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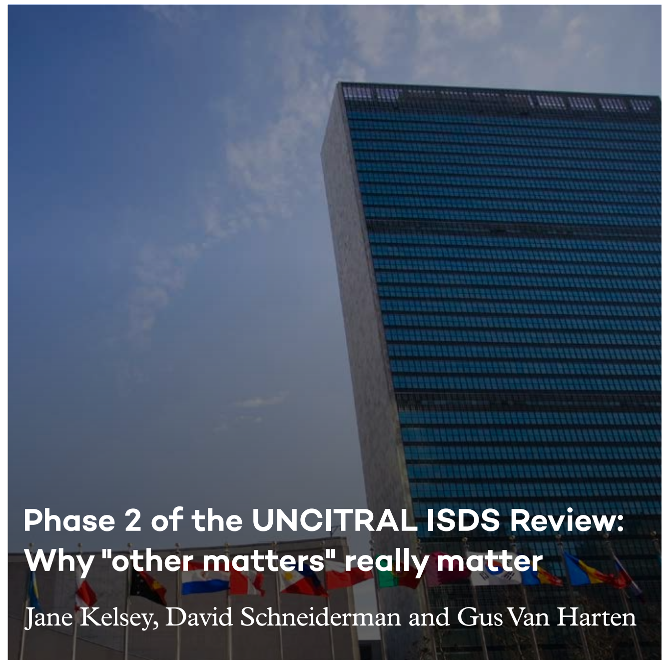
**Politically Motivated Conduct in Investment Treaty Arbitration**

Jonathan Bonnitcha and Zoe Williams



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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 |
| **VCLT** | Vienna Convention on the Law of Treaties |
| **WTO** | World Trade Organization |

INSIGHT 1

# Politically Motivated Conduct in Investment Treaty Arbitration

Jonathan Bonnitcha and Zoe Williams

## Introduction

The investment treaty regime grants foreign investors legal protection from adverse conduct of the host states in which they invest. In determining whether respondent states have violated these treaties, international arbitration tribunals pass judgement on a wide range of governmental measures that emerge from diverse decision-making processes. Foreign investors have used investment treaties to challenge legislation passed by democratically elected parliaments, regulations adopted by specialized agencies as a result of lobbying, and exercises of executive discretion taken in response to popular protest or social unrest.[1] Such disputes affect not just the host state and investor, but an array of third parties—citizens, domestic industries and civil society groups.

To date, public debates have focused on the extent to which investment treaties limit governments' ability to achieve particular policy objectives, such as public health,[2] environmental protection[3] and financial stability.[4] These debates have generated important insights, but tend to frame investment disputes as technocratic disagreements about the objectives and efficacy of regulatory measures. This framing overlooks important questions about the relationship between investment treaties and democratic processes at the national and sub-national levels.[5] It also obscures cross-cutting issues, including the fact that many investment treaty claims arise from shifts in political priorities associated with changes in government or deep-rooted disagreements about the distribution of the benefits and costs associated with investments.[6]

In contrast, the relationship between the investment treaty regime and domestic political contestation is central to the way investment disputes are litigated. A common strategy for foreign investors is to assert that the host state's treatment of the investment was "politically" motivated. For example, in *Bilcon v. Canada* the claimant argued: "Bilcon should have been entitled to expect that its progression through the regulatory process would have been free from political interference and political considerations. However, politics derailed a typically smooth regulatory process."[7] Dozens of other

[1] Van Harten, G. (2013). *Sovereign choices and sovereign constraints: Judicial restraint in investment treaty arbitration*. Oxford: Oxford University Press; Cotula, L. & Schröder, M. (2017). Community perspectives in investor–state arbitration. *IIED Land, Investment and Rights Series*. London: International Institute for Environment and Development (IIED). Retrieved from http://pubs.iied.org/pdfs/12603IIED.pdf

[2] See, e.g., Vadi, V. (2014). *Public health in international investment law and arbitration*. London: Routledge; Voon, T. & Mitchell, A. D. (2012). Implications of international investment law for plain tobacco packaging: Lessons from the Hong Kong–Australia BIT. In T. Voon, A. D. Mitchell & J. Liberman (Eds.), *Public health and plain packaging of cigarettes: Legal issues* (137–172). Cheltenham, United Kingdom: Edward Elgar.

[3] See, e.g., Tienhaara, K. (2009). *The expropriation of environmental governance: protecting foreign investors at the expense of public policy.* Cambridge: Cambridge University Press.

[4] See, e.g., Tams, C. J., Schill, S. W. & Hofmann, R. (Eds.). (2017). *International investment law and the global financial architecture.* Cheltenham, United Kingdom: Edward Elgar.

[5] Scholars who have considered the relationship between investment treaties and national democratic processes include Schneiderman, D. (2010). Investing in democracy? Political process and international investment law. *University of Toronto Law Journal*, *60*(4), 909–940; Cotula, L. (2017). Democracy and international investment Law. *Leiden Journal of International Law*, *30*(2), 351–382, p. 364.

[6] Williams, Z. (2016). *Risky business or risky politics: what explains investor-state disputes?* Unpublished Ph.D. dissertation (on file).

[7] *Bilcon v. Canada*, PCA Case No. 2009-04, Reply Memorial of the Investors, December 21, 2011, para. 556. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw1490.pdf

examples could be cited.[8] In labelling state conduct as "political," investors imply that the host state has failed to live up to some unarticulated ideal of rational, technocratic decision making.

Such disputes raise empirical questions about how arbitral tribunals distinguish legitimate and illegitimate influences over government decision making, and normative questions about the extent to which investment treaties should insulate foreign investors from the vagaries of domestic political contestation. In the discussion that follows, we outline how our research—part of an ongoing project—seeks to tackle these questions and highlight some of the findings and conclusions that have already emerged from the project.

## A framework for understanding tribunals' discussion of domestic political contestation

One immediate challenge for research into the intersection between the investment treaty regime and domestic political contestation is the breadth of the word "political." A law passed by a democratically elected parliament in response to public opinion is clearly political. An autocrat's intervention in domestic criminal proceedings to ensure that a rival for office is jailed is also political, albeit in a different sense. However, many foreign investors, and some arbitral tribunals, use the word "political" as if it were a catch-all term connoting impropriety in government decision making.

Several investment arbitration cases illustrate the variety of influences over government decision making that investors describe as "political." In *Yukos v. Russia*, the investor alleged that the initiation of tax proceedings against the Yukos oil company was "politically motivated," in the sense that the proceedings were part of a conscious attempt to destroy a high-profile political opponent of Vladimir Putin.[9] In *Tecmed v. Mexico*, the investor asserted that the decision to close down its hazardous waste facility following alleged breaches of conditions attached to its environmental permit was motivated by "political considerations," in the sense of being driven by the local community's opposition to the facility's continued operation at its existing location.[10] In *AES v. Hungary*, the investor asserted that an amendment to the electricity act facilitating the re-regulation of electricity pricing in Hungary was adopted for "political reasons" in the sense of being motivated by public concern about the excessive profitability of electricity generators.[11]

Rather than proposing our own definition of politically motivated conduct, we think it more productive to begin by mapping the variety of state conduct characterized by tribunals as politically motivated or influenced. Our first step is to code all publicly available arbitral awards for evidence of arbitral discussion of domestic political contestation. Using text-based search functions, we have coded awards for use of 25 different word stems, such as politic-, democra-, and elect-, that indicate the presence of a discussion of a domestic political process within the host state. In this way, we seek to identify the complete set of cases in which arbitral tribunals have engaged with processes of domestic political contestation.

"Many foreign investors, and some arbitral tribunals, use the word "political" as if it were a catch-all term connoting impropriety in government decision making."

The second step of our project aims to identify the variety of processes of domestic political contestation with which tribunals have engaged. We observe variation in several dimensions:

[8] E.g., *Urbaser v. Argentina*, ICSID Case No. ARB/07/26, Award, December 8, 2016, para. 864. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf; *Stati v. Kazakhstan*, SCC Case No. V 116/2010, Award, December 19, 2013, para. 906. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw3083.pdf; *Karkey v. Pakistan*, ICSID Case No. ARB/13/1, Award, August 22, 2017, para. 208. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw9767.pdf; *Vivendi v Argentina (II)*, ICSID Case No. ARB/03/19, Award, April 9, 2015, para. 5.6.3. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw4365.pdf; *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12, Claimant's Memorial on the Merits and Quantum, March 29, 2013, para. 381. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw1425.pdf; *von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, paras. 163, 503. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf

[9] *Yukos v. Russia,* PCA Case No. AA 227, Final Award, July 18, 2014, para. 132. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf

[10] *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/02, Award, May 29, 2003, paras. 42, 127–128. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf

[11] *AES v. Hungary*, ICSID Case No. ARB/07/22, Award, September 23, 2010, para. 9.1.7. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf

a) **Type of pressure or motivation** to which the host state is responding. We distinguish between popular pressure from broad interest groups, the influence of lobbyists or "special interest" groups,[12] and state actors' conscious and specific intent to harm an investor. These distinctions are important, because different types of pressure are associated with different *objectives* pursued by groups or actors with different patterns of *membership*.

b) **"Source" of the state measure** in question, which may be the executive, legislative or judicial branches of government. This is relevant because different branches of government adopt distinct decision-making processes and may have competing priorities and policy preferences.

c) Whether the measure is **addressed to an individual investor or applies generally.**

Other dimensions that are potentially relevant include the **industry** targeted by the measure, and the **level of development** and **form of government** in the host state. Taken together, these dimensions give us a much more nuanced picture of tribunals' engagement with domestic decision making.

## Simplified illustration of our framework (two dimensions shown), populated with well-known cases

| | Executive | Legislative | Judicial |
|---|---|---|---|
| Broad interest group pressure | *Tecmed v. Mexico*<br>*Bilcon v. Canada*<br>*Biwater v. Tanzania* | *AES v. Hungary*<br>*Glamis Gold v. United States* | *Al Warraq v. Indonesia* |
| Special interest group pressure (lobbying; clientelism) | *SD Myers v. Canada* | *Methanex v. United States* (alleged, not proven) | |
| Intent to harm the investor | *Yukos v. Russia*<br>*Tokios Tokeles v. Ukraine* (alleged, not proven) | | |

Source: Prepared by the authors.

[12] Schattschneider, E. E. (1960). *The semisovereign people: A realist's view of democracy in America.* Boston: Wadsworth, p. 25.

The third step of the project examines how tribunals evaluate domestic political contestation in different contexts. Our preliminary analysis suggests several interesting patterns in tribunals' attitudes to political contestation. Unsurprisingly, tribunals seem to regard state conduct that is motivated by a conscious intention to harm an investor as in breach of investment treaties, in circumstances where that intention can be proven. However, our analysis also suggests that variation in tribunals' attitudes is not solely a function of the source or type of political pressure. For example, looking only at cases in which the investor alleges that the executive branch took investor-specific measures in response to broad interest group pressure, we can identify some cases in which tribunals have held that the host state breached the investment treaty *due* to the interest groups' influence,[13] and others in which the tribunal held that the political context was *not relevant* in determining whether the treaty has been breached.[14]

## Implications

Notwithstanding the ubiquity of allegations of "politically" motivated conduct in investment treaty arbitration, our research suggests that tribunals lack both a coherent conception of what constitutes politically motivated conduct and a consistent understanding of the relevance, if any, of such motivations for the disposition of foreign investors' legal claims. Our framework illustrates that tribunals' vague references to political motivations behind state conduct collapse important distinctions between disparate influences over different branches of government. This insight has normative implications. Investors regularly characterize state conduct as "political" in order to discredit the conduct in question. But certain forms of political responsiveness are both normal and desirable in democratic societies. It is entirely appropriate for democratic legislatures to take public opinion into account, or for executive agencies to seek input from those affected by their decisions.

[13] *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, paras. 505, 604. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf; Cf. *Bilcon v. Canada*, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, March 10, 2015, para. 49. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw4213.pdf

[14] *Bear Creek Mining v. Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, paras. 401–412. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf

Our research also highlights the different ways in which tribunals have responded to state conduct that emerges from the process of domestic political contestation. While tribunals have not always been consistent with one another, we also observe a reflexive distrust of domestic political contestation among many tribunals. This also has normative implications. For example, in a forthcoming publication, we argue that many tribunals regard influence of broad interest groups over executive decision-making processes as inherently illegitimate, even though this distrust of politically motivated conduct is difficult to justify from either a public law or a private law perspective.

"Investors regularly characterize state conduct as "political" in order to discredit the conduct in question. But certain forms of political responsiveness are both normal and desirable in democratic societies. It is entirely appropriate for democratic legislatures to take public opinion into account, or for executive agencies to seek input from those a ected by their decisions."

Finally, our research speaks to wider debates about investment treaties. There is a vast body of literature in the discipline of political science on the way that different groups seek to advance their goals and interests by influencing policy-making. Legal constraints that limit or exclude the possibility of such influence have clear distributive implications. When tribunals hold states liable for responding to pressure from broad interest groups, foreign investors benefit at the expense of the host state or the interest group in question (or, perhaps, both). Arbitral jurisprudence about the legitimate scope for political influence over state conduct may well have a wider impact on the way that states resolve potential investment disputes that never reach arbitration. Tribunals' distrust of politics may discourage host states from responding to domestic constituents' demands.

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INSIGHT 2

# Phase 2 of the UNCITRAL ISDS Review: Why "other matters" really matter

Jane Kelsey, David Schneiderman and Gus Van Harten

UNCITRAL conferred a broad mandate on Working Group III to consider possible reform of ISDS.[1] In Phase 1 governments identified and considered concerns about ISDS. Phase 2, where they consider whether reform is desirable in light of those concerns, is well advanced. The meeting in New York in April 2019 was expected to conclude this phase and decide how to pursue the final phase, in which governments will develop any relevant solutions to recommend to the Commission.[2]

The UNCITRAL process acknowledged from the start that current criticisms of the investment law regime "reflect concerns about the democratic accountability and legitimacy of the regime as a whole."[3] Investor–state arbitration, in particular, is challenged for, among other things:

- Displacing domestic adjudicatory decisions and domestic law and institutions
- Operating against the interests of developing states
- Creating conditions for regulatory chill
- Establishing a fundamental asymmetry in legal protection
- Creating an exclusive category of international dispute settlement for foreign investors
- Permitting monetary awards of very large size to investors who are affected negatively by sovereign conduct
- Omitting institutional safeguards against conflicts of interest
- Creating other forms of unfairness in the arbitration process.

There are also fundamental questions about whether the costs of investment treaties, particularly as a result of ISDS, outweigh their purported benefits as tools for attracting sustainable investment, depoliticizing disputes and improving the rule of law.

Hence, UNCITRAL was urged "to take a holistic view of the system, especially of whether it was achieving its purported objectives, when considering and designing any ISDS reform."[4]

However, this reform process has become unduly narrow. First, the scope has been limited to issues of procedure and not substance, even though interventions from a number of participating governments have argued that substantive rules of investor protection and ISDS are in key respects inseparable.[5] Second, those procedural discussions were then concentrated on three

[1] United Nations. (2017). *Report of the United Nations Commission in International Trade Law* (A/72/17), para. 264. Retrieved from http://undocs.org/A/72/17

[2] See Brauch, M. D. (2018). Multilateral ISDS reform is desirable: What happened at the UNCITRAL meeting in Vienna and how to prepare for April 2019 in New York. *Investment Treaty News*, *9*(4). Retrieved from https://www.iisd.org/itn/2018/12/21/multilateral-isds-reform-is-desirable-what-happened-at-the-uncitral-meeting-in-vienna-and-how-to-prepare-for-april-2019-in-new-york-martin-dietrich-brauch

[3] United Nations Commission on International Trade Law (UNCITRAL). (2017, April 20). *Possible future work in the field of dispute settlement: Reforms of investor-state dispute settlement (ISDS): Note by the Secretariat* (A/CN.9/917), para. 12. Retrieved from http://undocs.org/A/CN.9/917

[4] UNCITRAL. (2018, May 14). *Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, April 23–27, 2018)* (A/CN.9/935), para. 97. Retrieved from https://undocs.org/en/A/CN.9/935

[5] Indonesia most recently expressed this view in a paper slated for discussion at the April 2019 session: UNCITRAL. (2018, November 9). *Possible reform of investor-state dispute settlement. Comments by the Government of Indonesia* (A/CN.9/WG.III/WP.156). Retrieved from http://undocs.org/A/CN.9/WG.III/WP.156

categories of concerns, pertaining to (1) consistency, coherence, predictability and correctness of arbitral decisions; (2) arbitrators and decision-makers; and (3) cost and duration of ISDS cases. Limiting the issues covered in Phase 2 will, in turn, constrain any reform efforts during Phase 3.

The UNCITRAL secretariat's scoping paper recognizes that governments might wish to consider other relevant issues.[6] However, other fundamental concerns raised by various developing countries have been relegated to "other concerns."[7] There was no space to discuss them at the last session and, while the chair stated that there would be at the April 2019 session, they do not appear on the draft agenda for that session.[8]

This note addresses three issues at the heart of the legitimacy crisis confronting the international investment regime that should inform the remainder of Phase 2.

## 1. The right to participation by affected parties

Any person who has an affected interest should have a right to standing in a legal proceeding, at least to the extent of that interest. Yet this basic right is grossly disrespected in ISDS. When foreign investors sue countries, they often make allegations and raise issues that affect others who have no legal right to participate, because ISDS excludes others from the process of deciding foreign investor claims. Therefore, investors can make allegations against people and organizations that have no right to reply. Where the person has been denied the right of standing, an ISDS tribunal risks making a decision that harms someone without having heard from him or her. That is deeply unfair. While the procedural option of appointing an *amicus curiae* can be very helpful, its purpose is very different. *Amicus* was never meant as a substitute for the right of standing.

In a fair process, all affected parties would have notice of the claim and its relevance to their interests and an opportunity to decide whether to seek standing to the extent of their affected interest. As the proceedings unfold, it may emerge that the party can provide facts that the investor and government could not or did not provide. To protect their rights or interests effectively, the affected party should also have access to the relevant evidence put before the tribunal, an opportunity to test the evidence, an opportunity to make claims and submit evidence, and so on.

## 2. The rule of law and domestic courts' jurisdiction

ISDS permits foreign investors to circumvent a country's courts, regardless of whether they offer justice and allows foreign investors to avoid the ordinary laws and courts that govern everyone else. In customary international law private parties must exhaust local remedies before their grievances can lead to an international claim against a country. That rule shows respect for the country's institutions and gives the country a chance to fix problems before they are brought to an international tribunal. It also recognizes that the foreign national's choice to enter a country carries a responsibility to accept domestic laws and institutions. Customary law always allowed an international tribunal to waive the duty if a foreign national showed that local remedies were not reasonably available or would be obviously futile to pursue.

In ISDS, foreign investors have been excused from this duty *completely*. This remarkable step has opened up dubious lawyering options for investors, especially by those most able to finance ISDS litigation (that is, large multinationals and the ultra-wealthy), who have the sole discretion to decide on the reliability and suitability of local remedies: they might sidestep the courts by challenging a country's decisions without going to the courts; bring an ISDS claim if they lose in domestic courts; bring disputes to both forums in parallel; or seek an international order of compensation against the country, thus avoiding limits on judicial awards of compensation in domestic law, while also pursuing other remedies—such as the striking down of a law—in domestic courts.

These practices contradict the oft-stated goal of investment agreements and ISDS to enhance the rule of law. A primary means for doing so is to preserve the role of domestic legislative, judicial, and administrative processes in creating, applying, and enforcing legal commitments. The focus should be to strengthen these institutions. An investment court model, much like ISDS, would generate a substitute system for the settlement of investment disputes that risks disincentivizing and undermining this type of reform at the domestic level, especially in the absence of a duty to exhaust local

[6] UNCITRAL. (2017, September 18). *Possible reform of investor-state dispute settlement (ISDS): Note by the Secretariat* (A/CN.9/WG.III/WP.142), para. 19. Retrieved from http://undocs.org/A/CN.9/WG.III/WP.142

[7] UNCITRAL. (2018, September 5). *Possible reform of investor-state dispute settlement (ISDS): Note by the Secretariat* (A/CN.9/WG.III/WP.149), para. 17. Retrieved from http://undocs.org/A/CN.9/WG.III/WP.149

[8] UNCITRAL. (2019, January 7). *Working Group III (Investor-State Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, Annotated Provisional Agenda (A/CN.9/WG.III/WP.155)*, para. 10. Retrieved from http://undocs.org/A/CN.9/WG.III/WP.155

remedies and deference to the domestic institutions.

As ISDS has expanded, the real purpose of the treaties appears to be to allow foreign investors to move their disputes to forums that are financially dependent on their business and which are often unfairly favourable to investors. The end result is the best of both worlds for foreign investors: accountability for others and a way to avoid accountability for themselves.

## 3. Chilling sovereign states' authority and responsibility to govern

Several delegations have raised a systemic and cross-cutting concern about the chilling effect on states' regulatory capacity and sovereignty of vague, pro-investor rules that are enforced through the ISDS mechanism, and that can undermine states' constitutional obligations, subordinate states' responsibilities to regulate in the public interest and the public good, and erode democratic electoral mandates, processes and accountability.

The fiscal costs that contribute to chill include those of preparing a response, including operational and opportunity costs within government and tendering for and appointing counsel. The risk of an investor threatening or lodging a claim with an intent to chill is heightened by the advent of third-party funding. Even where states mount a successful defence, they may not be awarded costs, any sum that is awarded may not fully compensate for the country's fiscal outlay, opportunity costs, and costs from delays in implementing the measure, and the costs award may never be paid.

The impacts of chill are wide-ranging. When measures designed to advance the public good are stopped, delayed or weakened, there are always opportunity costs, as well as downstream financial costs, such as for health expenditure or environmental remediation. There may also be non-monetary ecological and human costs, as with delayed action on climate change. Governments face their own legitimacy crises when they are unable to respond to the social, economic, or cultural needs of their citizens, which may carry severe political consequences. Likewise, adjudicatory chill may undermine the rule of law by denying effective access to justice and remedies for vulnerable or exploited communities. The development asymmetries between capital-importing and capital-exporting countries mean the impact of chill cuts most deeply for poorer countries, and for the ability of governments to deliver to the world's most vulnerable communities.

## Criteria for concluding Phase 2

In interpreting the UNCITRAL mandate, Working Group III needs to keep in mind the original impetus for the current reform push, which lies in deep concerns about the democratic accountability and legitimacy of the international investment regime as a whole, and especially of ISDS. The UNCITRAL reform process cannot solve all contentious issues, but if it is to alleviate the accountability and legitimacy crisis to a significant degree, its work plan must include steps to assess whether the issues identified for discussion and potential reform will genuinely address the core concerns.

Those factors should include the specific matters addressed above. More fundamentally, they should reference the objectives of the international investment regime itself. One clear criterion is the ability to fulfil members' commitment to the UN Sustainable Development Goals, including respect for human rights and governance structures that ensure inclusive participatory processes and equal access to justice. Another is whether those concerns will address the current inadequacy of the international investment regime to encourage sustainable new investment for development purposes in states that need it.

In 2018 the UN Secretary General observed that IIAs often have unintended consequences of constraining regulatory space or large financial penalties through arbitral awards, and called for reform policies that align agreements with countries' national development strategies.[9] If the regime is to be made supportive of development and overcome the legitimacy crisis confronting the international investment regime, something more is required than procedural reforms to ISDS on three narrow categories of issues.

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[9] United Nations General Assembly. (2018, July 31). *Report of the Secretary-General on the International Financial System and Development 72/203* (A/73/280), para. 62. Retrieved from http://undocs.org/A/73/280

INSIGHT 3

# Enhancing Environmental Protection in International Investment Law Through the Integration of International Civil Liability Principles

Alessandra Mistura

After more than a decade of debates, it is no longer disputed that the global IIA framework must go through an extensive process of reform to eliminate the asymmetry between foreign investors and host states and ensure a greater balance between their respective rights and obligations.

The need to rebalance the IIA regime is particularly evident in the field of environmental protection. Investment activities can result in significant environmental harm in the host state. In this scenario, both the host state and the victims often face significant challenges in securing remedies, in light of various features of investor–state arbitration, as well as the nature and characteristics of foreign investors, which usually operate as transnational corporations.

Among the potential avenues that could be explored to increase the host state's protection in the face of environmental damage caused by investment activities in its territory is the incorporation of civil liability principles developed in the field of international environmental law into IIAs. Such a solution would allow holding foreign investors liable for the environmental damage caused in the territory of the host state in the performance of their investment activities.

This piece explores how the incorporation of international civil liability principles into IIAs can be achieved. To do so, it first sets out relevant international civil liability principles that could be incorporated. Secondarily, it analyzes the tools available for such incorporation.

## 1. Overview of international civil liability regimes

The term "international civil liability regimes" refers to a series of international conventions concluded to address the potentially devastating consequences of specific activities dangerous to the environment and facilitate civil liability claims by the host state and the victims of such activities within the host state's territory, as well as the restoration of the damaged environment.[1] Such conventions create a uniform system of rules on liability that must be adopted and enforced by the states parties at the national level, through the enactment of the necessary implementing legislation.

International civil liability conventions have been negotiated to deal with the consequences of certain specific ultra-hazardous activities, such as nuclear damage[2] and oil pollution damage.[3] These were soon followed by regimes addressing damages caused by the movement of hazardous goods and waste,[4] living modified organisms,[5] industrial activities on transboundary waters,[6] and damage caused in the

[1] Churchill, R. R. (2002). Facilitating (transnational) civil liability litigation for environmental damage by means of treaties: progress, problems, and prospects. *Yearbook of International Environmental Law*, *12*(1), 3.

[2] For example, the Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 UNTS 251. Retrieved from https://treaties.un.org/Pages/showDetails.aspx?objid=080000028010a6ab; and the Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 UNTS 265. Retrieved from https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800fb0a7, as amended by the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, September 12, 1997, 2241 UNTS 270. Retrieved from https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280079ad5.

[3] For example, the London Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, November 27, 1992, 1956 UNTS 255. Retrieved from https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a5777 [hereafter 1992 Civil Liability Convention].

[4] For example, the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements to the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, December 10, 1999. Retrieved from https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-3-b&chapter=27

[5] Nagoya–Kuala Lumpur Supplementary Liability Protocol to the Biosafety Protocol, October 15, 2010. Retrieved from https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-8-c&chapter=27

[6] Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, May 21, 2003. Retrieved from https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-16&chapter=27

Antarctic region.[7] All these conventions rely on a series of uniform principles, which can be summarized as follows:

- The conventions provide a definition of "damage," which, in most recent treaties, requires the adoption of preventive measures as well as measures of reinstatement of the damaged environment.
- They channel liability for damage through the "operator," that is, the natural or legal person in control of the ultra-hazardous activity.
- Liability is strict, that is, it is imposed regardless of the operator's fault, and is subject to exemptions.
- Liability is limited in amount or time, or both.
- The operator must obtain adequate insurance or provide other financial security.
- Additional tiers of compensation are established for the cases in which the operator is not liable because exemptions from liability apply and for those in which, although the operator is liable, the damage exceeds the caps to liability set out in the conventions.
- The conventions identify the courts with jurisdiction over compensation claims and the applicable law.

In general, international civil liability conventions have had low rates of ratification and entry into force. However, where the relevant convention did enter into force, the application of the principles listed above has been particularly successful in ensuring compensation to the victims. This is the case of oil pollution damage, where the regime set out under the 1992 Civil Liability Convention and related agreements have ensured the payment of more than GBP 674 million in compensation since 1978.[8] This reinforces the idea that international civil liability principles could play a larger role in ensuring liability and facilitating compensation for environmental damage.

## 2. The integration between international investment law and international civil liability principles

The incorporation of international civil liability principles into IIAs could grant the host state and its citizens an additional and powerful safeguard against the adverse effects caused by hazardous economic activities of foreign investors. Such incorporation would, on the one hand, ensure adequate protection to the victims of environmental damage, by providing them access to prompt and adequate compensation, and, on the other hand, facilitate the restoration of the affected environment to its original condition.

In practice, incorporation could occur in three different ways, discussed in the sections below.

### a. Investor's liability

As a first step, IIAs could specifically provide that the investor shall be liable for the environmental damage caused in the performance of its investment activities in the host state, thus being treated as an "operator" for the purpose of international civil liability regimes.

With respect to the definition of "investment" relevant for the purpose of attaching liability to the investor, this should coincide with the definition of protected "investment" under the IIA. This would allow avoiding the risk of restricting liability to investments in certain activities, while at the same time omitting certain equally dangerous activities to which no liability would attach.

### b. Environmental investor obligations

Alternatively or in addition to the above, IIAs could provide for specific investor obligations, which are being increasingly recognized as a tool that could rebalance investor's rights and responsibilities under IIAs,[9] with a view to enhancing the protection of the environment.

For example, IIAs could incorporate the provisions of certain international civil liability conventions relating to the adoption of preventive or reinstatement measures. In this case, the investor would be required to put in place

[7] For example, Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty on Liability Arising from Environmental Emergencies. Retrieved from https://ats.aq/documents/recatt/Att249_e.pdf

[8] International Oil Pollution Compensation Funds (IOPC Funds). (2017), *Annual Report 2017*, p. 17. London: IOPC Funds. Retrieved from https://www.iopcfunds.org/publications

[9] UNCTAD. (2018). *UNCTAD's reform package for the international investment regime*. Geneva: UNCTAD. Retrieved from https://investmentpolicyhub.unctad.org/Upload/UNCTADs%20Reform%20Package_web_09-03-2018.pdf; IISD. (2018, April). *Integrating investor obligations and corporate accountability provisions in trade and investment agreements*. Geneva: IISD. Retrieved from https://www.iisd.org/library/integrating-investor-obligations-and-corporate-accountability-provisions-trade

all necessary preventive measures to avoid serious and imminent danger of environmental damage caused by its investment activity in the host state. If environmental damage has already occurred, the investor would instead be required to take all practicable and necessary measures to reduce, contain or manage the damage and restore the environment to its original condition.

IIAs could also establish obligations on investors aimed at providing prompt and adequate compensation to the victims of environmental damage caused by their investment activities, in accordance with a strict liability standard and subject to exemptions in the event the occurrence of damage was completely outside the investor's control. Moreover, IIAs could also require investors to obtain adequate insurance coverage or other financial security covering damages arising from investment in the host state, thereby also facilitating the victims' access to compensation.

In both cases under a. and b., it might be argued that the provision of such obligations in IIAs may be redundant, especially when similar provisions are included in the host state's domestic law and the applicable IIA provides for the investor's obligation to comply with the domestic law of the host state. However, directly including such obligations in IIAs may still prove useful where domestic law does not actually contain similar obligations, or in cases in which the transboundary nature of the investor's activities or structure hinders effective access to environmental remedies.

### c. Additional tiers of compensation

While the inclusion in IIAs of environmental investor obligations or provisions imposing liability on investors for environmental damage is—at least theoretically—straightforward, the incorporation of an additional tier of compensation in IIAs may be harder to achieve.

Civil liability regimes have followed two different approaches to additional compensation mechanisms: one, followed by the nuclear liability conventions, requiring state parties to make available public funds in the event of nuclear accidents, and the other, adopted by oil pollution conventions, establishing international funds financed through industry contributions.

Of these two models, the first option could be more easily integrated into IIAs, as the agreement could simply provide that states parties must make available public funds to cover environmental damage caused by investments of their nationals in the territory of the other party. The second option could create implementation challenges, such as the need for the interested states to enter into a separate agreement governing the functioning of the fund, or the identification of the investors that would be required to contribute to the fund.

## 3. Conclusion

From a theoretical perspective, there is no general, inherent incompatibility between the principles governing civil liability regimes and IIAs. Indeed, investor obligation provisions have already begun to appear in newer generation IIAs and model IIAs,[10] while the imposition of civil liability on investors has been advocated for in some model IIAs developed by scholars.[11] Therefore, these developments could be driven further, to strike a more equitable balance between investor protection and environmental concerns of the host state.

In practice, however, the incorporation may be harder to achieve. Leaving aside the issue of whether states would be willing to pursue this solution, the first difficulty lies in developing appropriate mechanisms that would allow transposing into IIAs the most complex principles of civil liability, such as the provision of additional tiers of compensation. Secondarily, a procedural reform of ISDS would also be necessary, creating appropriate procedural avenues for victims and host states alike to enforce their substantive rights under the reformed IIA regime against investors.

#### Author

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[10] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria [Morocco–Nigeria BIT], December 3, 2016, Art. 14. Retrieved from https://investmentpolicyhub.unctad.org/Download/TreatyFile/5409; Southern African Development Community (SADC). (2012, July). *SADC model bilateral investment treaty template with commentary*, Article 21. Gaborone: SADC. Retrieved from http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf; Government of India. (2015). *Model text for the Indian bilateral investment treaty*. Retrieved from http://indiainbusiness.nic.in/newdesign/upload/Model_BIT.pdf

[11] Mann, H., von Moltke, K., Peterson, L. E., & Cosbey, A. (2005). *IISD Model international agreement on investment for sustainable development: negotiators' handbook*. Geneva: IISD. Retrieved from https://www.iisd.org/library/iisd-model-international-agreement-investment-sustainable-development-negotiators-handbook; see also IISD, 2018, *supra* note 9.

INSIGHT 4

# Protecting Social Rights Using the Amicus Curiae Procedure in Investment Arbitration: A smokescreen against third parties?

Maxime Somda

The participation of a third party in investment arbitration is a relatively recent practice.[1] It is based on the fact that investment arbitration involves a state party bound to protect the common interest and usually addresses general measures and questions of public interest. The amicus curiae (friend of the court) is an entity or person not party to the dispute who wishes to present legal arguments before a court or arbitral tribunal.[2] Although third parties are supposed to simply assist the arbitral tribunal, they often seem to defend causes similar to those defended by one of the parties to the dispute. These causes include internationally recognized social rights, which the facts of the case may threaten.

Amici curiae are admitted under strict conditions in order to protect the equal rights of all parties in the dispute. The admission of amici curiae also lends legitimacy to the investment arbitration process. This calls for an examination of the consideration arbitral tribunals give to the pleadings submitted by amici curiae—in this case, to the arguments relating to social rights. This piece will cover the already problematic question of admission (Section 1) and the issue of the place of social rights in amicus curiae briefs (Section 2) and examine the impact of the arguments (Section 3) for lessons to be drawn (Section 4).

## 1. Evolution of the approach to admitting an amicus curiae

The admission of amici curiae has evolved through the clarification in arbitration rules and investment treaties of the mandate of the arbitrator. Indeed, decisions to refuse amici curiae were based on the consensual nature of arbitration,[3] while decisions to admit them were based on the procedural nature of the amicus curiae,[4] the presence of a public interest[5] or the procedure's legitimizing effect.[6]

Arbitration rules and investment treaties also established the jurisprudence relating to the conditions of admission.[7] They require that petitioners demonstrate their economic independence, the existence of an alternative argument and a general or significant interest, as well as to respect the material context of the dispute and the procedural equality of the parties. Some treaties implicitly reference jurisprudence by citing examples of conditions.[8]

However, despite being nonprohibitive,[9] these conditions remain restrictive (lack of a right to amicus curiae,

[1] *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to intervene as "Amici Curiae," January 15, 2001. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf

[2] Grisel F., & Vinuales E.-J., (2007). *Amicus curiae in investment arbitration. ICSID Review, 22*(2). 380–432.

[3] *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005, para.13. Retrieved from https://www.italaw.com/cases/57

[4] *Aguas Provinciales de Santa Fe S.A.and Others. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, March 17, 2006, paras. 11–13. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0803.pdf

[5] *United Parcel Service of America, Inc. v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, October 17, 2001, para. 70. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0883.pdf

[6] *Aguas Argentinas S.A and others v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, May 19, 2005, paras. 20–22. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0815.pdf

[7] See ICSID Arbitration Rules (2006), Art. 37(2). Retrieved from https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf; UNCITRAL Arbitration Rules (2013), Article 1(4). Retrieved from http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf

[8] See Free Trade Agreement between New Zealand and the Republic of Korea, March 23, 2015, Art. 10.26. Retrieved from https://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/3629

[9] See ICSID decisions on participation in arbitration: https://icsid.worldbank.org/en/Pages/process/Decisions-on-Non-Disputing-Party-Participation.aspx

limited rights of admitted amici).[10] Moreover, these texts rarely address what consideration should be given to amicus briefs. Some recent treaties specify at most that the tribunal is not required to respond to all arguments[11] or even to discuss any argument at all.[12]

## 2. Place of social rights in amicus curiae briefs

In defending the rights of populations,[13] amici curiae often rely on arguments related to social rights, in particular the right to water,[14] the right to health,[15] the right to food[16] and labour rights.[17] These rights are sometimes cited in connection with the rights to life, dignity,[18] a healthy environment, information and consultation,[19] as well as with public health and the environment.[20]

A variety of texts are cited as providing a legal foundation, including texts concerning human rights and the rights of Indigenous Peoples,[21] soft law instruments on CSR[22] and national constitutions.[23]

In general, the briefs rarely[24] spend time contesting the tribunal's authority to rule on the matter. They are often sympathetic to the position of the state because the action under dispute has arisen either from an individual measure terminating an activity that poses a threat to social rights (mining[25] and water service[26] concessions) or from a general measure aimed at protecting the social rights (regulation of harmful products,[27] agrarian reforms).[28]

## 3. Difficulty of presenting effective arguments relating to social rights

The tribunals' discretion in considering arguments makes it difficult to identify the criteria that determine an argument's success or failure. However, even when no references can be found in the award, one can evaluate the effectiveness of an argument by distinguishing between those that support the application of international human rights law in order to assess states' obligations relating to social rights and those that do not.

Arguments that support the application of international human rights law are never effective, because the tribunals do not accept that a reference to the principles of international law equates to an admission of the applicability of international law universe in the investment treaty.[29]

Likewise, any implication made in the agreement about the applicability of soft law or external standards or the citation of CSR standards[30] or national law in the investment agreement produces the same results.

In contrast, tribunals seem to accept arguments supporting a specific rule of investment law by way of determining the reasonableness of states' actions.[31] Presenting this

[10] Dias Simões, F. (2016). Myopic *Amici?* The participation of non-disputing parties in ICSID arbitration. *North Carolina Journal of International Law*, *42*(3), 791–822. Retrieved from https://icsid.worldbank.org/en/amendments/Documents/5.%20Fernando%20Dias%20Sim%C3%B5es.pdf

[11] See Canada–Burkina Faso BIT, April 20, 2015, Appendix IV.8. Retrieved from https://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/3557

[12] See Canada–Peru BIT, November 14, 2006, Art. 39.6. Retrieved from https://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/793

[13] See *Methanex Corporation v. United States of America*, Submission of Non-Disputing Parties (Bluewater Network and Others), March 9, 2004. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw9151.pdf; *Biwater Gauff LTD. v. Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, para. 379. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf; *Philip Morris Brands Sarl and Others v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Written Submission by the World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, January 28, 2015. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw7422.pdf; *UPS v. Canada*, Amicus curiae Submissions by the Canadian Union of Postal Workers and the Council of Canadians, 20 October 2005. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw8442.pdf; *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Amicus curiae brief submitted by the Association of Human Rights and the Environment–PUINO and Mr. Carlos Lopez, Ph.D. (non-disputing parties), May 9, 2016. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw7517.pdf; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Submission of Amicus Curiae on the Merits of the Dispute, July 25, 2014. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw4195.pdf

[14] See *Biwater Gauff v. Tanzania*, *supra* note 13.

[15] See *Methanex v. United States*, *supra* note 13.

[16] Pac *Rim v. El Salvador*, *supra* note 13.

[17] *UPS v. Canada*, *supra* note 13.

[18] *Pac Rim v. El Salvador*, *supra* note 13.

[19] *Bear Creek v. Peru*, *supra* note 13.

[20] *Methanex v. United States*, *supra* note 12, para. 16 et seq.

[21] See Bear *Creek v. Peru*, *supra* note 13, citing ILO Convention no. 169.

[22] See the reports on the right to water cited in the brief submitted in the *Methanex* case, *supra* note 13, para. 16.

[23] *Piero Foresti and Others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Petition for Limited Participation as Non-disputing Parties, July 17, 2009. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0333.pdf

[24] See *Pac Rim v. El Salvador*, Application for Permission to proceed as Amici Curiae, March 2, 2011. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0609.pdf

[25] See *Bear Creek* case. Retrieved from https://www.italaw.com/cases/2848

[26] See *Biwater Gauff* case. Retrieved from https://www.italaw.com/cases/157

[27] See *Philip Morris* case. Retrieved from https://www.italaw.com/cases/460

[28] See *Piero Foresti* case. Retrieved from https://www.italaw.com/cases/446

[29] See *Borders Timbers and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No.2, para. 57. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita1043.pdf. That order states that petitioners must demonstrate that inapplicability of international human rights law would render the judgement "legally incomplete" (para. 58).

[30] See the brief in the *Bear Creek* cases (argument on social licence only accepted in the dissenting opinion of September 12, 2017, para. 36). Retrieved from https://www.italaw.com/cases/2848

[31] The *Methanex* tribunal notes that "(t)he International Institute for Sustainable Development (IISD), in its carefully reasoned *Amicus* submission, also disagrees with Methanex's contention that 'trade law approaches can simply be transferred to investment law.'" *Methanex v. United States*, Award, August 3, 2005, Part IV, Chapter B, p. 13, para. 27. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf. The tribunal in *Biwater Gauff* finds the amici arguments "useful" and "relevant," adding that "specific points arising from the amici's submissions are returned to in that context" (*Biwater Gauff v. Tanzania. supra* note 13, paras. 392, 359).

type of argument is tricky, because it establishes proximity between the arguments of the amici and the tactics of the state, such that the former could support or even make the state's case.[32] This proximity can sometimes determine the consideration of amici arguments.[33]

Also included in this category are arguments that require the interpretation of certain standards (for example, FET) in a way that is advantageous to the state, even if their relevance is not explicitly analyzed in the tribunal reasoning.[34]

## 4. Desirability of demonstrating the existence of a constant protection of social rights

In the short term, amici should adopt arguments based on investment law. They could demonstrate that the state has acted normally by showing that social rights obligations have been upheld. The reports, recommendations and decisions of human rights bodies could be used to support the argument.

In the long term, states could increase the chance of successfully presenting this type of argument by including investor obligations in the provisions of investment treaties, which would encourage the admission of states' counterclaims supported by the amici curiae and abet the success of arguments based on applicable law.

Finally, if the identity of the entity presenting the argument is truly significant,[35] international organizations with an explicit mandate to protect human rights can follow the example of European Commission initiatives[36] by requiring an amicus curiae brief in any arbitration to which a member state is a party.


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[32] See *Methanex v. United States*, supra note 13, para. 2.

[33] Refusal of an argument not raised by the state (*Borders Timbers*, *supra* note 29, paras. 60–61).

[34] See *Bear Breek v. Peru*, supra note 13, para. 16.

[35] Cross C., & Schliemann-Radbruch, C. (2013). When investment arbitration curbs domestic regulatory space: consistent solutions through amicus curiae submissions by regional organisations. *De Gruyter*, *6*(2), pp. 99–102.

[36] See *AS Norvik Banka and Others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Procedural Order No.3, October 30, 2018. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw10169.pdf

# NEWS IN BRIEF

## *Achmea* judgement fallout: 22 EU member states agree to terminate intra-EU BITs

Twenty-two EU member states endorsed a political declaration on January 15, 2019, where they announced a series of actions involving existing intra-EU BITs and upcoming or ongoing investment arbitration.

The reason behind this series of changes is a CJEU ruling in the *Achmea. v Slovak Republic* case, which found that certain provisions of the TFEU "must be interpreted as precluding a provision in an international agreement concluded between Member States" that would allow an investor from one member state to initiate arbitration proceedings against another member state.

The political declaration was signed by Austria, Belgium, Bulgaria, Cyprus, Czechia, Denmark, Germany, Estonia, Greece, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and the United Kingdom.

The 22 countries involved have agreed to "terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty, or, where that is mutually recognised as more expedient, bilaterally." They have set a December 6, 2019 deadline for ratifying that plurilateral treaty.

These EU member states will also direct investors to hold off on any new intra-EU arbitration proceedings, and with regard to ongoing cases, will inform the relevant tribunals, and EU member states that are defendants in those cases are to ask the relevant courts to either drop intra-EU investment arbitration awards or to make sure these are not put into effect.

## European Economic and Social Committee recommends improvements, clarifications for MIC discussions

The European Economic and Social Committee (EESC) has weighed in on the European Commission's recommendation for a European Council decision to launch negotiations on the proposed MIC, supporting discussions on ISDS reform while noting areas for improvement.

The European Council already gave its backing last year to the Commission's recommendation for launching MIC negotiations with interested parties, and approved final negotiating directives.

Since then, the European Commission has continued consultations with stakeholders on the subject and has submitted its proposal to the UNCITRAL Working Group III process for multilateral ISDS reform ahead of its April 2019 meetings.

The EESC opinion, issued on March 22, 2019, says that the committee "welcomes the EU Commission's efforts towards a multilateral reform of ISDS under the auspices of UNCITRAL and considers it vital that the EU remains open to all approaches and ideas that have surfaced regarding ISDS reform."

The EESC is a 350-member body that brings together "economic and social interest groups" from across the European Union's member states. Its role as a consultative body was established and reaffirmed in multiple EU treaties.

The EESC "calls for an improved and more balanced invitation of stakeholders" in that process, and stresses that there are still several key unanswered questions regarding the MIC proposal, including "the scope, the protection of public interest, accessibility and relations with domestic courts."

Furthermore, the committee notes that there are additional options for addressing concerns over the current international investment regime. These include, for example, "strengthening the domestic judiciary; providing insurance to investors, such as through the Multilateral Investment Guarantee Agency of the World Bank; dispute prevention; more conciliatory forms of dispute settlement, such as mediation; investment promotion; and State-to-state Dispute Settlement."

## CJEU Advocate General finds ICS in line with EU law, final court ruling pending

CJEU Advocate General Yves Bot issued a non-binding opinion on January 29, 2019, deeming that the ICS included in the Canada–EU CETA is compatible with EU law. Bot assessed the ICS against the EU Treaty, the

TFEU and the EU Charter of Fundamental Rights.

The Advocate General's opinion came following a request from Belgium for the EU's highest court to give its opinion on the ICS's compatibility with EU law. Belgium made the request on September 7, 2017, a few weeks before CETA began its provisional application in Canada and the EU. The subject of ISDS, either through the ICS or through another mechanism, has been especially contentious in Belgium, where the region of Wallonia was able to delay CETA's signature over several concerns with the original version, ultimately leading to further negotiations and the adoption of a joint interpretative instrument.

Bot's opinion finds that the ICS mechanism "does not undermine the autonomy of EU law and . . . does not affect the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law." Bot also says that the built-in safeguards for the ICS allow for enough access to an independent, impartial tribunal, which was one of the concerns raised by Belgium.

Bot makes various other comments in relation to how CETA establishes the proposed tribunal's jurisdiction, stating that this is "narrowly circumscribed" and is "bound by the interpretation" of the ECJ. He also makes other findings related to the tribunal's interactions with EU legal systems at the EU-wide and national levels. For instance, he says that the joint interpretative instrument agreed by the EU and Canada encourages investors to exhaust local remedies before proceeding to cases under the ICS.

Bot also says that, under CETA, there is no "alteration of the essential character of the powers which the Treaties confer on the institutions of the EU and on the Member States." Additionally, the Advocate General finds that the provisions of CETA "do not infringe the general principle of equal treatment" in respect of access to the dispute settlement mechanism.

The CJEU must still render its final opinion on CETA's ICS, which will be binding, though the date has not yet been confirmed. The ICS, as well as the provisions on investment protection and investment market access for portfolio investment, are not yet being applied in CETA. Their application is pending CETA's ratification in EU member state legislatures.

The European Commission has decided to pursue trade and investment in separate agreements during upcoming negotiations with non-EU countries, due to the legal challenges seen in ratifying accords that incorporate both. That change in approach received the approval of the European Council in May 2018.

## UN General Assembly adopts new convention on mediation involving international settlements

On December 21, 2018, the United Nations General Assembly has given its approval to a new "Convention on International Settlement Agreements Resulting from Mediation," which aims to answer past concerns by many countries over how to enforce mediation settlement agreements involving multiple countries.

UN member states will be able to sign the new convention in August 2019 in Singapore, after which the convention will be named. Under the convention, international mediation settlements will have a uniform framework to follow, and the outcomes will be enforceable per the rules of the convention.

The convention sets out agreed definitions and general principles, requirements for parties that are relying on these settlement agreements, the grounds under which a convention party can decide not to grant relief, parallel applications or claims that may affect relief, reservations, and interactions with other laws and treaties in the relevant parties.

The convention will enter into force six months after at least three countries have deposited the necessary ratification instruments. For each additional ratification, the convention will take effect in that country following a six-month window.

## New EU framework on foreign investment screening to take effect in April

The European Union's new framework for screening FDI is due to take effect in April 2019, with the text now published in the EU's Official Journal. The framework allows both EU member states and the European Commission until October 2020 to enact the changes required.

The new system envisions a 35-day procedure that proponents say would make it easier for the European Commission and member states to work together in assessing whether FDI will have implications for security and public order, while giving the Commission the mandate to publish related opinions on the subject under certain circumstances.

According to an EU Commission factsheet, factors that could affect its assessment include whether and how these investments affect "critical infrastructure, critical technologies, the supply of critical inputs, such as energy or raw materials, access to sensitive information or the ability to control information, or the freedom or pluralism of the media." Member states without national screening mechanisms are not required to put those in place.

## RCEP ministers take stock of negotiations, press for 2019 outcome

Ministers from the 16 countries negotiating RCEP gathered in Siem Reap, Cambodia, on March 2 for an intersessional meeting to take stock of negotiations and reaffirm their revised goal of concluding the talks this year.

RCEP brings together the 10 members of ASEAN and their six FTA partners: Australia, China, India, Japan, New Zealand and South Korea. Negotiations have been underway since 2012.

Negotiators had previously met in Bali, Indonesia, from February 19–28, which included meetings of working groups devoted to trade in goods and services, as well as the investment working group, among others. They subsequently reported progress on market access and text-based negotiations, according to a meeting summary released by the Australian government.

The group's negotiators will meet again in Melbourne, Australia, from June 28 to July 3, with ministers due to hold another intersessional meeting in August.

## CPTPP Update: Trade deal now in force for seven signatories, more on the way

The CPTPP entered into force on December 30, 2018, when it took effect for Australia, Canada, Japan, Mexico, New Zealand and Singapore. Vietnam followed suit on January 14, 2019.

Chile's legislature is in the process of ratifying the agreement. The foreign affairs and treasury committee of Chile's Chamber of Deputies has voted in favour of the CPTPP, which next goes to a vote in the full chamber before being considered by the Senate. Brunei and Peru have not yet ratified the agreement, nor has Malaysia, where trade ministry officials say they are considering what the agreement will mean for its investment prospects. The country is also weighing whether the CPTPP will affect its standing within ASEAN, officials say.

Thailand is preparing to request accession to the CPTPP in the coming weeks, according to statements made by a commerce ministry official.

## ASEAN member states to sign fourth protocol amending Comprehensive Investment Agreement

ASEAN economic ministers are due to meet in Thailand this month, where they will sign a new protocol that would revise their existing, ASEAN-wide investment agreement, as well as their new ASEAN Trade in Services Agreement (ATISA). Negotiations to update both agreements concluded in late 2018.

The upcoming economic ministers' meeting is scheduled for April 23–24. The updated ASEAN Comprehensive Investment Agreement (ACIA) would include a prohibition on performance requirements, and switch its current list of reservations (which are included in a single annex) to a "two-annex" negative-list approach. It would split its existing list so that non-conforming measures that are in effect would remain on the first annex, while the second annex would detail related sectors or subsectors that would not be liberalized.

## Australia and Indonesia sign economic partnership agreement, including ISDS mechanism

Australia and Indonesia have now signed their Comprehensive Economic Partnership Agreement (IA-CEPA), bringing to a close a negotiating process that began in November 2010. The two countries signed the agreement on March 4, 2019. The IA-CEPA also includes an investment chapter and four related annexes, which cover an arbitrators' code of conduct; expropriation and compensation; foreign investment policy; and public debt.

The IA-CEPA investment chapter includes, among other provisions, an ISDS mechanism. The chapter prohibits claims being brought under ISDS that relate to public health measures, as well as those that involve investments "established through illegal conduct," though this excludes investments "established through minor or technical breaches of law."

Frivolous or meritless claims are not allowed under the ISDS mechanism, nor are those that refer to the MFN article of that chapter, should the complainant allege "that another international agreement contains more favourable rights or obligations."

The agreement must now undergo the ratification procedures of each side's respective legislatures before it can enter into force.

## UNCITRAL Working Group III holds New York session

Delegates had a new round of deliberations for multilateral reform of ISDS at UNCITRAL from April 1 to 5. The meeting of Working Group III, which is tasked with this process, was held in New York.

Delegates considered subjects such as third-party funding and the development of a "work plan" to guide their upcoming deliberations. The European Union has also submitted its proposal for an MIC.

Chile, Costa Rica, the Dominican Republic, the European Union, Indonesia, Israel, Japan and Thailand have all made written submissions ahead of the meeting.

## Investment facilitation discussions resume among WTO member group

"Structured discussions" on a possible multilateral facilitation framework resumed in Geneva this past month. The meeting, held in early March, marked the first session of the new year, and begins a new phase in the structured discussions process. The WTO members involved previously met seven times during 2018, examining a series of overarching objectives that this framework could address.

These objectives were listed in the joint statement from the 2017 WTO Ministerial Conference in Buenos Aires, Argentina, which formally launched this effort. They include how to "improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention."

The March meeting was dedicated to improving the transparency and predictability of investment features. The meeting featured opening remarks from WTO Director-General Roberto Azevêdo, who urged participants to be "creative and flexible" as they move into "practical, example-based discussions" as part of this "more outcome-oriented phase." The participants in this initiative are working off of a "checklist" of issues for each objective area that emerged from the 2018 discussions.

# AWARDS AND DECISIONS

## ICSID tribunal awards ConocoPhillips USD 8.7 billion plus interest in dispute with Venezuela

*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Company v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30*

**Gregg Coughlin**

An ICSID tribunal awarded over USD 8.7 billion plus interest to ConocoPhillips for Venezuela's unlawful expropriation of three oilfield investments made by Netherlands-based subsidiaries of U.S. corporation ConocoPhillips. The tribunal issued its award on March 8, 2019, nearly six years after its September 2013 decision on jurisdiction and the merits. The award also comes nearly one year after an ICC tribunal awarded over USD 2 billion in a separate contract-based claim against Venezuela related to two of the three oilfield investments implicated in this case.

### Background and claims

In the mid-1990s, ConocoPhillips invested in three projects—the Hamaca, Petrozuata and Corocoro Projects—involving the production, partial refining and marketing of extra-heavy oils from the Orinoco Oil Belt.

In 2007, Venezuela attempted to restructure the projects into companies in which affiliates of Petróleos de Venezuela, S.A. (PDVSA), Venezuela's state-owned oil company, would own 60 per cent of the shares, thereby aligning ConocoPhillips's investment with the legal and fiscal requirements applicable to all other companies with oil activities in Venezuela. ConocoPhillips rejected the terms of this restructuring deal and subsequently exited the Venezuelan market, after which PVDSA nationalized the projects.

On November 2, 2007, ConocoPhillips initiated arbitration against Venezuela, claiming unlawful expropriation and a violation of the fair and equitable treatment standard contained in the Netherlands–Venezuela BIT (the BIT). ConocoPhillips sought over USD 21 billion in compensation, while Venezuela contended that the investor was entitled to only USD 515 million.

In 2013, a majority of this tribunal found that Venezuela failed to negotiate in good faith for just compensation as required by BIT Article 6(c). In 2017, the tribunal filed an interim decision in response to Venezuela's third application for the tribunal to reconsider its 2013 decision. In the 2017 interim decision, the tribunal clarified it did not find a lack of good faith on the part of Venezuela in its negotiation efforts but rather that Venezuela failed to negotiate an offer in compliance with the BIT's requirements of just compensation and market value.

### Choice of law – BIT compensation standard and contractual standard

Venezuela argued that ConocoPhillips should not be able to claim damages outside the limits established by the Association Agreements (AAs) for the projects' original contracts and Venezuelan law at the time of the investment because these conditions placed a limit on ConocoPhillips's expected profit and the state's expected liability under the BIT.

The tribunal noted that, because the claim was initially brought under BIT Article 6, the AAs and Venezuelan law were not directly applicable. However, because the compensation for ConocoPhillips's rights and assets must include what the investors were entitled to if there had been no expropriation, the tribunal determined that compensation needed to take into account both the BIT standard and the provisions of the AAs.

### Venezuela carries burden to prove project costs, ConocoPhillips carries burden to prove output prices

The tribunal upheld all expected costs connected with the project. For output prices between 2007 and 2020, the tribunal accepted actual sale prices, rejecting both Venezuela's preference for lower prices and ConocoPhillips's contention that the crude would have sold at higher prices if managed by the investor during the relevant period. For post-award output, the tribunal determined that prices for future output would start at the 2020 average and increase at a flat rate for each subsequent year.

### Windfall Profit Tax constitutes "discriminatory action" in Petrozuata AA

The tribunal determined that the Windfall Profits Tax (WPT) implemented by Venezuela should not be included in ConocoPhillips's valuation of

reasonable expected profits because the AAs clearly gave Venezuela authority to modify the tax regime in connection with increases in oil prices and any WPT exemptions would have been granted solely at Venezuela's discretion. However, the tribunal also determined that the WPT constituted a "discriminatory action" under the Petrozuata AA because it authorized Venezuela to apply exemptions unequally to enterprises within the oil industry.

### Discount rate overview and relevant factors

With these considerations in mind, the tribunal determined the expected profit and dividends ConocoPhillips would have received over the duration of the projects. First, the tribunal rejected Venezuela's contention that ConocoPhillips's original internal rate of return (IRR) of 20 per cent is the appropriate discount rate. Instead, it adopted ConocoPhillips's position that once the IRR, or "hurdle rate," was passed, it is essentially irrelevant and should not be used because it is merely the minimum level of return expected by ConocoPhillips. The tribunal also determined that Venezuela's borrowing costs did not affect the discount rate analysis other than by increasing political risk because financing for oil projects is project specific and generally operates outside the general constraints of Venezuela's economy.

### Expropriation and taxation effect on discount rate

The tribunal noted that "the discount rate should not serve as a premium for unlawful acts committed by the host State and detrimental to the investment" (para. 906). However, the tribunal also noted that expropriation with "just compensation" is permitted under the BIT and thus ConocoPhillips assumed some risk of expropriation. As a result, the tribunal included in the discount rate the risk of any difference between "just compensation" and full reparation for loss suffered through expropriation.

### 17.25 per cent discount rate used by the tribunal

The tribunal ultimately used ConocoPhillips's 2006 discount rate of 13 per cent as a baseline, determining that it represented the expected risks of the projects more than any alternative presented by the disputing parties. The tribunal reduced it to 9.75 per cent to account for risk already accounted for due to reduced production and higher costs. Combining the cost of capital (risk-free rate and industry risk) with the discount rate of 9.75 per cent and the tribunal's margin of discretion resulted in a discount rate of 17.25 per cent.

### Interest rate

The tribunal noted that applying a risk-free rate—as argued by Venezuela—would allow Venezuela to retain expropriated dividends and earn higher profits, while ConocoPhillips "would have to be content with the most minimal rate available on the money market" (para. 816). The tribunal instead used ConocoPhillips's cost of equity as pre-award interest reduced to reflect the tribunal's findings on higher than expected costs.

In contrast, the tribunal focused on the investors' reduced opportunity to invest in the oil industry to determine the post-award interest rate. As a result, the tribunal adopted the industry risk premium of 5.5 per cent (compounded annually) for post-award interest.

### Total award

Ultimately, the tribunal awarded USD 8.4 billion for unlawful expropriation in violation of BIT Article 6 and USD 286 million for "discriminatory actions" taken in violation of the Petrozuata AA. The tribunal also awarded ConocoPhillips 40 per cent of its legal costs, amounting to over USD 20 million. Lastly, the tribunal declared the entire amount awarded net of taxes.

*Notes:* The tribunal was composed of Eduardo Zuleta (president, appointed by the chairman of the ICSID Administrative Council, Colombian national, replacing Kenneth Keith, New Zealand national, who resigned from the tribunal in 2016), Yves Fortier (claimants' appointee, Canadian national) and Andreas Bucher (respondent's appointee, Swiss national, replacing Georges Abi-Saab, Egyptian national, who resigned from the tribunal in 2015). The award is available in English at https://www.italaw.com/sites/default/files/case-documents/italaw10402.pdf.

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## Venezuela survives ICSID claims of expropriation and FET by Anglo American

*Anglo American PLC v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1*

**Vishakha Choudhary**

A wave of ICSID claims followed Venezuela's denunciation of the ICSID Convention in 2012. In one such proceeding initiated by an investor incorporated in the United Kingdom, Anglo American PLC (Anglo American), the majority of an ICSID Additional Facility tribunal dismissed all claims.

### Background and claims

Anglo American indirectly held 91.37 per cent of Minera Loma de Niquel C.A. (MLDN), a Venezuelan company engaged in mining nickel-cobalt deposits. Between 1992 and 1999, MLDN received several mining concessions from the Venezuelan government that expired in 2012. These concession agreements provided for reversion of MLDN's mining assets to the state upon the concession's termination. Additionally, the 2002 Venezuelan VAT Law allowed MLDN to recover value-added tax (VAT) paid for purchase of goods and services in Venezuela.

Anglo American alleged that Venezuela expropriated MLDN's processing facilities and inventory upon the expiry of the concessions, arguing that they were "non-reversionary assets." It also claimed a breach of the FET standard under the United Kingdom–Venezuela BIT for the discontinuation of VAT refunds to MLDN in 2010. Venezuela filed a counterclaim against Anglo American, seeking damages for breaches of the concession agreement.

### Tribunal dismisses Venezuela's objections to jurisdiction

In its objection to the tribunal's subject matter jurisdiction, Venezuela argued that the BIT, lacking an express reference to "indirect investments," did not protect indirectly held investments. It suggested that the United Kingdom and Venezuela had deliberately omitted any reference to "indirect investments" in the BIT by deviating from the drafting practice they ordinarily followed.

The tribunal focused its analysis on the broad language of the BIT, which extended treaty protection to "every kind of asset." The list of protected investments following the opening clause was deemed indicative and not a limitation on this wide material scope. The tribunal emphasized the "economic reality" at the time of the BIT's conclusion, noting that indirectly held investments were commonplace. For these reasons, it held that Anglo American's indirect investments—its shareholding in MLDN and participation in MLDN's assets—were "investments" protected by the BIT. In respect of the latter, the tribunal also pointed to BIT Article 5(2), which prohibits unlawful expropriation of the assets of a company "in which nationals or companies of the other Contracting Party owns shares." Consequently, the tribunal affirmed its jurisdiction over the claims.

Venezuela's second objection, based on an exclusive forum selection clause in the concession agreements, was briefly dismissed. The tribunal noted that Anglo American was neither a party to these concession agreements, nor had it disguised contractual claims as investment disputes.

### Allegedly expropriated assets were "reversionary"

It was undisputed between the parties that, if the assets were transferrable to the state upon expiration of concessions, no question of expropriation would arise. Anglo American asserted that under the concession agreements and related mining laws, Venezuela could only recover assets used toward fulfilling the "objects of the concessions," namely exploration and exploitation activities. Accordingly, assets used for ancillary processing activities and inventories were non-reversionary. Venezuela countered that these legal instruments did not regulate primary and ancillary mining activities differently, but jointly prescribed reversion of all assets used in mining activities to Venezuela without compensation.

The tribunal noted that the concession agreements classified assets "intended for the purpose" and "constituting an integral part" of the concession as reversionary. Reading the agreements with Venezuela's 1945 Mining Law, it concluded that the agreements' purpose extended to regulation of "the exclusive right to extract and utilize" the mine. Consequently, assets related to activities that profited or benefitted from the mine, including processing, were intended for the concession's "purpose." Further, the tribunal deemed processing assets "integral" to the concession since they were situated on the concession site. Accordingly, the tribunal held that MDLN's assets were reversionary and had not been expropriated.

The majority also assessed the impact of Venezuela's new 1999 Mining Law on its conclusion, focusing on

two key aspects. First, the law preserved the rights and obligations of concessionaires under the old law. Second, any distinction between primary and ancillary mining activities in the law was irrelevant, since it called for reversion of all assets "acquired for use in mining activities." Observing that Anglo American referred to "processing activities" as mining activities, the characterization of claimant's assets as reversionary remained unaffected, in the tribunal's view.

Finally, it turned to Venezuela's 1999 Investment Law, which compelled compensation for the non-amortized value for reversionary assets. The tribunal held that, since the law preserved rights and obligations contained in agreements preceding it, Anglo American's waiver of compensation under the concession agreements would continue to operate. The majority reached the same conclusion for the same reasons as regards Anglo American's inventory consisting of raw materials.

### Venezuela's conduct invites criticism but does not breach FET

Anglo American claimed that the discontinuation of VAT refunds, which MLDN had received since 2001, amounted to a breach of FET. Conversely, Venezuela attributed the discontinuation to Anglo American's failure to deduct its VAT credits from its VAT returns following regulatory changes in 2005.

At the outset, the tribunal dismissed Venezuela's contention that FET "in accordance with international law" compels adherence only to the minimum standard of treatment under customary international law. In its opinion, these words provided a baseline for FET and "the minimum standard of treatment under customary international law has evolved" to include "legitimate expectations, transparency, reasonableness, and due process, as well as the absence of discrimination and arbitrariness" (paras. 442–443).

Next, the tribunal emphasized that Venezuela conducted itself poorly by failing to inform MLDN of the refund discontinuation in a timely manner. Yet it refused to find a breach of FET: it found Venezuela's conduct to be justifiable since the state sought to prevent double counting of VAT credits. Moreover, it emphasized that, in the absence of a specific commitment to that effect, the claimant could not expect "that neither the law nor the administrative practice would change" (para. 468). Finally, it dismissed Anglo American's claims, holding that the lack of transparency in one official's conduct was not representative of Venezuela's position.

The tribunal chastised Anglo American's "passivity" in presenting its grievances before Venezuelan officials and its failure to comply with changed regulations despite receiving (albeit late) information.

### Other claims and Venezuela's counterclaim dismissed

Anglo American raised two full protection and security violations: physical security of its assets and legal security of its VAT refunds. With respect to the physical seizure of assets, the tribunal extended its reasoning on expropriation to this claim. Further, according to the tribunal, "legal security" under full protection and security involved the same analysis as FET. Consequently, both claims were rejected.

Anglo American's claims alleging breach of national treatment were dismissed for lack of evidence of discrimination. Venezuela's counterclaims were dismissed, since BIT Article 8(3) limited the tribunal's jurisdiction to "breach by the Contracting Party concerned" of its obligations.

### Awards and costs

The claims and counterclaim were dismissed. The tribunal adopted a balancing approach on costs: while Anglo American had succeeded on jurisdiction, it failed on merits. Conversely, Venezuela incurred unnecessary costs for claims withdrawn by the investor but delayed payment of advances for the arbitration's final phase. Thus, each party was directed to bear its own costs.

### Tawil's dissenting opinion

Arbitrator Guido Santiago Tawil differed from the majority's findings on merits. Primarily, he understood the purpose of the concession agreements and 1945 Mining Law to be exploration and exploitation activities. The investor's right to "extract and take advantage of" the mine under this agreement, in his opinion, did not define its purpose but was intended to ensure that mining was conducted for economic purposes. Hence, he concluded that assets used for processing nickel-cobalt were unrelated to the concession's primary purpose and were non-reversionary, and that Venezuela's seizure of these assets without compensation amounted to an unlawful expropriation.

On FET, Tawil questioned the majority's assessment of Venezuela's conduct: deciding that its failure to publicize or notify administrative changes to MLDN in a timely and reasoned manner was opposed to the transparency required by FET. In his opinion, MLDN's failure to approach local courts for an explanation

could neither prejudice its rights nor excuse the state from its obligations.

*Notes:* The tribunal was composed of Yves Derains (president, appointed by the parties, French national), Guido Santiago Tawil (claimant's nominee, Argentinian national) and Raúl E. Vinuesa (respondent's nominee, Argentinian and Spanish national). The award is available at https://www.italaw.com/sites/default/files/case-documents/italaw10293.pdf

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## Italy found liable for change in renewable energy policy in intra-EU arbitration

*Greentech Energy Systems A/S & Ors. v. The Italian Republic, SCC Arbitration V (2015/095)*

**Shyam Balakrishnan**

On December 23, 2018, an SCC tribunal rendered an award holding Italy liable for violation of the FET standard under ECT Article 10(1) and awarding the three claimants (two incorporated in Luxembourg and the third in Denmark) damages of approximately USD 15 million.

### Background and claims

The claimants, who had invested in 134 photovoltaic (PV) power plants, alleged that Italy had, at the time of the making of the investment, promised them certain financial incentives to induce the investment. They asserted that this investment was made with the expectation that the financial incentives prescribed through legislation, decrees and contract would remain unchanged.

Principal among these incentives was the *Conto Energia* decree, which provided for incentive tariff premiums (higher than market price) for a period of 20 years starting from the date on which each PV plant entered into an agreement with *Gestore dei Servizi Energetici* (GSE), a state-owned enterprise, and connected to the power grid.

Beginning in 2012, Italy implemented a series of measures, including Law Decree No. 91/2014 of June 24, 2014 (the *Spalma-incentivi* Decree), which diminished the value of the incentives offered to the claimants. Alleging that the measure harmed the claimants and their respective investments, they asserted that Italy breached the FET standard, the impairment clause and the umbrella clause under ECT Article 10(1) and sought damages, in addition to other declaratory relief.

Italy, in resisting the claim, objected to the jurisdiction of the tribunal on several grounds, in particular the intra-EU ISDS objection. On the merits, it argued that its right to regulate permitted the changes to the incentive structure and that its measures were reasonable and proportionate. The tribunal, however, remained unconvinced.

### Intra-EU objections: *Achmea* to Italy's rescue? Not quite

On Italy's objection to the tribunal's jurisdiction, the amicus curiae brief by the European Commission and the *Achmea* decision, the tribunal made several important observations.

First, it observed that the ECT did not exclude intra-EU disputes from the outset. Referring to the decisions in *RREEF Infrastructure v. Spain* and *Eiser v. Spain*, it noted that the ECT did not contain an implied "disconnection clause." The tribunal found that the EU would have inserted an express exclusion if it had intended to exclude intra-EU disputes from the purview of the ECT.

Next, addressing the issue of the alleged modification of the ECT in light of the Lisbon Treaty, the tribunal noted that Italy could not rely on VCLT Article 30 (titled "Application of Successive Treaties Relating to the Same Subject-Matter") as it had failed to demonstrate that that the ECT and the Lisbon Treaty were in fact "successive treaties relating to the same subject-matter" (para. 346).

Vis-à-vis the argument that TFEU Article 344 would preclude the tribunal's jurisdiction, the tribunal observed that the article provided that EU member states "undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." The tribunal concluded that Article 344 related to disputes involving EU member states or EU institutions, and not investor–state disputes. Accordingly, the tribunal felt that none of the above arguments were persuasive.

Lastly, the tribunal examined the *Achmea* decision and examined whether the CJEU judgment would have a bearing on its jurisdiction. The tribunal was, however, unconvinced and dismissed the objection on three grounds.

First, distinguishing the CJEU's decision, the tribunal observed that it derived its jurisdiction from ECT Article

26 and not an intra-EU BIT. In doing so, the tribunal endorsed the view of the *Eiser* and *Novenergia II* tribunals.

Second, the tribunal rejected Italy's contention that the applicable law provision in ECT Article 26(6) would warrant the application of EU law to the present dispute. It noted that the provision, which states that an investor–state arbitral tribunal "shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law," could not be stretched to include EU law. The tribunal noted that its mandate was confined to examine Italy's alleged breaches of the ECT and international law but not of EU law.

Third, the tribunal concluded that the *Achmea* decision was confined to agreements between EU member states and left open the possibility of dispute resolution under multilateral agreements that were not "intra-EU" per se. Accordingly, referring to the *Masdar v. Spain* decision, the tribunal concluded that the *Achmea* decision had "no preclusive effect" as to its jurisdiction (para. 395).

### FET and legitimate expectations

To examine the alleged breach of FET, the tribunal first assessed whether the claimants, at the time of the making of their investment, had been led to believe that the incentive tariffs would remain the same. It observed that, when the claimants invested in the PV facilities, there was sufficient evidence in the *Conto Energia* Decrees, in agreements with GSE and in correspondence with GSE that the rate of return would have remained constant for a period of 20 years. The tribunal thus took the view that Italy's modification of the rate of return by the *Spalma-incentivi* Decree breached the investors' expectations and the FET standard.

### Italy's right to regulate

Addressing Italy's objections that the *Spalma-incentivi* Decree was within its right to regulate, the tribunal observed that "the repeated and precise assurances to specific investors amounted to guarantees that the tariffs would remain fixed" (para. 450). It rejected Italy's argument that the object of its decree was to compensate the service provider and reduce costs borne by consumers. This policy reason, according to the tribunal, did not meet the threshold of *force majeure* that would allow Italy to deviate from its binding commitments. The tribunal concluded that the "specificity of the assurances Italy offered (*Conto Energia* decrees, statements and conduct of Italian officials, and individual GSE letters and GSE Agreements)" had the hallmarks of a stabilization clause and that Italy had waived its right to modify its commitments.

### The umbrella clause

Italy asserted that the clause could not encompass statutory commitments that were not made to a specific investor. The tribunal, however, considered the term "obligations" in the clause to include legislative instruments that could be understood as commitments made to investors. It found that the relevant question was not whether commitments made under the *Conto Energia* Decree or the GSE letters or agreements would, in isolation, be covered by the ECT's umbrella clause, but whether Italy had breached the umbrella clause given that the investors had the benefits of all these "obligations." With this characterization, the tribunal found that Italy's actions violated the umbrella clause as well.

### Damages and costs

Having found that Italy breached its FET obligation, the tribunal awarded the claimants EUR 11.9 million in damages plus compounded interest. Italy was also ordered to pay the claimants' arbitration costs and other reasonable costs in the amount of EUR 478,000 and EUR 1,408,268.

### Dissent

Giorgio Sacerdoti disagreed with the majority's findings on the merits. The arbitrator took the view that the Spalma-incentivi Decree was reasonably foreseeable and did not undermine investor expectations. He observed that measures taken by Italy were "reasonable and proportionate as to their aims and results; transparent as to their enactment; balanced and limited as to their impact on the operators" (dissent, para. 49). Accordingly, he observed that Italy had not violated the FET standard. In a similar vein, he also found that there was no violation of the impairment provision and the umbrella clause.

*Notes:* The tribunal was composed of William W. Park (president appointed upon jointly by the co-arbitrators, U.S. national), David R. Haigh (claimant's appointee, Canadian national) and Giorgio Sacerdoti (respondent's appointee, Italian national). The award is available at https://www.italaw.com/sites/default/files/case-documents/italaw10291.pdf and the dissenting opinion of Giorgio Sacerdoti is available at https://www.italaw.com/sites/default/files/case-documents/italaw10292.pdf

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## Tribunal finds expropriation of investment by Bolivia due to non-payment of compensation but awards only sunk costs to British investor

*South American Silver Limited (Bermuda) v. the Plurinational State of Bolivia, PCA Case No. 2013-15*

**Trishna Menon**

In a PCA-administered UNCITRAL arbitration initiated by South American Silver Limited (Bermuda) (SAS) against Bolivia, the tribunal held that Bolivia unlawfully expropriated SAS's investment, but awarded the mining investor sunk costs only. The final award was rendered on November 22, 2018.

### Background and claims

On November 7, 2003, Compañía Minera Malku Khota (CMMK) was incorporated in Bolivia to explore and develop the Malku Khota mining project. The claimant, SAS, indirectly owns all shares in CMMK.

Between 2003 and 2007, CMMK acquired 10 mining concessions. The area of the concessions was principally inhabited by Indigenous communities, grouped in *ayllus*. In 2010, members of these communities accused CMMK of polluting sacred spaces, abusing its authority, deceiving and threatening community members, and condoning the rape of women from the community.

Resulting tensions between the local communities and CMMK officials culminated in violent clashes. The Bolivian government intervened and reached an agreement with the Indigenous communities. On August 1, 2012, Bolivia issued Supreme Decree No. 1308, reversing the ownership of the mining concessions to Bolivia. SAS claimed that the reversion constituted expropriation under Article 5 of the Bolivia¬–United Kingdom BIT (the BIT).

### Jurisdictional objections dismissed

Bolivia raised two jurisdictional objections: (1) the tribunal lacks jurisdiction since SAS is not the direct owner of the shares, and (2) the claims are inadmissible since SAS did not have clean hands and its investment did not satisfy the legality requirement.

According to Bolivia, the consent to arbitration in the BIT was given for disputes regarding an investment "of" a company, meaning that the investor should be the owner or direct holder of the investment. Since SAS did not have direct ownership of CMMK or the concessions, Bolivia argued that the dispute did not relate to an investment "of" SAS and that the tribunal lacked jurisdiction.

The tribunal dismissed this objection since nothing in the BIT nor any evidence from the time of the negotiation of the BIT suggested that the state parties excluded the possibility of indirect acquisition. It also observed that the corporate structure under consideration was not so sophisticated as to be unforeseeable by the state parties to the BIT at the time of its conclusion, if they had wanted to restrict or prohibit it.

Bolivia also argued that VCLT Article 32 does not limit the supplementary means of interpretation to the *travaux préparatoires*, but requires "the circumstances of its conclusion" to be taken into account. According to Bolivia, contemporaneous treaties signed by it at the time when the BIT was concluded must be considered among the circumstances of the conclusion of the BIT.

The majority of the tribunal disagreed, because the "circumstances" that VCLT Article 32 refers to are those of the conclusion of the BIT and not those of other treaties that were not proven to have been part of such circumstances. Thus, the majority found that the term "of" in BIT Article 8(1) did not exclude indirect investments.

In his dissenting opinion, arbitrator Osvaldo César Guglielmino cited Poštová Banka v. Greece and considered that investment tribunals frequently referred to contemporaneously concluded treaties when applying VCLT interpretation methods. He concluded that, in accordance with VCLT Article 31, the scope of protection under BIT Article 5(2) did not extend to companies of third states making investments through special purpose companies of one of the state parties.

Bolivia had also invoked the *Salini* test, seeking a determination from the tribunal to the effect that, even when an investment fulfils the *Salini* requirements, only the entity making the contribution and undertaking the risk directly can be considered an investor. Having already held that SAS was an investor and that the shares in CMMK and the mining concessions were investments under the BIT, the tribunal did not deem it necessary to carry out an interpretation of the *Salini* requirements.

The tribunal noted that the clean hands doctrine invoked by Bolivia was neither referred to in the text of the BIT nor part of the general principles of international law or international public policy. It also held that Bolivia failed to show that the alleged violations go to the essence of the investment such that it must be considered illegal. According to the tribunal, even if CMMK's conduct may have motivated the reversion, this did not mean that the investment ceased

to be covered by the BIT or became unlawful.

### Bolivia committed unlawful expropriation by failing to compensate

In the tribunal's view, there was undoubtedly an aggravated conflict that led to serious acts of violence. Further, it found that the Indigenous communities' opposition to the project was well-established, as were SAS's significant shortcomings in managing community relations. The tribunal held that the mere absence of a formulaic reference to human rights or to the protection of the communities did not lead to the conclusion that the reversion was not conducted for a social benefit related to Bolivia's domestic needs. It held that the premises mentioned in the reversion had been proven. These include the protection of human rights—the right to life and the right to peace, both expressly mentioned in the reversion decree—and the protection of the communities and the *ayllus* against the difficulties resulting from the project.

With respect to due process, SAS argued that Bolivia's obligation to give the investor an opportunity to "assert its rights" included granting an opportunity to participate in the expropriatory decision and in the determination of the amount of compensation. The tribunal disagreed and held, based on the text of the BIT, that the affected investor has a right to challenge the legality of the expropriation decision, not a right to participate in the decision-making process.

Bolivia alleged that, insofar as SAS had opted to pursue an expropriation claim in international arbitration, Bolivia had complied with its obligation to compensate without delay by participating in the proceeding. The tribunal rejected this argument as contradicting its prior actions, since Bolivia had defended the reversion as a legal expropriation, recognized that it had to provide compensation and continued with the hiring process of a valuation company, even after SAS had initiated arbitration.

Therefore, the tribunal concluded that, although the reversion fulfilled the requirements under BIT Article 5 relating to public purpose and social benefit, as well as due process, it did not fulfil the compensation requirement. The tribunal also rejected Bolivia's arguments that the reversion was justified by a state of necessity and that it constituted the legitimate exercise of police powers.

### Other claims—FET and full protection and security

SAS contended that Bolivia violated the FET standard under BIT Article 2(2) as it frustrated its legitimate expectation and failed to act in a transparent and consistent manner. The tribunal agreed with SAS that, in certain situations, some of Bolivia's officials could have acted more efficiently. However, it held that the lack of opportunity or efficiency in some actions did neither qualify as an FET violation nor allow the conclusion that Bolivia acted with premeditation to gain control of the project. According to the tribunal, such allegations require a high standard of proof to establish bad faith or intolerable negligence by the state, and such evidence is nonexistent in this case.

The tribunal also found that Bolivia did not violate the full protection and security (FPS) standard under BIT Article 2(2). First, it concluded that SAS had not shown that Bolivia refused or failed to intervene when requested to do by SAS and that delays or inefficiencies regarding specific actions are insufficient to qualify as breaches of the standard. Second, SAS had complained that Bolivia did not militarize the areas surrounding Malku Khota and presented this as proof that Bolivia did not act with due diligence. The tribunal found that SAS failed to show that militarizing the area would have been conducive to resolving the social conflict. It also concluded that Bolivia did not stop implementing measures to seek the continuation of the project. Third, the tribunal understood that Bolivia's commitment to suspend criminal proceedings against the leaders of the Indigenous organizations was a concession within the framework of an agreement to end the social conflict; it did not constitute inaction against alleged threats and aggressions directed at CMMK.

### Decision and costs

The tribunal found that the reversal constituted direct expropriation and a breach of the obligation to provide compensation for expropriation. However, it found that Bolivia did not breach its obligations to afford FET or FPS. It also rejected SAS's claims that Bolivia adopted arbitrary or discriminatory measures and breached the national treatment standard.

Guglielmino, in his dissent, considered that SAS was not the owner of shares in CMMK and that BIT Article 5(2) does not afford protection to such indirect investments. Accordingly, he concluded that SAS did not prove that it made a protected investment under the BIT, which prevented the tribunal from assuming jurisdiction to resolve the dispute.

Considering that the project was not in the production stage, the tribunal disregarded the traditional

discounted cash flow (DCF) method in favour of a sunk-costs approach. The tribunal found that it was not possible to value the project on the basis of any comparable projects, nor was there evidence of its economic viability or of market value at which SAS's shares were traded. Consequently, it held that the market value of such shares was to be determined by reference to CMMK's value, which, for the purposes of compensation, corresponded to the value of what CMMK invested in the project.

The tribunal awarded SAS compensation of USD 18.7 million. It also ordered SAS to bear 65 per cent of the arbitration costs and each disputing party to bear its own legal costs and expenses.

*Notes:* The tribunal was composed of Eduardo Zuleta Jaramillo (president, Colombian national), Francisco Orrego Vicuña (claimant's appointee, Chilean national) and Osvaldo César Guglielmino (respondent's appointee, Argentinian national). The award is available at https://www.italaw.com/cases/2121

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## Cyprus legitimately exercised its police powers, defeats ICSID claims by Greek bankers

*Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Republic of Cyprus, ICSID Case No. ARB/13/27*

**Stephanie Papazoglou**

In an award dated July 26, 2018, an ICSID tribunal concluded that Cyprus's actions did not breach the 1992 Cyprus–Greece BIT (the BIT). Claims of EUR 1.05 billion were brought by Marfin Investment Group Holdings S.A. (MIG), an international investment holding company incorporated in Greece, and 18 other Greek corporations or shareholders following measures taken by Cypriot authorities in the context of the Eurozone crisis. The tribunal affirmed its jurisdiction over the case, but dismissed all claims against Cyprus and ordered the investors to pay EUR 5 million toward the state's costs.

### Factual overview of the bank crisis dispute

The claimants partly owned Marfin Popular Bank Public Co. Ltd. (Laiki Bank), the second largest bank in Cyprus. In May 2012, through the enactment of public measures, Cyprus acquired majority ownership in the bank and took over the management control in a EUR 1.8 billion recapitalization intended to limit the bank's exposure to defaulting Greek debt during the country's debt crisis.

The following year, the bank was placed in administration, and EUR 100,000 deposits were made subject to a levy, as part of a rescue deal agreed between Cyprus and the "Troika," consisting of the European Commission, the European Central Bank and the International Monetary Fund.

In response to these public measures, the claimants initiated ICSID arbitration against Cyprus, claiming breaches of FET and full protection and security (BIT Article 2(2)) and the expropriation clause (BIT Article 4). Particularly, the claimants challenged Cyprus's regulation of the bank, including the Central Bank of Cyprus's decision to remove management officers, and the terms of the 2012 recapitalization plan.

### Tribunal accepts jurisdiction over the disputes, despite the *Achmea* judgment

Cyprus focused its jurisdictional objection on the question of the application of successive treaties in time. It alleged that the BIT and its arbitration clause (Article 9) were terminated or superseded by the later EU Treaties and that, therefore, the ICSID tribunal had no jurisdiction over the case.

The tribunal rejected that it lacked jurisdiction to proceed with the case as a result of the March 2018 CJEU judgment in the *Achmea* case, which found that BITs between EU member states were incompatible with EU law. The tribunal relied on prior case law decisions (*EURAM v. Slovakia*), finding that intra-EU BITs and the EU Treaties deal with different subject matters. In the present case, the tribunal asserted that the relevant provisions of EU law guaranteeing the fundamental freedoms or prohibiting discrimination do not have the same topic or substance as the substantive protections offered under the BIT (for example, the FET standard). Therefore, the tribunal declined to examine the question of compatibility, which arises only if the two treaties have the same subject matter.

Accordingly, the tribunal rejected all jurisdictional objections by Cyprus and declared that the BIT remains in force, including its arbitration clause.

### Expropriation claim dismissed on grounds of legitimate exercise of police powers by Cyprus

The claimants alleged that Cyprus's conduct constituted

an act of nationalization and therefore a breach of the expropriation clause of BIT Article 4. In the tribunal's view, given that Cyprus held the majority stake in the Laiki Bank after the June 2012 recapitalization, such actions would not constitute violations of the BIT, but represented a legitimate exercise of Cyprus' regulatory powers. It held that the Cypriot regulatory authorities were entitled to a certain degree of discretion in making their choice in the recapitalization framework. The tribunal found that Cyprus had not sought to nationalize the bank and that its strategy at the Eurozone summit was not guided by such an intention.

Moreover, the tribunal asserted that Cyprus' failure to negotiate better terms or to seek Troika support for its banking sector immediately following the summit could not be seen as expropriatory. Referring to *SD Myers v. Canada*, the tribunal stated that it should not second-guess political and policy decisions made by a state, particularly where those decisions were made based on continuously developing threats to the safety of the financial system. It was persuaded that Cyprus faced one such difficult political decision on the occasion of the Eurozone summit. Therefore, it held that there was nothing arbitrary, capricious or unreasonable in Cyprus' lack of attempt to negotiate better terms.

Finally, it concluded that the removal of management was a legitimate exercise of the state's regulatory powers to protect the public welfare, which gave Cyprus the tools to intervene in order to support distressed banks and avoid systemic risks to its banking system and economy.

### No breach of FET or full protection and security standard; no discrimination

The claimants alleged that Cyprus breached the FET standard through a failure to provide due process to claimants' investment, denying them justice and engaging in arbitrary and abusive conduct in criminal proceedings initiated against the claimants.

The tribunal endorsed the view in *Philip Morris v. Uruguay* that "it is not enough to have an erroneous decision or an incompetent judicial procedure" for a finding of denial of justice, and agreed with Cyprus that exhaustion of local remedies was not a mere precondition to arbitration, but "a constituent element of the delict" (para. 1272). Thus, for the tribunal, the claimants' failure to exhaust local remedies was sufficient to dismiss their denial of justice claims (para. 1277).

The tribunal also concluded that the criminal proceedings against the claimants were in compliance with Cyprus criminal laws, and had not been initiated abusively, for tactical reasons or with the intent to harass the claimants. For these reasons, the tribunal found no breach of FET through a failure to provide due process.

Moreover, the tribunal found that there was no difference in treatment between claimants' investment (Laiki Bank) and the Bank of Cyprus, whose shareholders were Cypriot. Even if the two banks were in similar circumstances, both were exposed to the recapitalization plan and management removal after emergency financial assistance was offered by the state. The tribunal concluded that the claimants' investment was not discriminated against on the basis of their Greek nationality.

The claimants argued that Cyprus's decision to impose conditions on Laiki Bank's commercial operations and enact amendment of the Management of Financial Crises Law breached the full protection and security standard. The tribunal noted that Cyprus's conduct was a legitimate exercise of its police powers, and that there was thus no excess of power against which the claimants deserved protection. Consequently, the tribunal concluded that, even if it were to interpret the standard as imposing an obligation to ensure a secure investment environment (as argued by the claimants), the standard was not breached.

*Notes:* The tribunal was composed of Bernard Hanotiau (chair appointed by the parties, Belgium national), Daniel M. Price (claimant's appointee, U.S. national) and David A. O. Edward (respondent's appointee, British national). The award is available at https://www.italaw.com/cases/2068

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# Cyprus fends off SCC expropriation claim by Polish investors over bank bail-in measures

*Tomasz Częścik and Robert Aleksandrowicz v. Cyprus, SCC Case No. V 2014/169*

**Gladwin Issac**

In an award dated February 11, 2017, an SCC tribunal dismissed expropriation claims against Cyprus brought by two Polish investors in relation to various measures taken by Cyprus in 2013 to recapitalize its banking industry. In particular, the tribunal was not convinced, on the evidence before it, that the "value of the Claimants' investment was so significantly affected as to reach the level of expropriation" (para. 221).

## Background and claims

The claimants, Tomasz Częścik and Robert Aleksandrowicz, were Polish nationals and the only shareholders of an undisclosed Cypriot Limited Company. In March 2013, the Central Bank of Cyprus issued a decree to initiate certain legislative and regulatory measures to restructure its banking system (bail-in measures), in particular the two largest banks—the Bank of Cyprus (BoC) and Laiki Bank. Taking into considerations the risks of implementing this decree, the Cypriot Ministry of Finance declared a bank holiday for March 19 and 20, 2013.

Around this time, the claimants instructed BoC to make two payments for the purchase of shares in a related Polish start-up. While BoC executed the first transaction, it blocked the second one as it fell on a bank holiday. When the bank holiday elapsed, Cyprus had opted to bail-in BoC, by freezing or converting into shares deposits over EUR100,000.

On December 5, 2014, the claimants initiated SCC arbitration pursuant to the Poland–Cyprus BIT (the BIT), claiming that "the legislative acts of the State (Cyprus) and the restrictive measures undertaken by the organs of the Cypriot State and its dependents limiting and partially blocking the transfer of the Company's capital deposited in BoC resulted in expropriation of the business of the Claimants' Company" (para. 120).

In addition to the claim for damages amounting to the value of the lost funds (PLN 1.3 million, approx. USD 340,000), the Claimants sought more than PLN 16 million (approx. USD 4.1 million) in compensation as lost profits, alleging that Cyprus's conduct prevented them from consolidating their position in the Polish start-up and thus shielding that investment from external hostile takeovers.

## Tribunal declines to expand jurisdiction beyond expropriation claim

Cyprus objected to the tribunal's jurisdiction on several grounds and requested to bifurcate the proceedings to discuss its objection based on the limited scope of the BIT's dispute resolution clause. Cyprus argued that BIT Article 9 only provided for arbitration in case of "disputes … concerning expropriation of an investment" and that the claimants could not invoke the MFN clause under BIT Article 7 to broaden the tribunal's jurisdiction to hear the investors' claims for a breach of the FET standard under BIT Article 3. The tribunal granted Cyprus' request to bifurcate the proceedings. In a partial award dated March 4, 2016, it sided with Cyprus, deciding that it did not have jurisdiction over the investors' FET claim on the basis of the MFN clause (para. 165).

## Tribunal has *prima facie* jurisdiction; expropriation claim found admissible

Cyprus's second jurisdictional objection relied on the alleged incompatibility between the treaty-based expropriation claims and EU law. First, Cyprus relied on VCLT Article 59 to argue that, by acceding to the EU through the Lisbon Treaty on May 1, 2014, both Cyprus and Poland agreed to transfer certain competencies to the EU, namely the direct effect of EU law and the primacy of the EU law. Therefore, according to Cyprus, the BITs concluded between EU member states before their accession to the EU, covering areas governed by EU law, were superseded by EU law. Next, it argued that the expropriation claim under the BIT conflicts with the EU law on banking regulation and capital transfers (TEFU Articles 63 and 65).

The tribunal dismissed Cyprus' objections by stating that, since neither Cyprus nor Poland had taken any steps to terminate the BIT, the treaty was *prima facie* still in force and the tribunal had *prima facie* jurisdiction over the claims. However, it noted that "this *prima facie* conclusion would be reversed" if it were to be established by the CJEU in *Slovak Republic v. Achmea BV* that intra-EU BITs are incompatible with EU law" (para. 170).

## No expropriation absent "substantial deprivation" of investment

A preliminary question significant to the expropriation claim was whether the allegedly expropriated funds in BoC, which belonged to their Cypriot subsidiary, could qualify as an investment under the BIT. The claimants relied on the expansive scope of BIT Article

1(3) to argue that the funds transferred to the bank account in BoC can be characterized as an investment protected by the BIT. In the alternative, they argued that the shareholding in their Cypriot entity was their investment, whose value had been affected by the expropriation of the fund in BoC.

As regards the claimants' initial position, the tribunal found that the funds that were subjected to the bail-in measures were not intended to be invested "in Cyprus" and were therefore not an investment under the BIT, which applied to "investments made into the territory of Cyprus." However, the tribunal agreed that the claimants' shares in the Cypriot entity would constitute an investment in accordance with both the subjective and objective notions of investment.

The claimants contended that their investment was indirectly expropriated by Cyprus's actions, starting with the imposition of extraordinary bank holidays and combined with the issuance of the decrees authorizing the bail-in measures.

Given the absence of definition of expropriation in the BIT, the tribunal reviewed the arbitral jurisprudence on expropriation, particularly the discussion in *LG&E v. Argentina* and *Azurix v. Argentina*, and found that the test of an expropriation was whether there was a permanent and substantial deprivation of the value of the investment. The tribunal, however, noted that the claimants neither attempted to prove that they were deprived totally of these shares nor proved that a substantial deprivation of the value of the shares occurred. On the contrary, the tribunal found evidence during the hearing that undermined the claimants' allegations that the value of the shares in the Cypriot entity was substantially affected by the disputed measures. Therefore, it concluded that the bail-in measures did not amount to an expropriation of their investment under BIT Article 4.

### Costs

The tribunal first noted that, since the claimants failed in all their claims, including with respect to Cyprus's jurisdictional objections, they are to bear the costs of the arbitration and refund Cyprus the amount paid to the SCC as advance on costs. At the same time, however, it noted the "huge difference" between Cyprus's and the claimants' legal costs (with the latter amounting only to EUR 170,000). According to the tribunal, Cyprus's costs had been disproportionate, notably in view of the amounts at stake, and thus ordered the claimants to reimburse 70 per cent of Cyprus' legal costs.

*Notes:* The tribunal was composed of Yves Derains (chair, appointed by the SCC Board, French national), Sophie Nappert (claimants' appointee, Canadian national) and Andrea Giardina (respondent's appointee, Italian national). The award is available at https://www.italaw.com/sites/default/files/case-documents/italaw10243_0.pdf

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# RESOURCES AND EVENTS

## RESOURCES

### Legal Framework of Environmental and Social Impact Assessment in the Mining Sector

By Suzy Nikièma, published by IISD, January 2019

Environmental and social impact assessments (ESIAs), environmental and social management plans (ESMPs), closure and rehabilitation plans, and potential resettlement action plans (RAPs) are essential tools for any process related to the granting of environmental permits or mining authorizations. Unfortunately, these issues are often poorly considered in the initial phases of mining projects or are inappropriately monitored during subsequent operational phases. This is why the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) is focusing on ESIAs for its fourth Guidance for Governments. The purpose of this background paper is to identify the issues and problems related to the legal framework of ESIAs and related plans in the legal framework of mineral resource-rich countries, as well as their implications for how the mining sector is governed, while exploring avenues for action and reflecting on appropriate solutions. Available in English and French at https://www.iisd.org/library/background-document-legal-framework-environmental-and-social-impact-assessment-mining-sector

### Reforming Investment Dispute Settlement: A stocktaking

By UNCTAD, published by UNCTAD, March 2019

ISDS continues to be controversial, spurring debate in the investment and development community and the public at large. States are responding to challenges and concerns surrounding ISDS through different avenues. Taking stock of where reform stands today, this IIA Issues Note traces ISDS-related reform developments in recently concluded IIAs and in policy-making processes from the national to the multilateral level. It lists five principal approaches emerge from IIAs signed in 2018: I. No ISDS, II. Standing ISDS tribunal, III. Limited ISDS, IV. Improved ISDS procedure and V. Unreformed ISDS mechanism. It also highlights the prominence gained by multilateral engagement on ISDS reform, including through UNCITRAL Working Group III discussions on the possible reform of ISDS and processes at ICSID for the amendment of its rules. Available at https://investmentpolicyhub.unctad.org/Publications/Details/1194

### Asian Perspectives on International Investment Law

By Junji Nakagawa (Ed.), published by Routledge, March 2019

With changes to the international investment law landscape—and Asian countries now actively developing their network of BITs and FTAs—this volume studies issues relating to Asian perspectives on international investment law and forecasts the future of Asian contributions to its science and practice. It discusses the major factors driving Asian countries to new directions in international investment rule-making and dispute settlement. It also looks at whether Asian countries are crafting a new model of international investment law to reflect their specific sociocultural values. Finally, the book examines whether there are any Asian styles of international investment rule-making and dispute settlement, or if individual Asian countries are seeking specific national models based on economic structure and geopolitical interests. Available at https://www.routledge.com/Asian-Perspectives-on-International-Investment-Law/Nakagawa/p/book/9781138330535

### The Return of the Home State to Investor–State Disputes: Bringing back diplomatic protection?

By Rodrigo Polanco, published by Cambridge University Press, February 2019

The book examines the underlying reasons for the exclusion of home states from ISDS and explores the role that they could play in the dispute process. It also analyzes whether current reforms and proposed changes for the international investment law regime will improve it or reduce the exposure of states to investment claims. Further, it provides a historical perspective of the relationship between foreign investors, home states and host states, and examines how changes to this relationship have affected the development of investment law. Available at https://www.cambridge.org/academic/subjects/law/international-trade-law/return-home-state-investor-state-disputes-bringing-back-diplomatic-protection

### China's International Investment Strategy: Bilateral, regional, and global law and policy

By Julien Chaisse (Ed.), published by Oxford University Press, February 2019

In order to accommodate inward and outward investment, China's participation in the international investment regime has underpinned its efforts to join multilateral investment-related legal instruments and conclude IIAs. This work explores the three distinct tracks of China's investment policy and strategy: bilateral agreements, including those with the United States and the EU; regional agreements including the FTA of the Asia–Pacific; and global initiatives, spearheaded by China's presidency of the G20 and its "Belt and Road initiative." The book's overarching topic is whether these three tracks compete with each other, or whether they complement one another—a question of profound importance for the country's political and economic future and world investment governance. Available at https://global.oup.com/academic/product/chinas-international-investment-strategy-9780198827450

### Principles of Evidence in Public International Law as Applied by Investor–State Tribunals: Burden and Standards of Proof

By Kabir Duggal and Wendy W. Cai, published by Brill, January 2019

The book explores the fundamental principles of evidence and how these principles relate to burden of proof and standard of proof. By tracing the applications of major principles recognized by the International Court of Justice and applied by investor–state tribunal jurisprudence, the authors offer valuable insight into the interpretation, understanding, and nuances of indispensable principles of evidence, an area that has been ignored in both investor–state arbitration and public international law more generally. Available at https://brill.com/view/title/37967

### PITAD Investment Law and Arbitration Database: Version 1.0

By Daniel Behn, Malcolm Langford, Ole Kristian Fauchald, Runar Lie, Maxim Usynin, Taylor St John, Laura Letourneau-Tremblay, Tarald Berge and Tori Loven Kirkebø, online database published by Pluricourts Centre of Excellence, University of Oslo, January 2019

Currently in beta version, the database provides a comprehensive, regularly updated and networked overview of all known investment arbitration cases. It offers researchers and policy-makers immediate access to an initial selection of carefully coded variables together with a series of visualizations of raw and analyzed data from more than 1,000 cases. Subsequent versions will provide progressive access to the remaining 100-plus variables in the database together with all treaty and case texts in a format suitable for computational analysis. Available at https://pitad.org

### European Yearbook of International Economic Law 2018

By Marc Bungenberg, Markus Krajewski, Christian J. Tams, Jörg Philipp Terhechte, Andreas R. Ziegler (Eds.), published by Springer, 2019

This volume focuses on natural resources law understood as a special area of international economic law. In light of increasing conflicts over access to and use of natural resources—and of their impact on political, social and environmental aspects—contributors to this volume analyze the extent to which international economic law can support the sustainable exploitation, management and distribution of natural resources. The volume offers discussions of general principles of natural resources law, the importance of natural resources for trade, investment and European economic law, and analyses of particular sectors. Further sections address recent case law. The volume also contains review essays of important recent books in international economic law. Available at https://www.springer.com/gp/book/9783319977515

### Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)

By Makane Moïse Mbengue and Stefanie Schacherer, Stefanie (Eds.), published by Springer, 2019

This book analyzes the investment chapter of a new type of trade agreement between Canada and the European Union to help readers gain a better understanding of this mega-regional deal, which includes foreign investment protection. It first provides background information on CETA, particularly focusing on its chapter on foreign investment, including the rules on the entry of investments, their protection and the stringent dispute settlement mechanism. It goes on to explore whether these provisions are a further step toward reforming the current international investment law regime. It also examines the highly innovative part of the agreement: i.e., the inclusion of crosscutting issues such as sustainable development. In addition, it examines

CETA's investment chapter from the perspective of non-contracting parties, including Africa, Asia and Latin America. Available at https://www.springer.com/gp/book/9783319983608

### Key Duties of International Investment Arbitrators: A transnational study of legal and ethical dilemmas

By Katia Fach Gómez, published by Springer, 2019

This book critically analyzes how arbitration cases, institutional rules and emerging codes of conduct in the international arbitration sector have dealt with a series of key arbitrator duties to date. In addition, it offers a range of feasible and well-grounded proposals regarding investment arbitrators' duties in the future. It examines the duty of disclosure, the duty to investigate. the duty of diligence and integrity, the duty of confidentiality and other duties such as monitoring arbitration costs, or continuous training. Available at https://www.springer.com/gp/book/9783319981277

### The Participation of the EU in International Dispute Settlement: Lessons from EU investment agreements

By Luca Pantaleo, published by Springer, 2019

This book looks at the participation of the EU in international dispute settlement. It aims to provide the reader with an appraisal of the most problematic aspects connected with the participation of a sui generis legal subject such as the EU to international dispute settlement mechanisms in a state-centric international law. In particular, the publication dwells on the question of how to make possible the effective participation in disputes while at the same time preserving the autonomy of the EU legal order. It does so by outlining different models and proposing the internalization model adopted under EU investment agreements as a possible paradigm. Available at https://www.springer.com/gp/book/9789462652699

### Fact Sheet on Intra-European Union Investor–State Arbitration Cases

By UNCTAD, published by UNCTAD, December 2018

Intra-EU investor–state arbitration has been a prominent topic in domestic and international policy debates. Recent developments related to the Achmea case put a spotlight on the future of intra-EU disputes based on BITs and the Energy Charter Treaty. This IIA Issues Note presents statistics and facts on intra-EU investor–state arbitration cases by the end of July 2018. A review of 49 decided intra-EU cases provides information on the following issues: the affected investment, the types of challenged measures, the alleged rationale and the alleged adverse effects of the challenged measures. An annex contains a mapping of principal issues (jurisdiction, admissibility and merits) discussed by tribunals in these cases. Available at https://investmentpolicyhub.unctad.org/Publications/Details/1193

### Establishing Judicial Authority in International Economic Law

Joanna Jemielniak, Laura Nielsen and Henrik Palmer Olsen (Eds.), published by Cambridge University Press, December 2018

A central development in international law is the intensified juridification of international relations by a growing number of international courts. With this in mind, this book discusses how international judicial authority is established and managed in key fields of international economic law: trade law, investor–state arbitration and international commercial arbitration. The analysis explores the interplay between these areas of economic dispute resolution, tracing their parallel developments and identifying the ways they influence each other on processual mechanisms and solutions. It considers issues such as the usage of precedent and the role of legitimacy, suggesting that the consolidation of judicial authority is a universal trend impacting state behaviour. Available at https://www.cambridge.org/academic/subjects/law/international-trade-law/establishing-judicial-authority-international-economic-law

### The Use of Economics in International Trade and Investment Disputes

By Theresa Carpenter, Marion Jansen and Joost Pauwelyn (Eds.), published by Cambridge University Press, December 2018

Twenty-first-century trade agreements are increasingly a source of international law on investment and competition. With chapters contributed by leading practitioners and academics, this volume draws upon investor–state arbitration and competition/antitrust disputes to focus on the application of economics to international trade law and specifically WTO law. Available at https://www.cambridge.org/academic/subjects/law/international-trade-law/use-economics-international-trade-and-investment-disputes

### Alternative Visions of the International Law on Foreign Investment: Essays in honour of Muthucumaraswamy Sornarajah

C. L. Lim (Ed.), published by Cambridge University

Press, December 2018

This book is about the forces that are reshaping the international law on foreign investment today. It begins by explaining the liberal origins of contemporary investment treaties before addressing a current backlash against these treaties and the device of investment arbitration. The book describes a long-standing legal-intellectual resistance to a neo-liberal global economic agenda, and how tribunals have interpreted various treaty standards instead. It introduces our reader to the changes now taking place in the design of a range of familiar treaty clauses, and it describes how some of these changes are now driven not only by developing and emerging economies but also by the capital-exporting nations. Finally, it explores the life, career and writings of Muthucumaraswamy Sornarajah, a scholar whose work has been dedicated to the realization of many of these changes, and his views about the hold global capital has over legal practice. Available at https://www.cambridge.org/academic/subjects/law/international-trade-law/alternative-visions-international-law-foreign-investment-essays-honour-muthucumaraswamy-sornarajah

## Taxation of Bilateral Investments: Tax treaties after BEPS

By Carlo Garbarino, published by Edward Elgar, 2018

The OECD's guidance on combatting tax avoidance strategies associated with Base Erosion and Profit Sharing (BEPS) methods is complex and accompanied by a wealth of literature. This book provides a concise and accessible overview of counter BEPS measures in the OECD Model and Commentary, allowing readers to gain a practical understanding of how the measures can impact the taxation of bilateral investments protected by tax treaties. Available at https://www.e-elgar.com/shop/taxation-of-bilateral-investments

## Research Handbook on Environment and Investment Law

By Kate Miles (Ed.), published by Edward Elgar, 2019

This book examines one of the most dynamic areas of international law: the interaction between international investment law and environmental law and policy. It takes a thematic approach, analyzing key issues in the environment–investment nexus, such as freshwater resources, climate, biodiversity, biotechnology and sustainable development. It also includes sections exploring regional experiences and address practice and procedure, and offers innovative approaches and critical perspectives, including the interface between foreign investment and the environment with human rights, gender, Indigenous Peoples and economics. Available at https://www.e-elgar.com/shop/research-handbook-on-environment-and-investment-law

## Research Handbook on Human Rights and Investment

By Yannick Radi (Ed.), published by Edward Elgar, 2018

The interplay between human rights and investments is a key and complex issue in today's world. To take stock of its importance and to tackle its complexity, this book gathers in-depth contributions focusing on the interface between human rights and investments in various international legal regimes, economic sectors and regions. It also provides thorough analyses of the various types of accountability that may result from the activities of multinational corporations in relation to human rights. Available at https://www.e-elgar.com/shop/research-handbook-on-human-rights-and-investment

## Commentary on the Energy Charter Treaty

Rafael Leal-Arcas (Ed.), published by Edward Elgar, 2018

The Commentary on the Energy Charter Treaty (ECT) provides an article-by-article textual analysis of the international agreement, which outlines a multilateral framework for cross-border cooperation in the energy sector. Contributors provide commentary and analysis on the five primary areas of the ECT: investment promotion and protection, trade, transit, environmental protection and dispute settlement. The optional protocols are also addressed, including issues such as energy efficiency and the environment. Available at https://www.e-elgar.com/shop/commentary-on-the-energy-charter-treaty

## EVENTS 2019

### April 23–26

**2019 FORUM ON RESPONSIBLE MINERAL SUPPLY CHAINS**, Organisation for Economic Co-operation and Development (OECD), at the OECD Conference Centre, Paris, France, http://www.oecd.org/daf/inv/forum-responsible-mineral-supply-chains.htm

### May 16

**10TH ANNIVERSARY CONFERENCE OF THE INTERNATIONAL INVESTMENT LAW CENTRE COLOGNE (IILCC): "Evolution, Evaluation and Future Developments in International Investment Law,"** at the Cologne Chamber of Commerce and Industry (IHK), in Cologne, Germany, http://www.iilcc.com

**SEMINAR "A LOW-CARBON SOCIETY THROUGH INTERNATIONAL LAW,"** Arbitration Institute of the SCC & Haga Initiative, at the SCC, in Stockholm, Sweden, https://sccinstitute.com/about-the-scc/event-calendar/save-the-date-a-low-carbon-society-through-international-law

### May 21

**ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION,** ICSID and American University Washington College of Law (AUWCL), at ICSID, in Washington, D.C., United States, https://icsid.worldbank.org/en/Documents/flyer_arbitration_costs.pdf

### May 22

**WEBINAR "SUSTAINABLE INVESTMENT IN AGRICULTURE,"** International Bar Association (IBA) Agricultural Law Section, https://www.ibanet.org/Conferences/webinar-may22.aspx

### June 3–14

**EXECUTIVE TRAINING ON EXTRACTIVE INDUSTRIES AND SUSTAINABLE DEVELOPMENT,** Columbia Center on Sustainable Investment (CCSI), at Columbia University, in New York, United States, http://ccsi.columbia.edu/2019/06/03/executive-training-on-extractive-industries-and-sustainable-development

### June 11–21

**EXECUTIVE TRAINING ON SUSTAINABLE INVESTMENTS IN AGRICULTURE,** Columbia Center on Sustainable Investment (CCSI), at Columbia University, in New York, United States, http://ccsi.columbia.edu/2019/06/11/executive-training-on-sustainable-investments-in-agriculture

### June 13–14

**8TH DIS BALTIC ARBITRATION CONFERENCE 2019,** in Riga, Latvia, http://www.balticarbitration.com/en

### June 17–27

**EXECUTIVE TRAINING ON INVESTMENT TREATIES AND ARBITRATION FOR GOVERNMENT OFFICIALS,** Columbia Center on Sustainable Investment (CCSI), at Columbia University, in New York, United States, http://ccsi.columbia.edu/2019/06/17/executive-training-on-investment-treaties-and-arbitration-for-government-officials-2

### September 26–27

**COLLOQUIUM "ACTORS IN INTERNATIONAL INVESTMENT LAW: BEYOND CLAIMANTS, RESPONDENTS AND ARBITRATORS,"** at University Paris II Panthéon-Assas, in Paris, France, https://www.transnational-dispute-management.com/news/20190926.pdf

### October 25–26

**WORLD TRADE FORUM, "INTERNATIONAL ECONOMIC DISPUTE SETTLEMENT: DEMISE OR TRANSFORMATION?"** at World Trade Institute (WTI) of the University of Bern, and the European University Institute (EU), Bern, Switzerland, https://www.wti.org/media/filer_public/b1/2e/b12e1c5d-8def-40ad-92bf-6c77cd3ffcfb/call_for_papers_wtf_2019.pdf

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