD and UNCITRAL.

Scope

While the existing WTO agreements have some overlap with IIAs, the proposed MFIF could greatly expand the degree of overlap. The draft MFIF text applies to measures affecting investors or investments across

¹ The authors wish to thank Sarah Brewin, Soledad Leal, Zoe Williams, and Sofia Baliño for comments and review.

² INF/IFD/RD/45

³ INF/IFD/RD/50

⁴ WT/MIN(17)/59. Joint Ministerial Statement on Investment Facilitation for Development.



the life cycle of an investment, including in the pre-establishment and operations phases. IIAs also apply to measures affecting investment, although they typically focus on the operations phase only. As such, the primary area of overlap between the MFIF and IIAs is that they both seek to govern investment-related measures in the operations phase of the investment life cycle.

Overview of MFIF content

The current version of the proposed MFIF sets out seven overarching sections. Section I covers scope and general principles, including key definitions and a clause on MFN treatment. Section II focuses on the transparency of investment measures, including provisions on notifying measures to the WTO, setting up enquiry points, and the process around adopting and publishing new measures and conducting consultations. Section III covers administrative reforms, under the heading of “Streamlining and Speeding Up Administrative Procedures and Requirements,” while Section IV focuses on setting up contact or focal points, ombudspersons and other coordination systems, internally and with foreign partners.

The final three sections cover special and differential treatment for developing and least developed country members, “cross-cutting issues” such as corporate social responsibility and anti-corruption, and institutional provisions such as dispute settlement. It is also worth noting that there are two additional, newly proposed sections between Sections III and IV, which deal with “temporary entry for investment persons/facilitation of movement of business persons for investment purposes” (Section III bis) and free transfer of capital and subrogation (Section III ter). Most draft provisions, except those on CSR and corruption, use mandatory language (“shall”).

Many of the details of each section are still up for discussion and debate, including important definitional questions that could have major implications for the MFIF’s scope. What is clear, however, is that the current proposal would require states to engage in significant reform of processes and institutions of investment governance within their own economies. The institutional reform required to comply with the proposed MFIF would be especially demanding for developing countries.⁵

⁵ Berger, A. (2019). *Investment facilitation for sustainable development: Index maps adoption at domestic level*. German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE). <https://blogs.die-gdi.de/longform/investment-facilitation-for-sustainable-development/>

The potential interaction between the MFIF and IIAs⁶

The concern of JSI signatories about unintended consequences stemming from the interaction between two regimes governing the same subject area is well founded. New MFIF disciplines could indeed affect the outcome of disputes initiated by investors under an IIA against host states that are also party to the MFIF. This risk arises from the possibility that an arbitral tribunal deciding a dispute under an IIA incorporates obligations arising under the MFIF into the IIA through the interpretation or application of vaguely worded provisions of the IIA. The most relevant provisions in IIAs in this respect are umbrella clauses and provisions on FET, as well as MFN treatment.

Umbrella clauses

According to UNCTAD figures, approximately 43% of IIAs include umbrella clauses.⁷ These clauses bring obligations or commitments that the host state entered into in connection with a foreign investment under the “umbrella” of the IIA. An umbrella clause can elevate a host state’s other commitments to the level of the treaty, extending the treaty’s reach beyond the rights and obligations that it explicitly provides. The wording used in umbrella clauses can vary and has evolved over time, with modern treaties increasingly avoiding them altogether. However, many of the older treaties have short, broad umbrella clauses, setting out a commitment for the host government to abide by “any obligations with respect to investment.”

Investor–state tribunals have interpreted broadly phrased umbrella clauses as extending to contractual, legislative, and other commitments that the host state has generally made with respect to investments. No tribunal has yet weighed in with sufficient clarity on the question of whether breaches of international treaties, such as the WTO agreements, could amount to breaches of umbrella clauses. However, given the proposed approaches to the definition and scope of “investment” and “investor” in the MFIF, it is probable that commitments made in a

⁶ For a more detailed review on the relationship between the MFIF and IIAs, including references to arbitral decisions, see Bernasconi, N., Leal Campos, S., & van der Ven, C. (2020, September). *The proposed multilateral framework on investment facilitation: An analysis of its relationship to international trade and investment agreements*. IISD and CUTS International. <https://www.iisd.org/publications/proposed-multilateral-framework-investment-facilitation>

⁷ UNCTAD. (n.d.). *Mapping of IIA clauses*. Investment Policy Hub. <https://investmentpolicy.unctad.org/pages/1031/mapping-of-ii-clauses>



potential MFIF would qualify as a commitment “with respect to investments” under broad umbrella clauses. This would be especially the case where the MFIF commitments are mandatory, as is the case with most commitments in the proposed MFIF draft.

Fair and equitable treatment

According to UNCTAD, 95% of IIAs contain a FET requirement. It is the most litigated standard in ISDS, accounting for 83% of such claims.⁸

“Unqualified” FET clauses are common in most older IIAs. States have struggled to actively prevent disputes under treaties with this clause, as the treaty language usually gives no guidance and is interpreted by tribunals in a range of ways, including by determining the investor’s “legitimate expectations” which induced them to make the investment. Written commitments by governments to act in particular ways can influence a tribunal’s assessment of a foreign investor’s legitimate expectations under this clause.

When considering how potential new disciplines under the proposed MFIF might interact with the FET standard, an investor–state tribunal would likely, in line with the VCLT, look at the other international commitments a host state has undertaken. It would also consider whether MFIF commitments can create “legitimate expectations” of the investor, given that past tribunals have found that legitimate expectations can be based on the state’s legal order—potentially including its international treaty commitments. The crucial question for tribunals would then be whether the state has made a specific enough representation or commitment under the MFIF to generate legitimate expectations of the investor, inducing them to make the investment. If tribunals find this is the case, then a breach of an MFIF discipline would also breach that legitimate expectation and thus the FET obligation in an IIA.

MFN provisions

According to UNCTAD, over 98% of IIAs have at least some form of MFN clause.⁹ These provisions require contracting parties to treat investments by investors of the other party no less favourably than investments by investors of a third state. Investor–state tribunals have repeatedly allowed investors to invoke the MFN clause to

import rights and obligations under other BITs which the investor perceived as more favourable than those in the underlying BIT. Given the substantive overlap between IIAs and the MFIF, it would be possible for tribunals to allow for the importation of rights and obligations from the MFIF. An investor could then rely on the MFN clause in the IIA to import MFIF rights and obligations if the host state is part of the MFIF, but the investor’s home state is not, arguing that the host state treats investors from MFIF participants more favourably.

The attempt to insulate the MFIF from IIAs and ISDS

Governments have not yet analyzed in detail the potential for MFIF disciplines being subject to ISDS under IIAs based on the three provisions described above. Nevertheless, they have understood the risks, in general terms, of MFIF disciplines being used as a basis for claims for monetary compensation under IIAs and so have attempted to address it in the scope article which provides that the MFIF “shall not cover: a. investment protection rules; and, b. investor–state dispute settlement.” One proposal clarifies “for greater certainty” that “this framework does not create new or modify existing commitments relating to the liberalization of investment, *nor does it create new or modify existing rules on the protection of investment or investor–state dispute settlement*” [emphasis added]. In other words, it tries to insulate existing IIA rules and ISDS from MFIF disciplines by stating that the MFIF does not “create or modify” investment protection rules in IIAs. It is nevertheless impossible to predict how effective this provision would be in case of a dispute under an IIA. For instance, open questions for interpretation include: what qualifies as an “investment protection rule,” and what does “creating or modifying new or existing rules” mean? These questions of interpretation would be answered by future investor–state arbitral tribunals deciding disputes that arise under IIAs, not by the state parties to the MFIF or the dispute settlement system thereunder. Such investor–state tribunals have a track record of broad and unanticipated interpretations of states’ obligations to foreign investors.

Another proposal by a JSI signatory, also attempting to insulate the MFIF from IIAs, provides that the MFIF “shall not be understood or interpreted to affect in any manner international investment agreements that Members have concluded or will conclude for protection and treatment of foreign investors and

⁸ UNCTAD. (2020). *Investment dispute settlement navigator*. Investment Policy Hub. <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

⁹ UNCTAD, *supra* note 7.



investment” and that MFIF members “confirm their understanding that contracting parties and covered investors of international investment agreements shall not refer to or rely on this Agreement for any purpose.” This proposed language targets, first, the interpretation of the MFIF text. It states that the MFIF may not be understood or interpreted to “affect [IIAs] in any manner.” It is unclear how an investor–state tribunal, whose primary role is to interpret IIA provisions, would implement this clarification on the interpretation of MFIF provisions. It is also unclear whether a purported instruction to investors from the state parties to the MFIF parties that investors not “refer to or rely on [the MFIF] for any purpose” carries any legal weight. Investors are not parties to the MFIF and bring their claim under the IIA, not the MFIF. Finally, situations in which not all state parties to an IIA are also MFIF parties would add to the complexity in cases of an investor–state dispute.

Variations of these proposals have also been put forward elsewhere.¹⁰ The common difficulty facing all these proposals is that they seek to address problems that might arise from interaction between a future MFIF and the IIA regime through language included in the MFIF. However, the nature of these interactions will ultimately depend on how tribunals deciding disputes under IIAs interpret such language in light of the obligations contained within IIAs themselves. In other words, the crucial role of interpreting and applying such language is not something that the state parties to the MFIF or the WTO institutions will have direct control over. The risk of unpleasant surprises in the way that arbitral tribunals might interpret and apply the MFIF needs to be taken seriously, given the unpredictable nature of ISDS, past instances where investment obligations have been interpreted more broadly than states intended, and the lack of any process of appeal or institutional mechanism to ensure consistency between decisions in ISDS proceedings and the intentions of the state parties to the MFIF. None of the proposals to date address this underlying institutional problem, which would require IIA parties to amend or clarify the applicable IIA clauses.

Concluding remarks

The proposed MFIF raises important issues of international investment governance, particularly how the framework relates to IIAs. As they enter negotiating mode, WTO Members involved in the MFIF discussions need to understand the potential interaction between the proposed text and the IIA regime to avoid unintended legal consequences. The language of the MFN, FET, and umbrella clause provisions in investment treaties, especially older ones, significantly influences the likelihood of these unintended legal consequences. While the WTO Members involved in the MFIF discussions have made clear that they wish to insulate the MFIF from IIAs and ISDS, the current proposals submitted by JSI signatories or other proposals could clarify the intention of MFIF participants to some extent. However, these are unlikely to achieve the desired certainty because ISDS outcomes remain highly unpredictable due to the characteristics inherent to ISDS. As long as IIAs are not themselves reformed or clarified, MFIF members must expect that tribunals will scrutinize investment measures through the lens of the broadly formulated investment protection clauses taking into account the overall legal framework and obligations entered into by the host state, including under the MFIF. This analysis also highlights the challenges governments are facing in light of the increasingly fragmented system of international investment governance. The MFIF would add another layer of binding international commitments, which require many states to engage in a complex process of legislative and administrative reform in order to comply.

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¹⁰ For example, Bermann, G.A., Jansen Calamita, N., Chi, M., & Sauvant, K.P. (2020, September 7). *Insulating a WTO investment facilitation framework from ISDS. Columbia FDI Perspectives*, 286. <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>



INSIGHT 2

Explaining Ecuador's shifting position on FDI, investment treaties, and arbitration

Juan Carlos Herrera-Quenguan



Introduction

In recent years, Ecuador's investment policy framework has been marked by instability. This article provides an overview of Ecuador's approach to foreign investment policy over the last decade. It also reviews recent constitutional developments that may allow Ecuador to develop a more coherent approach toward new investment treaties and trade agreements.

Attempts to establish an investor-friendly policy framework

Over the past decade, Ecuador has made efforts to revise its legislative framework to be more attractive (substantively and procedurally) to foreign investors. For instance, in 2010, it enacted the Organic Code of Production, Commerce and Investments; in 2015, the Incentives for Public–Private Partnerships and Foreign Investment Act; and, in 2018, the Promotion of Production, Investment Attraction, and Employment-Generation Act. In the same year, it overhauled the Organic Code of General Procedures (already amended in 2015) by eliminating the *exequatur* requirement for recognizing and enforcing foreign arbitral awards.¹

¹ Larrea, A. (2020, May, 17) Enforcing international arbitral awards in Ecuador after recent legal reforms: Is this the end of the *exequatur* process? *Kluwer Arbitration Blog*. http://arbitrationblog.kluwerarbitration.com/2020/05/17/enforcing-international-arbitral-awards-in-ecuador-after-recent-legal-reforms-is-this-the-end-of-the-exequatur-process/?doing_wp_cron=1593121939.0552499294281005859375

All these legislative exercises were intended to make Ecuador more open to international businesses and allow access to international arbitration for foreign investors, thus increasing inward FDI flows. Despite these efforts, Ecuador is still far from reaching FDI levels that neighbouring Colombia and Peru enjoy.

Policy shifts

Ecuadorian politics often feature dramatic shifts in policy priorities following an election that brings a new administration into power—and policy-making in the area of foreign investment has been no exception.

During his time in office, President Rafael Correa evinced strong opposition to ISDS and BITs. Correa's efforts to disentangle Ecuador from the international investment protection regime began with denouncing the ICSID Convention² and some BITs, and seeking rulings from the Transitory Constitutional Court regarding the constitutionality of denouncing the remaining BITs, on the grounds that they were incompatible with the recently adopted 2008 Ecuadorian constitution. The Court ruled in Correa's favour and established that the dispute resolution provisions of these BITs contravened the prohibition to “cede sovereign jurisdiction” enshrined in Art. 422 of the Constitution.³ Similarly, in 2013 Correa created the The Ecuadorian Citizens' Commission for a Comprehensive Audit of Investment Protection Treaties and of the International Arbitration System on Investments (CAITISA), which concluded that, among other things, BITs did not contribute to increased FDI inflows and their termination was advisable.⁴ Finally, only days before leaving

² Carbrera Diaz, F. (2009 June 8). Ecuador continues exit from ICSID. *Investment Treaty News*. <https://cf.iisd.net/itn/fr/2009/06/05/ecuador-continues-exit-from-icsid/>

³ See for example the Transitory Constitutional Court ruling No. 020-10-DTI-CC of 24 July 2010 concerning the constitutionality of the UK–Ecuador Bilateral Investment Treaty.

⁴ Olivet, C. (2017, May 4). *Auditing Commission to release report as Ecuador moves to terminate investment agreements*. Transnational Institute. <https://www.tni.org/en/article/auditing-commission-to-release-report-as-ecuador-moves-to-terminate-investment-agreements>; see also Ecuador's audit on investment treaties: *Investment Treaty News*. (2016, February 29). CAITISA reports leaked. <https://www.iisd.org/itn/2016/02/29/ecuadors-audit-on-investment-treaties-caitisa-reports-leaked/>



office, Correa terminated the remaining BITs to which Ecuador was a contracting party.⁵

However, after taking office in 2017, Correa's successor (and former vice-president) Lenín Moreno decided to initiate BIT negotiations with several states, apparently reversing Ecuador's rejection of investment treaties.⁶

Political uncertainty and institutional crisis

President Moreno has not been popular during his time in office, and the changes to his predecessor's economic policies have prompted a backlash from civil society groups, leading to policy instability and higher levels of political risk. For instance, within weeks of entering into an agreement with the IMF which, among other things, aimed to remove fossil fuel subsidies,⁷ transport unions, Indigenous organizations, opposition groups (allegedly aligned with Correa) and, perhaps surprisingly, environmentalist groups marched to Quito to demonstrate against the agreement. Consequently, Moreno temporarily moved the government to Guayaquil⁸ and declared a state of emergency.⁹ After almost two weeks of confrontation, during which time demonstrators were injured and killed, the government agreed to reinstate the subsidies. This crisis led to a significant increase in Ecuador's country risk index¹⁰ and suggests that efforts to further revise Ecuador's investment policy framework, including signing new BITs, may be met with significant pushback from civil society and opposition parties.

In 2020, as the COVID-19 pandemic spread around the world and Ecuador was hit with thousands of deaths, the economy was plunged into a profound crisis with oil prices collapsing, several oil pipelines suffering damage

and oil production halted. This has led to an economic and institutional crisis that has unveiled corruption schemes in Moreno's administration that went from overpricing in sanitary equipment to undisclosed negotiations regarding natural resources projects.¹¹ Consequently, the current administration has become politically and economically vulnerable, and it is unlikely that this situation will substantially improve before the 2021 general election. The new government will have to overcome several complications to boost the economy and increase the levels of FDI.

Constitutional considerations and new developments

Aspects of Ecuador's constitution have an impact on the treatment of foreign investors. For example, an important feature in the Ecuadorian constitution is the priority given to domestic over foreign investment.¹² Similarly, the Organic Code of Production, Commerce, and Investments, despite containing non-discrimination standards,¹³ distinguishes between domestic and foreign investments by prioritizing the former in strategic sectors of the economy. This distinction may constitute an important limitation when entering into new BITs in which, for example, MFN or non-discrimination standards are common. Indeed, a similar issue arose during the ratification process of the free trade agreement between Ecuador and the European Free Trade Association (EC–EFTA), when the Constitutional Court—declaring the conditional constitutionality of the agreement—required that it contain a clause excluding public procurement from MFN requirements, thus allowing Ecuadorian providers of products and services to have priority over foreign providers.¹⁴ Notably, however, this agreement does not include provisions on investment or an ISDS mechanism.

Another important limitation for Ecuador when entering into new BITs is Art. 422 of the Ecuadorian constitution, which reads:

No international treaties or instruments may be concluded in which the Ecuadorian State cedes

⁵ *Investment Treaty News*. (2017, June 12). Ecuador denounces its remaining 16 BITs and publishes CAITISA audit report. <https://cf.iisd.net/itn/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/>

⁶ *Global Arbitration Review*. (2018, February 23). Ecuador begins talks over new BITs. <https://globalarbitrationreview.com/article/1159285/ecuador-begins-talks-over-new-bits>

⁷ IMF. (2019, September 23). *IMF reaches staff-level agreement on the second review of Ecuador's economic program under the Extended Fund Facility*. IMF. <https://www.imf.org/en/News/Articles/2019/09/23/pr19347-ecuador-imf-reaches-staff-level-agreement-on2nd-review-under-the-ef>

⁸ *Deutsche Welle*. (2019, October 8) Ecuador president Moreno leaves Quito amid growing unrest. <https://www.dw.com/en/ecuador-president-moreno-leaves-quito-amid-growing-unrest/a-50742727>

⁹ *Deutsche Welle*. (2019, October 12). Ecuador president declares 'curfew' and 'militarization' in Quito. <https://www.dw.com/en/ecuador-president-declares-curfew-and-militarization-in-quito/a-50809980>

¹⁰ *Primicias*. (2019, October 9) Riesgo país de Ecuador se dispara con las protestas. <https://www.primicias.ec/noticias/economia/riesgo-pais-ecuador-dispara-protestas/>

¹¹ *Periodismo de Investigación*. (2020, April 16) Llorimagua, la fiebre del cobre. <https://periodismodeinvestigacion.com/2020/04/16/llurimagua-la-fiebre-del-cobre/>

¹² Article 339 of the Ecuadorian Constitution.

¹³ Article 17 of the COPCI.

¹⁴ Constitutional Court ruling No. 2-19-TI/19 of 30 April 2019, paras 98–100 and 154 (Justice Daniela Salazar).



sovereign jurisdiction to international arbitration in contractual or commercial disputes between the State and natural persons or private legal entities.

Exceptions are made for international treaties and instruments that provide for the resolution of disputes between States and citizens in Latin America by regional arbitration bodies or by courts designated by the signatory countries.¹⁵

The first paragraph of Art. 422 served as a basis on which the Transitory Constitutional Court deemed BITs unconstitutional. In the opinion of the court, BITs' dispute resolution provisions (international arbitration) cede sovereign jurisdiction by submitting a dispute to an international tribunal. Likewise, the court noted that their benefits extend only to foreign investors.¹⁶ Thus, within the context of UNASUR, Correa pushed for the creation of a regional investment centre—which is an allowable exception according to Art. 422—which would have provided for a regional dispute resolution forum.¹⁷ Nonetheless, such a centre, to say nothing of UNASUR itself, has failed to materialize.¹⁸

Currently, there is a pending interpretation action before the Constitutional Court filed by the former president of the National Assembly and member of Moreno's political party, Elizabeth Cabezas,¹⁹ which seeks to overcome the interpretative limitation of Art. 422. According to Cabezas, investment matters do not fall within the scope of "contractual" or "commercial" disputes.²⁰ Almost two years after the petition was filed, the court still has not ruled on the matter. Nonetheless, Ecuador proposed a new model BIT,²¹ commenced negotiations with the Kingdom of the Netherlands,²² and entered into a Cooperation and Facilitation Investment Agreement (CFIA) with Brazil.²³

Interestingly, in its ruling No. 34-19-TI/19 the Constitutional Court, in establishing whether the CFIA needed legislative approval before being ratified by the president, stated that "the [CFIA does not] lea[d] to the creation of commercial obligations for the country"²⁴ and that "[t]he resolution of disputes between States is not a competence that belongs to the internal legal order of a State, and therefore by agreeing to arbitration in [the CFIA], no competence of this nature is being attributed to an international or supranational body."²⁵ This ruling may shed some light on the possible outcome of the Interpretation Action for two reasons: First, investment treaties do not necessarily encompass commercial or contractual obligations. Second, due to their nature, these are disputes which do not *exclusively* belong to any internal legal order.

Indeed, alleged contractual breaches can be adjudicated in investment arbitration via BITs' umbrella clauses, but this does not render any investment dispute commercial or contractual *per se*. Furthermore, a state is not exclusively competent, through its judiciary, to adjudicate international disputes in, for example, international criminal law, WTO law or the law of the sea. Each *fragmented* sub-system of international law has its own particularities and dispute resolution mechanisms; investment law is not indifferent to that fact.

Like the EC–EFTA, the CFIA, for instance, does not provide for investor–state arbitration but includes a dispute prevention mechanism and state–state arbitration.²⁶ A restrictive interpretation of Art. 422 of the Ecuadorian constitution would also limit dispute resolution mechanisms other than international arbitration. As mentioned above, the Constitutional Court when ruling on the EC–EFTA, adopted a measured and more open dialogue by declaring the conditional constitutionality of that treaty. A similar approach was adopted by the Colombian Constitutional Court when it declared the conditional constitutionality of the France–Colombia BIT by

¹⁵ Author's translation from Spanish.

¹⁶ *Ibid.* (n viii).

¹⁷ Fiezzoni, S. (2012, January 12). UNASUR Arbitration Centre: The present situation and the principal characteristics of Ecuador's proposal. *Investment Treaty News*. https://www.iisd.org/itm/2012/01/12/unasur/arbitrationblog.kluwerarbitration.com/2016/05/27/resen?doing_wp_cron=1593360070.6832900.047302246093750

¹⁸ *Associated Press*. (2018, April 20) Six countries suspend membership in UNASUR regional bloc. <https://apnews.com/c409589b666840378818423808519183>

¹⁹ The complete file at the Constitutional Court can be found here: <https://portal.corteconstitucional.gob.ec/FichaCausa.aspx?numcausa=0002-18-IC>

²⁰ Constitutional Interpretation petition of August 16, 2018, p. 3.

²¹ *Global Arbitration Review*. (2018, March 16). Ecuador model BIT gives state space to regulate. <https://globalarbitrationreview.com/article/1166677/ecuador-model-bit-gives-state-space-to-regulate>; *El Telégrafo*. (2018, March 9). Cancillería presentó el nuevo modelo de los CBI.

²² Tweede Kamer der Staten-Generaal 2 Vergaderjaar 2019–2020, p. 4, <https://t.co/svFGyYh3dI?amp=1>

²³ Available in Spanish and Portuguese here: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4908/brazil---ecuador-bit-2019->

²⁴ Constitutional Court ruling No. 34-19-TI/19 of 4 December 2019, para 16 (Justice Daniela Salazar). (emphasis added)

²⁵ *Ibid.*, para 17. (emphasis added)

²⁶ Brauch, M. (2020, March 10). The best of two worlds? The Brazil–India Investment Cooperation and Facilitation Treaty. *Investment Treaty News*. <https://iisd.org/itm/2020/03/10/the-best-of-two-worlds-the-brazil-india-investment-cooperation-and-facilitation-treaty-martin-dietrich-brauch/>



warning the president to adopt an interpretative declaration with France on some standards of protection of the treaty.²⁷

Risks and opportunities

Ecuador still faces some holdover risks from old BITs,²⁸ especially in the conflict-ridden natural resource industry where Indigenous peoples and politicians oppose the development of mining projects.²⁹ Indeed, opponents to mining projects have appeared before the Constitutional Court in order to request citizen consultations (*consultas populares*) which could lead to the prohibition of mining activities in local territorial jurisdictions. The Constitutional Court has denied these requests on procedural and substantive grounds, but the matter is not completely settled.³⁰

The Constitutional Court is expected to play an increasingly important role in Ecuador's investment narrative. The Court may initiate useful dialogue to harmonize constitutional objectives with the interests of foreign investors. During the ratification process of BITs or other similar instruments, the Court may create channels through which it could help the Ecuadorian state to enter into modern investment treaties that take into consideration climate change concerns, sustainable growth, and human rights.³¹

Conclusion

Ecuador should move beyond a rhetorical position in favour of or against FDI and BITs, and adopt a more coherent narrative that neither disregards its need for FDI nor investors' needs for certainty and policy stability. However, it should do so by exploring dispute resolution mechanisms such as investor-state mediation, as well as through advancing the work of the UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, in which it has actively participated.

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²⁷ Colombian Constitutional Court ruling No. C-252/19 of June 6, 2019. https://www.corteconstitucional.gov.co/relatoria/2019/c-252-19.htm#_ftn233; see also Ricaurte, F.S. (2019). Judgment C-252 of 2019 of the Constitutional Court of Colombia: Change of precedent on the control of BITs. *Investment Treaty News*. <https://www.iisd.org/itn/2019/09/19/judgment-c-252-of-2019-of-the-constitutional-court-of-colombia-change-of-precedent-on-the-control-of-bits-federico-suarez-ricaurte/>

²⁸ Bohmer, L. (2020 February 18). Chinese gold miner puts Ecuador on notice of treaty-based dispute *Investment Arbitration Reporter*. <https://www.iareporter.com/articles/gold-miner-puts-ecuador-on-notice-of-treaty-based-dispute/>

²⁹ Plan V. (2019). *An anti-mining activist will govern a province*. <https://www.planv.com.ec/anti-mining-activist-will-govern-province>

³⁰ See, for example, the following cases before the Constitutional Court: Case No. 002-19-CP and Case 009-19-CP. Nonetheless, a request of citizen consultation in the Girón parish was allowed due to the expiration of the time limit for the Constitutional Court to issue its ruling. Such a consultation ultimately prohibited mining activities in Girón.

³¹ On this point it is worth mentioning the developments with the treaty on business and human rights, an initiative led by Ecuador. See, Human Rights Council Forty-Third Session. (2020). *Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, UN Doc A/HRC/43/55. <https://undocs.org/A/HRC/43/55>



INSIGHT 3

The need for “Africa-focused” arbitration and reform of Tanzania’s Arbitration Act

Amne Suedi



Over the last several years, the government of Tanzania has enacted significant changes to the legislation governing foreign investment in natural resources—and related dispute settlement mechanisms—with the aim of ridding the sector of the vestiges of “colonial” relationships. Before discussing these changes, and in order to understand the rationale for them, this article first provides the relevant historical context of international arbitration in Africa.

Foreign investment in Africa and the international investment arbitration regime

Since decolonization and the attainment of political independence, many sub-Saharan African countries have been highly dependent on international trade and integration into the global economy.¹ Hoping to promote socioeconomic development, many African governments have relied on international agreements with foreign governments, international institutions, and multinational companies, whether they are for investments, technology, debt instruments, or the procurement of services and goods. These agreements often come with a number of conditions, one of the

most important being dispute settlement mechanisms, specifically international arbitration.

Foreign investors are comfortable with international arbitration because of its perceived neutrality, stability, predictability, and independence from national political considerations in its application of “international” law. However, the international character of international law norms and standards has been questioned by both academics and developing country governments, as many of them were developed with limited or no participation from African governments.

African states’ limited participation in the development of the international investment protection regime is no exception.² While African officials did participate in the preparatory meetings organized by the World Bank for the negotiation and drafting of the 1965 ICSID Convention and, to a limited extent, in the UNCITRAL Arbitration and Conciliation Rules and the UNCITRAL Model Law, they were not involved in the original formulation and establishment of the PCA, nor in the traditional commercial forums such as the ICC’s International Court of Arbitration and the London Court of Arbitration.

Within this context, we can better understand the changes that Tanzania has undertaken regarding international arbitration, which are all with the aim of continuing the decolonization agenda of foreign investments in Africa. This article examines the changes in Tanzania’s legal regime regarding dispute resolution within the context of natural resources.

Tanzania’s legal framework governing international arbitration: Origins and reform

Over the last several decades, it has become routine for foreign investors to choose to arbitrate disputes with African states outside of Africa. In the 1980s and

¹ Osakwe, P., Santos-Paulino, A.-U., & Dogan, B. (2018). Trade dependence, liberalization, and exports diversification in developing countries. *Journal of African Trade*, 5(1–2), 19–34. <https://www.sciencedirect.com/science/article/pii/S2214851518300185>

² Asouzu, A.A. (2001). *International commercial arbitration and African states: Practice, participation and institutional development*. Cambridge University Press.



1990s, as Tanzania began to liberalize and become more integrated into the global economy, the country's leaders held the belief that, in order to attract foreign investment, they must provide investors with access to international dispute settlement mechanisms.

Tanzania accommodated this demand for international dispute resolution through the ratification of the ICSID Convention of 1965 via the Tanzania Investment Act.³ Access to ICSID dispute settlement mechanisms for foreign investors in Tanzania is guaranteed by key provisions in Tanzania's BITs,⁴ as well as Section 23(2) of the 2002 Tanzania Investment Act, which allows for investor–state arbitration pursuant to ICSID and other international arbitration rules and mechanisms as provided within the bilateral and multilateral treaties or contracts.

However, since 2017, Tanzania has revised a number of mining development agreements, namely with Acacia Mining, and enacted a series of policy and legislative changes,⁵ through the Sovereignty Act⁶ and the Contract Review Act⁷ and amendments of the Public–Private Partnership (PPP) Act.⁸ The purpose of these revisions is to give Tanzania control over its natural resources and also re-establish sovereignty over key areas of economic policy.

For example, the Sovereignty Act frames domestic dispute resolution as a fundamental component of protecting permanent sovereignty over natural resources. Section 11 of the Sovereignty Act⁹ provides:

“(1) Pursuant to Article 27 (1) of the Constitution, permanent sovereignty over natural wealth and resources shall not be a subject of proceedings in any foreign court or tribunal.

(2) For the purpose of subsection (1), disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania.

(3) For the purpose of implementation of subsection (2), judicial bodies or other bodies established in the United Republic and application of laws of Tanzania shall be acknowledged and incorporated in any arrangement or agreement.”

This is a reflection of the view, widespread among sub-Saharan African government officials, lawyers, and the private sector that “international arbitration is essentially a distant and alien system, located in a foreign country, administered by foreign experts and applying foreign law, with little appreciation of the outcome African parties are powerless to affect.”¹⁰

One response to these developments is the adoption of the 2020 Arbitration Act. This Act replaces the Arbitration Act of 2002, which came to be considered inadequate to handle modern international disputes.¹¹ The Arbitration Act of 2020 relates to international commercial and domestic commercial arbitration. Domestic arbitration is defined at Section 3A of the Arbitration Act 2020 as an arbitration agreement that expressly designates arbitration in mainland Tanzania and that the parties involved are deemed Tanzania nationals for private individuals (or in the case of corporations that the management of the company is controlled in Tanzania and the company is incorporated in Tanzania). Furthermore, to qualify for national arbitration, the performance of the contractual obligations needs to either take place in Tanzania or the subject matter of the dispute be located in Tanzania. The new Act addresses the enforcement of domestic and foreign arbitral awards and provides mandatory provisions that every party must adhere to whether or not the parties were provided with an arbitration agreement. The 2020 Arbitration Act also established the Arbitration Centre.

³ The Tanzania Investment Act No. 26 of 1997 as amended from time to time.

⁴ United Nations Conference on Trade and Development (UNCTAD). (n.d.). *Investment Policy Hub, United Republic of Tanzania*. <https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/tanzania-united-republic-of>

⁵ Masamba, M. (2017). Government regulatory space in the shadow of BITs: The case of Tanzania's natural resource regulatory reform. *Investment Treaty News*. <https://www.iisd.org/itn/2017/12/21/governmentregulatory-space-in-the-shadow-of-bits-the-case-of-tanzanias-natural-resource-regulatory-reform-magalie-masamba/>

⁶ The Natural Wealth and Resources (Permanent Sovereignty) Act, No. 3 of 2017. http://www.tcme.or.tz/uploads/NATURAL_WEALTH_AND_RESOURCES_PERMANENT_SOVEREIGNTY_ACT_2017.pdf

⁷ The Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act, No. 6 of 2017 http://www.tcme.or.tz/uploads/NATURAL_WEALTH_AND_RESOURCES_REVIEW_AND_RE-NEGOTIATION_OF_UNCONSCIONABLE_TERMS_ACT_2017.pdf

⁸ Public Private Partnership (Amendment) Act, No. 9 of 2018.

⁹ The Natural Wealth and Resources (Permanent Sovereignty) Act, No. 3 of 2017.

¹⁰ Asante, S.K.B. (1993). The perspectives of African countries on international commercial arbitration, *Leiden Journal of International Law*, 6(2) page 331–356.

¹¹ Cosmas J. (2015). The State of International Commercial Arbitration in Tanzania: A Comparative Critique and Call for the Reform. *US-China Law Review*, 12(6) , 513



One element of the Arbitration Act that will be welcomed by investors is the removal of differentiation of levels of enforcement between domestic and foreign arbitral awards, allowing for equal enforcement rights.¹² The Act also establishes the Tanzanian Arbitration Centre, which could be particularly useful for resolving commercial and more technical disputes between investors and the state. The Centre will provide assistance with regard to the procedural aspects of arbitration, specifically, providing administrative assistance for the registration of claims, maintaining a list of accredited arbitrators, and providing a code of conduct.¹³ However, despite the establishment of a domestic arbitration centre, the country still needs to build capacity for *coherent* arbitration. The Arbitration Centre must operate at a high standard to ensure Tanzanians and foreign investors fully utilize its resources and facilities.

The Barrick Gold settlement: Moving Tanzania toward “Africa-focused” arbitration

While the government was pursuing legislative and policy changes regarding foreign investments, a high-profile dispute arose with Acacia Mining, in which the government of Tanzania accused Acacia of tax evasion, environmental standards violations, operating illegally, and having seized consignments of copper concentrate and gold. This dispute played out over several years, during which the Canadian mining giant Barrick Gold Corporation had to intervene to mediate the dispute.

This intervention ultimately resulted in a settlement agreement between Barrick Gold and the Government of Tanzania,¹⁴ which led to the establishment of a new company, Twiga Minerals, in which the government holds a 16% non-diluted participation in the equity and shareholder loans. With regards to dispute resolution, the government has agreed, despite the legislative changes discussed above, to allow that UNCITRAL Conciliation Rules¹⁵ and the UNCITRAL Arbitration Rules¹⁶ would apply to any future dispute. Tanzania, as well as other

EAC member states, Canada, the United Kingdom, and the United States, may not be chosen as the seat of the arbitration proceedings. Although there was initial speculation that the East African Court of Justice’s arbitration mechanisms would become the preferred mode of dispute resolution,¹⁷ the prohibition of an EAC seat excludes a number of arbitration mechanisms, including the East African Court of Justice, the Kigali International Centre of Arbitration (KIAC) and the Nairobi Centre for International Arbitration (NCIA). Notably, the inclusion of recourse to international arbitration contravenes the Permanent Sovereignty Act. This may set a precedent for other companies with mining development agreements pre-dating the Act to similarly request these terms with the government.

However, in a news release dated October 20, 2019, Barrick Gold highlighted that the dispute resolution framework related to its investment in Tanzania would be an “Africa-focused international dispute resolution.”¹⁸ Higher levels of foreign direct investment into African states has created a higher demand for Africa-focused arbitration centres founded and located conveniently within Africa that acknowledge current levels of socioeconomic development of African states, something other international arbitration centres may fail to do.¹⁹ More frequent use of Africa-focused arbitration by foreign investors should lead to an improved business environment and serve to resolve national and international commercial disputes. It will also increase the skills of local arbitrators and decrease reliance on arbitration bodies outside Africa.²⁰

¹² The Arbitration Act, 2020 s.78

¹³ The Arbitration Act, 2020 s.77.

¹⁴ Recommended Final Offer for Acacia Mining Plc by Barrick Gold – Corporation dated July 19, 2019.

¹⁵ United Nations Commission on International Trade Law Conciliation Rules of July 23, 1980.

¹⁶ United National Commission on International Trade Law Arbitration Rules revised edition of 2010 and 2013 edition.

¹⁷ East African Court of Justice Arbitration Rules, 2012.

¹⁸ Barrick Gold. (2019). The launch of Twiga Minerals heralds partnership between Tanzanian government and Barrick. <https://www.globenewswire.com/news-release/2019/10/20/1932172/0/en/The-Launch-of-Twiga-Minerals-Heralds-Partnership-Between-Tanzanian-Government-and-Barrick.html>

¹⁹ Other Africa-based arbitration institutions include the Cairo Regional Center for International Commercial Arbitration (CRCICA), which was created in 1979 by the Asian–African Legal Consultative Organization, and was ranked by the African Development Bank as one of the leading arbitration centres across the African continent. Another option would be the Casablanca International Mediation and Arbitration Centre (CIMAC), which was created in 2014 and its rules established in 2018. Finally, Mauritius has invested heavily in upskilling its professionals, government officials, and judges in international arbitration so as to establish itself as a preferred choice for dispute resolution in Africa. In 2008, Mauritius enacted its arbitration law, based on the UNCITRAL Model Law, and in 2011 it entered into an agreement creating the London Court of International Arbitration–Mauritius International Arbitration Centre (LCIA-MIAC).

²⁰ Mukkam-Owuor, R. (2018). Africa, stand up for Africa. *Kluwer Arbitration Blog*. <http://arbitrationblog.kluwerarbitration.com/2018/03/10/africa-stand-africa/>



Conclusion

As Tanzania further develops its international investment policy and puts BITs on hold,²¹ the government may take this as an opportunity to review the different dispute settlement options available and which are most appropriate for which types of dispute. With the Africanization of dispute settlement in mind, options could include judicial and non-judicial, regional, and national options. The Arbitration Act 2020 will certainly play a role in Tanzania's modernization of its domestic arbitration system, a much-needed change from the previous colonial heritage enshrined in the 2002 Act. Where Tanzania is reflecting on embracing African arbitration mechanisms, perhaps now is the time to examine its backyard—namely the East Africa Court of Justice, which enacted its arbitration rules in 2004 but to date none of the member states, including Tanzania, have opted to use it as a mechanism for dispute settlement. Here lies an opportunity for the future.

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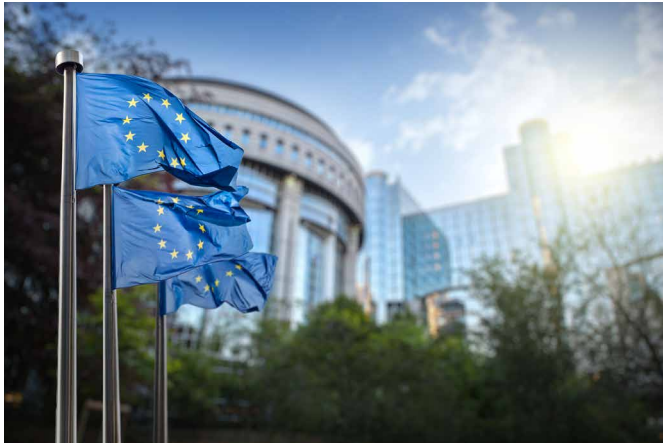
²¹ Tanzania is not currently renewing its BITs, most recently demonstrated by the issuing of notice of intent to terminate the Netherlands BIT; see Habib, S. (2019). Tanzania faces a new ICSID claim under the terminated Netherlands BIT. *Kluwer Arbitration Blog*. <http://arbitrationblog.kluwerarbitration.com/2019/06/21/tanzania-faces-a-new-icsid-claim-under-the-terminated-netherlands-bit-2>



INSIGHT 4

Side-stepping national courts would be a big step backwards for Europe: A reaction to the EC's public consultation on EU cross-border investment

Nathalie Bernasconi-Osterwalder and Sarah Brewin



Overview

On May 26, 2020, the European Commission launched a public consultation initiative on the European Union's (EU's) current system of investment protection and facilitation.¹ The initiative was prompted by the recent termination of BITs between 23 EU member states, through the EU termination agreement signed May 5, 2020.² The termination agreement brought an end to several BITs,³ mostly agreements negotiated in the 1990s between the original Western European EU member states and Eastern European states, or between two Eastern European states. In the time since these BITs were concluded, these Eastern European states joined the EU, and the rights of cross-border investors in their territories are protected by EU laws and institutions.

This consultation initiative appears to be aimed at justifying the creation of new EU-level investment protection and facilitation standards and institutions. While we consider holding a transparent public

consultation on this issue a laudable practice, we question whether there has been a genuine EU-wide demand to re-examine this issue. We are also concerned that creating new investment protection standards and institutions could upset the delicate equilibrium between EU and member state powers. This could serve to undermine the legitimacy of the EU at a time when the European project is under sustained criticism for excessive interference in member state sovereignty.

Background

The consultation initiative seeks feedback on the questions of how to “clarify the rules that protect and facilitate investment between EU countries; introduce new measures to fill the gaps; and improve enforcement in dispute cases between investors and national governments.”⁴ On this latter issue of enforcement, the introductory text in the survey explains that following the *Achmea* decision on the incompatibility of intra-EU BITs (including investor–state dispute settlement [ISDS]) with EU law, all EU investors must now seek legal remedies for investment-related disputes with EU member states in the national courts.⁵ The text goes on to note that the standards of justice dispensed by national courts in EU member states is governed by EU law, the Charter of Fundamental Rights of the EU, and case law of the Court of Justice and of the European Court of Human Rights (ECHR).

Despite these guarantees, the Commission states that “some stakeholders” have raised concerns, including that the effectiveness of national systems to settle international investment disputes varies greatly amongst member states, that national courts lack impartiality and may be influenced by national interests, and that small

¹ European Commission. (2020b). *Public consultation document: An Intra-EU Investment Protection and Facilitation Initiative*, p. 5. https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2020-investment-protection-consultation-document_en.pdf

² Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union. May 5, 2020. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01))

³ According to the UNCTAD International Investment Agreements Navigator database.

⁴ European Commission. (2020a). *Cross-border investment within the EU – clarifying and supplementing EU rules*. <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework>

⁵ *Supra* note 1, p. 14.



and medium-sized enterprises (SMEs) may struggle to access the national courts.⁶ “Some stakeholders” is a constituency whose concerns are frequently invoked as the justification for this initiative, but their identity and the source of their concerns is not further elaborated. Based on these concerns, the Commission is seeking input on what other types of EU body or mechanism would be suitable to settle cross-border investment disputes in the EU.

The EU does not need a parallel legal system to replace domestic and regional processes

The EU already has robust systems in place at the domestic, EU, and European Council levels to protect foreign investment and property rights. In its own communication to the European Parliament and European Council in 2018,⁷ the EU Commission noted that “EU law, as progressively developed over decades, provides investors with a high level of protection...” The Commission went on to describe the interplay of domestic judicial processes, EU oversight mechanisms, and national dispute prevention processes, noting that “[N]ational judges have a special role and responsibility in protecting investment. Together with the Court of Justice of the EU (‘CJEU’ or ‘Court of Justice’) through the preliminary reference procedure, national judges must ensure in complete independence the full application of EU law and judicial protection of the rights of individuals in all Member States.”

The Commission also stated that an “alternative system of dispute resolution” (referring to ISDS provided under the now-terminated intra-EU BITs) would “[T]ake away from the national judiciary litigation concerning national measures and involving EU law. They entrust this litigation to private arbitrators, who cannot properly apply EU law, in the absence of the indispensable judicial dialogue with the Court of Justice.” The Commission had it right in 2018—the national courts of the EU member states should be entrusted to provide justice to cross-border and domestic investors alike.

⁶ Ibid.

⁷ European Commission. (2018). *Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment*. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&from=EN>

Introducing new investment law standards and an EU-wide system of ISDS would run counter to current trends and potentially spur anti-EU sentiments

There is a strong and growing global trend away from the use of ISDS, and investment protection rules and ISDS remain rare between developed countries. The United States–Mexico–Canada Agreement (the USMCA) which came into force on July 1, 2020, will phase out ISDS between Canada and the US, and heavily circumscribe its use between the US and Mexico.⁸ The United States Democratic presidential nominee has spoken in opposition to ISDS and its inclusion in future US trade agreements.⁹ The 10 member states of the proposed Regional Comprehensive Economic Partnership (RCEP) have agreed to exclude ISDS from that instrument.¹⁰ Establishing some form of ISDS for intra-EU investors would not only be out of step with these developments, but would also play directly into the hands of those who harbour anti-EU sentiments due to a perceived loss of control over domestic affairs. Intra-EU ISDS may lend them a real and additional grievance and even recruit new sympathizers to their cause.

ISDS is not the solution to addressing gaps in the governance of intra-EU investment

The EU Commission’s stated objective in launching this initiative is to explore ways to strengthen enforcement of investors’ rights and create a ‘level playing field’ for intra-EU investors vis-à-vis foreign investors.¹¹ We consider that a more efficient and effective approach to achieve this objective would be to strengthen existing enforcement mechanisms at the national level, rather than create new and duplicative ones at the regional level. This means bolstering the ability of national courts in EU member states to effectively resolve investor–state disputes, rather than creating a new mechanism allowing intra-EU investors to circumvent those courts. This would only serve to undermine national courts’ capacity to handle such

⁸ Bernasconi-Osterwalder, N. (2018). *USMCA curbs how much investors can sue countries—sort of*. IISD. <https://www.iisd.org/articles/usmca-investors>

⁹ United Steelworkers. (2020). *Joe Biden candidate questionnaire*. <https://www.uswvoices.org/endorsed-candidates/biden/BidenUSWQuestionnaire.pdf>

¹⁰ Yunus, R. (2019). RCEP talks to proceed without ISDS. *The Malaysian Reserve*. <https://themalaysianreserve.com/2019/09/13/rcep-talks-to-proceed-without-isds/>

¹¹ *Supra* note 1, p. 5.



cases. As such, in pursuit of its stated ambitions, the EU Commission may instead wish to dedicate resources to capacity development activities for member state judiciaries.

Holding companies accountable within the EU

While the consultation initiative appears narrowly focused on the issue of strengthening investors' rights and the enforcement of those rights, the initiative could take a more balanced view and consider how to strengthen intra-EU investors' obligations. If there is a need and desire to fill gaps in the governance of regional investment, the EU could adopt an accountability mechanism to ensure that intra-EU investors abide by the OECD [Guidelines for Multinational Enterprises](#). Such an accountability mechanism, if established at the EU level, could be modelled on the International Finance Corporation (IFC) compliance advisor ombudsman (CAO) function. The CAO hears complaints from local communities affected by IFC and Multilateral Investment Guarantee Agency (MIGA) funded projects, to try and improve the social and environmental outcomes of those projects on the ground.¹² Unlike investment protection standards and ISDS, this initiative would not concern the liability of EU member states but would instead govern intra-EU investors with the aim to ensure responsible corporate behaviour.

Conclusion

It is clear that the EU Commission's consultation initiative takes as its point of departure the notion that intra-EU investors' rights are not adequately protected and so require the creation of new EU legal protections, compensation standards, and enforcement mechanisms. We challenge the assumption inherent in this initiative that the termination of intra-EU BITs – signed in a bygone geopolitical era preceding the EU as it is known today – means that the investment climate of the EU has suddenly deteriorated. Even if taken as *prima facie* true, the circumvention of national courts through the creation of some form of EU-level investor–state dispute

settlement would do little to alleviate this concern. Reinstating any form of intra-EU ISDS would run counter to contemporary trends and be a magnet for anti-EU pro-sovereignty critiques. The Commission would be better placed to support member states' own judicial processes to enforce extant investor rights and to strengthen investor accountability.

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¹² Compliance Advisor Ombudsman. (2009). About the CAO: *Who we are*. <http://www.cao-ombudsman.org/about/whoweare/index.html>



INSIGHT 5

Assessing outcomes in ISDS

Sebastian Puerta and Tim R. Samples



Introduction

How much are countries gaining and losing in the ISDS system? This deceptively simple question is rather difficult to answer. Our research, recently published in the *American Business Law Journal*, attempts to establish a baseline for measuring the extent to which countries are “winning” (as home states of successful claimants) and “losing” (as respondent states with adverse awards and settlements) in the ISDS system.¹ In this project, we estimate the net outcomes and proportional impact of investor–state arbitration for a set of 20 countries with high ISDS activity. This piece explains our methodology and three key findings of that research.

The numbers

Our study of ISDS outcomes acknowledges that, from a sovereign state’s perspective, losses in ISDS usually matter more than wins. The nature of “wins” and “losses” in ISDS illustrates the one-way design of the investment law system, which enables foreign investors to bring claims against states, but not vice versa. Effectively, sovereigns cannot “win” in ISDS cases.² As the home state of an investor–claimant, a favourable

award in ISDS does not provide direct benefits to the government.³ As respondents, states have a number of ways to lose in ISDS. Even a technical victory in arbitration, prevailing on the merits as a respondent, can involve significant legal costs.⁴ On the other hand, an ISDS “loss” takes a direct financial toll on states in the form of an adverse award or settlement. Additionally, as challenges to laws and regulations, investment disputes often pose a threat to sovereign power.

Data and methodology

To analyze the outcomes of ISDS for specific states, we began by scraping UNCTAD’s *ISDS Navigator* to create a novel data set.⁵ We then supplemented that data set with existing data gathered by Rachel Wellhausen, which contains all known ISDS cases between 1987 and the end of 2015.⁶ The result, what we call our master data set for this project, includes 983 cases, representing all known ISDS activity through the end of 2017.

We then selected 20 states with high levels of ISDS activity.⁷ Together, these countries accounted for roughly half of all ISDS activity from 1987 through

³ Outside the orbit of dispute resolution, the indirect or external benefits (e.g., investment flows and the upsides of signaling) of participating in the ISDS system have been widely debated and studied. See, e.g., Salacuse, J.W. (2017). Of handcuffs and signals: Investment treaties and capital flows to developing countries. *Harvard International Law Journal* 58(1), 127–176.

⁴ Legal costs in ISDS are non-trivial. In one estimate, legal fees per case averaged USD 7.4 million for claimants and USD 5.18 million for respondents. On top of that, tribunal costs per case average around USD 1 million. See Hodgson, M. & Campbell, A. (2017, Dec. 14). Damages and costs in investment treaty arbitration revisited. *Global Arbitration Review*. <https://www.allenoverly.com/en-gb/global/news-and-insights/news/damages-and-costs-in-investment-treaty-arbitration-revisited>; See also Desierto, D. (2017). Rising legal costs claimed by states in investor-state arbitrations: The test of ‘reasonableness’ in *Philip Morris v. Australia*. *European Journal of International Law*. <https://www.ejiltalk.org/rising-legal-costs-claimed-by-states-in-investor-state-arbitrations-the-case-of-philip-morris-v-australia/>

⁵ UNCTAD maintains a database of investment disputes with various search functions, the *Investment Dispute Settlement Navigator*, at <https://investmentpolicy.unctad.org/investment-dispute-settlement>

⁶ Rachel Wellhausen’s ISDS data set, which includes all known cases through December 31, 2015, contains some cases that the UNCTAD *ISDS Navigator* does not and is available at <http://www.rwellhausen.com/isds-data.html>; see also Wellhausen, R.L. (2016). Recent trends in investor–state dispute settlement. *Journal of International Dispute Settlement*, 7(1), 117–135.

⁷ We selected states with large case counts as home states or as respondents. We also chose some states for having protagonist roles in ISDS policy recalibrations, such as treaty withdrawals or BIT revision programs. The selection, in alphabetic order: Argentina, Albania, Belize, Bolivia, Canada, Ecuador, Egypt, France, India, Kazakhstan, Kyrgyzstan, Libya, Mexico, Netherlands, Peru, Poland, Russia, Spain, United States, and Venezuela.

¹ Samples, T.R. (2019). Winning and losing in investor–state dispute settlement. *American Business Law Journal*, 56(1), 115–175.

² Whereas the investment law system grants foreign investors a number of procedural and substantive rights, investors are typically not burdened with reciprocal obligations to sovereign states. Increasingly, states are exploring ways to rebalance the relationship. See, e.g., Tuerk, E. & Rosert, D. (2019, Dec. 17). UNCTAD’s 2019 High-Level IIA Conference: A new momentum for Phase 2 reform. *Investment Treaty News*. <https://cf.iisd.net/itn/2019/12/17/unctads-2019-high-level-ia-conference-a-new-momentum-for-phase-2-reform-elisabeth-tuerk-diana-rosert>



2017. The selection was balanced in terms of case volumes, encompassing 447 respondent cases and 471 home state cases. For each state in our selection, we built country-specific data sets to measure the net ISDS outcomes for those countries. We then filled gaps in the master data set by cross-checking with sources like ITA Law,⁸ *Investment Arbitration Reporter*,⁹ media outlets, and Internet searches.

Analysis

Using the best-available data, our country tallies produced the net ISDS outcomes for each state in our 20-country selection. Our calculations of ISDS outcomes include awards, settlements, and an estimate of legal costs and tribunal fees. We then net the outcomes for each country—both as a respondent and as a home state to investor claimants. Among our selection, there were five countries with positive net ISDS outcomes and 15 with negative net outcomes. These data were then merged with other country-level data to measure the proportionality of ISDS outcomes. For instance, we compare net ISDS outcomes to foreign direct investment, gross domestic product per capita, and government expenditures. We discuss the results of this analysis in greater detail below.

Key findings

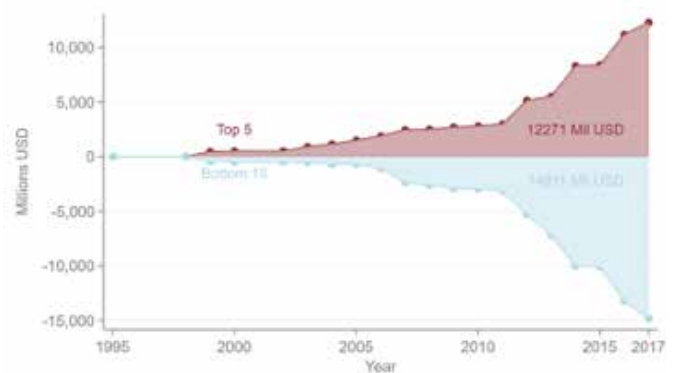
In showing how selected countries are faring in the ISDS system, our research confirms some anecdotal observations about investor–state arbitration. At the same time, this project raises new questions and underscores the need for more research in this direction. Here we summarize and illustrate high-level findings on ISDS outcomes in our research in three key areas: concentration, proportionality, and transparency.

Concentration of outcomes

Our research confirms and quantifies a simple but important reality in the ISDS system: positive and negative outcomes are highly concentrated among participating countries. Generally, highly active respondent countries that are losing in ISDS are losing a great deal in absolute and relative terms. Meanwhile, investors from highly active countries on the winning side are gaining a lot, but the gains are small relative to

their large economies. The five countries in our tallies with favourable ISDS records cumulatively account for USD 12.3 billion in net outcomes through 2017. Meanwhile, the 15 countries with net ISDS losses cumulatively account for USD 14.8 billion in net outcomes through 2017. Spain is a rare exception—a state that has been a highly active respondent while also home to highly active investor claimants. Figure 1 illustrates the extent of concentration in net cumulative ISDS outcomes among the five winning states and 15 losing states in our country tally data set.¹⁰

Figure 1. Net cumulative ISDS outcomes



Notes: This figure shows the net cumulative outcomes for the five winning countries (in red) and 15 losing countries (in blue).

Proportionality matters

For further comparison, we consider the data for net ISDS outcomes for our selected countries alongside economic indicators. Comparing the outcomes of ISDS to the economies of participating states is illustrative of proportionality. For instance, we compare each country's net ISDS outcomes to government spending, GDP, and FDI flows. The results of our proportionality analysis were dramatic, as shown in Figure 2, which illustrates ISDS outcomes as a percentage of GDP. Relative to economic activity, highly active countries with negative ISDS outcomes are losing at a significant pace. On the other hand, for wealthy countries with positive ISDS records, the outcomes are relatively insignificant. Figure 2,

⁸ <https://www.italaw.com/>

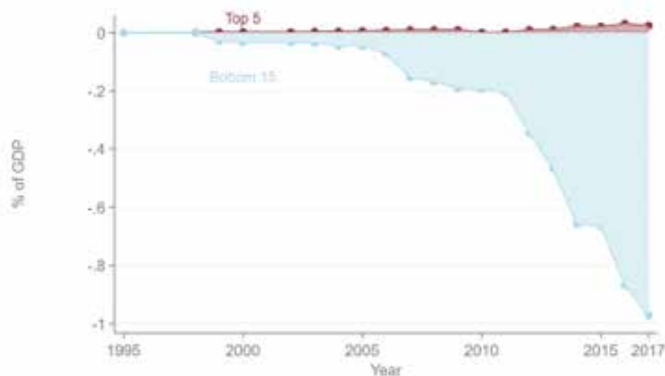
⁹ <https://www.iareporter.com>

¹⁰ At USD 50 billion, the *Yukos* award is an outlier and potentially distorts the overall numbers. Accordingly, we exclude *Yukos* from our calculations here.



especially when compared to the fairly balanced cumulative net volumes in Figure 1, underscores concerns about the disparate proportional impact of ISDS outcomes among participating states.

Figure 2. Net cumulative ISDS outcomes as a percentage of GDP



Notes: This figure shows the net cumulative outcomes proportional to 2017 GDP for the five winning countries (in red) and 15 losing countries (in blue).

Transparency concerns

Transparency deficiencies in ISDS are a widely recognized problem, and our research underscores those concerns. In the master data set for this project, award or settlement data were unavailable in 199 of 983 cases. Investment disputes frequently involve matters of profound public interest—health regulations or regulatory responses to a financial crisis, for instance. At the very least, public resources are at stake in ISDS cases. Efforts to remedy transparency deficiencies have produced initiatives like the UNCITRAL Transparency Rules and the Mauritius Convention. We applaud those efforts, yet also acknowledge the glaring persistence of transparency deficiencies in the ISDS system.

Final remarks/looking ahead

In a separate research project currently underway, we are developing a model to estimate the ISDS transparency gap, which is essentially an estimate of the monetary value of unknown cases in ISDS. We anticipate that the likely volume of unknown case results will be significant. Given the public interests at stake in many investment disputes, we believe that increasing transparency is an urgent and compelling priority. Greater transparency would enable more informed research and decision making on international investment law. Better policy tomorrow calls for more transparency today.

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The authors would like to acknowledge the excellent work of **Andrew Teal**, currently a second-year student at the University of Virginia School of Law, on the original research project.



NEWS IN BRIEF

UNCITRAL Working Group III sessions to resume in October

Negotiators working on multilateral reform of the ISDS system will reconvene on October 5 to 9, 2020, in Vienna for their 39th session. This session, which was originally to be held in March and April 2020, was rescheduled in light of the COVID-19 pandemic.

This meeting will be the latest in a years-long process which aims to identify states' concerns regarding ISDS and identify potential options for reform of the system.

According to the [provisional agenda](#), the Working Group is expected to consider several topics related to ISDS reform, including dispute prevention, mitigation and mediation; treaty interpretation; security for costs and frivolous claims; multiple proceedings and counterclaims; and a multilateral instrument on ISDS reform. Submissions from several governments will also be considered.

The Working Group has additionally posted several working papers on their website, which are open for comments. These papers address the appellate mechanism and enforcement issues; the selection and appointment of ISDS tribunal members; and a code of conduct for adjudicators in ISDS. As we , these topics were discussed in depth during the January 2020 session.

CETA faces hurdle after Cypriot parliament fails to ratify the agreement

On July 31, 2020, the Cypriot parliament voted against the ratification of CETA, the trade deal between the EU and Canada.

The agreement was [ratified](#) by Canada in 2017 and has subsequently been provisionally applied by the EU. However, as it is a “[mixed agreement](#),” CETA must be ratified by all 27 member states before all provisions apply, including the rules on foreign investment. To

date, 15 member states (including the U.K.) have ratified the agreement.

Central to the [concerns](#) of the Cypriot parties which voted against the agreement is the lack of a geographical indication for halloumi cheese. Geographical indications are given to agricultural and food products which originate from specific regions, differentiating them from similar products produced elsewhere. Opposition parties also cited [concerns](#) regarding environmental and labour protection, GMOs, and protections for small producers.

Observers [argue](#) that it is unlikely that Cypriot opposition to CETA will torpedo the entire agreement, suggesting that a deal can be reached before the Cypriot parliament returns to vote on the deal again in the autumn. However, CETA must still be ratified in member states including Italy and the Netherlands, in which important political parties also [oppose](#) the deal.

U.S.–Kenya FTA negotiations underway

The U.S. and Kenya [formally launched](#) negotiations on the US–Kenya FTA on July 8, 2020. If concluded, the agreement would be the first bilateral trade agreement between the U.S. and a sub-Saharan African state. The FTA is being framed by the parties as a “[model](#)” agreement for the region, fulfilling a goal of the Trump administration [articulated](#) by USTR Lighthizer in 2018.

The Trump administration [notified](#) Congress of its intention to begin negotiations with Kenya under the Trade Promotion Authority (TPA) in March 2020. The current TPA—which sets specific negotiating priorities and allows for the fast-tracking of negotiations while requiring regular consultation with Congress—expires in July 2021. This gives negotiators a relatively short timeline to conclude an agreement under the current TPA.



Following a public consultation, the USTR released [negotiating objectives](#) in May 2020. While the section on investment does not mention ISDS, in a [recent confirmation](#) hearing, incoming Deputy USTR Michael Nemelka did not rule out the possibility of its inclusion in an eventual FTA with Kenya.

Beyond the timeline imposed by the TPA, negotiations will likely be influenced by other current agreements of which Kenya is a part. One of these is the African Growth and Opportunity Act (AGOA) which sets preferential tariff rates for Kenyan imports to the U.S. With AGOA set to expire in 2025, Kenya may wish to use the FTA to secure this preferential treatment going forward.

Additionally, negotiators will have to take into consideration Kenya's commitments under the [AfCFTA](#), which will likely [take effect](#) in January 2021. African Union officials have expressed discontent with Kenya's decision to enter into bilateral negotiations with the U.S., arguing that this may [jeopardize](#) the AfCFTA.

While Kenya is not, in global terms, a major trading partner for the U.S., it is [Kenya's second largest export market](#), importing apparel, agricultural, and mining products, and trade volume has been increasing annually since the AGOA tariff regime went into effect.

European Commission initiates infringement proceedings against the UK and Finland for failing to terminate intra-EU BITs

On May 14, 2020 the EC initiated infringement proceedings against the UK and Finland for failing to terminate the intra-EU BITs to which they are a party. Though the UK has formally left the European Union, EU law continues to apply to the UK during the transition period, which ends on December 31, 2020.

The [decision](#) to terminate intra-EU BITs was reached in October 2019, and 23 member states – excluding Austria, Sweden, Ireland, Finland, and the UK—formally agreed to do so on May 5, 2020. This agreement, which entered into force on August 29, 2020, [outlined](#) the steps member states must take both to terminate their BITs and to address ongoing arbitration proceedings.

Despite the May 2020 agreement, reaching a consensus among the member states with regard to intra-EU BITs has been slow going. While Ireland and Italy terminated their BITs with other member states early in the last decade, other states—namely Austria, Romania, and Sweden—have already faced [infringement proceedings](#) for failing to terminate their treaties. Romania subsequently did begin termination in 2017, while Austria and Sweden have [reportedly](#) recently begun terminating their BITs bilaterally.

According to the [May infringements package](#) released by the EC, Finland and the UK have “failed to engage in any discussion with the member states” regarding the bilateral termination of their BITs. In the case of infringement proceedings, member states are required to respond with a detailed reply within two months. If the EC concludes that the states are not complying with EU law, it follows up with a “reasoned opinion”—a formal request that the member states comply with the relevant EU law—and, if necessary, the Commission will refer the matter to the European Court of Justice.

Notably, while the EC has been strongly advocating for the termination of intra-EU BITs, the ECT, one of the most frequently invoked investment treaties, remains in force for intra-EU investors, though the EU is also advocating for a [modernization](#) of this treaty.

Investment facilitation talks move to negotiating phase

Following two years of “structured discussions,” the negotiations for a proposed WTO multilateral framework for [investment facilitation](#) (MFIF) are set to begin on September 24–25, 2020.

As we [reported](#), negotiations had been scheduled for the 12th Ministerial Conference, which was to be held in June 2020 in Kazakhstan but has been delayed until 2021 due to the COVID-19 pandemic.

While WTO members involved in the investment facilitation talks have been hesitant to agree to binding decisions during this time, virtual meetings have taken place over the summer months, with members [proposing language](#) on elements of the framework, including temporary entry for investment persons and the facilitation of movement of business persons for



investment purposes, facilitating transfers (related to profits as well as other investment-related capital flows), as well as the preamble, scope, and general principles.

With regard to scope, the discussion focused on whether the framework would cover services and non-services, as well as portfolio investment, and if the MFIF would apply to the entire life cycle of an investment. Additionally, members considered whether to include a specific definition of investment, whether some sectors could be excluded from the framework, and the inclusion of an MFN provision.

This last point may be quite contentious, as it raises concerns about [the relationship between the MFIF and the IIA regime](#).

(Editor's note: This issue of Investment Treaty News contains an analysis of the potential ways in which the MFIF and provisions in investment treaties may interact.)

Update on EU trade and investment agreement negotiations: Indonesia, Mexico, Vietnam, and China

Negotiations for the Indonesia–EU FTA have been ongoing since 2016, with the ninth round taking place on June 15–26, 2020. The agreement covers both trade and investment, and the EC's proposed investment chapter provides for the establishment of a court to settle any investor–state disputes arising under the agreement, in line with the push to establish an [Investment Court System \(ICS\)](#) in EU bilateral agreements.

According to the EC's [report](#) on this most recent round, discussions on the investment chapter “were constructive following Indonesia's internal consultations on the concept of the Investment Court System. In-depth discussions on several key policy issues took place, such as transparency, mediation, the Code of Conduct, and the issue of cost allocation (“loser pays principle”).”

A [sustainability impact assessment \(SIA\)](#) of the agreement was completed in July 2020. Regarding the investment chapter, the SIA report recommends that the final treaty affirms the right to regulate, and in particular, that the treaty not be taken as a commitment that the parties “will not change the legal and regulatory framework, including in a manner

that may negatively affect ... covered investments or the investor's expectations of profits,” including the removal of subsidies.

On April 26, 2020, the parties [agreed](#) on the final details of the EU–Mexico FTA. While the parties had reached an agreement in principle in April 2018, negotiations on specific chapters have been taking place over the last two years. The last chapters under negotiation concerned [public procurement](#), including for sub-central governments. The agreement will now go through legal revision.

The Vietnam–EU FTA [entered into force](#) on August 1, 2020. The EU–Vietnam IPA was [approved](#) by the European Parliament in February 2020 but still requires ratification by the EU member states. The agreement with Vietnam, along with those with Canada, Singapore, and Mexico, includes the ICS.

The most recent round of the China–EU Comprehensive Agreement on Investment concluded on July 28, 2020. [Recent rounds](#) of negotiation have focused on market access, treatment of state-owned enterprises, state–state dispute settlement, sustainable development, transparency, CSR, and the environment. This latest round focused on level playing field disciplines (state-owned enterprises, transparency rules for subsidies, and rules tackling forced technology transfers).

Negotiations between the EU and New Zealand, Australia, Chile, and Uzbekistan are also ongoing.

The EC publishes a regularly updated [overview](#) of its trade negotiations.

India moves to restrict foreign investment from its neighbours and bans dozens of Chinese apps

The government of India has recently enacted significant restrictions on inward FDI coming from its neighbours, in a move that seems calculated to target Chinese investment.

According to a [press release](#) issued by the Ministry of Commerce and Industry on April 18 2020, new restrictions have been placed on investment coming from any country which shares a land border with India



– namely Afghanistan, Bangladesh, Bhutan, China, Myanmar, Nepal and Pakistan– and has been enacted to curb “opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic.”

Prior to this recent change, under India’s investment laws most inward investment did not require government approval. Approval, was however, required for FDI in sensitive sectors such as telecom, defence and railway infrastructure, and any investment from Bangladesh or Pakistan. Now those restrictions have been extended to any FDI from any of India’s neighbours.

Over the last twenty years, 99 per cent of the investment India received from its neighbours was Chinese. However, Chinese investment has increasingly met with political push-back, particularly in the tech sector, and while Amazon has also faced political difficulties, these recent moves seem to favour US over Chinese tech companies. According to some observers, the move to restrict FDI from India’s neighbours is aimed primarily at China.

Indeed, this is not the only restriction India has placed on Chinese economic activity recently – on June 29 2020 the government banned TikTok and 58 other apps from Chinese developers, reportedly citing national security concerns.

Reportedly in response to political tensions between the two countries, Chinese tech-giant Alibaba has recently announced that it will halt investment into India.

EU consultation on cross-border investment within the EU comes to an end

As we reported, the EC launched a consultation to clarify and supplement rules on cross-border investment within the EU in May 2020. This consultation period came to an end on September 8, 2020.

The consultation was aimed at eliciting views of relevant stakeholders on ways to improve the general intra-EU investment environment, focusing on (the enforcement of) rules protecting intra-EU investment and investment facilitation.

Latest round of talks on ECT modernization yields little progress on “modernization”; parliamentarians call for removal of protection for fossil fuels and ISDS

Two rounds of the negotiations for the modernization of the ECT have been held over the past two months, from July 6 to 9 and September 8 to 11, 2020.

As we reported, negotiations began in December 2019, and several negotiation rounds were scheduled for 2020, which have been, to date, held by video conference.

Among the topics slated to be discussed during these rounds are investment protection and ISDS, with some ECT signatories, including the EU, pushing for a “modernization” of the treaty’s approach to ISDS.

The July round of negotiations focused on investment protection, including definitions of investor and investment and substantive provisions, while the September round included discussion on several issues related to dispute settlement, including frivolous claims, security for costs, third-party funding, transparency, and valuation for damages.

While a public statement from the ECT notes that “several delegations” are in favour of modernization of ISDS, the secretary-general of the ECT has reportedly admitted that reaching a consensus on this matter will be difficult, and several signatories, including Japan and Central Asian states dependent on fossil fuel revenues, are resistant to reform of ISDS in the ECT.

As a result, dozens of representatives from the European Parliament, as well as from national parliaments of member states, have signed a declaration calling for the removal of protections for fossil fuel investments and the “scrapping” or “reform” of ISDS provisions. Failure to do this, these representatives argue, should result in the EU’s withdrawal from the ECT by the end of 2020.

The next negotiation round will take place from November 3 to 6, 2020.



AWARDS AND DECISIONS

PCA Tribunal upholds jurisdiction over disputes under India–Japan Comprehensive Economic Partnership Agreement

Nissan Motor Co. Ltd. (Japan) v. India, PCA Case No. 2017-37

Sarthak Malhotra

In a decision dated April 29, 2019, a PCA tribunal considered the objections to its jurisdiction over claims brought against India by Japanese company Nissan Motor Co. Ltd. (Japan) under UNCITRAL rules. The tribunal rejected all objections except one, on which it deferred its decision due to a lack of sufficient information.

Background and claims

The dispute related to Nissan's investment involving the establishment of a vehicle-manufacturing factory. It made the investment through a consortium that included a wholly-owned subsidiary company and a company jointly owned with its French partner Renault s.a.s.

The consortium entered into a memorandum of understanding (MoU) with the provincial government of Tamil Nadu in 2008 (GoTN). Pursuant to this MoU, the consortium agreed to invest a minimum amount to establish a vehicle-manufacturing factory and achieve a minimum production capacity within seven years. The GoTN agreed to provide various incentives to the consortium, including refunds of certain categories of taxes. The MoU also prescribed the eligibility criteria for claiming these benefits.

Nissan alleged that the GoTN failed to pay the aforementioned incentives in a timely manner, resulting in an outstanding amount of INR 2,057.36 crores (approximately USD 290 million). According to Nissan, this constituted a breach of CEPA's FET (Article 87[1]) and umbrella (Article 87[2]) clauses. It sought full reparation for the non-payment of these incentives and applicable interest.

The tribunal was properly constituted

India objected that the arbitral tribunal was not constituted in accordance with Article 96 of CEPA and Article 9 of UNCITRAL Rules. It argued that the

combined effect of Article 96(11) of CEPA and Article 9 of UNCITRAL Rules was that the PCA Secretary-General (default appointing authority under Article 96[11]) could appoint the presiding arbitrator only if the parties and the two co-arbitrators failed to appoint the presiding arbitrator within 30 days from the appointment of the second arbitrator.

According to India, the PCA Secretary-General failed to follow the proper appointment procedure in two ways. First, he commenced the list procedure as set out in Article 8(2) of UNCITRAL Rules without first giving the parties an opportunity to mutually appoint the presiding arbitrator as provided in Article 96(11) of the CEPA. Second, he proceeded with the list procedure without confirmation of appointment of the second arbitrator. India claimed that this contradicted Article 9 of UNCITRAL Rules because Article 9 implicitly requires confirmation of appointment of the second arbitrator before commencement of any procedure for appointment of the presiding arbitrator.

The tribunal rejected India's arguments and held that it was properly constituted. It observed that Article 96(5) of CEPA and Article 1(1) of UNCITRAL Rules envisaged that the appointment procedure set out in CEPA took precedence over the conflicting appointment procedure prescribed in UNCITRAL Rules.

The tribunal observed that Article 96(11) of CEPA contemplated that the parties shall appoint their respective arbitrators and jointly appoint the presiding arbitrator within 60 days from the date on which the dispute was submitted to arbitration. The assistance of the appointing authority could be sought by either party upon the expiry of this 60-day period. Therefore, Article 96(11) did not provide for a separate or different timetable for appointment of the presiding arbitrator.

The tribunal also observed that India missed the 60-day deadline for appointing its own arbitrator, and the parties had failed to reach an agreement on the presiding arbitrator, after which the PCA Secretary-General was permitted to act on Nissan's request to appoint the arbitrators not appointed by the parties.

The tribunal held that the PCA Secretary-General acted consistently with CEPA procedure by proceeding in



tandem for appointment of the second arbitrator and using the list mechanism to determine the mutually acceptable candidates for presiding arbitrator. It took note of the Secretary-General's decision to defer the final appointment of the presiding arbitrator until the formal appointment of the second arbitrator.

The tribunal concluded that there was no need for the Secretary-General to suspend the list procedure before the appointment of the second arbitrator because his authority to appoint the presiding arbitrator under Article 96(11) was independent of his authority to appoint the second arbitrator under the same provision.

Nissan's pending domestic proceedings did not affect the tribunal's jurisdiction

India also argued that Nissan was barred from proceeding with this arbitration pursuant to Article 96(6) of CEPA because it initiated proceedings in a domestic court and failed to withdraw those proceedings within 30 days of filing this case.

The tribunal rejected India's objection on the basis of the plain text of Article 96(6) of CEPA. It interpreted Article 96(6)'s scope as imposing a bar on only those domestic proceedings that were commenced by a "disputing investor" as defined in Article 96(2) of CEPA for resolution of an "investment dispute." It observed that CEPA defined an "investment dispute" as a dispute alleging loss or damage from a CEPA violation and did not include all disputes arising out of similar facts or involving measures motivated by similar policy concerns.

According to the tribunal, the fact that the domestic proceedings may have involved certain overlapping facts with Nissan's CEPA claims did not change its analysis of Article 96(6)'s clear text. It also cautioned against a tribunal overriding the drafting choices of parties and undertaking what the parties did not undertake in the treaty provisions.

The tribunal ultimately concluded that Nissan's initiation of the domestic court case did not fall afoul of Article 96(6) as these proceedings did not allege a breach of CEPA but rather challenged the constitutionality of Tamil Nadu's amendments to its Value Added Tax legislation.

Nissan's claims were not fundamentally contractual in nature

The tribunal next examined India's objection that Nissan's claims were fundamentally contractual claims under the MoU. According to India, the MoU's dispute resolution clause required that the disputes under the

MoU would be submitted to a domestic arbitral tribunal and excluded all other forums for adjudication of such disputes. It alternatively argued that even if the tribunal accepted jurisdiction over the FET claim, the umbrella clause claim would still be inadmissible because the umbrella clause required importing into the BIT all the parties' obligations under the MoU, including the obligation to abide by the dispute resolution clause. In India's view, Nissan could not approbate and reprobate in respect of the same contract.

The tribunal rejected India's objection. It first held that Nissan was only required to show that the pleaded facts presented a treaty question for the tribunal to decide and not whether the facts as pleaded would definitively prevail on the merits. In the tribunal's view, this formulation was consistent with the approach to preliminary jurisdictional questions articulated by Judge Rosalyn Higgins of the ICJ in her opinion in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*.¹ The tribunal concluded that the facts pleaded by Nissan satisfied this standard.

Thereafter, the tribunal examined the implications of the dispute resolution clause in the MoU. It stated that it would focus on the content of the relevant arbitral agreement, rather than the formalism of its conclusion with Tamil Nadu rather than India.

The tribunal observed that the MoU dispute resolution clause was an exclusive forum selection clause in favour of domestic arbitration for the categories of disputes covered by it. However, it ultimately held that this clause did not foreclose resort to arbitration under CEPA. It noted that international treaty obligations—and the right to enforce them by procedures specified in such treaties—exist on a different level of the international legal order than domestic law rights. It found that there was no clear and convincing evidence to suggest that Nissan waived its rights under CEPA by agreeing to the dispute resolution clause in the MoU.

The tribunal also rejected India's alternative objection relating to the umbrella clause and held that the treaty text did not suggest any such exception for the forum selection clauses in the provincial contracts.

¹ <https://www.icj-cij.org/en/case/90>



Nissan's claims were not time barred

India also argued that the tribunal lacked jurisdiction because Nissan failed to bring its claims before the expiry of the three-year limitation period imposed by Article 96(9) of CEPA. In contrast, Nissan argued that different time bars applied to its FET claims and umbrella claims which made it clear that none of its claims were time barred.

The tribunal dismissed India's objection. It accepted Nissan's pleaded facts *arguendo* only for the purpose of examining this objection and concluded that Nissan's claims were not time barred.

Taxation measures deferred for further consideration

India also argued that Nissan's claims related to "taxation measures" that were excluded from the tribunal's jurisdiction pursuant to Article 10(1) of the CEPA. However, the tribunal deferred this objection for further consideration because it did not have enough information to make a finding on this issue at the preliminary stage.

(Editor's note: Nissan has subsequently withdrawn its claims under the CEPA after reaching a confidential settlement with the GoTN in May 2020.)

Notes: The tribunal was composed of Jean E. Kalicki (president appointed by PCA, United States of American national), Kaj Hobér (claimant's appointee, Swedish national) and Jagdish Singh Khehar (respondent's appointee, Indian national). The decision is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10875.pdf>. The parties have reportedly settled this dispute and withdrawn these proceedings.

Sarthak Malhotra is an attorney based in New Delhi, India.

All claims dismissed in telecommunications case against Canada: Changes in the regulatory environment did not breach F.E.T.

Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16

Anna Sands

Global Telecom Holding (GTH), a joint stock company incorporated under Egyptian laws, entered the Canadian telecommunications market through investment in a Canadian company. The investment took place in the context of Canada's attempts to open the telecommunications market to new operators to foster more competitiveness. GTH claimed that Canada had failed to provide it *inter alia* with fair and equitable treatment and full protection and security due to its maintaining a changing regulatory environment unfavourable to foreign investors.

The tribunal dismissed all claims on merits, apart from the claim under national treatment, which was considered outside the tribunal's jurisdiction. It ordered the Parties to bear the arbitration costs in equal parts and their own legal costs and expenses without contribution of the other party.

Background and claims

In 2007, the Canadian telecommunications market was highly concentrated, its market share being held predominantly by three main carriers (the Incumbents). An auction for a new Advanced Wireless Services (A.W.S.) spectrum was seen as a chance to open the market to new entrants. To this end, a portion of the spectrum was set aside for new operators, and a five-year restriction on transferring licences to the Incumbents was put in place, with all licence transfers requiring approval by the relevant government minister.

GTH entered into investment agreements with Canadian companies where it agreed to advance funds for spectrum licences which would be held by Wind Mobile. To follow Canadian ownership and control rules, GTH as a foreign investor could only hold 20% of voting shares in Wind Mobile. However, the investment agreements gave GTH the right to take voting control of Wind Mobile if the rights were relaxed in the future.

In 2012, the legislation was amended to exempt carriers with less than 10% market share from the foreign ownership restrictions. Nonetheless, transfers of voting shares were still subject to review and approval under the Investment Canada Act, which required the review of investments by non-Canadians that could be injurious

² Shah, A. & Varadhan, S. (2020, May 28). Exclusive: Nissan settles dispute with Indian state over unpaid dues – sources. *Reuters*. <https://www.reuters.com/article/us-nissan-india-arbitration-exclusive/exclusive-nissan-settles-dispute-with-indian-state-over-unpaid-dues-sources-idUSKBN2342AR>



to national security. GTH's application to acquire voting control of Wind Mobile was subject to this review.

In the years following the A.W.S. auction, Canada became concerned about the market consolidating again after the five-year restriction ended. This led to new policies, such as the 2013 Framework, which stated that the review of licence transfers would include, among other factors, the market concentration in spectrum ownership relating to them.

GTH brought a claim to ICSID in 2016, alleging that through the changing regulatory framework and review processes, Canada had violated the standard of national treatment, of F.E.T., and of full protection and security (F.P.S.), amongst others.

Exception to national treatment clause interpreted broadly (but Gary Born dissents)

The tribunal considered that, while the Canada–Egypt BIT contained the obligation of national treatment, the case fell into one of the exceptions provided by the BIT and thus was not within the tribunal's jurisdiction. This interpretation was challenged in Gary Born's dissent, where he argued that the effect of the BIT was that Canada had the right to make further exceptions to the application of the standard but that would require additional procedures which Canada had not fulfilled.

F.E.T. affords protection that is much broader than the minimum standard of treatment required by customary law, following *Vivendi*

GTH argued that Canada had breached F.E.T. by (a) the 2013 Framework, which had the effect of stopping GTH from selling Wind Mobile to an Incumbent, and (b) subjecting GTH to an arbitrary national security review that lacked due process, amongst others.

The tribunal followed GTH's interpretation of the F.E.T. standard, but found that it was not breached on the facts. It found that the standard was much broader than the minimum standard of treatment required by customary law, rejecting Canada's argument and referring to the approaches of tribunals in *Vivendi v. Argentina* and *C.M.S. v. Argentina* (para 482).

A change in the legal framework to reflect market evolution which is not arbitrary or aimed to harm the investor is not a breach of F.E.T.

The tribunal found that the 2013 Framework did not violate F.E.T. Following *E.D.F. v. Romania* and *SARL v. Spain*, a change in the legal framework to reflect market evolution that is not arbitrary nor aimed at harming the investor does not breach the standard (para 563).

Further, for a measure to be arbitrary it would need to be based on an "excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker" (citing *Crystallex v. Venezuela*) (para 561). The tribunal found that as the rationale for the 2013 Framework was to make the market more competitive, which was consistent with the earlier A.W.S. Auction, the measure was not arbitrary.

Due process standard satisfied where the subject of an investigation is afforded a fair opportunity to make their case

The tribunal found that the national security review did not violate F.E.T. It analyzed whether the review had been conducted in accordance with due process, in a non-arbitrary, reasonable, and transparent manner, which are elements of F.E.T. With regards to due process, the tribunal considered that it "should be deemed satisfied where the subject of the investigation is afforded a fair opportunity to make its case in relation to readily identifiable issues, and that opportunity is afforded reasonably ahead of an administrative decision being made based on objectively verifiable factors and after an appropriate time period which is not unnecessarily rushed." (para 608). It found that because Canada had provided GTH with an adequate opportunity to make its case, it did not violate due process.

F.P.S. standard extends beyond physical protection and requires the state to act with "due diligence"

GTH claimed that the F.P.S. of its investment was breached due to the changes in the regulatory framework and the reviews to which its investment was subjected. As it had with the F.E.T. analysis, the tribunal agreed with GTH's interpretation of the standard but found that it had not been violated in this case. It agreed that the standard is not limited to safeguards against physical interference by the state but extends to according to a legal safeguard for the investment. F.P.S. also requires the state to act with "due diligence" to meet this obligation (para 662).

Notes: The tribunal was composed of Professor Georges Affaki (president appointed by both parties, French and Syrian national), Gary Born (nominated by claimant, U.S. national), Professor Vaughan Lowe (nominated by respondent, British national). The award of March 27, 2020, is available at <https://www.italaw.com/sites/default/files/case-documents/italaw11434.pdf>

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UNCITRAL tribunal dismisses claims of German aircraft leasing company against the Czech Republic while upholding its jurisdiction over the intra-EU claim

A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic, PCA Case No. 2017-15

Sujoy Sur

In an award dated May 11, 2020, an UNCITRAL tribunal considered claims brought by the German LLP AMF Aircraftleasing Meier & Fischer GmbH & Co. KG (AMF), under the Germany–Czech Republic BIT against the Czech Republic for acts of its bankruptcy administrators and its courts. The tribunal rejected the investor’s claims of expropriation under Article 4(2), breach of standard of FET under Article 2(1), breach of standard of full protection and security (FPS) by the respondent under Article 2(3), and breach of standard of non-arbitrary or discriminatory measures under Article 2(2).

Background and claims

Václav Fischer, a German business operator born in the Czech Republic, held a majority share in AMF and AVF Aircraftleasing Václav Fischer GmbH & Co. KG, (AVF). Fischer was also the founder of Fischer Air s.r.o. (Fischer Air). In 1997, HSH Nordbank (HSH) financed AMF’s and AVF’s purchase of one aircraft each (Aircraft 1 to AMF and Aircraft 2 to AVF) and also entered into separate loan agreements with Fischer and Meier for Aircraft 1 and with Fischer alone for Aircraft 2. After that, Fischer Air sold Aircraft 1 to AMF and Aircraft 2 to AVF by way of aircraft purchase agreements, and AMF and AVF both leased the aircraft to Fischer Air on a monthly rental basis. In 2003, Fischer sold Fischer Air to Kárel Komarek due to financial difficulties and thereafter lost his majority share in the company, the name of which was changed to Charter Air by Komarek. In 2004, AVF and AMF merged.

In March 2005, Fischer filed for personal bankruptcy in Germany, and insolvency proceedings were opened. However, in February 2005, Komarek’s company Atlantik IB filed a petition for involuntary bankruptcy against Fischer in the Czech Republic, and in April 2005 the Municipal Court opened bankruptcy proceedings against him. The aircraft owned by AMF were included in the Czech bankruptcy proceedings. This inclusion was challenged by both the claimant and Charter Air, but by the time a definitive pronouncement on the exclusion of the aircraft was made by Czech courts, their value had depreciated considerably due to deterioration, and

they had to be sold at very low prices in 2010. After AMF’s claim for damages failed before the Czech courts, the claimant initiated arbitral proceedings under r UNCITRAL rules against the Czech Republic.

The EC submitted an *amicus curiae* brief as a non-disputing party in the proceedings on the issue of jurisdiction.

CJEU’s *Achmea* judgment and subsequent January Declarations are not applicable

The respondent opposed the tribunal’s jurisdiction, contending that in light of the *Achmea* judgment, the tribunal lacked jurisdiction over the dispute as it was brought under an intra-EU BIT. It was further contended that the Declaration of the Member States of January 15, 2019¹ (the January Declarations) constitute a subsequent agreement to Article 31 of VCLT as all EU-members declared arbitration clauses contained in intra-EU BITs to be inapplicable. In its *amicus* brief, the EC contended that the January Declarations following from the *Achmea* judgment led to partial termination of the relevant BIT by virtue of Article 59 of the VCLT.

However, the tribunal disagreed, finding that it had jurisdiction to preside over the dispute, as Article 10 of the BIT constitutes an unambiguous offer to arbitrate. Further, in the view of the tribunal, the January Declarations were mere statements of the political will of the member states to comply with the *Achmea* judgment. The tribunal further concluded the January Declarations do not constitute subsequent agreements on intra-EU BIT disputes under Articles 31(2) and 31(3) of the VCLT, and that it cannot be said that the BIT has been terminated under Articles 30 and 59 of the VCLT on the basis of the January Declarations. Further, even if it is accepted that they constitute subsequent agreements, they cannot be given a retroactive effect from the date when the Czech Republic became a part of the EU.

The tribunal concluded that EU law is a regional system of law; therefore, the *Achmea* judgment of the CJEU, which is a court within a regional sub-system of law, is not binding on the tribunal, which is international in nature. It further held that the *Achmea* judgment does not automatically invalidate Article 10 of the BIT, since the procedures to invalidate a treaty under the VCLT, as given in Article 46 through 53, were not followed. The condition of a manifest violation of internal law, as given

¹ https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en



under Article 46(2) of the VCLT, was not met by the alleged incompatibility between Article 10 of the BIT and Articles 267 and 344 of the TFEU.

The tribunal went on to reject several other possible jurisdictional hurdles raised by the respondent. First, the tribunal rejected the respondent's argument that it lacked jurisdiction *rationae personae* because the claimant did not have a seat in Germany on the grounds that no real business activity was being undertaken by the claimant in Germany from its registered office address in Hamburg. Instead, the tribunal concluded that the claimant, a company with all of its activities in Germany, had made an investment in the Czech Republic by purchasing the aircraft from Fischer Air. On the issue of the tribunal lacking jurisdiction *rationae materiae* on the ground that the claimant's investments are not protected by the BIT, the tribunal held that the lease agreements for the aircraft were entered into by the claimant on a long-term basis for 30 years, and the investment consisted of placing an income-generating asset in the territory of the Czech Republic which was subject to risk; the claimant's investment, therefore, met the ordinary criteria of "investment" as formulated by the *Romak v. Uzbekistan* award and was thus protected under the BIT.

Attribution of acts of bankruptcy trustees and courts to the Czech Republic

The respondent argued that the acts of the bankruptcy trustees cannot be attributed to the Czech Republic under Articles 4, 5, and 8 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).² The tribunal held that irrespective of Article 4 of ARSIWA, the acts of the Bankruptcy trustees are attributable to the Czech Republic by virtue of Article 5 of ARSIWA as they were acting as agents of the Czech Republic while performing public duties. However, the tribunal concluded that since they were performing these duties without specific directions from the state, there was no "overall control" by which the failure of courts to prevent the acts of bankruptcy trustees could be attributed to the Czech Republic.

Acts of the Czech bankruptcy trustees and its courts were not in breach of the BIT

With regard to liability, the claimant put forward several arguments attributing the conduct of the Czech

bankruptcy courts to the state claiming these amounted to a violation of the BIT. With respect to the seizure of the aircraft, the tribunal held that the claimant failed to prove that the bankruptcy trustee had acted in bad faith and not in compliance with Czech national law by seizing the aircraft and including them in the bankruptcy estate of Fischer. Since the claimant failed to justify its claim for exclusion of the aircraft multiple times before the Czech courts, the tribunal held that the claimant was unable to demonstrate that the courts failed to carry out their supervisory functions in accordance with the law.

The claimant also alleged that there was a failure on the part of the bankruptcy trustees and the courts to prevent damage to the aircraft. The tribunal took note of the fact that multiple attempts were made by the bankruptcy trustee to lease the aircraft, but the negotiations were frustrated at separate stages by the claimant's financing bank, HSH, and the claimant, as they refused to grant approval for leasing the aircraft, which led to a lack of funds for maintenance and insurance of the aircraft against continuing deterioration. On this basis, the tribunal held that the claimant did not provide sufficient proof that the bankruptcy trustee had acted in breach of his obligations, nor that there was a failure by Czech courts to exercise due supervision.

With respect to the delay in selling the aircraft and their subsequent low selling price, the tribunal held that besides the sale of the aircraft being carried out in accordance with the rules and regulations of Czech law, there was also no lapse on the bankruptcy trustee's part in performing his duty to inform the claimant of the potential sale and seeking consent for it. The tribunal further held that there was no delay from the Czech courts in deciding the challenges put forth by the claimant against the bankruptcy process; therefore, the duration between seizure and sale of the aircraft did not amount to expropriation. The acts of the bankruptcy trustees, as a whole, were found by the tribunal to be in accordance with their legal obligations under Czech law and were without bad faith.

With regard to claims of expropriation, the tribunal, relying upon the *Saluka* and *Binder* awards, concluded that the temporary sequestration of the aircraft during the course of legitimate bankruptcy proceedings cannot amount to expropriation. The claimant failed to show that the sequestration was in bad faith or that the difference in their value between the time of their seizure and their lawful sale amounted to expropriation.

² https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf



Next, the tribunal, while acceding to the claimant's argument that an obligation of FPS goes beyond providing physical protection to include provisions of legal security, held that the Czech Republic was compliant with its due diligence obligations in maintaining a functioning judicial system which was repeatedly utilized by the claimant to redress its grievances. It further held that the Czech bankruptcy law does not fall below international law standards in providing FPS to investors, and thus its actions do not amount to a breach of the FPS standard under the BIT.

The claimant had alleged breach of FET obligations on account of denial of justice to the claimant, violation of claimant's legitimate expectations, and arbitrary and discriminatory treatment by Czech courts and bankruptcy trustees. The tribunal concluded that the claimant has failed to demonstrate any of the above violations on the basis of the same facts that allegedly led to other breaches of the BIT. On the question of Czech law not meeting the FET standard under international law, the tribunal held that the claimant failed to demonstrate that if there are any other such standards in practice which include an additional obligation on the state to ensure a full effective remedy against deterioration of assets embroiled in contested ownerships claims so that they are returned unharmed to the ultimate owner, even when bankruptcy estates have insufficient funds to forestall deterioration.

Based on its findings, the tribunal finally dismissed all the claims of BIT violations of expropriation under Article 4(2), breach of FET standard under Article 2(1), breach of FPS standard under Article 2(3), and breach of standard of non-arbitrary or discriminatory measures under Article 2(2).

The tribunal decided that the parties bear half the cost of the arbitral proceedings and that each party shall bear its own costs.

Notes: The tribunal was composed of Pierre Tercier (presiding arbitrator, Swiss national), Stanimir Alexandrov (claimant's appointee, Bulgarian national) and Jean Kalicki (respondent's appointee, United States). The award of May 11, 2020, is available at: <https://www.italaw.com/sites/default/files/case-documents/italaw11589.pdf>

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ICSID annulment committee annuls Eiser v. Spain Award for improper constitution of the tribunal and severe departure from a fundamental rule of procedure

Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36

Maria Bisila Torao

On June 11, 2020, an ICSID ad hoc committee annulled an award in its entirety on the grounds of serious departure from fundamental rules of procedure. The committee found that a lack of disclosure compromised the independence and impartiality of one of the arbitrators, Stanimir Alexandrov, amounting to the improper constitution of the tribunal and a severe departure from a fundamental rule of procedure.

The Eiser v. Spain award

The award relates to a dispute registered at ICSID under the ECT. On the award rendered on May 4, 2017, by a panel of three arbitrators composed of Prof. John R. Crook, Stanimir A. Alexandrov, and Prof. Campbell McLachlan, the tribunal ordered Spain to pay damages to the claimants for breach of the FET standard under ECT Article 10(1). The tribunal awarded EUR 128 million in damages to Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l., (collectively, "Eiser").¹

The annulment proceedings

Spain's grounds for annulment

Spain put forward several arguments for annulment of the award. It argued that, for the case at hand, "manifest appearance of bias" arose from a long-standing relationship between Alexandrov and the Brattle Group ("Brattle"), in particular Brattle's employee, Carlos Lapuerta,² and from Alexandrov's failure to disclose his relationship with Brattle and this particular employee (Brattle is a company that provides expert testimonies and quantum of damages in international arbitration proceedings).

¹ See Arbitral Award, ICSID Case No. ARB/13/36, available at <https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf>

² Principal of The Brattle Group. Lapuerta acted as an expert on economic analysis and financial valuation in the Eiser v. Spain arbitration, See Arbitral Award, ICSID Case No. ARB/13/36, available at <https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf>



Although Spain requested the annulment of the arbitral award on multiple grounds, the committee examined only the relationship between Alexandrov and Brattle and the extent to which his connections amounted to an improper constitution of the tribunal and to a serious departure from fundamental rules of the arbitral procedure. The committee declared annulment of the arbitral award and indicated that there was no need to address the other grounds for annulment raised by Spain (para. 256).

Improper constitution of the tribunal

Tribunal's interpretation of Article 52(1)(a) of the ICSID Convention

Eiser argued that under Art. 52(1)(a) of the ICSID Convention an award can only be annulled for failure to comply with the steps necessary to constitute the tribunal at the outset of the proceedings (para. 63). The committee rejected this approach, concluding that for the purpose of determining whether the tribunal is properly constituted, Art. 52(1)(a) should be interpreted in light of the context, object, and purpose of the treaty, which empowered the committee to examine whether “the members of the tribunal were and remained (and were seen to be/remain) impartial and independent throughout the proceedings” (para. 178).

After concluding that review under Art. 52(1)(a) extends to situations in which an arbitrator is alleged to have lacked impartiality and independence at any time during the arbitration, the committee turned to determining the applicable standard to establish if an arbitral award should be annulled under said article.

The committee concluded that the “improper constitution” of a tribunal under Art. 52(1)(a) did not prevent the committee from reviewing whether the procedural steps to constitute the tribunal had been appropriately followed at the beginning of the arbitration, as review under Art. 52(1)(a) encompasses situations where an arbitrator is alleged to have lacked impartiality and independence at any time during the arbitration.

The three-step tests

To examine the alleged lack of independence, the committee applied the three-step tests following the approach in *EDF v. Argentina* annulment decision:

1. Was the right to raise this matter waived because Spain had not raised it sufficiently promptly?
2. If not, has the party seeking annulment established that a third party would find evident or obvious

lack of impartiality or independence on the part of an arbitrator on a reasonable evaluation of the facts of the case (the Blue Bank standard)? And,

3. If so, could the manifestly apparent lack of impartiality or independence on the part of that arbitrator have had a material effect on the award? (para. 180).

Eiser argued that Spain had waived its right to object to the connections between Alexandrov and Brattle because Spain should have known about it since they were public domain before the arbitral award was rendered. The committee rejected this argument and explained that there was nothing on the record to prove that Spain had such knowledge. It also noted that “a clear and unequivocal waiver” is needed to surrender a right so fundamental that it goes to the very foundation of the proper constitution of the tribunal. According to the committee, “[s]uch a waiver cannot be established without proof that the party concerned had actual or constructive knowledge of all the facts” (para. 190).

Turning to the second step, the committee had to determine whether the standard for disqualification had been met. For that, the committee adopted the *Blue Bank v. Venezuela* standard that determines that the relevant legal standard is an objective one “based on a reasonable evaluation of the evidence by a third party” (para. 206). The committee’s view was that a third party would have found an evident or obvious bias on an objective assessment of the facts at hand. It further concluded that Alexandrov should have disclosed his relationship with Brattle and particularly with Lapuerta based on an objective assessment of the multiple professional connections and interactions between them.

In this sense, the committee found that the relationship between Alexandrov and Lapuerta created a manifest appearance of bias and, therefore, Alexandrov had an obligation to disclose this relationship (paras 220-228).

Tribunal's interpretation of Article 52(1)(d) of the ICSID Convention

Finally, the committee examined whether there had been a serious departure from a fundamental rule of procedure, and if such departure was serious in terms of Art. 52(1)(a). The committee concluded that the absence of disclosure deprived Spain of the opportunity to challenge Alexandrov during the arbitration proceedings. This constituted a departure from a fundamental rule procedure as it affected Spain’s right to a fair trial and the right to be heard by an independent and impartial decision-maker.



Additionally, the committee found nothing upon examination of the award that could signal that Lapuerta's damages report had no material effect on the reasoning or findings in the award since Lapuerta's model for damages was adopted in its entirety by the arbitral tribunal. The committee also noted that given the fact that it is in the very nature of deliberations that arbitrators exchange opinions before issuing the award "it would be unsafe to hold that Alexandrov's views and his analysis could not have had any material bearing on the opinions of his fellow arbitrators" (paras. 246–247).

Arbitral award annulled in its entirety

The committee found that Alexandrov's failure to disclose could have had a material effect on the award. Hence, the lack of disclosure constituted a serious breach that warranted annulment both under clauses (a) and (d) of paragraph (1) of Art. 52. The committee did not find, as argued by Eiser, that it had the discretion to decide not to annul the award even if the requirements under Art. 52 were met (para. 254), agreeing with the approach taken by the committee in *Pey Casado*, where the committee concluded it has no discretion not to annul an award if a serious departure from a fundamental rule is established.³

Notes: The ad hoc committee was composed of Prof. Ricardo Ramírez Hernández (president), Makhdoom Ali Khan (member) and Judge Dominique Hascher (member). The annulment decision of June 11, 2020, is available at <https://www.italaw.com/sites/default/files/case-documents/italaw11591.pdf> in English and <https://www.italaw.com/sites/default/files/case-documents/italaw11592.pdf> in Spanish.

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³ ICSID Case No. ARB/98/2 Annulment Proceeding <https://www.italaw.com/sites/default/files/case-documents/italaw11100.pdf>



RESOURCES AND EVENTS

RESOURCES

International Trade, Investment, and the Sustainable Development Goals

By Cosimo Beverelli, Jürgen Kurtz, and Damian Raess, published by Cambridge University Press (forthcoming October 2020)

This book examines the ways in which international trade and investment regimes can contribute to or complicate the pursuit of the SDGs. Available [here](#).

Admissibility of Shareholder Claims Under Investment Treaties

By Gabriel Bottini and Uría Menéndez, published by Cambridge University Press (September 2020)

This book examines the admissibility of shareholder claims under investment treaties and proposes specific admissibility criteria. Available [here](#).

Post-COVID-19: Investment Promotion Agencies and the "New Normal"

UNCTAD. Available at <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2819>

Symposium Introduction: Centering voices from the global south on investor-state dispute settlement reform: A debate

By James Thuo Gathii and Olabisi D. Akinkugbe (Afronomics Law)

<https://www.afronomicslaw.org/2020/09/07/symposium-introduction-centering-voices-from-the-global-south-on-investor-state-dispute-settlement-reform-a-debate/>

Flexibility and Innovation in International Economic Law: Enhancing rule of law, inclusivity, and resilience in the time of COVID-19

Katrin Kuhlmann (Afronomics Law)

<https://www.afronomicslaw.org/2020/08/27/flexibility-and-innovation-in-international-economic-law-enhancing-rule-of-law-inclusivity-and-resilience-in-the-time-of-covid-19/>

Asymmetries in Trade and Investment Regimes in the Age of COVID-19 and Beyond: A reflection on subnational government marginalisation and resistance within the trade and investment governance structures

By Ohio Omiunu (Afronomics Law)

Available at: <https://www.afronomicslaw.org/2020/08/26/asymmetries-in-trade-and-investment-regimes-in-the-age-of-covid-19-and-beyond-a-reflection-on-subnational-government-marginalisation-and-resistance-within-the-trade-and-investment-governance-structur/>

Hegemony 101 in International Investment Law

Jena Ho (Afronomics Law)

<https://www.afronomicslaw.org/2020/09/09/hegemony-101-in-international-investment-law/>



EVENTS 2020

October 9

Balancing States' Responses and the Protection of Foreign Investors in the (Post) Pandemic World.

14:00–17:30 CET

<https://www.transnational-dispute-management.com/news/20201009.pdf>

Register by sending an email to:
credimi.secretariat@u-bourgogne.fr

October 22

Webinar and Book Launch: Mediation in international investment disputes. 14:00–16:00 CET

https://www.eventbrite.co.uk/e/webinar-and-book-launch-meditation-in-international-investment-disputes-registration-116997297065?utm_campaign=post_old_publish&utm_medium=email&utm_source=eventbrite&utm_content=shortLinkViewMyEvent



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