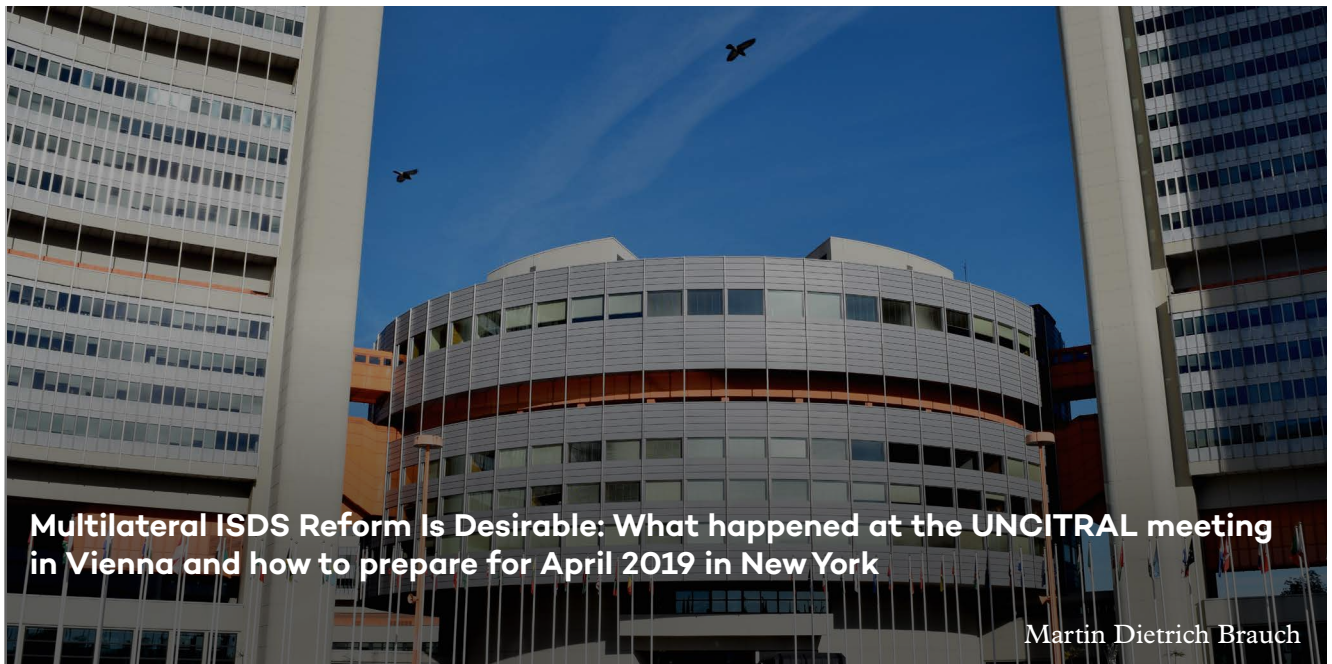




AN ONLINE JOURNAL ON INVESTMENT LAW AND POLICY FROM A SUSTAINABLE DEVELOPMENT PERSPECTIVE

ISSUE 4. VOLUME 9. DECEMBER 2018



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



Do Developing Countries Really Benefit from Investment Treaties? The impact of international investment law on national governance

Mavluda Sattorova



Corporate Social Responsibility Clauses in Investment Treaties

Laurence Dubin





Contents

INSIGHT 1 Multilateral ISDS Reform Is Desirable: What happened at the UNCITRAL meeting in Vienna and how to prepare for April 2019 in New York	4
INSIGHT 2 Do Developing Countries Really Benefit from Investment Treaties? The impact of international investment law on national governance	8
INSIGHT 3 Corporate Social Responsibility Clauses in Investment Treaties.....	12
NEWS IN BRIEF	15
European Union moves swiftly toward adopting regulation on screening foreign direct investment.....	15
After sixth ratification, the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) to enter into force on December 30, 2018	15
European Union signs trade and investment agreements with Singapore; EU–Japan EPA to enter into force on February 2019	15
UNCITRAL Working Group III decides that multilateral reform of ISDS desirable; governments to submit proposals to develop work plan for reform.....	16
Judges of the International Court of Justice decide to no longer participate as arbitrators in ISDS cases.....	16
Negotiations of a legally binding instrument on business and human rights continue at the United Nations.....	16
AWARDS AND DECISIONS	17
<i>Achmea</i> judgment analyzed and FET claim granted in ECT case against Spain.....	17
Kenya prevails in BIT arbitration: British investors' claims dismissed due to the absence of environmental impact assessment	19
ICSID tribunal finds Hungary in breach of expropriation clause in France–Hungary BIT.....	21
Tribunal finds Costa Rica's measures to protect the environment did not breach FET or its expropriation obligations under CAFTA-DR	22
Egypt found liable for the shut-down of an electricity plant during the 2011 uprising.....	25
ICSID tribunal accepts jurisdiction over investor's claim under United Kingdom–Czechia BIT but rules in favour of Czechia	27
RESOURCES AND EVENTS	29

INVESTMENT TREATY NEWS

International Institute for the Sustainable Development
International Environment House 2
9, Chemin de Ballexert, 5th Floor
1219, Chatelaine, Geneva, Switzerland

Tel +41 22 917-8748
Fax +41 22 917-8054
Email itn@iisd.org
Twitter

IISD Group Director – Economic Law & Policy
Nathalie Bernasconi

French Translator
Isabelle Guinebault

Editor-in-Chief
Martin Dietrich Brauch

Spanish Translator
María Candela Conforti

French Editor
Suzy Nikiéma

Design (PDF)
PortoDG

Spanish Editor
Marina Ruete



LIST OF ACRONYMS

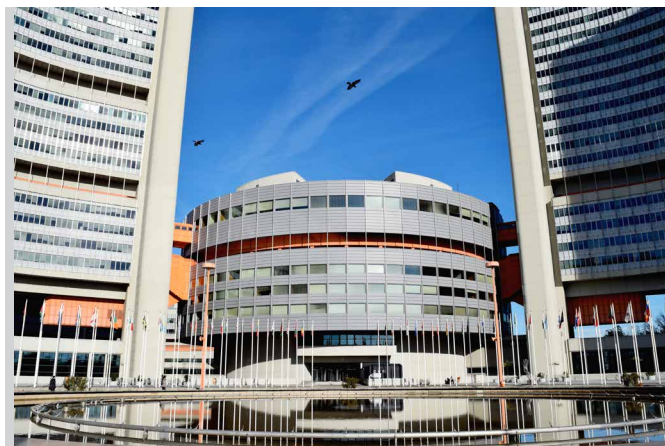
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
COMESA	Common Market for Eastern and Southern Africa
CPTPP	Comprehensive and Progressive Trans-Pacific Partnership
CSR	Corporate Social 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

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



UNCITRAL Working Group III (WG III) met in Vienna from October 29 to November 2, 2018 and decided that multilateral reform is desirable to address various concerns regarding ISDS. Its next session—scheduled to take place in New York from April 1 to 5, 2019—will not yet be about developing solutions to these concerns: it will focus on preparing a *work plan* to develop solutions.

Various challenges lie ahead for WG III member and observer states, particularly developing countries suffering dire consequences from the ISDS regime. They need to ensure that other relevant concerns they may have are not left behind in the deliberations. They also need to contribute to drawing up a work plan that leads to systemic reform of ISDS rather than isolated fixes of some of its troublesome aspects. If states do not prepare for and engage actively in the April 2019 meeting, they risk seeing the hard-fought UNCITRAL process fail to deliver meaningful reform of the existing international regime for investment-related dispute settlement.

This article looks into the WG III process so far, with a focus on the developments at the Vienna session, and brings important considerations for governments in preparing for the New York meeting.

Background on ISDS reform discussions in UNCITRAL WG III

In July 2017 the UNCITRAL Commission mandated its WG III to work on possible ISDS reform. WG III was given a broad mandate to: (1) identify and consider

concerns regarding ISDS, (2) consider whether reform is desirable and, if so, (3) develop any relevant solutions to be recommended to the UNCITRAL Commission. Deliberations, “while benefitting from the widest possible breadth of expertise from all stakeholders, would be government-led, consensus-based and fully transparent.”¹

WG III deliberations under this mandate began in a meeting in Vienna in October–November 2017² and continued in New York in late April 2018.³ In both week-long sessions, WG III dealt with the first phase of the mandate, namely, the identification and consideration of concerns regarding ISDS. It also left it open for states to raise additional concerns at future WG III sessions.⁴

In preparation for the deliberations on the desirability of reform (phase two), the UNCITRAL Secretariat prepared a note—Working Paper 149—attempting to set out the main concerns identified by WG III. These concerns were categorized by the secretariat under three main areas, plus a fourth residual one:⁵

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

² United Nations Commission on International Trade Law (UNCITRAL). (2017, December 19). *Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December, 2017), Part I (A/CN.9/930/Rev.1)*. Retrieved from <https://undocs.org/en/A/CN.9/930/Rev.1>; UNCITRAL. (2018, February 26). *Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December, 2017), Part II (A/CN.9/930/Add.1/Rev.1)*. Retrieved from <https://undocs.org/en/A/CN.9/930/Add.1/Rev.1>; see also IISD. (2018, April 17). *Webinar: UNCITRAL Process on IISD Reform*. Retrieved from <https://www.iisd.org/event/webinar-uncitral-process-isds-reform>.

³ 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)*. Retrieved from <https://undocs.org/en/A/CN.9/935>; Investment Treaty News. (2018, July 30). *UNCITRAL Working Group III continues to debate on ISDS concerns and multilateral reform*. Retrieved from <https://www.iisd.org/itn/2018/07/30/uncitral-working-group-iii-continues-debate-on-isds-concerns-and-multilateral-reform>

⁴ UNCITRAL (2018, May 14), *supra* note 3, para. 99.

⁵ UNCITRAL. (2018, September 5). *Possible reform of investor–State dispute settlement (ISDS) (A/CN.9/WG.III/WP.149)*, paras. 8–17. Retrieved from <https://undocs.org/en/A/CN.9/WG.III/WP.149>. Supplementing Working Paper 149, the secretariat also prepared background reference documents with more detailed discussion of each topic:

- Consistency and related matters: <https://undocs.org/en/A/CN.9/WG.III/WP.150>
- Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS: <http://undocs.org/en/A/CN.9/WG.III/WP.151>
- Arbitrators and decision makers: appointment mechanisms and related issues: <https://undocs.org/en/A/CN.9/WG.III/WP.152>
- Cost and duration: <https://undocs.org/en/A/CN.9/WG.III/WP.153>



1. Concerns pertaining to consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals.

These relate to matters including divergent interpretations, procedural inconsistency, lack of a framework to address multiple proceedings and limits of mechanisms to address inconsistency and incorrectness of decisions.

2. Concerns pertaining to arbitrators and decision-makers, expressed from two perspectives. First, there are concerns regarding their independence and impartiality, including double hatting and the limitations of challenge mechanisms. Second, there are those relating to the impacts of tribunal constitution approaches on the qualifications and characteristics of tribunal members, such as concerns regarding party-appointment mechanisms, repeat appointments, and the limited number and diversity of individuals appointed as arbitrators.

3. Concerns pertaining to cost and duration of ISDS cases. These relate to concerns regarding lengthy and costly proceedings, the allocation of costs by tribunals, difficulties faced by successful respondent states in recovering costs and the lack of mechanisms to address frivolous or unmeritorious claims.

4. Other concerns, reiterating that states would have the opportunity to raise additional concerns not identified under the three main areas outlined above.

What happened at the UNCITRAL WG III meeting in Vienna, October–November 2018

Deliberations throughout the Vienna session closely followed the structural framework and the paragraphs in the secretariat’s Working Paper 149, summarized in the section above.

It is important to look closely at the language of the “decisions by the Working Group” contained in the draft official report of the session, which will frame future deliberations. The draft report indicates that the WG III concluded its discussion with respect to the three main areas outlined above, and concluded that it is desirable for UNCITRAL to develop reforms to address concerns related to the following specific aspects of ISDS:⁶

⁶ UNCITRAL. (2018, November 6). *Draft report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-sixth session (A/CN.9/964)*, paras. 40, 53, 63, 83, 90, 98, 107, 123, 127 and 133. Retrieved from https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf (hereafter referred to as Draft Report).

- “unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law”
- “the lack of a framework for multiple proceedings that were brought pursuant to investment treaties, laws, instruments and agreements that provided access to ISDS mechanisms”
- “the fact that many existing treaties have limited or no mechanisms at all that could address inconsistency and incorrectness of decisions”
- “the lack or apparent lack of independence and impartiality of decision makers”
- “the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules”
- “the lack of appropriate diversity amongst decision makers”
- “the mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules”
- “cost and duration of ISDS proceedings”
- “allocation of costs by arbitral tribunals”
- “security for cost”

What happened in Vienna—but did not make it into the draft official report

Although some “other concerns” were raised by certain governments and acknowledged by the chair during in the Vienna session, they were not reflected in the draft official report. In several interventions, South Africa voiced concerns going beyond the categorization under Working Paper 149. For example, South Africa pointed to the issue of investors requesting the arbitral tribunal to grant interim measures in an attempt to stop the state from investigating corporate wrongdoing, or to stop the state from collecting sums it was awarded in other proceedings. It also pointed to the reputational harm and regulatory chill experienced by states as a result of ISDS proceedings. A common thread in South Africa’s interventions was its support for systemic reform.

Indonesia circulated a paper stating that substantive and procedural elements are inherently intertwined and questioned the substance–procedure dichotomy on which WG III discussions were built. The submission emphasized Indonesia’s concerns regarding the ISDS



mechanism, including some that were not covered by categories mentioned above. These included concerns regarding the regulatory chill and the loss of policy space resulting from the threat of ISDS and regarding the ability of foreign investors to circumvent domestic legal processes.⁷

Also not reflected in the draft official report are interventions made by non-governmental organizations. For example, the Netherlands-based Centre for Research on Multinational Corporations (SOMO) stated that the framework for discussions did not adequately reflect the need to balance rights and obligations of states and investors. SOMO indicated that ISDS is procedurally unfair and unbalanced, as only foreign investors can bring claims. Both SOMO and the Centre for International Environmental Law (CIEL) indicated that Working Paper 149 omitted several concerns. CIEL, in particular, stated that it was unclear how the secretariat selected which concerns to include and which to omit, and requested transparency in this regard. It also requested that time be set aside to discuss other concerns, including those contained in Indonesia's submission.

In response, the secretariat maintained that it has no role in deciding what is included in the background papers, which reflect WG III discussions. It explained that Indonesia's submission had not been translated into all UN languages and therefore could not be looked at in the Vienna session, but would be available for discussion in New York if the WG III decides to do so. The WG III's chair said that the UNCITRAL reform project belongs to member states, not to the secretariat or the chair, and reassured observers that, if concerns were omitted, WG III would still hear them.

It is also worth noting that, on October 30, 2018, over 300 civil society organizations from 73 countries publicized an open letter to UNCITRAL member states, calling on governments to address the fundamental problems of ISDS rather than focusing on procedural tweaks. The letter suggested that WG III should “facilitate a discussion on termination or wholesale replacement of existing agreements without countries being bound to the extended ‘survival’ clauses.”⁸

⁷ Indonesia's paper also advanced some ideas for phase three of the WG III's mandate (development of solutions): rebalancing investors' rights and obligations through substantive and procedural safeguards, requiring exhaustion of local remedies, requiring specific written consent to arbitration and introducing mandatory mediation prior to ISDS.

⁸ ISDS Platform. (n.d.). *More than 300 civil society organizations from 73 countries urge fundamental reform at UNCITRAL's investor-state dispute settlement discussions*. Retrieved from <http://isds.bilaterals.org/?more-than-300-civil-society>. See also: SOMO. (2018, October 30). The limitations of the UNCITRAL process on ISDS reform. Retrieved from <https://www.somo.nl/the-limitations-of-the-uncitral-process-on-isds-reform>

What to expect from UNCITRAL WG III meeting in New York, April 1–5, 2019

The draft report of the Vienna meeting provides a clear outline of how the WG III will conduct its work in the New York session.

First, WG III will consider concerns related to third-party funding (TPF), possibly in light of a background note that is being prepared by the secretariat. TPF was framed by the secretariat in Working Paper 149 as a concern regarding the cost and duration of ISDS proceedings, but during the deliberations it was stated that TPF also had an impact on other aspects and that it introduced a structural imbalance in the ISDS, given that states did not have access to TPF. Accordingly, in New York, WG III will consider the desirability of reforms on TPF.⁹ In advance of the meeting, governments may wish to make formal submissions underscoring that TPF is a broader, more systemic issue than just related to cost and duration.¹⁰

Second, it will consider “other concerns not already covered by the broad categories of desirable reforms already identified”—the fourth residual category that was not addressed in Vienna. Governments that wish to raise additional concerns are specifically “encouraged to submit them in writing” before the New York session.¹¹ Therefore, governments should make submissions flagging their other concerns that were captured neither in the three main areas of Working Paper 149 nor in the official report of the Vienna session.

Third, and very importantly, WG III will “develop a work plan to address the concerns for which it had decided that reform by UNCITRAL was desirable.”¹² Opposing views were expressed during the Vienna deliberations on how work on phase three should be structured. One view was that governments should identify which specific concerns under the three main areas should be priorities for reform. Others, however, maintained that WG III should work on comprehensive reform and that such a prioritization approach could lead to missing out on reform areas.¹³

⁹ Draft Report, *supra* note 6, paras. 120, 134 and 136.

¹⁰ Garcia, F. J. (2018, July 30). The case against third-party funding in investment arbitration. *Investment Treaty News*, 9(4). Retrieved from <https://www.iisd.org/itn/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia>

¹¹ Draft Report, *supra* note 6, para. 137.

¹² *Ibid.*, para. 138.

¹³ *Ibid.*, para. 139.



Discussions on these two opposing views were not pursued in Vienna; instead, it was agreed that they would occur in New York. Again, “governments were encouraged to consult and submit written proposals for the development of the work plan,” and the secretariat was requested to prepare a note on available options. The work plan will indicate how concerns identified as desirable for reform should be addressed in phase three. It will also include questions such as sequencing, priority, coordination with other organizations, multiple tracks and ways to continue the work between WG III sessions.¹⁴

Conclusion: How to prepare for the UNCITRAL WG III meeting in New York in April 2019

To prepare for the April session of WG III in New York, governments should develop their national positions and make written submissions to UNCITRAL on:

1. TPF
2. “Other concerns” not reflected in official documents
3. The development of a work plan for phase three of the WG III’s mandate

To allow the secretariat sufficient time to translate the submissions into the six UN languages in time for the New York meeting, they should be made by early February 2019.

If governments miss the opportunity to express their views on TPF and other concerns relating to the ISDS regime (such as concerns regarding reputational harm, regulatory chill, the ability of foreign investors to circumvent domestic courts, among others), these concerns will likely be left out of the UNCITRAL reform agenda in the crucial phase three, when possible solutions will be discussed.

The work plan to be developed in April will determine the way forward in the UNCITRAL process for ISDS reform. Discussions on this work plan can only be based on the ideas that will be on the table by then. In the absence of other ideas, discussions will be based on the options yet to be presented by the secretariat, by governments who support a prioritization approach leading to mere “tweaking” of some aspects of ISDS, or by the European

Union, whose position is unequivocal:¹⁵

The European Union believes that systemic reform is how we can address these concerns [identified at UNCITRAL as desirable for reform]—and that *only one of the options on the table can effectively address these concerns*. That is the creation of a permanent body to resolve investment disputes—a *multilateral investment court* [emphasis added].

Actively preparing for and engaging in the April session of UNCITRAL WG III in New York will be essential for governments that wish to advance ISDS reform. The session will be their opportunity to have their voices heard on how the WG III’s work should proceed and, ultimately, on whether the UNCITRAL process should lead to procedural tweaks or to systemic reform of ISDS mechanisms.

Author

Martin Dietrich Brauch (LL.M.) is International Law Advisor and Associate with IISD’s Economic Law and Policy program and is based in Brazil. He is ITN’s editor-in-chief.

¹⁴ Ibid., para. 140.

¹⁵ European Commission. (2018, November 22). *A multilateral investment court: A contribution to the conversation about reform of investment dispute settlement*, p. 2. Retrieved from http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157512.pdf



INSIGHT 2

Do Developing Countries Really Benefit from Investment Treaties? The impact of international investment law on national governance

Mavluda Sattorova



Contemporary international rules on investment protection have their historical roots in a system that was designed to protect interests of foreigners abroad—to ensure that foreign business actors in host states benefited from governance as good as that which they enjoyed in their home states, even if a host state’s legal system fell below the acceptable standard.¹ Although met with strong opposition from the wider international community,² the idea of special treatment—or good governance—for foreign investors has entered the corpus of international law through IIAs. Supported by its own bespoke dispute settlement mechanism (ISDS), the modern IIA regime effectively reaffirms the historically contested rules on special treatment of foreign investors.

In its recent moves, however, the investment treaty regime has moved far beyond its original mission of safeguarding foreign investors against serious breaches of international law, such as outright takings of property and denial of justice. Special treatment of foreign investors now means that international business actors may claim redress even for governmental actions displaying “a relatively lower degree of inappropriateness.”³ Lack of transparency,

stability and predictability of state actions combined with the lack of effective remedies and enforcement mechanisms at the national level can now lead to a host state’s liability for damages.

The rise of good governance justification in arbitral awards and the literature

To support the expansion of the scope of state responsibility under investment treaties, new justifications have been proffered claiming that the regime fulfils a useful societal function. Some of the emerging narratives argue that investment treaties and ISDS benefit not only foreign investors but also a broader range of stakeholders in host states, from businesses to ordinary citizens. Even if investment treaties might be unsuccessful in achieving their economic objectives, it is argued, their existence would still be justified by good governance norms enshrined in substantive standards of treatment such treaties impose on state parties.⁴ Although designed to benefit foreign investors, these good governance standards may arguably “spill over into domestic law and set new standards also for the domestic legal system.”⁵ The key premise of the good governance narrative is that the remedy of damages would pressure host states into complying with and incorporating the good governance standards in their domestic legal order and wider bureaucratic practices.⁶ By acting as *catalysts* of governance reforms in host states, investment treaties allegedly improve domestic governance not only for foreign investors but also for host communities.

In a rather worrying turn, the language of good governance has been embraced not only by academics but also by arbitral tribunals. In a string of awards, including the seminal *Metalclad*, *Tecmed* and *Occidental*

¹ Root, E. (1910). The basis of protection to citizens residing abroad. *American Journal of International Law*, 4(3), 517–528, pp. 521–522.

² See, for example, UN GA Resolutions No. 1803 (December 14, 1962) and No. 3281 (December 12, 1984).

³ *Saluka Investments BV v. Czech Republic*, PCA—UNCITRAL, Partial Award, March 17, 2006, para. 293. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>

⁴ Vandevelde, K. J. (2010). *Bilateral investment treaties: History, policy, and interpretation*. Oxford: Oxford University Press, p. 119.

⁵ Muchlinski, P., Ortino, F., & Schreuer, C. (Eds.). (2008). *The Oxford Handbook of international investment law*. Oxford: Oxford University Press, p. vi.

⁶ Schill, S.W. (2009). *The multilateralization of international investment law*. Cambridge: Cambridge University Press, p. 377.



cases,⁷ arbitral tribunals held that transparency, stability, predictability and consistency of state behaviour ought to be seen as constitutive elements of the FET standard. Recent efforts to reform investment treaties have done little to reverse such interpretative practices, although construing FET as a host state's obligation to abide by good governance has never been adequately supported by historical and doctrinal evidence. The interpretations of other good governance standards, such as an investment treaty obligation to provide an effective means of asserting claims and enforcing rights, are similarly questionable both for their insufficient legal underpinnings and their normative implications.⁸ Harnessing the language of good governance to justify the expansive interpretation of investment treaty rules is unlikely to divert attention from the shortcomings of the legal and normative reasoning underpinning the relevant arbitral awards. Rather, it may further heighten concerns over the regime's legitimacy and credibility.

Does empirical evidence support the good governance argument?

The claim that investment treaties improve governance at a national level has yet to be supported with empirical evidence. Instead, the good governance narrative of international investment law is premised on a set of assumptions about how host states *should* respond to investment treaty norms. Proponents of the good governance narrative presume that the imposition of monetary liability on host states for a breach of good governance standards will (1) deter host states from mistreating foreign investors and (2) encourage them to proactively reform legal and bureaucratic practices.⁹

⁷ *Metalclad Corporation v. Mexico*, Award, August 25, 2000, ICSID Case No ARB (AF)/97/1. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf>; *Técnicas Medioambientales Tecmed SA v. Mexico*, Award, May 29, 2003, Case ARB(AF)/00/2. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf>; *Occidental Exploration and Production Company v. Ecuador*, Award, July 1, 2004, LCIA Case No UN 3467. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf>

⁸ See, for instance, *AMTO v Ukraine*, Final Award, March 26, 2008, SCC Case No 080/2005, para. 87 (the tribunal construed the effective means standard as requiring that national laws must be not only accessible but also effective). Retrieved from <https://www.italaw.com/sites/default/files/case-documents/ita0030.pdf>

⁹ See Dolzer, R. (2005). The impact of international investment treaties on domestic administrative law, *New York University Journal of International Law and Policy*, 37, 972; Schill, S.W. (2009). *The multilateralization of international investment law*. Cambridge: Cambridge University Press, p. 377; and Echandi, R. (2011). What do developing countries expect from the international investment regime? In Alvarez, J. E. & Sauvant, K. P. (Eds.), *The evolving international investment Regime: Expectations, realities, options* (pp. 3–21). Oxford: Oxford University Press.

For such deterrent and transformative effects to exist, however, government officials in host states need to be aware of the existence and meaning of investment treaty norms. Furthermore, national legal and regulatory frameworks should be in place to effectively discourage government officials from acting in breach of those investment treaty norms. The crucial question is: to what extent are government officials actually aware of and influenced by investment treaty disciplines in making their decisions vis-à-vis foreign investors? Does the imposition of monetary sanctions on host states prompt them to address the governance failures lying at the roots of investor–state disputes and to enhance accountability of relevant government agencies and officials?

"The case study of five developing countries' experience reveals that, even after states become respondents in investment arbitration, many of their government officials tend to remain unaware of investment treaty law and its implications."

Recent empirical studies seek to answer these questions through interviews with government officials and the analysis of national legislation in developing country states.¹⁰ The case study of five developing countries' experience reveals that, even after states become respondents in investment arbitration, many of their government officials tend to remain unaware of investment treaty law and its implications. Even where government officials learnt about investment treaty law from their involvement in investor–state arbitration, such learning has not been translated into reforms to improve governance. The empirical data also shows that, despite having gained a certain awareness and knowledge of investment treaty law, some host governments continue to neglect the possible repercussions of their actions in breach of that law. Notwithstanding the threat of adverse

¹⁰ See Sattorova, M. (2018). *The impact of investment treaty law on host states: Enabling good governance?* Oxford: Hart Publishing. See also Van Harten, G. & Scott, D.N. (2017). Investment treaties and the internal vetting of regulatory proposals: A case study from Canada. *Investment Treaty News*, 8(3), 8–9. Retrieved from <https://www.iisd.org/itn/2017/09/26/investment-treaties-internal-vetting-regulatory-proposals-case-study-from-canada-gus-van-harten-dayna-nadine-scott>



financial consequences, in some cases host governments prefer to breach investment treaty norms where they find it economically and politically more expedient. Dissatisfaction with investment arbitration also appears to push host states to consider retroactive changes in national laws on investment protection and to withdraw from the investment treaty regime altogether.

Good governance only for foreign investors?

The emerging empirical evidence also raises the question whether, by effectively insulating foreign investors from the shortcomings of domestic regimes and by replacing the latter with the arguably stronger and more effective international alternative, the investment treaty regime reduces the incentive for host states to improve domestic governance institutions and practices.¹¹ Since ISDS allows investors to escape the jurisdiction of domestic courts, national judiciaries are not merely deprived of incentives to compete with international tribunals and enhance the quality of their governance outputs, but they are also effectively barred from otherwise embedding international standards of good governance in the legal and bureaucratic practices of host states.

"Rather than encouraging a comprehensive reform of national governance institutions and practices, developing country governments are directed toward solutions offering "good governance only for foreign investors."

The empirical evidence also suggests that, due to the emphasis of the investment treaty regime on the idea of foreign investors deserving special protection, the regime contributes to a fragmentation of the national judicial and regulatory landscape and the emergence of special decision-making bodies specifically tasked with shielding foreign investors

from national law and institutions. There is a discernible trend among developing country states toward creating legal enclaves for foreign investors not only at the international but also national level. The proliferation of these enclaves does not inspire belief in international law as a force for change. Instead, overvaluing foreign investors entrenches the prevailing perceptions of international law as a forum for select privileged actors. Rather than encouraging a comprehensive reform of national governance institutions and practices, developing country governments are directed toward solutions offering "good governance only for foreign investors."

"Dissatisfaction with investment arbitration also appears to push host states to consider retroactive changes in national laws on investment protection and to withdraw from the investment treaty regime altogether."

Is the investment treaty regime itself compliant with good governance standards?

Another crucial question is whether international investment law has the necessary characteristics to inspire changes at a national level. The investment treaty regime, in its current form, lacks some of the vital characteristics necessary for its purported mission to act as a mechanism signalling what the universally acceptable standards of good governance are.¹² Among other things, the actual impact of investment treaty law on governance in host states hinges on the stance the regime takes on investor misconduct. If investment treaties and arbitral tribunals turn a blind eye to illegal acts perpetrated by foreign investors in host states, including bribery and corruption, the investment treaty regime could be complicit in encouraging and perpetuating inadequate and undesirable patterns of behaviour by governments and foreign investors. Regrettably, the bulk of existing investment treaties

¹¹ Tom Ginsburg has convincingly shown that the availability of ISDS at the international level reduces incentives for host states to improve domestic governance mechanisms and practices. See Ginsburg, T. (2005). International substitutes for domestic institutions: Bilateral investment treaties and governance. *International Review of Law and Economics*, 25(1), 107–123, pp. 119–121.

¹² Investment treaty law's failure to comply with rule of law ideals of clarity, coherence and fair process has been discussed in Van Harten, G. (2010). Investment Treaty arbitration, procedural fairness, and the rule of law. In Schill, S.W. (Ed.), *International investment law and comparative public law* (pp. 627–657). Oxford: Oxford University Press.



do not contain provisions to expressly address investor misconduct. Investment treaty law has long been criticized for its asymmetric nature—for providing investor with rights, but not imposing any obligations.¹³ The failure to address the lack of investor accountability in IIAs is at odds with the investment treaty regime's proclaimed commitment to the ideals of rule of law and good governance.

Sanctions, top-down reforms and capacity building

The empirical studies of the good governance effects of investment treaty law also highlight the central role played by resource constraints in shaping states' capacity to internalize good governance norms. As law and development scholars have long argued, external sanctions and top-down reforms may not always have an enabling effect on recipient countries.¹⁴ It seems that the emerging transnational network of influence—primarily comprising international financial and aid institutions, Western governments and those responsible for the production and diffusion of investment treaty norms—may in fact suppress rather than enable meaningful improvements in domestic governance. With their emphasis on external (foreign) expertise and external (international) law and dispute settlement mechanisms, the workings of these transnational agents may have a weakening effect on the national legal consciousness and thus hinder the emergence of new, innovative ways of interaction between developing country states and the global investment protection regime.

Final remarks

Now that empirical evidence increasingly points to the lack of positive correlation between investment treaties

and increased FDI,¹⁵ who stands to gain from IIAs granting foreign investors enhanced privileges? What is the overarching societal function of the contemporary investment treaty regime and to what extent is that function attainable given the existing design of investment treaty rules and associated investment arbitration procedures? Further studies are needed to explore how those who ultimately bear the costs of investment rules—developing country states and host communities—could be included in the process of redefining international investment governance and shaping the content of investment protection policies.

Author

Mavluda Sattorova is senior lecturer in law at the University of Liverpool. She specializes in international investment law and investor-state arbitration. Her most recent work examines the impact of investment treaty law on national policy-making and governance.

¹³ UNCTAD. (2015). *World investment report 2015: Reforming international investment governance*. Geneva: UNCTAD, p. 158. Retrieved from https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf

¹⁴ See e.g., Trebilcock, M.J., and Daniels, R. J. (2008). *Rule of law reform and development: Charting the fragile path of progress*. Cheltenham: Edward Elgar, 2008, p. 351.

¹⁵ Pohl, J. (2018, January 18). Societal benefits and costs of international investment agreements: A critical review of aspects and available empirical evidence. *OECD Working Papers on International Investment*, 2018/01. Retrieved from http://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en;

Bonnittha, J. (2017, September). *Assessing the impacts of investment treaties: Overview of the evidence*. Geneva: IISD. Retrieved from <https://www.iisd.org/library/assessing-impacts-investment-treaties-overview-evidence>;

Yackee, J. (2010–2011). Do bilateral investment treaties promote foreign direct investment? Some hints from alternative evidence, *Virginia Journal of International Law*, 51, 397–442.



INSIGHT 3

Corporate Social Responsibility Clauses in Investment Treaties

Laurence Dubin



Corporate social responsibility (CSR) refers to practices and rules that companies, particularly multinational enterprises (MNEs), follow voluntarily to limit the negative social, environmental and other externalities caused by their activities. Originally based on the sovereign ethics of MNEs, CSR has since been structured by international institutions such as the OECD (with the OECD Guidelines for Multinational Enterprises) and the United Nations (with the Human Rights Council's Guiding Principles on Business and Human Rights). These soft-law instruments have been developed alongside hard-law investment treaties, which, in turn, grant rights to foreign investors under international law.

In recent years, there has been a trend for investment law to take CSR into account implicitly or explicitly. Implicitly, it appears when the “non-socially responsible” behaviour of an investor is considered in investment arbitration in relation to conditions of admissibility or jurisdiction of arbitration tribunals. Explicitly, on the other hand, it appears in CSR clauses in investment treaties. The inclusion of CSR clauses in such treaties is a relatively new practice, and these clauses have not yet been subject to investment arbitration. There are at most some 30 CSR clauses in investment treaties and models or FTAs.¹ These clauses may be categorized as follows.

¹ For an overview of all the clauses, see the article by Monebhurrin, N. (2017). Mapping the duties of private companies in international investment law. *Brazilian Journal of International Law*, 2017, 14(2), 50–71, and by the same author but regarding Brazilian agreements only: Monebhurrin, N. (2017). Novelty in international investment law: The Brazilian agreement on cooperation and facilitation of investments as a different international investment agreement model. *Journal of International Dispute Settlement*, 8, 79–100. For a more general analysis of the obligations of foreign investors, see also Mbengue, M. M. (2017). Les obligations des investisseurs. In L. Dubin et al. (Eds.), *Colloque de Paris 8 Vincennes–Saint Denis: L'entreprise multinationale et le droit international* (pp. 295–339) Paris: Pedone. Retrieved from <http://pedone.info/site/wp-content/uploads/2017/05/Pr%C3%A9sentation-SFDI-2016-Lentreprise.pdf>

1. A typology of CSR clauses in investment treaties

The first category includes clauses in which, at most, states encourage companies to self-regulate. The second category includes clauses in which the home and host states of foreign investors consider CSR to be within their own national competence. The third category, which is more recent, comprises clauses in which states explicitly require that investors comply with human rights or environmental obligations.

Clauses in the first two categories conceive CSR to be organized spontaneously by MNEs or by domestic laws (mainly host state laws). They can be described as *indirect clauses* since they create intermediate instruments for the regulation of business conduct by foreign investors, either through the spontaneous policies of MNEs or through host states' domestic legal frameworks. In turn, clauses that impose on investors direct obligations concerning human rights, environmental protection or the international prohibition on corruption—categorized as *direct clauses*—oppose the primary objective of traditional investment law, which is to protect investors, and demonstrate the substantial reform movement in this area. Indirect clauses could remedy the widespread imbalance between overprotective international rights of foreign investors and the corresponding obligations of host states. They could also change the corporate duties of MNEs by converting CSR into enforceable international obligations on investors, making investment law a useful and unexpected lever to hold MNEs accountable.

2. Indirect clauses: A means of protecting the powers of host countries

Most CSR clauses are indirect clauses, framing CSR as a self-regulating technique that home and host states should promote. Most agreements to which Canada is a party contain this type of clause, including the Canada–EU CETA, currently under provisional application.²

² See also the preamble and article 22.3 of CETA, retrieved from http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/index_en.htm



Under the CETA, the parties agree on:

encouraging the development and use of voluntary best practices of corporate social responsibility by enterprises, such as those in the OECD Guidelines for Multinational Enterprises, to strengthen coherence between economic, social and environmental objectives.

These provisions do not change the corporate or ethical duties of companies into enforceable legal obligations in the context of dispute settlement proceedings. They merely reaffirm the voluntary nature of CSR, which remains a form of self-responsibility for companies that can, at most, be encouraged by states.

Some indirect clauses aim to go beyond the understanding of CSR as a voluntary corporate engagement, by urging states to adopt legislation to regulate the conduct of investors. This type of indirect clause can play a useful role in interpreting the content and scope of host country obligations in investment treaties. Indeed, the inconsistency of arbitration case law in the interpretation of certain standards of treatment can be detrimental to states' positive obligations to protect human rights or the environment. Indirect CSR clauses could therefore justify or emphasize the restrictive interpretation of FET and, in particular, the protection of investors' legitimate expectations. By explaining the intention of states to reinforce investors' corporate responsibility, indirect clauses could help better define the scope of investors' legitimate expectations.³

3. Direct CSR clauses: A means of defining investors' international obligations

Direct CSR clauses, in turn, aim to hold foreign investors responsible by defining the obligations that govern their activities. There are not many of them, simply because the primary objective of traditional investment treaties is to grant rights to foreign investors rather than impose obligations on them. This objective of investment treaties explains why direct clauses often use weak language. Article 24 of the Pan-African Investment Code (PAIC) uses conditional verbs ("should") to encourage investors to comply with internationally recognized human rights laws

³ An interpretive trend in legitimate expectations can be seen, which tends to increase investors' responsibility by at least being aware of the applicable legislation and anticipating regulatory changes.

while using imperative verbs ("shall") in relation to combating corruption (Article 21). Similarly, Article 12 on CSR in the Argentina–Qatar BIT is limited to stating that investors operating in the territory of each state "should make efforts to voluntarily incorporate internationally recognized standards of [CSR] into their business policies and practices."

When conditional verbs are not used, direct clauses can be relatively weak in substance. Some only recall one of the criteria of the *Salini* test, namely, that investors must contribute to the development of the host country. This is the case of Article 22(2) of the Draft Pan African Investment Code, entitled Corporate Social Responsibility:⁴

Investors shall, in pursuit of their economic objectives, ensure that they do not conflict with the social and economic development objectives of host States and shall be sensitive to such objectives.

Furthermore, direct CSR clauses must often coexist with clauses relating to the compliance of the investment with the domestic law of the host country. Therefore, the Argentina–Qatar BIT, in addition to a direct CSR clause in Article 12, contains in Article 11 an obligation on investors to comply with domestic law. Another option is to combine the CSR clause and the obligation to comply with domestic law in a single provision. This is the case of Article 11 of the Brazil–Malawi Investment Cooperation and Facilitation Agreement (an investment treaty that is different from traditional BITs):⁵

The investors and their investments shall develop their best efforts to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host Party receiving the investment : ... b) Respect the human rights of those involved in the companies' activities, consistent with the international obligations and commitments of the Host Party.

These direct clauses demonstrate the difficulty that states face when imposing internationally recognized human rights obligations on investors without linking

⁴ Economic Affairs Department, African Union Commission. (2016, December 15). *Draft Pan African Investment Code, EA15660*. Retrieved from https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf. See also article 14 of the Intra-MERCOSUR Investment Facilitation Protocol, retrieved from <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5548>

⁵ See Article 11 of the Brazil–Malawi Investment Cooperation and Facilitation Agreement here: <https://investmentpolicyhub.unctad.org/Download/TreatyFile/4715>



them to states' own international commitments. Therefore, in the example of the clauses in Brazil's treaties, if investors must respect human rights, this is only in the context of the international commitments and obligations undertaken by the host countries.

While direct CSR clauses are currently imprecise in their content regarding the international obligations of foreign investors, it could nonetheless be useful for host countries to invoke them when resolving disputes with foreign investors.

4. The potential impact of CSR clauses on host country counterclaims in ISDS

Several well-known arbitral awards⁶ have already considered that a foreign investor's corrupt conduct or breach of host state laws can lead to either the dismissal of the case on jurisdictional grounds or to the inadmissibility of the investor's claim. Thus, host countries have mechanisms—namely, objections to jurisdiction or to admissibility—allowing them, as a defence, to avoid their own responsibility by challenging the claimant investor's socially irresponsible conduct (whether or not it characterized as such). CSR clauses could be a useful basis for counterclaims allowing host countries not to avoid their own responsibility but to actively hold investors liable.

This is because counterclaims allow host countries to react to the principal claims of foreign investors and directly challenge their wrongful conduct. Even so, counterclaims have not been very successful so far. The main obstacle to the success of counterclaims is the uncertainty as to whether host country obligations under international law can be enforced on foreign investors, as demonstrated in the *Urbaser v. Argentina* case. In this case, Argentina filed a counterclaim regarding the investor's breach of the human right to water. The tribunal concluded that Argentina's claim could not be accepted, as the human right to water created obligations for states only. However, the arbitrators considered that:

the situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights[,] would be at stake. Such an obligation can be of immediate

application, not only upon States, but equally to individuals and other private parties.⁷

At first, such a negative obligation recalls one of the well-known CSR standards, the due diligence obligation requiring MNEs to “endeavour” not to violate human rights or pollute the environment. It could be imagined that, faced with a CSR clause in an investment treaty requiring investors to comply with this due diligence obligation, the arbitrators would have a useful tool to consolidate the establishment of an enforceable obligation on investors, as well as a useful basis for counterclaims.

If investors are aware of the risk of host countries successfully bringing counterclaims invoking their lack of due diligence, they could be dissuaded from initiating an arbitration proceeding in which they would have to justify their own conduct. Therefore, surprisingly, the link between the duty of due diligence (as described in a CSR clause) and investment law (through counterclaims) could help “significantly moralize the use of treaty-based arbitration.”⁸ Even more unexpectedly, investors could be held liable for breaching a due diligence obligation that is directly enforceable and that could ultimately impose on them an obligation to compensate the host country.

Author

Laurence Dubin is Professor of International Law at the Sorbonne Law School. For a comprehensive view on the subject, see Dubin, L. (2018). RSE et droit des investissements, les prémisses d'une rencontre, *Revue Générale de Droit International Public*, 2018, vol. 4.

⁶ See *World Duty Free Company Limited v. Kenya*, CIRDI case No. ARB/00/7, award, August 31, 2006. Retrieved from <https://www.italaw.com/documents/WDFv.KenyaAward.pdf>; *Metal Tech Ltd v. Republic of Uzbekistan*, CIRDI case No. ARB/10/03, award, October 4, 2013. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf>.

⁷ See *Urbaser and Consorcio de Aguas Bilbao v. Argentina*, ICSID Case No. ARB/07/26, Award, December 8, 2016, § 1210, retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf

⁸ Gaillard, E. (2015). L'avenir des traités de protection des investissements. C. Leben (Ed.), *Droit international des investissements et de l'arbitrage international*, Paris, Pedone, 2015, p. 1040.



NEWS IN BRIEF

European Union moves swiftly toward adopting regulation on screening foreign direct investment

On November 20, 2018, the European Parliament, Council and Commission reached political agreement on an EU framework for screening FDI, and on December 11, 2018, the International Trade Committee of the European Parliament endorsed the political agreement. The stated objective of the framework is to protect the strategic interests of the EU, its member states and enterprises—including security and public order—while remaining open to foreign investment.

The draft EU Regulation will create a cooperation mechanism for the exchange of information between EU member states and the commission. It will also encourage international cooperation on screening policies, including sharing experiences, best practices and information on investment trends. Importantly, it reaffirms EU member states have the last word on whether a specific operation should be allowed or not in their territory.

The EU Regulation is expected to enter into force once the European Parliament and the Council conclude the respective ongoing approval procedures.

After sixth ratification, the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) to enter into force on December 30, 2018

On October 31, 2018, Australia became the sixth state to formally ratify the CPTPP, along with Canada, Japan, Mexico, New Zealand and Singapore. This triggered a 60-day countdown for the agreement to enter into force on December 30, 2018. Brunei Darussalam, Chile, Malaysia, Peru and Vietnam have yet to ratify the agreement. The CPTPP was signed in Santiago, Chile, on March 8, 2018.

European Union signs trade and investment agreements with Singapore; EU–Japan EPA to enter into force on February 2019

On October 19, 2018, Singapore and the European Union signed political and trade agreements as well as the EU–Singapore Investment Protection Agreement (IPA). The texts are intended to be building blocks toward similar ASEAN–EU agreements.

The EU–Singapore IPA is subject to *Opinion 2/15* of the ECJ. On May 16, 2017, the court decided that the treaty fell within exclusive EU competence, except for certain provisions that fall within a competence shared between the EU and its member states. These include provisions on investment protection related to portfolio investment and on ISDS. The IPA creates an *Investment Court System*, following the EU proposal in its recent bilateral agreements.

As a mixed agreement, on the EU side, the IPA will require ratification the European Parliament as well as by national and regional parliaments of EU member states.

On December 12, 2018, the European Parliament approved the EU–Japan Economic Partnership Agreement (JEEPA), following a similar decision by Japan’s National Diet. Given that the JEEPA does not cover investment protection or ISDS, parliamentary ratification by both partners paves the way for its entry into force on February 1, 2019.

EU–Japan negotiations continue for a potential agreement on investment protection. In the proposed agreement, the European Union has also included a reformed *Investment Court System* proposal and has stated that “it is clear that there can be no return to the old-style ISDS.”



UNCITRAL Working Group III decides that multilateral reform of ISDS desirable; governments to submit proposals to develop work plan for reform

UNCITRAL Working Group III continued discussions on possible reform of investor–state dispute settlement (ISDS) at its 36th session, held October 28–November 2, 2018 in Vienna. The working group has a **broad mandate** in three phases: (1) **identify concerns** regarding ISDS, (2) consider whether reform is desirable and, if so, (3) develop recommendations.

The Vienna session centred on the second phase of this mandate—desirability of multilateral reform. The working group considered three areas of concern: (1) consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals, (2) arbitrators and decision-makers, and (3) cost and duration of ISDS cases. As indicated in the **draft report of the meeting**, the working group concluded that multilateral reforms are desirable to address various concerns under these three areas.

The 37th session is scheduled for April 1–5, 2019 in New York, when the working group will consider concerns related to third-party funding, as well as other concerns not already covered by the three broad categories of desirable reforms already identified. Importantly, it will also develop a work plan to develop reform recommendations. In preparation for the April 2019 session, governments are encouraged to consult and submit written proposals for the development of the work plan.

An inter-sessional regional meeting of the working group is also scheduled to take place in Santo Domingo, Dominican Republic, February 13–14, 2019. More information and official documents of UNCITRAL Working Group III are available on the **working group website**.

Judges of the International Court of Justice decide to no longer participate as arbitrators in ISDS cases

In a **speech** to the United Nations General Assembly on October 25, 2018, Judge Abdulqawi Yusuf, President of the International Court of Justice (ICJ), mentioned that the court has decided to restrict the practice of allowing members to serve in arbitral tribunals. ICJ members have

decided that they “will not normally accept to participate in international arbitration” and, “in particular, they will not participate in investor–state arbitration or in commercial arbitration.”

Only under exceptional circumstances will the ICJ authorize its members to participate in arbitrations between states, “if the circumstances so warrant.” President Yusuf clarified that even in such exceptional cases, an ICJ judge will only participate, if authorized, in one arbitration procedure at a time, and provided that the appointment as an arbitrator is not by a state that is a party in a case pending before the court.

This contrasts with current practice pursuant to which **some judges increasingly served as arbitrators in several investor–state arbitrations** at the same time, alongside their function as ICJ judges.

Negotiations of a legally binding instrument on business and human rights continue at the United Nations

During the week of October 15–19, 2018, the **fourth session** of the Open-Ended Intergovernmental **Working Group** on Transnational Corporations and Other Business Enterprises with Respect to Human Rights took place in Geneva. Representatives from over 90 states participated in the session. More than 60 international organizations, civil society representatives and other stakeholders participated as observers.

At the session, the working group completed the first reading of **the zero draft of a proposed legally binding instrument**. The objective of the proposed instrument is to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. It also discussed **the zero draft optional protocol** annexed to the proposed instrument. Reaffirming the need to prevent and to end business-related human rights abuses, participants engaged in dialogue focusing on the content of the draft instrument.

As recommended by the chair-rapporteur, states and other stakeholders are invited to submit their comments and proposals on the drafts no later than the end of February 2019. The working group’s email address is igwg-tncs@ohchr.org. A revised draft instrument will be prepared for further negotiation at **the fifth session of the working group**, which is scheduled for October 2019 in Geneva.



AWARDS AND DECISIONS

Achmea judgment analyzed and FET claim granted in ECT case against Spain

Foresight Luxembourg Solar 1 S.à.r.l., Foresight Luxembourg Solar 2 S.à.r.l., Greentech Energy Systems A/S, GWM Renewable Energy I S.P.A. and GWM Renewable Energy II S.P.A. v. The Kingdom of Spain, SCC Arbitration V (2015/150)

Kirrin Hough

In an award dated November 14, 2018, an SCC tribunal considered ECT-based claims against Spain. The claims were brought by two Luxembourg companies, Foresight Luxembourg Solar 1 S.à.r.l. and Foresight Luxembourg Solar 2 S.à.r.l.; two Italian companies, GWM Renewable Energy I S.p.A. and GWM Renewable Energy II S.r.l.; and one Danish company, Greentech Energy Systems A/S, following legislative and regulatory measures enacted by Spain to address its growing tariff deficit. The tribunal affirmed its jurisdiction over the dispute and granted the FET claim made under ECT Article 10(1), awarding the claimants EUR 39 million in damages.

Background and claims

In 2007, Spain enacted Royal Decree (RD) 661/2007 to attract investments in renewable electricity generation and meet its renewable energy target under EU law. RD 661/2007 established fixed feed-in tariffs (FiTs) to be paid for qualifying photovoltaic (PV) facilities for the lifetime of the facilities and provided priority of access to the electricity grid. Between May 2009 and May 2010, the claimants acquired Spanish companies operating three PV facilities that had been registered under RD 661/2007.

While RD 661/2007 proved successful in gaining renewable energy investments in Spain, and 85 per cent of the target under RD 661/2007 was reached in four months, Spain experienced a corresponding widening of its tariff deficit. In order to eliminate the growing tariff deficit, Spain enacted several measures between 2010 and 2013 (including RD 1565/2010, RDL 14/2010, Law 15/2010 and RDL 2/2013) that modified the incentives given to PV facilities registered under RD 661/2007. From 2013 to 2014, Spain subsequently repealed RD 661/2007 and established a new regulatory regime (including RDL 9/2013, Law 24/2013, RD 413/2014 and MO 1045/2014), which created a new legal framework for the production of renewable energy.

In response to the measures, the claimants brought several ECT claims against Spain, including claims of breaches of the FET, impairment and umbrella clauses under ECT Article 10(1) and a claim of breach of the expropriation clause under ECT Article 13.

Achmea examined in establishing tribunal's jurisdiction over intra-EU dispute

Before considering the claims, the tribunal considered Spain's objection to the tribunal's jurisdiction over the dispute on the grounds that the ECT does not apply to intra-EU disputes in which claimants are nationals of EU member states and the respondent is an EU member state and an ECT contracting party. Spain ultimately argued that the dispute settlement clause under ECT Article 26 excludes arbitration of intra-EU disputes, because it is forbidden under EU law.

In considering Spain's objection, the tribunal began its analysis by examining the plain language of ECT Article 26 and found no carve-out of intra-EU disputes from the protections of ECT. The tribunal also considered Spain's argument that the tribunal lacked jurisdiction over the dispute due to the primacy of EU law but found that EU law is not relevant to the question of the tribunal's jurisdiction.

Of particular significance in the tribunal's analysis was its consideration of Spain's jurisdictional objection on the grounds of the judgment in *Slowakische Republik v. Achmea*. In *Achmea*, recently decided in March 2018, the European Court of Justice deemed an arbitration clause in an investment agreement between two EU member states to be incompatible with EU law.

In determining whether *Achmea* applied in this arbitration against Spain, the tribunal agreed with the tribunal in *Masdar Solar v. Spain* and found that the judgment in *Achmea* has limited application and does not apply to multilateral treaties such as the ECT. The tribunal further upheld the opinion of Advocate General Wathelet in *Achmea*, finding that the protections afforded to investments in the ECT, and the ISDS mechanism, apply to EU member states.

Tribunal lacks jurisdiction over TVPEE claim

While the tribunal found that it did have jurisdiction over the dispute, it denied its jurisdiction over the



claim that Spain had breached ECT Article 10(1) by introducing a 7 per cent tax on the value of the production of electrical energy (TVPEE) under Law 15/2012. Upon examination of ECT Article 21, the tribunal found that taxation measures, such as the one in question, had been carved out from the application of ECT's protections for investors and thus did not fall under the tribunal's jurisdiction.

Spain in breach of FET

In considering the claim that Spain had breached its FET obligation under ECT Article 10(1), the tribunal found that the claimants did not have a legitimate expectation that the regulatory scheme under RD 661/2007 would not be modified at all. At the same time, however, the tribunal did find that they had a legitimate expectation that the tariff regime under RD 661/2007 would not be changed in such a fundamental manner that would ultimately deprive investors of a significant portion of their projected revenues.

In applying these findings, the tribunal concluded that, since the regulations enacted by Spain from 2010 to 2013 merely modified and did not fundamentally change RD 661/2007, they did not breach the FET standard. The tribunal did find, however, that the new regulatory regime enacted by Spain from 2013 to 2014 breached FET. According to the tribunal, the new regulatory regime fundamentally changed the regulatory framework of RD 661/2007 by repealing and replacing it with a new regulatory structure. In this way, Spain's enactment of the regulations amounted to a compensable breach of the FET standard under ECT Article 10(1).

Impairment and umbrella clause claims dismissed

The claimants argued that Spain had violated the protection of the impairment clause in ECT Article 10(1); however, the tribunal found that such a claim was connected to the same standard as the FET claim and the same factual basis as the FET claim, and thus found it unnecessary to make a separate determination on the claim.

It also dismissed the claim brought under the umbrella clause in ECT Article 10(1), because the clause refers to the obligation of the state to honour any commitments it has entered into with the investor or investment. The tribunal explained that such obligations mentioned in the umbrella clause refer to specific commitments, not general regulations made by the state. Thus, the tribunal found that Spain did not make any such commitments to the claimants and dismissed the claim on these grounds.

Expropriation claim dismissed

In making their expropriation case, the claimants argued that 83 per cent of the value of their equity investment had been destroyed due to Spain's regulatory measures, resulting in a substantial deprivation of the right to receive the full value of the FiTs under RD 661/2007. Spain countered that expropriation had not occurred since the claimants were still the owners of the PV facilities. The tribunal ultimately found that, while the claimants did suffer serious financial losses resulting from the disputed measures, the measures did not substantially deprive the claimants of value or use and enjoyment of their investment.

Damages

Having found that Spain breached its FET obligation under ECT Article 10(1), the tribunal awarded the claimants EUR 39 million in damages plus compounded interest. Spain was also ordered to pay the claimants arbitration costs and other reasonable costs in the amount of EUR 3,900,374.73 and USD 2,997,596.33.

Partial dissent by Vinuesa: EU law is applicable law and applies to the merits

In a partial dissent written by Raúl Emilio Vinuesa, the arbitrator disagreed with the majority of the tribunal on the issue of applicable law, finding that EU law is international law and should be applied to merits of the dispute. Vinuesa also disagreed with the majority's findings concerning due diligence by the claimants at the time that the investment was made and the claimants' subsequent liability.

Notes: The tribunal was composed of Michael Moser (chairperson appointed by the SCC), Klaus Sachs (claimants' appointee) and Raúl Emilio Vinuesa (respondent's appointee). The award and the partial dissenting opinion by Raúl Emilio Vinuesa are available at <https://www.italaw.com/sites/default/files/case-documents/italaw10142.pdf>

Kirrin Hough is a U.S. attorney based in Washington, D.C., United States.



Kenya prevails in BIT arbitration: British investors' claims dismissed due to the absence of environmental impact assessment

Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29

Xiaoxia Lin

On October 22, 2018, an ICSID tribunal constituted under the United Kingdom–Kenya BIT issued its award, dismissing all claims and ordering the British investors to pay Kenya half of its legal costs, plus all ICSID arbitration costs. Remarkably, the tribunal confirmed that the environmental impact assessment (EIA) study was one of the requirements of a lawful investment in accordance with Kenyan law.

Background and claims

The claimants were Cortec Mining Kenya Limited (CMK), a private company constituted in Kenya, and its majority shareholders, Cortec (PTY) Limited and Stirling Capital Limited, two British holding companies. The claimants began to invest in a mining project at Mrima Hill in Kenya in 2007 and obtained their Special Prospecting License (SPL 256) in 2008, which expired in December 2014 after two renewals. According to the investors, they were also granted Special Mining License 351 (SML 351) in March 2013 based on SPL 256.

In August 2013, the newly elected Kenyan government investigated and suspended several hundred “transition period” mining licences, including the investors’ SML 351, due to “complaints regarding the process.” According to the investors, this amounted to a revocation of their licence.

In their 2015 request for arbitration and subsequent submissions to the tribunal, the investors claimed that Kenya’s revocation of their SML 351 (their “key asset”) constituted a direct expropriation contrary to the United Kingdom–Kenya BIT.

Investors made a premature application for a mining license in absence of EIA

Prior to addressing jurisdictional issues, the tribunal analyzed the relationship between SPL 256 and SML 351. It confirmed that SPL 256 required CMK to conduct a mine feasibility report and an EIA study before applying for a mining licence, in accordance with the Kenyan Mining Act and Environmental Impact (Assessment and Audit) Regulations (para. 104). The

tribunal dismissed the *Mining Feasibility Study* hastily produced by the claimants, holding that it failed to fulfill standard industry practices (para. 129).

The investors contended that a Kenyan government official, Mr. Langwen, had approved the EIA four months after the issuance of SML 351 by Mr. Masibo, the Commissioner of Mines and Geology. They argued that Masibo also had the discretion to convert the EIA, as a condition precedent to CMK’s application for a mining licence, into a condition consequent that could be fulfilled after the issuance of SML 351.

Siding with Kenya, the tribunal affirmed that the EIA licence is a condition precedent to the issuance of a special mining licence, in accordance with Kenyan law. It also concluded that Langwen’s “approval letters” proved that CMK had no EIA approval at the time of the issuance of SML 351, and that he was actually not given the authority to issue these letters. Therefore, the tribunal held that the investors failed to undertake an EIA that might allow them to obtain a valid mining licence.

Tribunal grapples with Kenya’s allegations of corruption

Kenya alleged that Jacob Juma, a businessman hired by the claimants for the licence application, worked together with Commissioner Masibo corruptly to issue SML 351. Kenya submitted a witness statement to show that Juma “had a history of paying bribes to Commissioner Masibo” (para. 183).

The tribunal did not accept the witness statement as convincing evidence of corruption. It also considered that Juma was deceased and that Masibo was not given the opportunity to explain his conduct and receive cross-examination. The tribunal was not persuaded to accept the corruption allegation against Masibo in absence of due process.

Tribunal affirms that the investment was made in good faith

The tribunal affirmed its jurisdiction under Article 25 of ICSID Convention and Article 8 of the United Kingdom–Kenya BIT. It also cited the *Phoenix v. Czech Republic* case and particularly referred to two of the criteria used in that case (namely, assets invested in accordance with the laws of the host state and assets invested in good faith) to define “protected investment.”

Kenya alleged that the claimants’ conduct violated the principle of good faith by referring to the *Inceysa v. El*



Salvador and *Khan v. Mongolia* cases, which shared the same maxim *nemo auditur propriam turpitudinem allegans* (“nobody can benefit from his own fraud”).

The tribunal, however, seemed unimpressed by such allegation. Apart from reiterating the unsubstantiated corruption allegations, it added that other allegations of bad faith on the part of the claimants had not been proven so as to satisfy a “balance of probabilities” standard (para. 308). Therefore, the tribunal concluded that there was no bad faith.

United Kingdom–Kenya BIT contains implicit obligation of domestic law compliance

Citing *Bear Creek v. Peru*, the claimants contended that regulatory compliance is not a jurisdictional issue as there is no express legality requirement in the United Kingdom–Kenya BIT (para. 314). Kenya, in turn, heavily relied on the *Phoenix* case, which held that compliance with domestic law is required even when not expressly stated in the relevant BIT.

The tribunal confirmed that both the ICSID Convention and the BIT protected only “lawful investments.” It also recognized the inconsistency of text and purpose between the BIT and the ICSID Convention as to whether the host state should be liable for the investment “created in defiance of their laws fundamental[ly] protecting public interests such as the environment” (para. 333). Importantly, the tribunal determined that “explicit” language was unnecessary and held that investments must be made “in accordance with the laws of Kenya” to be protected (para. 333).

Tribunal endorses *Kim* test to invalidate SML 351 issued by Masibo

As an alternative argument, the claimants submitted that, even if the tribunal were to treat compliance as a matter of jurisdiction, it should apply the principle of proportionality established in *Kim v. Uzbekistan* to reject the alleged “illegalities” as a basis for the “harsh consequence” of denying treaty protection (para. 316). Kenya relied on a domestic court ruling that the Masibo had no authority to issue the licence under Kenyan law. This court decision, in Kenya’s view, was not subject to the scrutiny of the arbitral tribunal.

As suggested by the investors, the tribunal applied the three-stage approach of the proportionality principle in *Kim* case to assess the impact of alleged illegalities. In *Kim*, the tribunal first assessed the significance of the obligation allegedly breached by the investor; second,

it assessed the seriousness of the investor’s conduct; and third, it evaluated whether the legal consequences of such violation are proportional to the harshness of denying access to the protections of the BIT (paras. 406–408 of the [decision on jurisdiction](#) in the *Kim* case).

The *Cortec* tribunal first affirmed the significance of the environmental legislation to the Mrima Hill project, with special environmental vulnerability. It held that non-compliance with the protective regulatory framework was a serious breach. While some Kenyan law experts supported the “wait and see” and “live together” theories in treating the EIA, the tribunal had no hesitation to confirm that the EIA should be completed prior to the issuance of the licence, in accordance with Kenyan law.

As such, the tribunal accepted the finding of the Kenyan courts that SML 351 was void from the outset under Kenyan law. As an extra note, the tribunal added that no protection should be given to SML 351 on the merits even if it were not void, on the grounds that Masibo abused his authority in deviation of Kenyan law.

Tribunal rejects investors’ claims and grants half the costs claimed by Kenya

After concluding both on jurisdiction and merits that SML 351 was not a protected investment, the tribunal dismissed all of the investors’ claims. The tribunal ordered the investors to pay half of the costs claimed by Kenya, in view of the unsupported “corruption objection” allegation and other blameful conduct by Kenya during the arbitral proceedings.

Notes: The tribunal was composed of Ian Binnie (President appointed by the parties, Canadian national), Kanaga Dharmananda (claimants’ appointee, Australian national) and Brigitte Stern (respondent’s appointee, French national). The award is available at <https://www.italaw.com/cases/3974>. The *Kim v. Uzbekistan* decision on jurisdiction of March 8, 2017 is available at <https://www.italaw.com/cases/5403>

Xiaoxia Lin is a New York University School of Law International Finance and Development Fellow with IISD’s Investment for Sustainable Development Program.



ICSID tribunal finds Hungary in breach of expropriation clause in France–Hungary BIT

UP and C.D. Holding Internationale v. Hungary, ICSID Case No. ARB/13/35

Sarthak Malhotra

In an award dated October 9, 2018, an ICSID tribunal considered claims brought against Hungary by two French companies: UP (formerly known as Le Chèque Déjeuner, a cooperative company) and C.D. Holding Internationale, a wholly owned subsidiary of UP. The tribunal upheld the indirect expropriation claim under the France–Hungary BIT, awarding the claimants roughly EUR 23 million in compensation.

Background and claims

The dispute related to certain legal and tax reforms that impacted the claimants' fringe voucher business in Hungary. The business consists of selling vouchers to employers who grant them to employees as part of their compensation. The employees are entitled to use the vouchers at various affiliates to purchase goods and services.

The investors entered the Hungarian market through their wholly owned subsidiary Le Chèque Déjeuner Kft (CD Hungary) in 1996 and were primarily active in the food voucher business, including both “cold food” vouchers for use at supermarkets and grocery stores and “hot food” vouchers for use at restaurants.

In 2011, Hungary created two types of fringe benefits vouchers: (1) SZÉP cards, a dematerialized alternative to paper vouchers, which could be used for various goods, including “hot food,” and (2) Erzsébet vouchers, which could be used to pay for “cold food” (and eventually also “hot food”). The investors did not meet the legal conditions to issue SZÉP cards. The Erzsébet vouchers could only be issued by Magyar Nemzeti Üdülési Alapítvány (MNUA), a government entity.

According to the claimants, SZÉP cards and Erzsébet vouchers benefited from lower tax rates vis-à-vis the vouchers issued by the investors, which made their vouchers unattractive for employers. CD Hungary's market share and revenues fell, and it had to cease its operations in 2013. The claimants argued that these reforms resulted in the expropriation of their investment and breached Hungary's FET obligation under the France–Hungary BIT.

CJEU's *Achmea* decision not applicable to ICSID cases

The Court of Justice of the European Union's (CJEU)

decision in the *Achmea* case of March 6, 2018 held that an international agreement concluded between the EU member states that allowed an investor of a member state to bring a claim against another member state was inconsistent with EU law. Hungary relied on the *Achmea* decision to assert that the tribunal did not have jurisdiction over the case. It argued that Hungary was no longer bound by the ICSID Convention because the ruling in *Achmea* rendered the ICSID dispute resolution regime inconsistent with the EU law.

The tribunal rejected Hungary's argument and held that the *Achmea* decision was different from the present case in many aspects and therefore did not affect the tribunal's jurisdiction.

First, the tribunal's jurisdiction was based on the ICSID Convention, that is, a multilateral public international law treaty. As such, it was placed in a public international law context and not in a national or regional context.

Second, the tribunal pointed out that the *Achmea* decision relied on certain aspects that were not present in this case. German law applied to the arbitration proceedings in the *Achmea* decision, while the ICSID Convention and Arbitration Rules were applicable to these proceedings. In addition, the judicial review of the *Achmea* award was within the competence of the German courts and was exercised by them, whereas the judicial review of the award in the present case was only subject to the annulment procedure under the ICSID Convention. Furthermore, the *Achmea* decision was a result of the German Federal Court of Justice submitting preliminary questions to the CJEU.

The tribunal also observed that the *Achmea* decision contained no reference to the ICSID Convention or to ICSID arbitration. It then observed that there was no rule in EU law providing that the obligations under the ICSID Convention were inconsistent with EU law or that they had been terminated or replaced by Hungary's accession to the EU. The tribunal also held that Hungary failed to establish its case of implied withdrawal from the ICSID Convention and that, in any event, any denunciation from the ICSID Convention could not have the effect of retroactively withdrawing Hungary's consent to the arbitration.

Hungary indirectly expropriated the claimants' investment

The tribunal rejected Hungary's argument that the investors' entire claim was based on the loss of economic profitability. Instead, it concluded that their case was based on indirect expropriation of their shareholding



in CD Hungary by dispossession of the shareholding's economic value. It further observed that the loss of shares' economic value due to a state's measures can be considered an indirect expropriation.

According to the tribunal, it was required to examine whether the disputed measures together had the effect of dispossessing the claimants of their investment. It compared the economic value of their shareholding before the reforms to the value after such measures to determine whether they were substantially dispossessed of economic value by Hungary's reforms.

In its analysis, the tribunal concluded that Hungary knew and intended that no company other than three Hungarian banks could fulfil the eligibility criteria for issuing SZÉP cards. It further concluded that Hungary created a tax differential in favour of SZÉP cards and Erzsébet vouchers, which disadvantaged CD Hungary. The tribunal found it to be unnecessary to examine whether only this tax treatment caused dispossession of claimants' investment, because the dispossession was a consequence of the package of measures by Hungary (the SZÉP card, the Erzsébet voucher and the tax advantages).

Taking note of the statements made in the Hungarian Parliament, the tribunal concluded that Hungary intended to create a state monopoly and evict CD Hungary from the meal voucher market or at least knew that the effect of its reforms would be that no one would continue to buy CD Hungary's meal vouchers.

The tribunal ultimately concluded that Hungary had dispossessed the claimants of their investments, because the reforms led to a substantial loss of CD Hungary's economic value.

Next, the tribunal examined whether the dispossession of claimants' investment was done for a lawful purpose. The BIT provides that a dispossession may be permitted for "reasons of public necessity." However, the tribunal concluded that the goal of the reforms was aimed at keeping non-Hungarian issuers out of the Hungarian voucher market and deliberately targeted the claimants' investment and that, therefore, the dispossession of the claimants' investment was not for a public purpose.

The tribunal held that Hungary breached its indirect expropriation obligations. It declined to examine the FET claim, citing procedural efficiency.

Damages

The tribunal rejected Hungary's argument that the

rule of compensation for expropriation provided in BIT Article 5(2) applied both to lawful and unlawful expropriation. It held that the compensation rule provided in the BIT applied only to lawful measures and that customary international law governed the valuation of damages for unlawful expropriation.

Having found that Hungary indirectly expropriated the claimants' shareholding in CD Hungary, in breach of BIT Article 5(2), the tribunal awarded claimants damages amounting to EUR 23,196,000. Hungary was also ordered to pay 75 per cent of the claimants' legal and other costs and interest at a rate of Euribor rates plus 6.01 per cent, compounded annually on the two amounts.

Notes: The tribunal was composed of Karl-Heinz Böckstiegel (president appointed by the parties, German national), L. Yves Fortier (claimants' appointee, Canadian national) and Daniel Bethlehem (respondent's appointee, British national). The award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10075.pdf>

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

Tribunal finds Costa Rica's measures to protect the environment did not breach FET or its expropriation obligations under CAFTA-DR

David R. Aven and Others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3

Victoria Khandrimaylo

In an award dated September 18, 2018, an arbitral tribunal constituted under the Dominican Republic–Central America–United States FTA (CAFTA-DR) considered the claims brought against Costa Rica by David R. Aven, a dual national of Italy and the United States, and six other foreign investors, all U.S. nationals. The tribunal dismissed the FET and indirect expropriation claims, awarding Costa Rica arbitration costs.

Background and claims

In the early 2000s, the claimants decided to implement a tourism project in Esterillos Oeste, on the Pacific Coast



of Costa Rica (Las Olas Project). For this purpose, Aven acquired a stake in the several special vehicle companies (SPVs) incorporated under the laws of Costa Rica, which owned a land plot of approximately 37 hectares. One of these SPVs entered into a concession contract with the Municipality of Parrita.

Las Olas Project comprises areas designated for a beach club, a hotel, 72 residential plots, a commercial area with supermarkets and restaurants, and a “condo” section of 288 individual lots. The claimants alleged that they received all required permits and approvals, including the most significant one, the Environmental Viability Permit (EV). However, the EV was issued by Costa Rican authorities in the absence of the report prepared by the claimants’ subcontractors, which identified potential wetlands on the project site.

Due to neighbours’ complaints regarding harm to the wetlands and the felling of trees, Costa Rican authorities undertook various inspections that resulted in contradictory reports as to the existence of wetlands and forests on the project site. Subsequently, the Costa Rican authorities issued a series of injunctions prohibiting the works at the Las Olas Project.

Criminal proceedings were initiated by the prosecutor against Aven and Damjanac (sales and marketing director of the Las Olas Project), who were accused of violating local laws on forestry and wildlife conservation. The criminal court issued the INTERPOL Red Notice to extradite Aven, since he left Costa Rica alleging email threats and being a victim of a shooting incident. Damjanac was acquitted of all charges, although the decision was later reversed. At the time the arbitral award was issued, his new trial was still pending.

In 2014 the claimants initiated UNCITRAL arbitration. They argued that Costa Rica’s interference in the Las Olas Project amounted to a failure to accord them FET and an unlawful expropriation of their investments, in breach of CAFTA-DR. They claimed for compensation in the amount of USD 69.1 million in material damages, plus interest, and USD 5 million in moral damages to Aven.

Tribunal affirms jurisdiction over dispute save for 67 disposed properties

Costa Rica objected to the tribunal’s jurisdiction on four grounds: (1) Aven is not a protected investor under CAFTA-DR because his effective and dominant nationality is Italian rather than American; (2) two other claimants are not protected investors since they

committed no resources as required under CAFTA-DR; (3) certain properties were not owned by the claimants in the Las Olas Project; and (4) the concession site is out of the jurisdiction of the tribunal since 51 per cent of the shares of the concessioner SPV is not owned by a Costa Rican national as required under domestic law, and the SPV had overdue taxes.

The tribunal rejected the “dominant and effective nationality” interpretation raised by Costa Rica. It stated that CAFTA-DR Article 10.28 seeks to prevent claims from an investor who possesses citizenship of the host state, not of a third state. Given Aven’s dual nationality and considering that the investment was made in Costa Rica, the tribunal concluded that the provision was not applicable. Such factors as the habitual residence and centre of interest also demonstrated that Aven’s effective and dominant nationality is American.

The tribunal rejected Costa Rica’s argument that two claimants did not make any investments. It found that they contributed their marketing and real estate development experience and that their non-monetary contributions were confirmed by share certificates.

Regarding certain properties allegedly no longer owned by the claimants, the tribunal admitted that the claimants failed to disclose the ongoing sale of the lots to third parties during the arbitration. The tribunal concluded that an investment disposed of prior to the submission date of notice of arbitration should not be protected by CAFTA-DR. Thus, the tribunal refrained from exercising jurisdiction over 67 properties.

The claimants’ failure to comply with rules applicable to the concession site did not preclude the tribunal from upholding jurisdiction. It noted that Costa Rica did not challenge the prohibited share ownership structure and, thus, tacitly accepted it. Likewise, it held that no Costa Rican authorities challenged the failure by the claimants to pay the taxes and that such failure did not bar the tribunal’s jurisdiction.

All claims found admissible save for full protection and security claims

Costa Rica also raised three objections to admissibility: (1) unlawful and illegal conduct of the investors during the operation of the investment; (2) failure to raise full protection and security claims at the notice of arbitration; and (3) failure to exhaust domestic proceedings.

The tribunal concluded that Costa Rica failed to



provide evidence that the claimants acted fraudulently in the establishment of the investment and held that the requirement of unlawful and illegal conduct does not extend to the actions during the operation of the investment. Thus, the tribunal dismissed the challenge of admissibility on this ground. However, it found the claims for full protection and security inadmissible since there were raised at the closing of the hearing rather than at the notice of arbitration.

Regarding the exhaustion of domestic proceedings, the tribunal stated that CAFTA-DR does not require exhaustion of domestic remedies as a condition of admissibility to access international arbitration. It stated that exhaustion of local remedies was required to prove a denial of justice and would be addressed in the merits phase.

Investor protection is subordinate to the state's right to adopt and enforce environment protection laws and measures

Relying on CAFTA-DR Art. 10.11, Costa Rica contended that the suspension of the Las Olas Project was justified by environment protection obligations assumed by Costa Rica under international and domestic law. It argued that any inconsistency between the standards under Chapter 17 (Environment) and those under Chapter 10 (Investment) must be interpreted in favour of Chapter 17.

The tribunal concluded that, under CAFTA-DR, the rights of investors are subordinate to the right of Costa Rica to ensure that the investments are carried out “in a manner sensitive to environmental concerns” (para. 412). However, it held that this subordination is not absolute and that the host state must implement and enforce its environmental laws “in a fair, non-discriminatory fashion, applying said laws to protect the environment, following principles of due process, not only for its adoption but also for its enforcement” (para. 413).

The tribunal identified that Costa Rica was a party to international conventions protecting wetlands and forests and adopted domestic laws on the matter. The tribunal's task was to determine whether the enforcement of the laws was proper and lawful.

FET, expropriation and denial of justice claims dismissed

The tribunal stated that whether Costa Rica breached FET or unlawfully expropriated the investment depended on two factors: (1) whether there were wetlands and forests at the Las Olas Project at the

time the measures were adopted and (2) whether wetlands and forests were adversely impacted.

Based on the analysis of various expert reports and Costa Rican laws, the tribunal concluded that there were wetlands in at least one location in the project site and that the conditions in the site allowed for a determination that a “forest” existed within the definition of the forestry law.

The tribunal considered that, under Costa Rican laws, as developers the claimants bear the burden of proof that no harm would be caused to the environment and have the duty to inform the authorities of any potential environmental damage. The tribunal found that they failed to disclose the existence of the “swamp-type flooded area” at the project site. Additionally, it concluded that the fragmentation of the land did not have a business purpose in and for itself, and that by doing so the claimants circumvented the requirement to secure an EV for that part of the area.

There was enough evidence for the tribunal to determine that wetland and forests were impacted by the claimants' works. The tribunal concluded that the measures undertaken by Costa Rica to protect the environment are consistent with international law and neither arbitrary nor in breach of the obligations under CAFTA-DR.

Furthermore, according to the tribunal, the claimants did not meet the standard for bringing a denial of justice claim. The tribunal found no evidence that the prosecutor or the judicial system in Costa Rica acted or failed to take actions toward Aven or Damjanac that were not in accordance with domestic laws. It concluded that the prosecutor had reasonable grounds to treat the claimants' conduct as a continued crime and validly used the discretion to issue the INTERPOL red notice.

Costa Rica's counterclaim for environmental damage under CAFTA-DR

Costa Rica submitted a counterclaim seeking damages between USD 500,000 and USD 1 million to restore the natural conditions in Las Olas. It argued that nothing in the CAFTA-DR prevents the tribunal from exercising jurisdiction over a counterclaim under Chapter 10. The investors objected to the tribunal's jurisdiction over the counterclaim, interpreting that, under the dispute settlement provisions in CAFTA-DR, only host states can be respondents.

The tribunal agreed that the majority of CAFTA-DR provisions concerns obligations of states, which



could support the claimants' argument that investors cannot be respondents. However, the tribunal analyzed CAFTA-DR provisions on environment protection and concluded that they implicitly imposed obligations on the investors to protect the environment. It considered that investors are not immune from being sued for breaching the environmental protection obligations under CAFTA-DR and upheld its jurisdiction over Costa Rica's counterclaim.

However, the tribunal remarked that CAFTA-DR does not impose "affirmative obligations" (para. 743) on investors and does not provide that any failure to comply with environmental regulations will constitute a breach of CAFTA-DR and would serve a basis for a counterclaim. Accordingly, finding that Costa Rica failed to provide the facts supporting the counterclaims and relief sought as required by Art. 21 and 20 of the UNCITRAL Arbitration Rules, the tribunal found the counterclaims inadmissible.

Costs

The tribunal found that both parties were unsuccessful to a certain extent. It recognized that they acted properly during the proceedings, that the complexity of the case appeared in the inconsistencies of the facts, and that the claimants do not appear to be wealthy institutional investors. Therefore, it ordered the investors to bear all arbitration costs, but ordered each party to bear its own legal costs and expenses.

Notes: The tribunal was composed of Eduardo Siqueiros (president appointed by the ICSID Secretary General, Mexican national), C. Mark Baker (claimants' appointee, U.S. national) and Pedro Nikken (respondent's appointee, Venezuelan national). The award is available at: <https://www.italaw.com/cases/2959>

Victoria Khandrimaylo is a MIDS LL.M. Candidate (2018–2019) at the University of Geneva – Graduate Institute (IHEID)

Egypt found liable for the shut-down of an electricity plant during the 2011 uprising

Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4

Ksenia Koroteeva

In an award of August 31, 2018, an ICSID tribunal considered claims brought against Egypt by Unión Fenosa Gas (UFG), a Spanish company. The claims related to the UFG's gas supply to Damietta Plant, which was shut down due to the severe economic crisis and civil protests in Egypt in 2011. The tribunal dismissed all of Egypt's jurisdictional objections and upheld the FET claim under the 1994 Egypt–Spain BIT, awarding UFG more than USD 2 billion in compensation.

Egypt made several objections to the tribunal's jurisdiction and to the admissibility of the claims, which related to corruption, the absence of a protected investment and the contractual nature of the dispute.

Corruption: Despite a few "red flags," Egypt fails to discharge its burden of proof

Egypt submitted that UFG procured its alleged investments through corrupt and illegal means, thus in violation of Egyptian law and international public policy. Egypt advanced that, in order to maintain its investment, UFG selected a subcontractor, who later pleaded guilty in the United States for violations of the U.S. Foreign Corrupt Practices Act, in connection to bribes and kickbacks.

In addition, Egypt contended that UFG's procurement of investment was replete with "red flags." Specifically, it alleged that the investment was made in a country known for corrupt payments and that, in order to develop its investment, UFG partnered with a company whose employees had close personal relationships with Egyptian officials.

Before analyzing the factual evidence, the tribunal made several important legal considerations. First, it stated that corruption would be fatal to UFG's claims as regards jurisdiction, admissibility and the merits. Second, it considered "the balance of probabilities" to be the applicable standard of proof. Third, it underlined that timing mattered. Egypt raised allegations of corruption more than 15 years after UFG made its investment, which raised doubts as to the credibility of such allegations.

The tribunal acknowledged that several payments received by UFG's local partners in regard to the development of the investment were indeed generous.



However, the tribunal refused to second-guess the conditions behind these payments. It also acknowledged that UFG's local partners had certain access to senior decision-makers in Egypt. However, they were chosen by UFG primarily to act as lobbyists, which, by itself, did not evidence corruption, in the tribunal's view.

Moreover, the tribunal underlined that the relevant events occurred more than 15 years ago before Egypt's allegations and, importantly, that neither UFG nor its local partner nor Egyptian governmental officials had ever been prosecuted by Egypt for criminal conduct in regard to UFG's investments.

Therefore, the tribunal concluded that the plea of corruption raised by Egypt as a jurisdictional objection might have served a convenient tactical purpose. Accordingly, it dismissed the objection by concluding that Egypt failed to discharge its burden of proof.

Subject-matter jurisdiction, contractual nature of dispute and parallel proceedings: Unpersuaded tribunal proceeds to the merits

Egypt then contended that UFG had failed to establish the existence of the investment protected under the BIT, since in 2007 UFG pledged to the Egyptian bank its shares in the investment and the associated rights, as security.

Also, Egypt argued that the dispute was essentially contractual in nature and had been submitted to contract-based arbitrations. Egypt contended that UFG and its subsidiaries were engaged in an elaborate and improper strategy of "claim-splitting." Specifically, Egypt turned the tribunal's attention to three additional arbitrations under the auspices of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and ICC, which significantly overlapped with the treaty-based ICSID arbitration. Egypt, therefore, asked the tribunal to either dismiss the claims advanced by UFG or stay the proceedings until the ICC and CRCICA tribunals resolved the contractual claims.

The tribunal decided that UFG's acquisition of shares formed part of a broader business transaction, thereby satisfying the BIT's investment definition, as well as the *Salimi* test, and that the subsequent pledge to the bank did not affect the status of the investments. Accordingly, it dismissed Egypt's objection.

Also, after analyzing the principles of *res judicata* and *lis pendens*, as well as the risk of double recovery and inconsistent decisions, the tribunal refused to stay or suspend the ICSID arbitration pending the results of the ICC and CRCICA proceedings.

Merits: The customary plea of necessity fails again

UFG contended that Egypt had failed to afford its investments the protections granted by the BIT. It argued that its investments had suffered significant harm as a result of the decisions attributable to Egypt to curtail and cut the supply of natural gas to the Damietta Plant, which eventually resulted in the Damietta Plant's complete shut-down due to the lack of necessary gas supply.

Egypt advanced that the contested decisions were not attributable to the state and, therefore, could not engage its international responsibility under the BIT.

Alternatively, Egypt denied any violation of the BIT and, in any case, attempted to justify it by the customary plea of necessity contained in Article 25 of International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts. Egypt asserted that the privatization of domestic electricity was the only way to safeguard Egypt's essential interests from a grave and imminent peril. According to Egypt, at the time the contested measure was adopted, the situation in Egypt was horrendous. It reached historic levels of violence and was out of control due to riots and clashes across the country. Police could not bring the situation under control, which constituted, in Egypt's view, "a threat to the basic functioning of society and the maintenance of internal stability" (para. 8.10). All this caused a dramatic drop in the supply of natural gas both internally and for export.

The tribunal dismissed the necessity plea and concluded that Egypt frustrated UFG's legitimate expectations derived from the Ministry of Petroleum's undertaking in regard to the investment, thus violating the FET standard in the BIT.

In order to reach this conclusion, the tribunal analyzed the letter dated August 5, 2000, in which the Egyptian Ministry of Petroleum fully endorsed the Natural Gas Sales and Purchase Agreement signed between UFG and EGPC, an Egyptian state-owned company. Importantly, in the contract, EGPC undertook to procure that Egyptian authorities did not to interfere with the rights of UFG under the contract and did not dictate or promulgate any regulation that could affect the rights of UFG or affect the capacity of UFG and EGPC to perform their contractual obligations.

Based on the letter and the abovementioned contractual provision, the tribunal concluded that UFG legitimately expected that Egypt would not interfere in its contractual relationship with EGPC. It held that, by shutting down the Damietta Plant, Egypt deprived



UFG of the possibility to perform its contract, thereby frustrating UFG's legitimate expectations. In analyzing the link between the FET standard and the concept of legitimate expectations, the tribunal was guided by *Phillip Morris v. Uruguay*, *Parkerings v. Lithuania*, *Glamis v. United States* and *Mobil v. Canada*.

However, the tribunal decided that the other violations alleged by UFG related to performance of the contract and associated agreements signed between EGPC and UFG were not attributable to Egypt, as EGPC was a separate legal entity without any authority to bind Egypt by means of its conduct.

In calculating the appropriate amount of compensation, the tribunal applied the principle of full reparation under customary international law (referring to the *Chorzów Factory* case and Articles 31 and 36 of the ILC Articles on State Responsibility) to wipe out, as far as possible, the consequences of Egypt's international wrongs. The tribunal concluded that, as a result of Egypt's unlawful conduct, UFG lost more than USD 2 billion in profits.

Clodfelter's dissent: Investor failed to reasonably explain corruption-related matters

Mark Clodfelter's principal disagreement related to whether the investment was procured through corrupt means. He agreed that there had been no direct evidence of bribery or money passing hands from the UFG's partners to Egyptian decision-makers. However, the dissenting arbitrator noted that there was a tremendous and unexplained discrepancy between the local partner's involvement in the project and the compensation he was awarded. This clear red flag was sufficient, in the arbitrator's view, not to shift to UFG a burden of proving that there was no corruption, but rather to require UFG to provide the tribunal with a plausible and credible explanation as to such increased fees.

Notes: The tribunal was composed of William Rowley (claimant's appointee, Canadian and British national), Mark Clodfelter (respondent's appointee, U.S. national), and V.V. Veeder (president appointed upon the mutual agreement of the parties, British national). The award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10061.pdf> and the dissenting opinion of Mark Clodfelter is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10062.pdf>

Ksenia Koroteeva is pursuing an LL.M. in International Dispute Resolution (MIDS) in Geneva. Previously, she worked as legal counsel and tribunal secretary at the Russian Arbitration Center (RAC).

ICSID tribunal accepts jurisdiction over investor's claim under United Kingdom–Czechia BIT but rules in favour of Czechia

A11Y Ltd v. Czech Republic, ICSID Case No. UNCT/15/1

Trishna Menon

An ICSID tribunal decided in favour of Czechia in a case initiated by A11Y Ltd. (A11Y), a company providing assistive technology (AT) solutions for visually impaired persons. The proceedings were bifurcated, and the final award was rendered on June 29, 2018.

Background and claims

A11Y, a British company, after the registration of its Czech branch office, took over the AT solutions activities of BRAILCOM o.p.s. (BRAILCOM), a Czech company that offered blind and visually impaired individuals unique AT solutions.

Czechia, in January 2012, brought into effect the Act on Providing Allowances to Persons with Health Impairment (Act). The act provides for the granting of subsidies to persons with health impairments, including the blind. Subsidies were limited in absolute amounts (to CZK 800,000 per applicant for five years) and in the amount for a single grant (to CZK 350,000 per grant). The beneficiary was required to pay 10 per cent of the aid for which an allowance was sought. Section 9(10) specified that an allowance would be granted for an aid: (a) in its basic version, (b) which satisfies the individual needs of the applicant and (c) which is the least economically demanding option for doing so.

On May 21, 2013, the Czech Labour Office, which was responsible for administering the act, received a letter from Transparency International (TI Letter) alleging that BRAILCOM had been contacting persons eligible for aid under the act. According to the letter, BRAILCOM had been suggesting that those persons conclude an agreement with a power of attorney to organize their application for a special-aid allowance with the Labour Office. Under the agreement, as a gift, the company would pay to the applicant the value of their 10 per cent statutory contribution.

After the receipt of this letter, the Ministry of Labour (Ministry) issued a statement further defining the criteria set out by the act to ensure that the requirements of the act could effectively be assessed in each application and to allow the Labour Offices to take a uniform approach toward all applications (July Statement).



Particularly, it stipulated that, when the aids applied for consisted of several individual functionally independent components, the applicant was obligated to submit a list of the components and their respective prices. Further, additional services, like training, or accessory products, like protective covers or laptop bags, could not be considered part of the basic version of an aid and were therefore not covered under the act.

A11Y initiated arbitration against Czechia in 2014 under the United Kingdom–Czechia BIT. It argued that, following the July Statement, four measures allegedly taken by Czechia destroyed A11Y’s investment in the country and led to its insolvency: (a) Czech representatives repeatedly told many customers of A11Y that they should seek their AT aids from A11Y’s competitors; (b) Czechia denounced A11Y on prime-time national television for “overpricing”; (c) Czechia turned over A11Y’s confidential and pricing information to its competitors; and (d) Czechia rigged the independent assessments of its AT solutions. Accordingly, A11Y claimed compensation in the amount of CZK 564,719,000 for breach of the BIT provision on indirect and creeping expropriation.

Jurisdiction: Know-how and goodwill qualify as investments under the BIT

Although the proceedings had been bifurcated to deal with jurisdictional objections in the first stage, the tribunal had reserved for the merits stage its decision on whether A11Y had made a qualified investment in Czechia at the time of incorporation.

The tribunal referred to the plain language of Article 1(a) of the BIT, which defines “investment” as “every kind of asset belonging to an investor.” The tribunal noted that the BIT did not require any qualification of the investment, for instance, that the assets be transferred for consideration, that there be a flow of funds from the United Kingdom into Czechia or that there be an underlying transaction. Further, it noted that the proceedings were initiated under UNCITRAL Arbitration Rules, which had no equivalent to ICSID Convention Article 25.

Consequently, the tribunal chose not to read any limitations into the BIT when none existed. It held that A11Y’s assets in Czechia, which consisted of its know-how and goodwill, were a qualified investment.

Indirect and creeping expropriation analysis

A11Y argued that, first, the Czechia’s four measures had the effect of expropriating its investment; second, that the actions were discriminatory; and third, that they were

not for a public purpose. Czechia, in turn, argued that A11Y’s insolvency was not due to the four measures but rather to its own business model.

The tribunal found that the July Statement was a good-faith regulatory measure as it applied to all people with a health impairment and not just those who were visually impaired. The language of the July Statement, the tribunal reasoned, applied uniformly to all companies providing aids across different groups of people with health impairments and did not target A11Y. Although the July Statement was issued after receipt of the TI Letter, the tribunal concluded that it did not target or discriminate against A11Y.

The tribunal concluded from the witness examination that A11Y’s economic model was “economically unsustainable from a long-term perspective” (para. 221) in the regulatory environment created by the July Statement. It noted that, in the implementation of the July Statement, some Labour Office employees acted improperly, by pressuring customers to abandon A11Y and purchase aids from its competitors and by sharing A11Y’s business proprietary information with A11Y’s competitors. It also accepted that the TV report harmed A11Y and caused it to lose more customers and orders.

Although the tribunal attempted to separate the effect of A11Y’s loss of customers and orders as a result of those improper actions of Labour Office employees from the effect of A11Y’s significant price reductions and the non-coverage of extras such as training as a result of the implementation of the July Statement, it was unable to do so.

Decision and costs

Consequently, the tribunal held that the evidence before it was inadequate to conclude that Czechia’s conduct and the resulting loss of customers and orders would have caused the demise of A11Y’s business independently of the effect of the July Statement. Therefore, A11Y had not met its burden of proof that Czechia, by its actions, unlawfully indirectly expropriated A11Y’s investment. The tribunal directed A11Y to bear all arbitration costs and ordered each party to bear its respective legal costs.

Notes: The tribunal was composed of L. Yves Fortier (President, jointly appointed by the co-arbitrators, Canadian national), Stanimir A. Alexandrov (claimants’ appointee, Bulgarian national) and Anna Joubin-Bret (respondent’s appointee, French national). The award is available at <https://www.italaw.com/cases/5183>

Trishna Menon is an Associate at Clarus Law Associates, New Delhi, India.



RESOURCES AND EVENTS

RESOURCES

Transforming Agriculture in Africa & Asia: What are the policy priorities?

By Kieran McDougal and Carin Smaller, published by IISD and International Food Policy Research Institute (IFPRI), October 2018

This report uses a first-of-its kind analytical framework that tracks the performance of 117 countries over 45 years to understand which policies have succeeded or failed. It concludes that agricultural transformation takes off when countries remove price policies that penalize agriculture. It also finds that public investment in research, extension services, electricity and irrigation are important, but the quality of those services can matter more than the quantity. Another conclusion is that land reforms, research institutions and improving access to credit are also critical, but ultimately no country succeeds without a combination of policies and public investments that complement each other. The key finding of the report is that successfully eradicating poverty through agriculture depends on whether a country has enough agricultural land, how fertile it is, and the demographic pressures. Available at <https://www.iisd.org/library/transforming-agriculture-africa-asia-what-are-policy-priorities>

Designing Local Content Policies in Mineral-Rich Countries

By Isabelle Ramdoo, published by IISD, October 2018

This report provides clarity on key characteristics and challenges of local content policies. It does not attempt to propose one definition of local content. It is meant to provide a better understanding of the various types of instruments used, as currently contained in existing legal and institutional frameworks and based on country-specific experiences. The purpose is to highlight the prerequisites necessary to inform a decision whether or not to design local content policies and to guide readers to what types of policies could best be adopted, given the specific policy environment in place in their respective countries. Available at <https://www.iisd.org/library/designing-local-content-policies-mineral-rich-countries>

The Formation and Identification of Rules of Customary International Law in International Investment Law

By Patrick Dumberry, published by Cambridge University Press, December 2018

This book provides a comprehensive analysis of the phenomenon of customary international law in the field of international investment law. It analyzes two questions: how customary rules are created in this field and how they can be identified. The book examines the types of manifestation of state practice that should be considered as relevant evidence for the formation of customary rules and the extent to which they are different from those existing under general international law. It also analyzes the concept of *opinio juris* in investment arbitration. Available at <https://www.cambridge.org/academic/subjects/law/arbitration-dispute-resolution-and-mediation/formation-and-identification-rules-customary-international-law-international-investment-law>

Stabilization Clauses in International Investment Law: A sustainable development approach

By Jola Gjuzi, published by Springer, 2018

This book analyzes the tension between the host state's commitment to providing regulatory stability for foreign investors and its commitments to its citizens with regard to environmental protection and social welfare. It argues that the antinomy between stabilization clauses and regulatory power contradicts the content and rationale of sustainable development. To reconcile this antinomy at the decision-making and dispute settlement levels, it employs a "constructive sustainable development approach," relying on principles of law such as non-discrimination, public purpose, due process, proportionality, good governance and rule of law. It re-conceptualizes stabilization clauses in terms of design (ex-ante) and interpretation (ex-post), yielding stability for foreign investors while mitigating negative effects on the host state's power to regulate. Available at <https://www.springer.com/gp/book/9783319972312>



State Responsibility for Breaches of Investment Contracts

By Jean Ho, published by Cambridge University Press, December 2018

This work seeks to address the need for a detailed study that investigates and analyzes the sources, the content, the characteristics and the evolution of the law of state responsibility for breaches of investment contracts. It argues that this law has carved a unique and distinct trajectory from the traditional route for the creation of international law, developing principally from arbitral awards and mimicking, to a considerable extent, the general international law on the protection of aliens and alien property. Available at <https://www.cambridge.org/academic/subjects/law/international-trade-law/state-responsibility-breaches-investment-contracts>

International Governance and the Rule of Law in China under the Belt and Road Initiative

By Yun Zhao (Ed.), published by Cambridge University Press, November 2018

This volume examines China's role in the field of international governance and the rule of law under the Belt and Road Initiative from a holistic perspective. It seeks alternative analytical frameworks that take into account legal ideologies and legal ideals as well as local demand and socio-political circumstances. It critically evaluates the changes the Belt and Road Initiative might bring to the field of international law and international governance and explores possible approaches to dealing with resulting legal issues. Available at <https://www.cambridge.org/academic/subjects/law/international-trade-law/international-governance-and-rule-law-china-under-belt-and-road-initiative>

International Challenges in Investment Arbitration

By Mesut Akbaba and Giancarlo Capurro (Eds.), published by Routledge, September 2018

Investment arbitration is heavily relied upon around the globe and has to cope with the demands of increasingly complex proceedings. At the same time, it has come under close public scrutiny in the midst of heated political debate. Both of these factors have led to the field of investment protection being subject to continuous changes, presenting an abundance of challenges in its interpretation and application. This book collects recently debated issues in investment law and deals with the underlying fundamental questions at the intersection of investment arbitration and international law. Available at <https://www.routledge.com/International-Challenges-in-Investment-Arbitration/Akbaba-Capurro/p/book/9781138298729>

EVENTS 2019

January 24–25

6th ITA-IEL-ICC JOINT CONFERENCE ON INTERNATIONAL ENERGY ARBITRATION, Institute for Transnational Arbitration (ITA), Institute for Energy Law (IEL) of the Center for American and International Law & the ICC International Court of Arbitration, in Houston, TX, United States, <https://iccwbo.org/event/6th-ita-iel-icc-joint-conference-international-energy-arbitration>

February 13–14

2nd UNCITRAL WORKING GROUP III INTER-SESSIONAL REGIONAL MEETING ON ISDS REFORM, in Santo Domingo, Dominican Republic, https://uncitral.un.org/en/working_groups/3/investor-state

February 27–March 1

12th ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS, IISD, South Centre and Government of Colombia, in Cartagena, Colombia, <https://www.iisd.org/event/12th-annual-forum-developing-country-investment-negotiators>

March 8–9

RESEARCH FORUM ON ADVANCES IN COMPARATIVE & TRANSNATIONAL ADR: RESEARCH INTO PRACTICE, Law Faculty at the University of Hong Kong, in Hong Kong, China, <https://adrinasia.wordpress.com/2018/11/15/call-for-papers-advances-in-comparative-transnational-adr-research-into-practice>

April 1–5

37th SESSION OF UNCITRAL WORKING GROUP III, Investor–State Dispute Settlement Reform, UNCITRAL, New York, NY, United States, https://uncitral.un.org/en/working_groups/3/investor-state



© 2018 The International Institute for Sustainable Development
Published by the International Institute for Sustainable Development.

International Institute for Sustainable Development (IISD)

IISD is one of the world's leading centres of research and innovation. The Institute provides practical solutions to the growing challenges and opportunities of integrating environmental and social priorities with economic development. We report on international negotiations and share knowledge gained through collaborative projects, resulting in more rigorous research, stronger global networks, and better engagement among researchers, citizens, businesses and policy-makers.

IISD is registered as a charitable organization in Canada and has 501(c) (3) status in the United States. IISD receives core operating support from the Government of Canada, provided through the International Development Research Centre (IDRC) and from the Province of Manitoba. The Institute receives project funding from numerous governments inside and outside Canada, United Nations agencies, foundations, the private sector and individuals.

Investment Treaty News (ITN)

The views expressed in this publication do not necessarily reflect those of the IISD or its funders, nor should they be attributed to them.

ITN welcomes submissions of unpublished, original works.

Requests should be sent to Martin Dietrich Brauch at itn@iisd.org

To subscribe to ITN, please visit: www.iisd.org/itn/subscribe



Investment Treaty News



IISD

International Institute for
Sustainable Development