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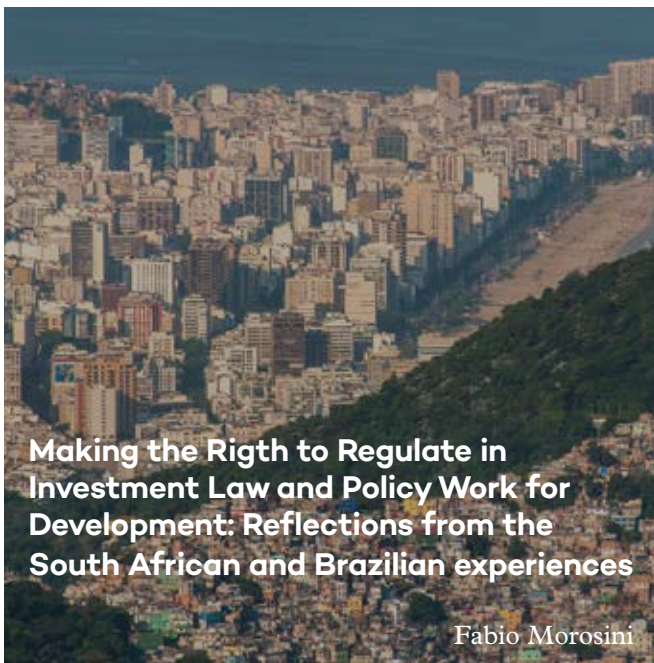
**The 2018 Draft Dutch Model BIT:  
A critical assessment**

Bart-Jaap Verbeek and Roeline Knotterus



**The Case Against Third-Party Funding  
in Investment Arbitration**

Frank J. Garcia



**Making the Right to Regulate in  
Investment Law and Policy Work for  
Development: Reflections from the  
South African and Brazilian experiences**

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**Conflicts between Latin American  
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Jorge Marchini, Josefina Morales  
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## INVESTMENT TREATY NEWS

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## INSIGHT 1

# The 2018 Draft Dutch Model BIT: A critical assessment

Bart-Jaap Verbeek and Roeline Knottnerus



On May 16, 2018, the Dutch Ministry of Foreign Affairs published its new draft model bilateral investment treaty (BIT).<sup>1</sup> The draft model, which remained available for public comment until June 18, 2018, is intended to replace the 2004 model BIT and be used for renegotiation of the 79 existing Dutch BITs with non-EU countries and negotiation of future agreements.

The idea of revising the model BIT dates back to early 2015<sup>2</sup> and forms part of a broader rethinking of trade and investment agreements by the Dutch government.<sup>3</sup> Unfortunately, the long-awaited new model BIT continues to fall short of the promised “policy reset” that would put sustainable development first. Despite certain welcome improvements, the model generally misses a golden opportunity to break away from the current regime for treaty-based investment protection and to meaningfully address its systemic imbalances.

A recent report compiled by the Centre for Research on Multinational Corporations (SOMO), among others, found that 12 per cent of all publicly known investor–state dispute settlement (ISDS) cases are filed by investors who claim that the Netherlands is their home country, and that 17.5 per cent of the aggregate claim sums derives from allegedly Dutch investors, even though the Netherlands is party to only 3 per cent of all investment treaties. The report calculated that transnational corporations and other investors using the Netherlands as their home base have submitted investment claims amounting to USD 100 billion.<sup>4</sup> This makes the Netherlands the second most popular home state—after the United States—in ISDS claims.

Only 13 per cent of these investors are in fact Dutch: 84 per cent of the claims come from non-Dutch companies and 3 per cent have an unknown origin. “Mailbox companies” with no substantial commercial or operational presence in the Netherlands have brought 77 per cent of all allegedly Dutch claims. The coverage of 90 investment treaties makes the Netherlands a highly attractive country for investors to set up a subsidiary, especially in combination with the attractive fiscal climate the country also offers.<sup>5</sup>

<sup>1</sup> <https://www.internetconsultatie.nl/investeringsakkoorden>

<sup>2</sup> Letter from the Minister of Foreign Trade and Development to the Chair of the House of Representatives, Kamerstuk 21 501-02, nr. 1481, Den Haag, April 9, 2015. Available at <https://zoek.officielebekendmakingen.nl/kst-21501-02-1481.html>

<sup>3</sup> Ploumen, L. (2016, September). *The Netherlands: Reforming EU trade policy: Protection, not protectionism*. (Non-paper). Retrieved from <https://www.rijksoverheid.nl/onderwerpen/handelsverdragen-europese-unie/documenten/vergaderstukken/2016/09/01/reforming-eu-trade-policy-protection-not-protectionism>

<sup>4</sup> Knottnerus, R., Van Os, R., Verbeek, B.-J., Dragstra, F., & Bersch, F. (2018, January 13). *50 jaar ISDS. Een mondiaal machtsmiddel voor multinationals gecreëerd en groot gemaakt door Nederland*. Amsterdam: TNI, SOMO, BothEnds, Milieudefensie. Retrieved from <https://www.somo.nl/nl/50-jaar-isds-een-mondiaal-machtsmiddel-voor-multinationals>

<sup>5</sup> Van Os, R. & Knottnerus, R. (2011, October). *Dutch bilateral investment treaties: A gateway to “treaty shopping” for investment protection by multinational corporations*. Amsterdam: SOMO. Retrieved from <https://www.somo.nl/wp-content/uploads/2011/10/Dutch-Bilateral-Investment-Treaties.pdf>; International Monetary Fund numbers show that the Netherlands is the world’s number one country in terms of investment flowing into the country and the world’s number two in terms of outward investment, ahead of much larger economies. See <http://data.imf.org/?sk=40313609-F037-48C1-84B1-E1F1CE54D6D5&skId=1482247616261>



In recent years, various countries have expressed their discontent with the Dutch approach after being hit by one or more ISDS claims brought under Dutch treaties. Bolivia, Ecuador, India, Indonesia, South Africa, Uganda and Venezuela even proceeded to unilaterally terminate their BITs with the Netherlands. Several of these countries have formulated forward-looking alternative approaches to investment protection, seeking to establish a better balance between the rights of multinationals and their social responsibility, including by setting specific requirements for investors to respect human rights and to contribute to the sustainable development of the host country and local communities.

A closer look at the new Dutch model BIT, however, shows that it largely failed to take a similar path. We now analyze some of the definitions and substantive rights granted to investors in the new Dutch model BIT, many of which emulate the EU approach taken in its recent treaties, notably the EU–Canada Comprehensive Economic and Trade Agreement (CETA).

## 1. Scope: narrower definition of investor, yet broadest possible definition of investment

In terms of covered investments, the draft model uses an illustrative list that covers not only any type of property or claims to money but also any contractual performance having an economic value, intellectual property rights, asset categories such as goodwill and know-how, and any rights granted under contract. Rights to prospect, explore, extract and exploit natural resources are explicitly mentioned as covered investments. There is no attempt to narrow the scope: the draft model continues to rely on the widest possible definition of investment that covers “every kind of asset” (Art. 1(a)).

Art. 1(b)(iii) requires legal persons to have “substantial business activities” in the territory of the home state. A footnote clarifies that indications of having substantial business activities include a registered office and administration, headquarters and management, an office, production facility or research laboratory, number of employees and turnover generated in the state. This marks a radical

break away from existing Dutch treaty practice and is likely to limit the scope for abuse by mailbox companies. It remains to be seen how effective these requirements will be in the context of ISDS. The Netherlands boasts a thriving trust firm sector that may assist foreign shell companies in complying with the necessary substance requirements.<sup>6</sup>

The model BIT lays down that states may deny benefits to an investor that has changed its corporate structure with a main purpose to submit a claim “at a point in time where a dispute had arisen or was foreseeable” (Art. 16(3)). It could however make more sense to treat the issue of corporate restructuring as a jurisdictional issue: if an investor changed its corporate structure in order to submit a claim, the tribunal would not have jurisdiction.

## 2. No affirmation of states’ duty to regulate—but at least a provision on the right to regulate

The new model BIT continues to leave it to arbitrators to determine, with wide discretion, whether a contested measure taken by a state Party falls within the definition of an action *necessary* to achieve *legitimate* policy objectives. It falls far short of Dutch civil society’s demand to affirm states’ *duty* to regulate in the public interest.<sup>7</sup> However, the model BIT does seek to more effectively enshrine the right to regulate, by stating that “the mere fact that a Contracting Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectation of profits, is not a breach of an obligation under this Agreement” (Art. 2(2)).

## 3. Fair and equitable treatment broadened with “legitimate expectations” of the investor

The provisions on national treatment and most-favoured-nation (MFN) treatment, fair and equitable treatment (FET) and indirect expropriation largely follow the CETA text. Like CETA, Art. 9 allows arbitral tribunals to “take into account whether a Contracting Party made a specific representation to an investor to induce an investment that created a

<sup>6</sup> Parliamentary Enquiry on Fiscal Structures, (2017, June 5). *Report of public hearings*. Tweede Kamer, vergaderjaar 2016–2017, 34 566, nr. 4. Retrieved from <https://www.tweedekamer.nl/kamerstukken/detail?id=2017D20244>.

<sup>7</sup> Knotterus, R., Van Os, R., Van der Pas, H., Vervest, P. (2015, January). *Socialising losses, privatising gains. How Dutch investment treaties harm the public interest*. Amsterdam: SOMO, BothEnds, Milieudefensie, TNI. Retrieved from <https://www.somo.nl/wp-content/uploads/2015/01/Socialising-losses-privatising-gains.pdf>.



legitimate expectation,” which is problematic in that it gives broad discretion to tribunals. In addition, Art. 9(5) stipulates that “[w]hen a Contracting Party has entered into a written commitment with investors of the other Contracting Party regarding a specific investment, that Contracting Party shall not [...] breach the said commitment through the exercise of governmental authority in a way that causes loss or damage to the investor or its investment.” This provision acts as an umbrella clause, elevating contractual obligations to the international level. The wording of the article accordingly broadens the already elusive understanding of what constitutes FET in customary international law.

#### 4. Little ambition to promote sustainable development, no obligations on investors

The draft model requires investments to have certain characteristics, including a certain duration, a commitment of capital or other resources, the assumption of risk and the expectation of gain or profit. However, a contribution to the economic development of the host state, one of the *Salini* criteria, is notably missing.<sup>8</sup> Parties merely commit to a best-efforts obligation to “strive to strengthen the promotion and facilitation of investments that contribute to sustainable development” through consultations and exchanges of information regarding investment opportunities (Art. 3(3)), without further clarification.

The article on sustainable development (Art. 6) is unjustifiably weak and lacking in ambition. It does mention the fundamental International Labour Organization (ILO) Conventions, the Universal Declaration of Human Rights and the Paris Agreement on climate change, but only states that Parties reaffirm their commitments under these agreements insofar as they are party to them (Art. 6.5), without requiring their ratification and implementation.

In fact, the only “hard” language in relation to sustainable development appears aimed at protecting economic rights and creating additional rights for investors against the state, rather than expressing an ambition to promote sustainability. Art. 6.4 reads: “A Contracting Party shall not adopt and apply domestic laws contributing to the objective of sustainable

development in a manner that would constitute unjustifiable discrimination or a disguised restriction on trade.” Such phrasing is open to broad interpretation.

Like CETA, the new Dutch model BIT limits the scope of ISDS if the investment was “made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process” (Art. 16(2)). This limit could and should have been extended to also include human rights obligations, labour and environmental standards, and responsible business conduct in line with climate change mitigation and adaptation objectives.

**“The draft model requires investments to have certain characteristics, including a certain duration, a commitment of capital or other resources, the assumption of risk and the expectation of gain or profit.”**

As to corporate social responsibility (CSR), in the new model the Parties merely reaffirm its importance by encouraging investors operating in the territory or subject to the jurisdiction of a Party to voluntarily incorporate into their internal policies those internationally recognized CSR standards, guidelines and principles that have been endorsed or are supported by that Party (Art. 7). Thus, the model fails not only to establish a binding obligation, but also to at least raise the bar by holding investors to the most stringent level of CSR applied in either Party.<sup>9</sup>

A tribunal may, when determining compensation, take into account any investor non-compliance with the United Nations Guiding Principles on Business and Human Rights and the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (Art. 23). However, a potential reduction in compensation seems inadequate to address human rights violations. Moreover, the tribunal is not directed to take these issues into account; it is only permitted to do so.

<sup>8</sup> *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, para. 52. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/ita0738.pdf>

<sup>9</sup> See, for example, the 2016 BIT between Nigeria and Morocco: <https://www.bilaterals.org/IMG/pdf/5409.pdf>



## 5. Enhanced transparency, appointing authorities for arbitrators, no “double hatting”—but otherwise a traditional ISDS mechanism

The draft model provides investors with the possibility to bring ISDS claims for breach of the BIT’s core protection standards. It envisions the future establishment of a multilateral investment court (MIC) by providing that “the ISDS provisions will cease to apply upon the entry into force of an international agreement providing for a [MIC]” (Art. 15). Meanwhile, claims may be submitted only under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (or the ICSID Additional Facility) or under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) with the understanding that the Permanent Court of Arbitration (PCA) shall administer the proceedings (Art. 19(1)).

Most notably, the model departs from established ISDS approaches in that it provides for the three members of an arbitral tribunal to be appointed by an appointing authority—the ICSID Secretary-General for ICSID arbitrations or the PCA Secretary-General for UNCITRAL arbitrations (Art. 20). This would effectively put an end to the practice of the disputing parties in tribunals appointing arbitrators under new or renegotiated Dutch BITs. However, the selection of these two appointing authorities may not necessarily translate into a more diverse pool of arbitrators.

**"Most notably, the model departs from established ISDS approaches in that it provides for the three members of an arbitral tribunal to be appointed by an appointing authority."**

The UNCITRAL Transparency Rules are incorporated in Art. 20(11), and the new model text does seek to address the problem of “double hatting” by arbitrators, and the associated conflict of interest, by laying down that arbitrators may not have acted as legal counsel to the disputing parties in the previous five years. However, the model does not adopt the same approach as CETA, which also prohibits tribunal members from acting as party-appointed experts or witnesses in other investment disputes.

The draft model does not include a provision allowing states to bring counterclaims against investors based on international human rights or environmental obligations. Nor does the model allow affected third parties to join a case with full rights and on equal grounds with the main parties to the dispute. As such, ISDS remains based on the asymmetrical regime in which foreign investors are granted rights without accompanying enforceable obligations.

## Conclusion

Where a growing number of countries and regions is focusing on binding obligations for investors, in the interest of sustainable development, the revised Dutch model BIT seems a missed opportunity to substantially narrow down treaty-based investment protection and achieve a better balance between the rights and obligations of foreign investors. The Dutch BIT disappoints, as the “trade policy reset” announced by the Ministry of Foreign Affairs had raised hopes for a much more innovative approach to expediting sustainable development.

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## INSIGHT 2

# The Case Against Third-Party Funding in Investment Arbitration

Frank J. Garcia



Third-party litigation funding (TPF) is a rapidly expanding industry composed of speculative investors who invest in a legal claim for control of the case and a contingency in the recovery.<sup>1</sup> In the wake of the global financial crisis and the demand by speculative finance for new investment vehicles, TPF has discovered the regime of bilateral investment treaties (BITs) with investor–state dispute settlement (ISDS) mechanisms.

The high costs and potentially high damages characteristic of ISDS cases have made it a new and highly attractive market for TPF. It is difficult to estimate the scale of TPF in ISDS today, since TPF funders generally prefer not to disclose their role to the other parties or to the arbitrators. However, available evidence suggests an already significant role, with TPF (actual or alleged) at issue in several recent ISDS cases.<sup>2</sup> With many jurisdictions beginning to recognize the impact of TPF and its unique role in international investment arbitration, it is important to

consider whether TPF is consistent with the goals of the investment law regime and the values and interests states must advance and protect.

## An exploitation mechanism impairing rather than advancing access to justice

TPF proponents argue that it provides a number of benefits across a range of dispute settlement platforms, including promoting access to justice and filtering out unmeritorious cases. Whatever the merits of TPF in civil and commercial litigation, in the investment arbitration context the traditional justifications for TPF are upended and the risks of TPF magnified. The legal context of ISDS (asymmetric treaties) and its political economy (awards are paid by states out of public funds, and cases are settled or lost by states in two-thirds of the disputes) raise important concerns about TPF unique to the investment arbitration context.

TPF within a system as unbalanced as the investment law regime is, to put it bluntly, an exploitation. Exploitation has been defined as a form of “unfair advantage-taking.”<sup>3</sup> TPF is explicitly designed to take advantage of the asymmetric structure of the investment regime today for the benefit of speculative finance. The funding model is predicated on a system in which states have no substantive rights under the treaties, claimants have a direct voice in the selection of arbitrators and there is no right of appeal.<sup>4</sup> Moreover, the global investment climate makes ignoring an arbitral award a risky course of conduct for any respondent state concerned with its investment rating.

TPF gives a small class of investors even more resources to pursue unbalanced claims against constrained states. These claims come at a significant cost to target countries and their citizens, since these claims will ultimately be paid by a large underrepresented class of stakeholders: the public, who as taxpayers are the “residual risk-bearers”

<sup>1</sup> See generally Steinitz, M. (2011). Whose claim is this anyway? Third party litigation funding, *Minnesota Law Review*, 95, 1268.

<sup>2</sup> See *Abaclat v. Republic of Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, (Aug. 4, 2011); *Abaclat v. Republic of Argentina*, ICSID Case No. ARB/07/5, Dissenting Opinion, Georges Abi-Saad, (Oct. 28, 2011); *RSM Production Corp. v. Grenada*, ICSID Case No. ARB/05/14, Annulment Proceeding, (Apr. 28, 2011); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case No. ARB/07/15, Award (March 3, 2010); *ATA Constr., Indust. & Trading Co. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Annulment Proceeding, (Aug. 2011) (unpublished), as reported by Hepburn, J. (2011, August). ICSID annulment proceeding is discontinued in Jordan construction case, as third-party funding is again flagged. *Investment Arbitration Reporter*.

<sup>3</sup> See Wertheimer, A. (1996). *Exploitation*. New Jersey: Princeton University Press.

<sup>4</sup> See Garcia, F. J., Ciko, L., Gaurav, A., & Hough, K. (2015). Reforming the international investment regime: Lessons from international trade law. *Journal of International Economic Law*, 18(4), 861–892.



in the current system. Developing country respondents are particularly vulnerable. Research suggests the vast majority (88 per cent) of all claimant investors are from high-income countries, and developing countries win only half as often as developed countries.<sup>5</sup> TPF funders have admitted that these factors enter into their preliminary evaluation of a potential claim or “investment.”<sup>6</sup>

TPF thus effects a wealth transfer to TPF funders and their investors from the citizens of respondent states through the operation of the BIT/ISDS regime. Such transfers are not what the investment regime was designed to achieve. On the contrary, such transfers seem the opposite in spirit to the basic investment principle of no expropriation without compensation. Moreover, these wealth transfers would seem to reverse a widely accepted norm of fairness, amounting to an uncompensated taking from the less-favoured many for the benefit of the privileged few.

TPF proponents in ISDS have sought justification in traditional TPF rationales, arguing that funding of investment claims provides access to justice for investors who wish to seek redress but lack sufficient financial resources. This is a view favoured by funders, as it frames their role as a vital one that facilitates and contributes to global economic justice. However, in the ISDS context, this rationale is fundamentally flawed—the role of TPF in ISDS cannot be equated with providing financing for disadvantaged claimants.<sup>7</sup>

**"TPF effects a wealth transfer to TPF funders and their investors from the citizens of respondent states through the operation of the BIT/ISDS regime. Such transfers are not what the investment regime was designed to achieve."**

<sup>5</sup> Schultz, T., & Dupont, C. (2014). Investment arbitration: Promoting the rule of law or over-empowering investors? A quantitative empirical study. *European Journal of International Law*, 25(4), 1147–1168.

<sup>6</sup> Round Table Discussion on Third Party Funding in Investor-State Dispute Settlement with ICCA/Queen Mary Task Force on Third-Party Funding in International Arbitration, Columbia Ctr. for Sustainable Inv., in N.Y.C., N.Y. (Oct. 17, 2017).

<sup>7</sup> See Santosuosso, T. & Scarlett, R. (2018). *Third-party funding in investment arbitration: Misappropriation of access to justice rhetoric by global speculative finance*. Boston College Law School Law and Justice in the Americas Working Paper No. 8. Retrieved from <http://lawdigitalcommons.bc.edu/ljawps/8>

Traditionally, access to justice has meant capacity building for social justice, that is, the provision of financing or other support for parties who lack the human and financial resources to litigate. In contrast, TPF in ISDS is primarily about balance-sheet management, offering typically well-resourced claimants the ability to minimize the risk associated with bringing a claim, and does not focus on providing funding to impecunious or disadvantaged claimants.<sup>8</sup>

In the words of a leading TPF funder, “much of the focus of the litigation finance market today is on the growing corporate utilization of funding by large, well-resourced entities, who are looking for ways to manage risk, reduce legal budgets or take the cost of pursuing arbitration off-balance sheet, or other business reasons for not wanting to allocate resources to financing an arbitration matter.”<sup>9</sup>

In fact, when one considers access to justice in its broadest social context, TPF actually impairs access to justice for developing country respondent states and their citizens. TPF funding exacerbates the inherent imbalance in the BIT regime, disproportionately affecting already disadvantaged states’ ability to control regulatory change within their borders and deliver important social welfare benefits. Instead, TPF further shifts power and resources towards private investors, which can in turn have a negative impact on the political affairs and social welfare of developing countries. Public health, public safety and environmental protection measures have all been challenged under the BIT/ISDS regime. Developing country states can further ill afford the burden to public finances that even non-public welfare arbitration claims will create when paid out of the public fisc.<sup>10</sup>

## **The way forward on TPF in ISDS: Policy options**

For all of these reasons, TPF as it is currently designed cannot play a constructive role in investment arbitration until TPF is regulated and the BIT/ISDS regime is significantly reformed. Allowing speculative finance a

<sup>8</sup> Ibid.

<sup>9</sup> Bogart, C. P. (2016, October 14). Third-party financing of international arbitration. In Global Arbitration Review (pub.), *The European Arbitration Review 2017*. Retrieved from <https://globalarbitrationreview.com/insight/the-european-arbitration-review-2017/1069316/third-party-financing-of-international-arbitration>. Christopher Bogart is the co-founder and CEO of Burford Capital.

<sup>10</sup> See generally Eberhardt, P. & Olivet, C. (2012, November 27). Profiting from injustice: How law firms, arbitrators and financiers are fueling an investment arbitration boom. Retrieved from <https://www.tni.org/en/briefing/profitting-injustice>





stake in the outcome and a voice in the determination of which cases to bring, which arbitrators to choose and which cases to settle amounts to nothing less than a deliberate exploitation of the flaws in the BIT regime for the benefit of speculators and at the cost of respondent states, their taxpayers and citizens.

States should consider banning TPF entirely, at least until the international investment regime can be reformed toward more balanced agreements. States currently not allowing TPF in their domestic legal systems should maintain this ban, at least for TPF in investment arbitration. States should also take steps to ban TPF in their BITs and the investment chapters of regional free trade agreements (FTAs). Finally, states should seek collective action opportunities to exercise leadership multilaterally, and should work to support a TPF ban in the arbitral rules of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL), among others. By acting in concert, states can minimize any real or perceived risks of alienating foreign investment or investment arbitration business through unilateral bans.

If TPF is to be allowed in ISDS, the regime should require mandatory, expansive disclosure of TPF agreements, coupled with mandatory security for costs.<sup>11</sup> While there is growing consensus that the existence and identity of a TPF funder should be disclosed, such disclosure should go further and include the terms of funding agreements. Such disclosure aligns well with general institutional trends toward increased transparency and highlights funding agreement provisions that create perverse incentives. Such expansive disclosure will also provide the much-needed data for future research into the benefits and harms involved in TPF and enable more effective regulation going forward. Mandatory security for costs can help disincentivize TPF funders from pursuing weak cases merely for their settlement value.

## "States should consider banning TPF entirely, at least until the international investment regime can be reformed toward more balanced agreements."

Although there is currently no across-the-board requirement to disclose the presence or identity of TPF funders, some promising steps have been taken. The International Council for Commercial Arbitration (ICCA)/Queen Mary Report on Third-Party Funding, while timid in its assessment and in terms of recommendations, does call for limited disclosure.<sup>12</sup> On the regulatory front, Article 8.26 of the Canada–European Union Comprehensive Economic and Trade Agreement (CETA) includes mandatory disclosure of the presence and identity of TPF funders, while Article 23(1) of the Singapore Investment Arbitration Commission (SIAC) rules gives the tribunal the discretionary authority to order disclosure of the details of the agreement as well. States should build on these beginnings, while recognizing that the benefits of disclosure come at the cost of accepting in the meantime a rapidly growing TPF presence in ISDS and foregoing the broad systemic benefits of a TPF ban.

## Conclusion

It is critically important that states, their negotiators, academics and civil society take a careful, public, transparent and sustained look at the risks that TPF poses to the public and to the investment regime itself. Rather than be positioned as a *fait accompli*, TPF should be properly regulated, if not eliminated outright. Otherwise, we risk looking back at this period as we do at the prelude to the global financial crisis, as a story of opportunities missed.

## Author

**Frank J. Garcia** is Professor and Dean's Global Fund Scholar, Boston College Law School. The author would like to thank Kirrin Hough for her excellent assistance in the preparation of this research note. The author is the principal investigator in a [Boston College-based research collaborative on TPF](#) and gratefully acknowledges the essential contributions made by Tara Santosuosso and Randall Scarlett, and Rachel Denae Thrasher of Boston University's Pardee School, toward the development of these arguments. The author also wishes to thank Lise Johnson and Brooke S. Güven of the Columbia Center on Sustainable Investment (CCSI) for their role in this project and their groundbreaking work in investment law

<sup>11</sup> See Thrasher, R. D. (2018). The regulation of third party funding: Gathering data for future analysis and reform. *Boston College Law School Law and Justice in the Americas Working Paper No. 9*. Retrieved from <http://lawdigitalcommons.bc.edu/ljawps/9>

<sup>12</sup> International Council for Commercial Arbitration (ICCA). (2018, April). *Report of the ICCA–Queen Mary task force on third-party funding in international arbitration*. Retrieved from [http://www.arbitration-icca.org/media/10/40280243154551/icca\\_reports\\_4\\_tpf\\_final\\_for\\_print\\_5\\_april.pdf](http://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf)



## INSIGHT 3

# Making the Right to Regulate in Investment Law and Policy Work for Development: Reflections from the South African and Brazilian experiences

Fabio Morosini



## 1. Introduction

The right to regulate can be defined as states' sovereign right to regulate in the public interest—their policy space. Because international investment agreements (IIAs) were created to limit certain aspects of countries' right to regulate, the first wave of IIAs inhibited host countries' regulatory experimentation that could be harmful to foreign investors' rights. Mounting domestic criticism and fear of challenges before arbitral tribunals against developed countries made them carve out some policy space within IIAs under the rubric of right to regulate.<sup>1</sup> This development in investment law has mostly benefited countries wanting to regain policy space in areas such as environment, health and safety.<sup>2</sup>

Within this broad debate, development-based approaches, central to countries in the Global South, have not received the same level of attention. From the perspective of developing countries, honest reform in order to promote greater policy space should be able to accommodate development concerns, providing room for policy experimentation in a variety of areas, from distributive justice to industrial policy.

In this essay, I propose to enlarge the notion of the right to regulate in IIAs to include a development dimension, and I do so by looking at the experiences of South Africa and Brazil. Reforms occurring in these two countries emerge in the context of increased opposition to the traditional investment protection model and could influence reforms oriented towards greater policy space for development.

## 2. South Africa's development-based approach to the right to regulate

South Africa, a country still struggling with inequalities, depends heavily on foreign capital. As part of its strategy to attract foreign direct investment (FDI), the country rushed into bilateral investment treaties (BITs) with capital-exporting countries in order to hint at its commitment to global capitalism.<sup>3</sup> The formulation of standard BITs allowed very little policy space for host countries and certainly no room for the promotion of race-based policies potentially harmful to investors' rights. Eager to join the global capitalist system after years of isolation and desperately needing capital, South Africa did not fully evaluate the possible negative externalities of BITs on its policy space until much later, when a claim was brought against the state, opening a Pandora's box for similarly motivated disputes.<sup>4</sup> In the *Foresti* case, private investors challenged South Africa's Mineral and Petroleum Development Act (MPDA) and Mining Charter for allegedly expropriating an investment while adjusting to the demands of the Black Economic Empowerment Act.<sup>5</sup>

In 2009 South Africa issued a position paper to critically evaluate its investment policy, suggesting

<sup>1</sup> In practical terms, if a measure falls under one of these categories, chances are that the government will not have to compensate for damages caused to foreign investors. Organisation for Economic Co-operation and Development (OECD). (2004). *Indirect expropriation and the right to regulate in international investment law*. (OECD Working Papers on International Investment, 2004/04). Retrieved from [https://www.oecd.org/daf/inv/investment-policy/WP-2004\\_4.pdf](https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf)

<sup>2</sup> Titi, A. (2014). *The right to regulate in international investment law*. Munich: Nomos.

<sup>3</sup> Morosini, F. & Sanchez Badin, M. R. (Eds.) (2017). *Reconceptualizing international investment law from the Global South*. Cambridge: Cambridge University Press.

<sup>4</sup> Forere, M. (2017). The new South African Investment of Protection Act. In F. Morosini & M. R. Sanchez Badin (eds.), *Reconceptualizing international investment law from the Global South*. Cambridge: Cambridge University Press.

<sup>5</sup> Piero Foresti, Laura de Carli and Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01, Award, August 4, 2010. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/ita0337.pdf>



rebalancing investor rights and regulatory space<sup>6</sup> and serving as the basis for domestic legislation, the 2015 South African Protection of Investment Act. The act challenges mainstream formulations of investment regulation and sets out the government's intention to not renew the so-called first-generation BITs and to only enter into new BITs based on compelling economic and political reasons for doing so.<sup>7</sup> The act embraces substantive changes, such as limiting the definition of investment and investor, excluding fair and equitable treatment (FET), limiting full protection and security, and replacing investor–state arbitration with adjudication by domestic courts and state-to-state arbitration after exhaustion of local remedies.

**"The 2015 South African Protection of Investment Act sets out the government's intention to not renew the so-called first-generation BITs and to only enter into new BITs based on compelling economic and political reasons for doing so."**

Most importantly, the act subjects property rights to the Constitution of the Republic. The Constitution of South Africa guarantees property rights but, like any other constitutional right, they are subjected to public purpose limitations. Specifically, section 25(2) of the Constitution allows expropriation of property for public purpose subject to payment of equitable compensation. Another important aspect of the act is that it brings the obligation to take measures to protect or advance historically disadvantaged persons to the core of the agreement: in the preamble, in its right to regulate provision and as an exception to the national treatment obligation.

In a similar vein, South Africa was actively engaged in designing the 2012 Southern African Development Community (SADC) BIT template, which, among others, contains a development dimension in its right to regulate

provision and another specific provision on the rights of a state Party to pursue development goals, which includes taking "measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups."<sup>8</sup>

At the time of this writing, new challenges are underway. There is pending legislation and heated public debate on the possibility of land expropriation without compensation. This brings an additional element of tension to the debate in South Africa. While previous measures adopted by the government have centred around violations of BIT commitments, these new measures attempting to expropriate land without compensation also appear to conflict with Section 25 of the Constitution, which requires expropriation to be followed by compensation.

### **3. Brazil's development-based approach to the right to regulate**

Brazil has been able to maintain policy space outside the mainstream investment regime. The country's engagement with investment policies has varied from resisting standard BITs in the 1990s to developing a new model investment agreement in 2015, replacing the paradigm of investment protection with one based on investment cooperation and facilitation. On both occasions, the government was centrally concerned with shielding Brazil's regulatory space from investment commitments.

In the 1990s, during the heyday of neoliberalism, Brazil resisted joining any investment agreement, although it signed 14 such agreements never to be ratified.<sup>9</sup> These agreements, mostly with developed economies, reproduced standard BIT formulations.

In 2003 Lula da Silva was elected president and awoke a dormant developmental state, resuscitating Brazil's industrial policy with important spillover effects on investments.<sup>10</sup> Mostly through financing by Brazil's National Bank for Economic and Social Development (BNDES), the government targeted a group of national

<sup>6</sup> Republic of South Africa. (2009). *Bilateral investment treaty policy framework review*. Government Position Paper. Retrieved from [http://www.dtps.gov.za/documents-publications/category/94-vodacom.html?download=441:annexure-c\\_reposfa\\_bit-policy-framework\\_june2009](http://www.dtps.gov.za/documents-publications/category/94-vodacom.html?download=441:annexure-c_reposfa_bit-policy-framework_june2009)

<sup>7</sup> International Institute for Sustainable Development. (2015). *Meeting report: Investment treaties in a state of flux: Strategies and opportunities for developing countries (Rio de Janeiro, November 16–18, 2015)*. Retrieved from <http://www.iisd.org/sites/default/files/material/IISD%209th%20Annual%20Forum%20Meeting%20Report%20English.pdf>

<sup>8</sup> Southern African Development Community (SADC). (2012, July). *SADC model bilateral investment treaty template with commentary*, Article 21. Gaborone: SADC. Retrieved from <http://www.iisd.org/itm/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>

<sup>9</sup> Morosini, F. & Xavier Junior, E. C. (2015). Regulação do investimento direto no Brasil: Da resistência aos tratados bilaterais de investimento à emergência de um novo modelo regulatório. *Revista de Direito Internacional*, 12(2), 421–448.

<sup>10</sup> Trubek, D. M., Alviar Garcia, H., Coutinho, D. R. & Santos, A. (Eds.) (2013). *Law and the new developmental state: The Brazilian experience in Latin American context*. Cambridge: Cambridge University Press.



champions and fostered the emergence of a new constituency: Brazilian multinational corporations.<sup>11</sup> This policy had direct effects on the foreign activities of these corporations. Between 2005 and 2010, Brazil's FDI outflow was multiplied by almost nine.<sup>12</sup>

Although debatable in the literature, it has been argued that BNDES financing was a relevant factor in fostering Brazilian investment outflows during the Workers' Party governments. This policy could have been curtailed and Brazilian multinationals could have been negatively affected if Brazil had been party to IIAs. Outside this large government financing program, foreign investors could also have challenged Brazil's right to regulate in matters as diverse as fiscal policy to water supply, as experienced by several developing countries. On the other hand, Brazil opted for pursuing a development strategy that did not include signing traditional BITs, all the while remaining a top FDI recipient, challenging existing narratives on the need for BITs to attract FDI.

Brazil has recently decided to initiate an investment treaty program that moves away from the standard investment treaty language that has the protection of foreign investment as the primary, or sole, subject matter. The new approach based on investment cooperation and facilitation emphasizes: 1) creating mechanisms such as ombudspersons and joint committees to monitor investment relations and prevent disputes and 2) creating open-ended or framework agreements that can be adapted over time to accommodate the state parties' development needs through thematic work programs.<sup>13</sup> Since March 2015 Brazil has signed nine Agreements on Investment Cooperation and Facilitation (ACFIs)

with other developing countries (Angola, Chile, Colombia, Ethiopia, Malawi, Mexico, Mozambique, Peru and Suriname) as well as the intra-MERCOSUR Investment Protocol. In addition, investment facilitation agreements, the kind supported by Brazil, have been discussed in multilateral forums, such as the G20 and the World Trade Organization (WTO), with the open support of China.<sup>14</sup>

**"Brazil has recently decided to initiate an investment treaty program that moves away from the standard investment treaty language that has the protection of foreign investment as the primary, or sole, subject matter."**

Brazil's search for development promotion outside the traditional investment regime and through an alternative regulatory framework is currently on hold. The present administration has been taking drastic measures, doing away with many elements of Brazil's developmental state.<sup>15</sup> Brazil has embarked on a neoliberal reform agenda led by the Ministry of Finance that includes: 1) approving a 20-year budgetary cut affecting investment in education and health; 2) curtailing labour rights; 3) attempting to approve pension funds reform; and 4) requesting accession to the Organisation for Economic Co-operation and Development (OECD). Under this new agenda, Brazil's investment policies, seen by some as a legacy of the previous administration, risk losing traction.

#### 4. Concluding thoughts: Will development prevail?

South Africa's and Brazil's experimentation with investment law and policy to promote development face challenges. Externally, their practices go against a mainstream regime based on more than 3,000 agreements designed in the shadow of the neoliberal approach to investment regulation. While there have recently been signs that the traditional approach may allow some detours, as in the case of certain

<sup>11</sup> Amann, E. (2009). Technology, public policy and the emergence of Brazilian multinationals. In: L. Brainard & L. Martinez-Diaz (Eds.), *Brazil as an economic superpower? Understanding Brazil's changing role in the global economy* (pp. 187–220). Washington, D.C.: Brookings Institution.

<sup>12</sup> United Nations Conference on Trade and Development. (2018). *UNCTADstat*. Retrieved from <http://unctadstat.unctad.org>.

<sup>13</sup> Bernasconi-Osterwalder, N., & Brauch, M. D. (2015, September). *Comparative commentary to Brazil's cooperation and investment facilitation agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi*. Retrieved from <http://www.iisd.org/library/comparative-commentary-brazil-cooperation-and-investment-facilitation-agreements-cifas>; and Morosini, F., & Sanchez Badin, M. R. (2015, August). The Brazilian agreement on cooperation and facilitation of investments (ACFI): A new formula for international investment agreements? *Investment Treaty News*, 6(3), 3–5. Retrieved from <https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements>; Martins, J. H. V. (2017). Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments. *Investment Treaty News*, 8(2), 10–12. Retrieved from <http://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins>

<sup>14</sup> Berger, A. (2018, April 23). What's next for investment facilitation?, *Columbia FDI Perspectives*, 224. Retrieved from <http://ccsi.columbia.edu/files/2016/10/No-224-Berger-FINAL.pdf>



environmental and health measures, it is less likely that it will welcome a development-based approach that challenges the rationale of investment protection.

**"The experiences of South Africa and Brazil demonstrate that there is room for genuine reimagination of the investment regime, where the interests of investors are matched with the development concerns of host countries."**

In addition, both South Africa and Brazil face domestic challenges to implementing their investment policies. After President Zuma's resignation, it is now President Ramaphosa's responsibility to strike a balance between addressing the country's historical racial inequalities—the DNA of the African National Congress—and the global capitalist system in which BITs are embedded. Brazil's experimentation with heterodox policies, including on investment, to further an alternative development model is less clear in the wake of a neoliberal-driven government. In such a context, the future of Brazil's investment policy will remain uncertain until a newly elected government comes into power in 2019.

Despite these challenges, the experiences of South Africa and Brazil demonstrate that there is room for genuine reimagination of the investment regime, where the interests of investors are matched with the development concerns of host countries. In order to achieve a balance on potentially conflicting interests, countries need to be creative and design more flexible alternatives that go beyond safeguarding policy space on environment, health and safety, and include other national economic priorities.

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## INSIGHT 4

# Conflicts between Latin American Countries and Transnational Corporations: The challenges of the region in the face of asymmetrical investment treaties

Jorge Marchini, Josefina Morales and Gabriela Roffinelli



## 1. Introduction

Political positions and laws on foreign investment have been polarized into two opposing perspectives. On the one hand, there is the assumption that foreign direct investment (FDI) is essential for the economies of peripheral countries to take a leap toward development, prompting FDI promotion and even generating competition among countries to attract more investment. On the other hand, there are those who think that countries should legislate and regulate FDI so as to prioritize the national interests, design strategies and dynamics that favour economic and social sustainable development and to defend national wealth and resources. They should not be subjected to merely interest in profit maximization or the constantly changing and uncertain decision-making logic typical of foreign private capital.

The analysis of foreign investment policies, standards and treatment has been a recurring topic of debate in Latin American countries throughout their history. Since the colonial emancipation of Latin America in the 19th century, the treatment of FDI and approach to conflict resolution have changed along with the political and economic transformation of the region.

Starting in the 19th century, significant conflicts have grown out of core countries' ongoing practice of imposing diplomatic protection on their investments. In such conflicts, partnerships between corporations

and the home states of investments turn the investment disputes of developed country investors in Latin American countries into disputes over taxes or state matters. At first, this meant a denial of the legal capacity of Latin American states and their right to regulate and to decide on investment matters independently; in some cases, it evolved into subordination, by accepting the privileged status of FDI, supported by political, economic and military power relationships.

## 2. The increasing spread of bilateral investment treaties and Latin America

With the rise of neoliberalism in the 1990s, the inhibition of the debate about development led to a reliance on open markets. The lack of balanced progress in multilateral agreements led to an increasing spread of bilateral investment treaties (BITs), which gained momentum especially in Latin America.

According to United Nations Conference on Trade and Development (UNCTAD) statistics, out of a total of 2,947 existing BITs at a global level, 414 were concluded by Latin American countries; this is in addition to 280 free trade agreements (FTAs) that also contain investment treatment provisions.<sup>1</sup>

Traditional BITs are legal agreements between two countries to provide a common legal framework for investments. They tend to include similar clauses: most-favoured-nation treatment, national treatment, fair and equitable treatment, prohibition of performance requirements, restriction on regulatory changes, free transfer of funds, elimination of national content requirements, and no obligation of local content, hiring or procurement.

In general, BITs between core and peripheral countries do not include binding clauses that could be of special interest for the latter, such as labour, migration,

<sup>1</sup> <http://investmentpolicyhub.unctad.org/ia>



environment and human rights clauses. Neither do they include clauses providing special or differential treatment, with mechanisms and explicit support from developed countries to level up the production and living conditions in developing countries.

Under investor–state dispute settlement (ISDS) mechanisms included in BITs, foreign investors can elude the justice systems of host countries and challenge host states before arbitral tribunals for non-compliance of the aforementioned clauses. The awards rendered by arbitral tribunals, such as tribunals at the International Centre for Settlement of Investment Disputes (ICSID), part of the World Bank Group, provide binding and enforceable compensation to affected parties.

### 3. The need to go back to multilateralism

Massive demonstrations against neoliberal policies at the beginning of the present century in Latin America forced substantial political changes, which, in turn, prompted changes in the economic and financial conditions of investments. This led to an uptick in claims against states before ad hoc arbitral tribunals provided for in BITs.

Criticism and controversy arose out of multimillion dollar claims; lack of public information and oversight over proceedings administered by arbitral tribunals, in particular those at ICSID; and doubts about the impartiality of arbitrators due to conflicts of interest. In an environment of condemnation and manifest disagreement, Bolivia, Ecuador and Venezuela terminated most or all of their BITs, even though they are still valid because of survival clauses.

The Government of Ecuador initiated a noteworthy search for a better understanding about the conditions of BITs and their alternatives. In October 2013, with the participation of international experts, it set up the Commission for a Comprehensive Citizens' Audit of Investment Protection Treaties and of the International Investment Arbitration System (CAITISA).<sup>2</sup> In the presentation of its final report in May 2017, the president of the commission, Cecilia Olivet, stated that:<sup>3</sup>

It is absolutely logical for Ecuador to move forward with the denunciation of its investment protection treaties, because, as our report will reveal, they have been very onerous for the country. BITs do not contribute to attract foreign investment and have deviated millions of dollars of the public treasury to fight against million-dollar claims. In turn, they have systematically undermined social and environmental regulation.

Given the conviction that the treatment of foreign investment is vital to Latin America, it is necessary to resume seeking common positions and consistent proposals among the countries in the region. In other words, it is vital to resume a multilateral approach instead of the problematic bilateral treatment of foreign investment issues.

**"CLACSO will create a comprehensive database on the state of affairs of BITs concluded by member states of the Ministerial Conference on States and Transnationals and by observer countries in the Latin American region. It will also track disputes with foreign investors that affect countries based on commitments assumed in those BITs."**

### 4. CLACSO research group and preliminary conclusions

To meet this need, the Latin American Council of Social Sciences (CLACSO) has launched a special interdisciplinary group. Among its other goals, CLACSO will create a comprehensive database on the state of affairs of BITs concluded by member states of the Ministerial Conference on States and Transnationals and by observer countries in the Latin American region. It will also track disputes with foreign investors that affect countries based on commitments assumed in those BITs.

Other information proposed for inclusion in the database include the structure and constraints of BITs, and the legal, institutional and economic

<sup>2</sup> Citizens' Commission for a Comprehensive Audit of Investment Protection Treaties and of the International Arbitration System on Investments (CAITISA). (2017, May). *Auditoría integral ciudadana de los tratados de protección recíproca de inversiones y del sistema de arbitraje en materia de inversiones en Ecuador: Informe ejecutivo*. Retrieved from <http://caitisa.org/index.php/home/enlaces-de-interes>

<sup>3</sup> Olivet, C. (2017, May 4). *Auditing Commission to release report as Ecuador moves to terminate investment agreements*. Retrieved from [https://www.tni.org/en/node/23493?content\\_language=en](https://www.tni.org/en/node/23493?content_language=en)



consequences faced by signatory countries when BITs are enforced. The database is intended as a starting point to report regularly on the state of international investment disputes and provide legal and policy tools for stakeholders to develop analyses and possible defenses, in order to effectively protect their interests

in the framework of commercial contracts and investment treaties.

We highlight below, we highlight some results of the research on ISDS cases brought against Latin American countries.



Argentina

The country records 60, the highest number of cases before international tribunals.

*Repsol Case.* The Spanish oil company sued Argentina for the expropriation of 51 per cent of shares in YPF, owned by the Spanish transnational Repsol. Alleging the violation of the 1992 Argentina–Spain BIT, Repsol stated that Argentina, by means of the expropriation, had violated the standards of fair and equitable treatment, non-discrimination, and full protection and security contained in the BIT. Initially, high-level government officials alleged that the expropriation “would be done for free” due to non-compliance of Repsol’s investment commitments in the privatization specifications document as well as due to the environmental liabilities generated by the corporation. Finally, after arduous legal proceedings held in parallel, the government agreed on the payment of a compensatory amount out of the scope of the ICSID of USD 5 billion plus interest. Payment of USD 6.770 billion was finally made in 2015.



Colombia

A claim was filed in March 2016 by the Swiss multinational Glencore International: it rejected the sanction imposed by the Office of the Comptroller-General of the Republic for irregular changes in the concession contracts of coal mines.

Three other claims are in the phase of direct settlement:

1. Canadian company Eco Oro Minerals, for a ban issued by the Constitutional Court on the exploitation of mines in the area of the Santurbán paramo.
2. Mexican company América Móvil is challenging a change of trade rules in the telecom sector.
3. U.S. company Tobie Mining, for a ban on mining exploitation in the recently created Yaigojé-Apaporis National Park.





**El Salvador**

In 2009, the state was sued before an ICSID tribunal by the companies Commerce Group Corp and San Sebastián Gold Mines, claiming damages for the exploitation of the San Sebastián mine in the municipality of Santa Rosa de Lima, department of La Unión. These companies exploited this mine for over seven decades, where it caused irreversible environmental damage, mainly of water sources that were contaminated with chemicals such as arsenic, lead, iron and manganese. The San Sebastián River is now known as the Dead River, as the water can no longer be used for consumption because of the high concentration of chemicals. This claim was dismissed by the ICSID tribunal in 2013.

In October 2016, the ICSID tribunal issued an award in favour of El Salvador in the case filed by the mining company Pacific Rim Cayman LLC (Pac Rim).



**Mexico**

Between 1997 and 2016, Mexico had 20 cases as respondent under the NAFTA; 17 initiated by U.S. companies and three by Canadian companies. Only two cases were filed before UNCITRAL tribunals and the rest were filed at ICSID tribunals. Nine of these cases were decided in favour of the Mexican government. In contrast to other Latin American countries, where most claims are in the mining or energy sectors, in Mexico the most onerous claims come from agribusiness companies, and the greatest number is concentrated in the services sector. Many disputes were also initiated in the mining sector, but they were settled between the parties. Out of seven cases filed under BITs, five were settled and two are still pending.



**Puerto Rico**

Puerto Rico does not have any ISDS cases at ICSID. The cases initiated against Puerto Rico are handled by the Supreme Court of Puerto Rico and in U.S. federal courts. Apart from six tax-related cases, all the rest are more recent (2016).

There are 21 disputes between transnational enterprises and the government of the island: six are related to tax issues; two are about transfer prices; one concerns a challenge to the government's power to regulate international companies' operations in its territory; and 13 are about vulture funds.

In 19 cases, the claimant companies come from the United States.



Venezuela registered 41 cases, one in 1996 and the rest between 2000 and 2016; half of them (20) in 2011 and 2012. As to sectors, eight involved oil, gas, and mining, and five were exclusively in the mining sector. Among the home states of the claimants are Canada, Spain and the Netherlands, with five claims each. Most of the claims (19) focused on non-negotiated expropriation. Sixteen claims reached a cumulative total of USD 7.755 billion. At ICSID, 18 cases were settled, although several awards are still pending.

## 5. Conclusions

The analysis of the CLACSO team points to some preliminary conclusions:

- In general terms, BITs and other international investment agreements materialize the subordinated integration of countries to the requirements of the world market. They set up the liberalization of investments, granting privileges to investors over public and national rights, emphasizing financial services, public procurement and intellectual property rights.
- There is an asymmetrical liberalism without reciprocity. The rule is not to negotiate treaties, but to impose them by means of extra economic pressures of a political and, where applicable, military nature. At the same time, the disintegration (or blockade) of previous integration projects is widely assumed.
- ISDS arbitration forums are set up with the purpose of denationalizing dispute settlements in matters of strategic interest for the countries.

## Authors

**Jorge Marchini, Josefina Morales and Gabriela Roffinelli** are coordinators of the CLACSO research group on disputes between states and transnational enterprises in Latin America.

During the first stage of work, CLACSO focused on the preparation of a database on national cases pertaining to Argentina (Javier Echaide and Luciana Giotto), Colombia (Carolina Jiménez, José Francisco Cuello-Socarrás and David Saiz Idarraga), Ecuador (Piedad Mancero), El Salvador (Sandra Núñez), Mexico (M. Teresa Gutiérrez Haces), Puerto Rico (Maribel Aponte García, Carmen Correa Matos, Amílkar Cruz, J.D. and Yarlier Y. López Correa) and Venezuela (Oly Millán Campos, Paulino Nuñez and Guillermo Moro).



## NEWS IN BRIEF

### European Commission communication on protection of intra-EU investment rejects ECT as a basis for intra-EU ISDS

On July 19, 2018, the European Commission (EC) published a communication to the European Parliament and the Council of the European Union (EU) titled *Protection of Intra-EU Investment*.

The EC stressed its long-standing position that intra-EU bilateral investment treaties (BITs) are incompatible with EU law. It highlighted the March 8, 2018 judgment in the *Achmea* case, in which the Court of Justice of the European Union (CJEU) held that investor–state arbitration clauses in intra-EU BITs are unlawful. For the EC, the *Achmea* decision is also relevant for the application of the *Energy Charter Treaty (ECT)*. In the EC’s view, the ECT cannot be used as a basis for dispute settlement between EU investors and EU member states.

The communication recalls the most relevant substantive and procedural standards in EU law for cross-border investments within the EU. It is intended to dispel any perception that, as a result of the *Achmea* judgment, EU law does not provide for adequate safeguards for intra-EU investors.

### Update on EU trade and investment negotiations: Japan, Vietnam, Australia, New Zealand, Mexico

On July 17, 2018, EC President Jean-Claude Juncker and Japanese Prime Minister Shinzo Abe signed the Japan–European Union (EU) Economic Partnership Agreement (JEEPA). Negotiations had been finalized in December 2017. Signature will be followed by ratification procedures both at EU level and in Japan.

Given that investment protection and investor–state dispute settlement (ISDS) were left out of the JEEPA, legal problems at the EU level and political opposition in EU member states may be avoided. The EC expects the agreement to enter into force in early 2019.

While not included in the JEEPA, investment continues to be negotiated between the two partners. On July 11, 2018, the chief negotiators of both partners acknowledged a “large degree of

convergence on investment protection standards,” but noted that certain positions still need to be reconciled, particularly regarding dispute settlement. The European Union is committed to advancing its Investment Court System (ICS) proposal, but Japan is reportedly unwilling to agree.

The EC announced on June 26, 2018 that the legal review of its free trade agreement (FTA) with Vietnam has been completed, paving the way for signature, conclusion and ratification of the agreement. Negotiations of the FTA, which includes ICS, had been finalized in December 2015 and published the text in February 2016.

The EC launched negotiations of FTAs including investment chapters with Australia and New Zealand, respectively, on June 18 and 21, 2018. The Council of the European Union published the mandates given to the EC on June 25, 2018. The mandates do not include ISDS. The first rounds of negotiations with both countries were completed in July.

On April 21, 2018, the European Union and Mexico reached an agreement in principle on a modernized 1997 EU–Mexico Global Agreement. The texts, published on April 26, reveal that it is the fourth EU agreement to include ICS, following those with Canada, Singapore and Vietnam.

The EC publishes and periodically updates an overview of its trade negotiations.

### United States Trade Representative outlines plan to negotiate model free trade agreement with sub-Saharan African country

The 17th African Growth and Opportunity Act (AGOA) Forum, hosted by the United States for sub-Saharan African countries, took place in Washington, D.C. from July 9 to 12, 2018. The event was titled Forging New Strategies for U.S.–Africa Trade and Investment.

In his statement in the opening plenary on July 11, United States Trade Representative (USTR) Robert Lighthizer set out to address “one very specific new strategy—the Trump Administration’s desire to negotiate a model free trade agreement with a sub-Saharan African country.”



The strategy, as Lighthizer outlined, is “based on three core objectives: (1) pursue a bilateral agreement with a willing partner; (2) ensure that this agreement is crafted so that it can serve as a model that can be rolled out to other willing partners in sub-Saharan Africa in the future; and (3) ensure that the model agreement will reinforce regional and continental integration in Africa.”

Lighthizer stated that no final decision has been made about which country or countries the model agreement would be negotiated with, but emphasized: “We are serious and intend to move quickly. I hope to announce exploratory talks soon.”

### **UNCITRAL Working Group III continues debate on ISDS concerns and multilateral reform**

Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) continued discussions on [possible reform of investor–state dispute settlement \(ISDS\)](#) at its 35th session, held April 23–27, 2018 in New York. The meeting was attended by representatives of 50 of the [60 member states of UNCITRAL](#) and 36 non-member states with observer status, as well as international and non-governmental organizations.

[General statements](#) at the beginning of the session highlighted the importance of the working group’s work for developing countries, in view of the impact of foreign investment and ISDS on sustainable development. Several statements stressed the need for any ISDS reform to strike a balance between rights and obligations of states and investors and underlined the importance of considering possible reform of ISDS at the multilateral level, with participation by both developing and developed country states. Contributions were made to the UNCITRAL trust fund to allow participation of developing countries in working group deliberations.

During the week, [the working group discussed](#) the question of coherence and consistency of ISDS outcomes. It also considered concerns regarding the appointment of arbitrators as well as ethical requirements, including with respect to the limited number of individuals repeatedly appointed as arbitrators, the absence of transparency in the appointment process, individuals acting as counsel and as arbitrators in different proceedings (double-hatting) and the perception that arbitrators are less cognizant of public interest concerns than judges holding a

public office. Other issues raised included third-party funding, lack of disclosure and security for costs.

The working group presented its progress report at UNCITRAL’s 51st session, held in New York from June 25 to July 13, 2018. The 36th session of the working group is tentatively scheduled for October 29–November 2, 2018 in Vienna. At the next working group session, UNCITRAL member states will begin to identify and discuss areas where, in their view, multilateral reform of ISDS may be desirable. More information and official documents are available on the [working group website](#).



## AWARDS AND DECISIONS

### ICSID tribunal finds Spain in breach of the FET standard under the Energy Charter Treaty

*Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain, ICSID Case No. ARB/14/1*

**Trishna Menon**

In a final award of May 16, 2018, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) found Spain in breach of the fair and equitable treatment (FET) standard under Article 10(1) of the Energy Charter Treaty (ECT), in a case initiated by Masdar Solar & Wind Cooperatief U.A. (Masdar), a company constituted in the Netherlands.

#### Background and claims

One of Spain's policies to stimulate investment in the renewable energy sector was the Royal Decree 661 of 2007 (RD661/2007), under which renewable energy generators would benefit from a premium set by the Spanish government above the wholesale market price. The basis of remuneration for generators was a feed-in tariff (FIT) for the lifetime of the installation by way of an alleged stability commitment: Article 44.3 of RD661/2007 would prevent future changes to the tariff regime from affecting plants registered and commissioned by January 1, 2012.

Masdar contended that, by a series of disputed measures introduced between 2012 and 2014, Spain abolished the RD661/2007 regime and introduced a much less favourable regime, which applied to those installations commissioned under the RD661/2007 regime alike.

Masdar had made investments in three concentrated solar power (CSP) plants pursuant to RD661/2007. Claiming that its investments had been affected by the disputed measures, Masdar initiated arbitration seeking a declaration that Spain had breached the FET standard under ECT Article 10(1). It also sought full reparation for the injury to its investments in the form of full restitution by re-establishing the situation that existed prior to Spain's alleged ECT breaches, together with compensation for all losses suffered prior to the reinstatement.

#### Tribunal dismisses most of Spain's jurisdictional objections

Objecting to the tribunal's personal jurisdiction

(*ratione personae*), Spain alleged that Masdar's conduct, by virtue of general indicia of control, was attributable to the UAE, which is not party to the ECT. Since the dispute was between two states, Spain argued that the requirements of ECT Article 26 and Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) were not met. The tribunal dismissed this objection since Spain had not adduced evidence supporting its control argument and had already conceded that Masdar had no governmental powers.

Spain's objection to the tribunal's subject matter jurisdiction (*ratione materiae*) was based on its argument that Masdar had no "investment" in Spain for the purposes of ECT Article 1(6) and ICSID Convention Article 25. The tribunal considered that a substantial number of recent awards, such as *Abaclat v. Argentina* and *GEA Group Aktiengesellschaft v. Ukraine*, considered that "investment" has an inherent meaning that an alleged investment must meet, along with falling under one of the categories of assets mentioned in bilateral investment treaties (BITs). Essentially, the tribunal held that elucidating the meaning of the term "investment" in ECT Article 1(6) was part of the interpretation of this provision. It was satisfied that Masdar had made an "investment" within the meaning of the above cases.

Spain relied on the Spanish and Italian language versions of the ECT to argue that Article 17 of the ECT requires an investor to have substantial business activities in its home state. It raised a consent (*ratione voluntatis*) objection, arguing that Masdar's presence in the Netherlands did not satisfy this criterion. The tribunal rejected the objection as it was not proven by evidence.

Another *ratione voluntatis* objection related to the "levy introduced on the value of the production of electricity of a direct and real nature," with Spain arguing that the levy was a bona fide tax to which the ECT Article 21(1) taxation exemption applied. The tribunal agreed and concluded that it did not have jurisdiction to entertain claims arising out of the introduction of the levy.

#### For tribunal, *Achmea* does not apply to multilateral treaties to which the European Union is a party

A last objection was raised by Spain on the ground that



ECT Article 26 did not apply to intra-EU disputes: as Masdar was a Dutch enterprise, EU law would have primacy over the ECT. The tribunal concluded that nothing in the text of the ECT precluded intra-EU disputes from its scope and that EU law is not incompatible with the provision for investor–state arbitration contained in the ECT. The two legal orders could be applied together as regards this arbitration, because only the ECT deals with investor–state arbitration and nothing in EU law can be interpreted as precluding investor–state arbitration under the ECT and the ICSID Convention.

Following the rendering of the [judgment of the CJEU in \*Slovak Republic v. Achmea BV\* on March 6, 2018](#), Spain requested the tribunal to reopen the arbitration. It sought to introduce into the record the *Achmea* judgment, arguing that it confirmed the intra-EU objection it had raised. The tribunal, however, held that the *Achmea* judgment applied to BITs, but not to multilateral treaties to which the European Union itself is a party, such as the ECT (para. 679).

### Fair and equitable treatment under ECT Article 10(1)

According to Masdar, the enactment of the disputed measures led to the dismantling of the regime under RD661/2007, which removed the stability that was promised on the basis of which Masdar made its investments. Spain relied on *Charanne v. Spain* to argue that stabilization provisions offered in general legislation, or press releases and others, cannot create legitimate expectations for investors.

In its analysis, the tribunal affirmed that a state is at undisputed liberty to amend its legislation. It indicated that FET could not include economic and legal stability, and foreign investors could not legitimately expect it, unless explicit undertakings were directly extended to investors (para. 485). However, the tribunal also cautioned that this right was not unfettered.

To establish whether Spain had breached the investor’s legitimate expectations, the tribunal considered the two schools of thought developed in *Charanne*. The majority opinion in that case held that only specific commitments can give rise to legitimate expectations. In turn, the dissenting opinion held that, if investors were relying on general law as the source for their legitimate expectations, they would have to prove that they had undertaken sufficient due diligence to understand the legal system.

The tribunal in the *Masdar* case found that the

investor had undertaken the due diligence necessary to understand the legal system and bring a claim of legitimate expectations based on general law. While noting that it was not bound to the *Charanne* majority opinion, and therefore did not need to consider the existence of specific commitments, the tribunal also found that a specific commitment existed in the form of a resolution issued by Spain addressed specifically to each of the operating companies (para. 520).

Since specific commitments existed, in addition to general commitments, both of which were found to give rise to legitimate expectations, the tribunal declined to choose between both schools of thought and found that Spain was in breach of its FET obligations pursuant to ECT Article 10(1).

### Decision and costs

The tribunal decided that Spain breached the FET standard under ECT Article 10(1) and that Masdar was entitled to full reparation. Considering that granting restitution of the RD661/2007 regime would materially affect Spain’s legislative authority, the tribunal decided to grant reparation through monetary compensation. The tribunal ordered Spain to pay damages of EUR 64.5 million plus pre- and post-award compound interest.

*Notes:* The tribunal was composed of John Beechey (President, appointed by the Chairman of the ICSID Administrative Council, British national), Gary Born (claimant’s appointee, U.S. national) and Brigitte Stern (respondent’s appointee, French national). The award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf>.

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## Kosovo’s jurisdictional objections prevail against claims of German investor

*ACP Axos Capital GMBH v. Republic of Kosovo, ICSID Case No. ARB/15/22*

### Kirrin Hough

In an award dated May 3, 2018, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) dismissed claims brought by German company ACP Axos Capital GMBH (Axos) against Kosovo following the cancellation by Kosovo of the tender and sale of 75 per cent of the shares of the Post and Telecom of Kosovo (PTK). The tribunal found that it lacked jurisdiction over the arbitration on the



grounds that no valid contract existed between Axos and Kosovo under Kosovar law.

### Factual background and claims

Following its independence in 2008, Kosovo decided in 2011 to privatize the state-owned postal communication authority, PTK, and established a Government Privatization Committee (GPC) to conduct the tender and sale of 75 per cent of the shares of PTK. Kosovo subsequently made a public invitation for the tender process. In response to the invitation, a consortium comprising Columbia Capital V LLC (Columbia) and Axos submitted a bid and became one of five pre-qualified applicants.

In September 2012 the pre-qualified applicants received Instructions for Tender Participants (ITP) and draft transaction documents, including the share purchase agreement (SPA), which needed to be signed in order for the tender and sale to be finalized. In December 2012, Columbia announced its withdrawal from the consortium, resulting in Axos becoming the lead member and Najafi Companies, LLC (Najafi) entering as a new member.

On April 3, 2013, the Axos/Najafi consortium submitted a bid for the purchase of PTK shares. On April 18, 2013, the transaction advisors informed Axos in a letter that the consortium would be selected as the first-ranked bidder. The following week Najafi withdrew from the consortium.

During the summer of 2013, Axos sought to negotiate the terms of the transaction documents and expressed concerns about PTK's financial performance. Kosovo refused to amend any part of the transaction documents, but assured Axos that it was committed to the success of the privatization process. The GPC subsequently requested that the Assembly of Kosovo review a report that detailed the process of privatization as it related to PTK. After months of review by the Assembly and an extension of the signing date, the Assembly failed to secure a quorum on the privatization report.

With December 30, 2013 as the deadline for signing the SPA, the GPC found that it had no legal basis to further postpone the signing date. As a result, the GPC decided to cancel the privatization process of PTK and, consequently, the transaction with Axos.

On January 30, 2014, Axos notified Kosovo of its intention to arbitrate, claiming that Kosovo had expropriated Axos's investment and failed to accord fair and equitable treatment (FET) to Axos,

prejudiced Axos's investment by taking arbitrary measures and failed to observe its obligations to Axos, in violation of the Germany–Yugoslavia bilateral investment treaty (BIT).

### Kosovo objects to the tribunal's jurisdiction: No protected investment

Kosovo argued that the tribunal lacked jurisdiction, because Axos had neither established a protected investment within the meaning of BIT Article 1(1) nor made an investment under the meaning of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention).

Axos argued in turn that a valid contract for the sale of shares of PTK had been entered into based on the exchanges between Kosovo and Axos, which occurred in April 2013. The existence of such contract, Axos argued, constituted an investment under the BIT, thus establishing jurisdiction over the arbitration.

### No offer or acceptance under Kosovo Law

To determine whether a valid contract for the sale of shares existed between Axos and Kosovo, the tribunal first addressed Axos's argument that the April 3, 2013 bid submission constituted an offer within the meaning of the Kosovo Law on Obligations. Observing that the bid was made under the ITP and that the ITP made clear that the bid was not an offer to acquire shares of PTK, the tribunal concluded that the bid submission was merely an offer to be selected as a "Selected Bidder," not an offer to enter into a contract for the sale of shares.

The tribunal then analyzed Axos's argument that the April 18, 2013 letter sent to the consortium by Kosovo, informing Axos of its selection as first-ranked bidder, constituted an acceptance that would create a contract between the two parties. The tribunal found that the letter was nothing more than an indication that the consortium had been chosen as the Selected Bidder. It concluded that the signing of the SPA existed as a step subsequent to the selection of the Selected Bidder, and the letter sent by Kosovo did not constitute an acceptance to enter into an agreement for the sale of shares.

### Claimant cannot avail itself of rights it does not own

The tribunal further found that, since the bid submission was made by the consortium, any rights held by a Selected Bidder belonged to the Axos/Najafi consortium. Thus, since Najafi had left the consortium, Axos lacked the ability to unilaterally exercise any such



rights as a Selected Bidder as there was no indication that Axos was the legal successor of the rights.

### Kosovo's unfettered right to cancel PTK privatization

In its analysis, the tribunal concluded that, in keeping with the terms of the ITP, Kosovo had the unfettered right to cancel the privatization process of PTK at any time prior to the signing date with no indemnification due to bidders. The tribunal found that, since no contract was in place, Kosovo could rightfully cancel the tender up until the very last moment of the signing of the transaction documents.

### Unsatisfied requirements of Kosovar public law

Kosovo made the case that, even if there was an agreement between the consortium and Kosovo, such agreement was not valid since it had not been executed in accordance with Kosovo's Law on Public-Private-Partnership (PPP). Indeed, the law required that the authorized representative of the private partner and the highest representative of the state (that is, the minister chairing the GPC) sign the agreement. The tribunal found that, lacking the minister's signature, there was no valid contract.

### Claimant's conduct confirms that no binding contract had been concluded

Finally, in determining whether Axos and Kosovo entered into a binding contract, the tribunal analyzed the conduct of the parties following the bid selection. The tribunal found that, if Axos had believed that a binding contract had existed, it would have immediately signed or offered to sign the transaction documents. Instead, Axos sought to negotiate the terms of the transaction documents and only offered to sign such documents several months later. Thus, the tribunal concluded that Axos's conduct did not suggest that a binding contract had been concluded.

### No jurisdiction over Axos's claims; Kosovo obtains award of full costs

Based on its finding that no valid contract existed between Axos and Kosovo for the sale of shares of PTK, the tribunal concluded that no investment existed under the meaning of BIT Article 1(1) and, thus, that it did not have jurisdiction over the dispute. In light of Kosovo's successful defense, the tribunal held that Axos would bear all arbitration costs and Kosovo's reasonable legal fees and expenses, ordering Axos to pay Kosovo USD 1,713,349.40 and EUR 132,446.20.

*Notes:* The tribunal was composed of Philippe Pinsolle (President appointed by Secretary-General of ICSID, Swiss and French national), Michael Feit (claimant's appointee, Swiss and Israeli national) and J. Christopher Thomas (respondent's appointee, Canadian national). The award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9648.pdf>

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## UNCITRAL tribunal declines jurisdiction as France–Mauritius BIT does not apply to dual national investor

*Dawood Rawat v. The Republic of Mauritius, PCA Case 2016-20*

### Pietro Benedetti Teixeira Webber

In the proceeding initiated by Mr. Dawood Rawat against Mauritius, a tribunal constituted under the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) ruled that it lacked jurisdiction to decide on the investor's claims under the 1973 France–Mauritius bilateral investment treaty (BIT). The arbitration was administered by the Permanent Court of Arbitration, and the award was rendered on April 6, 2018.

### Background and claims

Mr. Rawat claimed that he controlled “one of the most innovative and dynamic conglomerates in Mauritius” (Statement of Claim, para. 29) operating in the banking sector. He argued that, soon after the 2014 general elections in Mauritius, he started to face a series of illegal actions by the government, including the revocation of his banking license (later transferred to a state-owned company) and the arrest of some of his relatives. Claiming that Mauritius had breached BIT Articles 2 and 3 (expropriation and fair and equitable treatment clauses), Mr. Rawat requested the restitution of his assets and the payment of compensation.

Mauritius did not dispute that certain of the actions alleged by Mr. Rawat had occurred, but sustained they were justified by a legal investigation of a money laundering scheme coordinated by Mr. Rawat and his family members. Before getting into the merits of its arguments, Mauritius raised preliminary objections to the tribunal's jurisdiction, requesting that it dismiss Mr. Rawat's claims.

Although Mr. Rawat was born in Mauritius and had





Mauritian nationality, the tribunal found that there was substantial evidence that he became a French national after marrying a French woman. However, the parties contended as to whether Mr. Rawat thus qualified as a French investor entitled to initiate arbitration against Mauritius under the BIT. Therefore, the key issue to be decided by the tribunal was whether the France–Mauritius BIT applied to the case in view of the claimant’s dual French–Mauritian citizenship.

### No express exclusion of dual nationals from BIT coverage

The arbitrators reasoned that they could not “add conditions to the BIT, as drafted and ratified by France and Mauritius” (para. 170). They noted that there was no express exclusion of dual nationals from the protections under the BIT, unlike other treaties signed by the same states, such as the 1984 France–China BIT and the 2014 Mauritius–Egypt BIT, and considered that this would lead to considering Mr. Rawat as protected under the France–Mauritius BIT.

### Interpreting the BIT according to the Vienna Convention of the Law of Treaties

The tribunal then turned to the interpretation of the BIT according to the Vienna Convention of the Law of Treaties (VCLT). It considered that “the object and purpose of the France–Mauritius BIT would also point to the outcome of including, rather than excluding, dual nationals” (para. 172), since the preamble of the BIT highlighted that the goal of the treaty is to “protect and stimulate investment” without distinguishing the possible sources of investment.

Regarding the interpretation in accordance with the context (VCLT Art. 31(2)), the tribunal deemed it necessary to examine the relevant provisions of the BIT. It read BIT Article 9 as requiring that agreements relating to investments made in the territory of the contracting states *must* include an International Centre for Settlement of Investment Disputes (ICSID) arbitration clause. Article 25(2) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), in turn, expressly excludes dual nationals from the concept of “*ressortissant*” in the official French version.

The tribunal found that BIT Article 9 “makes an obligation, as opposed to an option, for Contracting States to include an ICSID arbitration clause in investment contracts” (para. 178). Therefore, there was a strict alignment between the concept of “*ressortissant*” under the BIT and the ICSID Convention.

In conclusion, the tribunal considered that France and Mauritius, by referring to the ICSID Convention, implicitly excluded dual nationals from the scope of the BIT. Consequently, it held that it had no jurisdiction over the dispute.

### Interpreting the BIT according to the *effet utile* principle

According to the tribunal, the *effet utile* principle would reinforce that conclusion. The arbitrators referred to *Cemex v. Venezuela* and sustained that the useful effect, although not expressly set out in the VCLT, “is generally accepted to flow from the principle of interpretation of treaties in good faith as envisioned in VCLT Article 31(1)” (para. 182).

As the BIT referred to the ICSID Convention, according to which there is no room for arbitration involving dual national investors (Art. 25(2)), the arbitration clauses would be inoperable. Hence, the application of the *effet utile* principle would lead to the same conclusion: it would be meaningless to interpret the BIT as providing for arbitration with French–Mauritian dual nationals.

### Establishing jurisdiction through the most-favoured-nation clause

It was undisputed that there was no investor–state arbitration clause in the France–Mauritius BIT. However, Mr. Rawat argued that Mauritius consented to arbitrate with French investors in two steps. First, it consented to the most-favoured-nation (MFN) clause of the France–Mauritius BIT, which allowed an investor to “benefit from all the provisions more favorable than those of [the BIT] which could result from international commitments already made or that would be made in the future” (BIT Art. 8). Second, Mauritius entered into an investment treaty with Finland providing for direct arbitration. Therefore, the claimant invoked the MFN clause in the France–Mauritius BIT to establish the tribunal’s jurisdiction.

Mauritius contended there was no consent to arbitrate, arguing that one can only rely on the MFN clause after establishing the tribunal’s jurisdiction under the treaty. As the BIT was silent on investor–state arbitration, it could not be considered a “matter” governed by the treaty.

The tribunal considered that Mr. Rawat was not covered by the France–Mauritius BIT, holding that the claimant could not benefit from substantive protections provided by the BIT. Notwithstanding, the tribunal proposed criteria for deciding if jurisdiction could be established



via the MFN clause.

The “heart of the *ejusdem generis* test” (para. 187), according to the arbitrators, would be to define the scope of the expression “the matters covered by this agreement” (BIT Article 8) and whether the matters covered by the France–Mauritius BIT and by the Finland–Mauritius BIT were of the same kind. This would involve distinguishing *matters* and *treatments* by assessing the “level of granularity” at which matters should be considered. Such difference would be relevant as “matters cannot be ‘bettered’ by virtue of MFN clauses; ‘treatment’ of matters may” (para. 187).

### Decision and costs

The tribunal concluded it lacked jurisdiction over the dispute, ordering Mr. Rawat to pay one third of Mauritius’ total fees and expenses for the jurisdictional objection phase. No further reimbursement was determined regarding the arbitration costs, as neither party had prevailed on its prior requests for interim measures.

*Notes:* The arbitral tribunal was composed of Lucy Reed (Presiding arbitrator appointed by the Parties, U.S. national), Jean-Christophe Honlet (Claimant’s appointee, French national) and Vaughan Lowe (Respondent’s appointee, British national). The award on jurisdiction of April 6, 2018 is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9618.pdf>

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## Investor ordered by ICSID tribunal to pay Canadian government CAD 9 million following failed NAFTA claim

*Mercer International Inc. v. Government of Canada, ICSID Case No. ARB(AF)/12/3*

### Matthew Levine

A tribunal at the International Centre for Settlement of Investment Disputes (ICSID) constituted under Chapter 11 of the North American Free Trade Agreement (NAFTA) has reached the award stage. In a dispute initiated by U.S. company Mercer International Inc. (Mercer), the tribunal found in favour of Canada. As the successful party, Canada was awarded legal costs totalling CAD 9 million. The award was rendered in March 2018 and made public in May 2018 following redaction of commercial information.

### Background and claims

Mercer is a corporation established under the laws of the State of Washington, United States. Through its Canadian affiliates, it owns and operates a pulp mill in Castlegar, in the Canadian Province of British Columbia (the Celgar mill).

The Celgar mill processes wood chips from local sawmills into pulp. This activity uses large amounts of electricity, purchased at prevailing rates from FortisBC, the local utility. In addition to generating pulp, the Celgar mill also produces a by-product that could be converted into biomass-based electricity.

Up until 2009, Mercer sold biomass electricity at rates that were much higher than the rate at which it purchased electricity. As such, profits from electricity sales partly cross-subsidized pulp operations. Following an alleged provincial policy shift, a new generator baseline was set for the Celgar mill. This was recorded in a 2009 electricity purchase agreement (EPA) between the Celgar mill and British Columbia Hydro and Power Authority (BC Hydro).

As a result of the new generator baseline, the Celgar mill needed to use all of its self-generated electricity before it could purchase electricity from FortisBC at the cheaper industrial rate.

According to Mercer, the result was that Canada had failed to provide Mercer non-discriminatory treatment and the minimum standard treatment under NAFTA. Mercer initiated arbitration against Canada in January 2012, claiming CDN 232 million in damages plus interest.

EPA claims are disputed under NAFTA’s time bar, but only those pertaining to a “relative standard” are dismissed

Canada’s first objection to jurisdiction hinged on Mercer’s delay in filing for arbitration. In particular, Canada disputed jurisdiction over claims arising from the EPA.

The tribunal observed that NAFTA Articles 1116(2) and 1117(2) provide that an investor “may not make a claim if more than three years have elapsed from the date on which the investor [or enterprise] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor [or enterprise] has incurred loss or damage.”

The question was thus the exact date on which the investor and its affiliates first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that they had incurred loss or damage.



Citing the NAFTA decision in *Grand River v. United States*, Canada argued that the time bar began to run when the investor “by exercise of reasonable care or diligence [...] would have known” (para. 6.10). For the investor, however, the time bar started to run only when its claim was “ripe,” that is, when the challenged measure actually took effect (para. 6.13). The tribunal relied on the date that the EPA took contractual effect—January 2009—and concluded that Mercer knew the implications of the new generator baseline by that date.

However, the tribunal found that the time bar began to run in January 2009 only for some of Mercer’s claims. Here, it distinguished Mercer’s claims that the EPA’s terms were arbitrary, unfair or unjust, which were standards that were not relative but instead assessable by the claimant immediately without need for a comparator, from claims “for what may broadly be described as ‘discriminatory treatment’, brought under any of NAFTA Articles 1102, 1103 and 1105. These are pleaded by the Claimant as relative standards” (para. 6.18).

The tribunal held that claims of the first type were time barred, but that claims of the second type depended on actual or constructive knowledge of at least one other BC pulp mill in like circumstances having received more favorable treatment. Ultimately, on the facts, the tribunal did not dismiss these claims as time barred.

#### More claims barred under NAFTA procurement carve-out

The second jurisdictional objection was that the claims of discriminatory treatment (in alleged breach of NAFTA Articles 1102 and 1103) pertained to procurement and were thus excluded. NAFTA Article 1108(7)(a) provides that such articles “do not apply to procurement by a Party or a state enterprise.”

The tribunal accepted that it should apply the ordinary meaning of the word “procurement” and that BC Hydro had procured electricity from the Celgar mill through the EPA. For the tribunal, it did not automatically follow that a specific provision in the EPA—namely, the generator baseline provision—was excluded from application of NAFTA Articles 1102 and 1103. However, upon further analysis, it found that the generator baseline provision was integral to the “procurement function” (para. 6.47) of the EPA and thus excluded from the tribunal’s jurisdiction.

#### Remaining discrimination claims fail

As a result of its findings on jurisdiction, the tribunal only had to consider a limited set of Mercer’s original claims of

discriminatory treatment under Articles 1102 and 1103.

On the legal standard for finding discrimination, the tribunal clarified that the words “in like circumstances” in NAFTA Articles 1102 and 1103 referred to the treatment afforded to the investor vis-à-vis other investors. The tribunal accepted two self-generating pulp mills in British Columbia—the Skookumchuck Pulp mill and the Port Mellon mill—as ostensible comparators. The former is domestic owned while the latter was foreign owned.

On the facts, the tribunal found that the Celgar mill had not been discriminated against.

#### Discrimination is not covered by Article 1105

Mercer also sought to advance claims of discriminatory treatment, as distinguished from discrimination, under Article 1105 (minimum standard of treatment). The majority of the tribunal, however, was skeptical and found that the customary international law minimum standard could add nothing to the claimant’s search for compensation.

Arbitrator Orrego Vicuña indicated in a dissenting opinion that the prohibition of discriminatory treatment should be considered to be part of Article 1105. He relied on the findings of other investment tribunals, rather than *citing opinio juris* and state practice, to support this position.

#### Canada is awarded CAD 9 million in legal costs

The parties had criticized each other for mischievous conduct during the arbitration, but the tribunal characterized the events in question as innocent mishaps and delays brought about in part by a dispute that was complicated and difficult. No part of the tribunal’s decision on costs had any punitive element. Rather, the paramount factor for allocating legal costs was the success of the parties in the arbitration. The tribunal determined that Canada, as the successful party, should in principle recover its legal costs from Mercer. Although Canada had claimed legal costs of CAD 9,154,166.56, the tribunal found it reasonable to award CAD 9 million.

*Notes:* The tribunal was composed of V. V. Veeder (chair appointed by the parties, British national), Francisco Orrego Vicuña (claimant’s appointee, Chilean national) and Zachary Douglas (respondent’s appointee, Australian national). The final award of March 6, 2018 is available at [https://www.italaw.com/sites/default/files/case-documents/italaw9651\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw9651_0.pdf)

**Matthew Levine** is a Canadian lawyer and a contributor to IISD’s Investment for Sustainable Development Program.



## Luxembourg fund awarded EUR 53.3 million for FET breach arising out of Spain's curtailment of renewable energy incentive schemes

*Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, SCC Case No. 063/2015*

### Gladwin Issac

In a proceeding brought by Novenergia, a Luxembourg investment fund, a tribunal at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) found that Spain's electricity reforms breached its obligation to accord to the investor fair and equitable treatment (FET) under the Energy Charter Treaty (ECT). In particular, the tribunal stated that Spain's actions fell "outside the acceptable range of legislative and regulatory behaviour and entirely transform[ed] and alter[ed] the legal and business environment under which the investment was decided and made" (para. 695). The award was issued on February 15, 2018.

### Background and claims

Following Spain's special regime for renewable energy support under Law 54/1997 and Royal Decree RD 661/2007, the claimant invested in Spain's photovoltaic (PV) sector on September 13, 2007. The special regime guaranteed, with respect to all PV plants registered with the Administrative Registry for Electrical Power Generating Units (RAIPRE), a feed-in-tariff (FIT) to renewable energy producers for the lifetime of the PV plants.

However, due to the economic crisis and a regulated electricity tariff set lower than the FITs, this support scheme became a heavy financial burden and was replaced with a less favourable regime in 2013. Novenergia initiated arbitration claiming compensation for Spain's breach of its ECT obligations, particularly the obligation to accord FET under ECT Article 10(1).

### Tribunal dismisses the intra-EU objection

Spain contended that the tribunal lacked jurisdiction to hear intra-EU investment disputes. First, it emphasized that ECT Article 26 on arbitration covers disputes between "a Contracting Party" and "an Investor of another Contracting Party," and argued that as both Spain and the European Union are parties to the ECT, the condition envisaged in the article is not met. Second, relying on *Flaminio Costa v. ENEL*, Spain argued that, since the dispute involves intra-EU relations, EU law should prevail and displace any other law, including the ECT. However, the tribunal disagreed and stated that it derived its jurisdiction solely from the

ECT and not from EU law.

### Applicability of the taxation carve-out

In addition, Spain argued that the tribunal lacked jurisdiction to hear the claim related to the introduction of the tax in Law 15/2012 since Spain had not specifically consented to submitting this issue to arbitration. Spain maintained that the tax was a bona fide tax and covered by the carve-out for taxation measures under ECT Article 21(1) from its obligations under ECT Article 10(1). The tribunal agreed that Law 15/2012 was a taxation measure and rejected the claimant's arguments that the measure was not a bona fide taxation measure. Consequently, it denied jurisdiction to hear the claims arising out of the tax.

### Breach of FET standard under ECT Article 10(1)

Novenergia alleged that Spain retroactively repealed the special regime, truncating its legitimate expectations created through Spain's assurances and undertakings. It also claimed that the ECT contained a reinforced obligation to create and maintain stable and transparent investment conditions by virtue of the first sentence of Article 10(1), which Spain breached. The tribunal agreed with Spain, however, that the stability and transparency obligation was simply an illustration of the obligation to respect investors' legitimate expectations through the FET standard, rather than a separate obligation. Accordingly, the tribunal did not assess this obligation separately, but as part of the FET standard.

On the FET breach itself, the tribunal decided that Spain's conduct had given rise to a legitimate and reasonable expectation that there would not be any radical or fundamental changes to the special regime as set out in RD 661/2007. However, it held that the changes enacted by Spain in 2013 and 2014 abolished the fixed long-term FIT previously guaranteed and did so retroactively. It concluded that the subsequent legislations introduced by Spain amounted to a breach of its obligation to accord to the investor FET under ECT Article 10(1), entitling the claimant to compensation.

### Revocation of special regime does not amount to expropriation

Novenergia argued that the complete elimination of the special regime and the imposition of a tax on renewable energy producers also amounted to the expropriation of its investment, in breach of ECT Article 13(1) on expropriation.

However, the tribunal held that the expropriation claim was not well founded. It reasoned that Novenergia's assets that could have been expropriated were its



industrial properties and the shares in the companies involved in the investment that it directly or indirectly owned and controlled. It considered that, even if the value of these assets diminished as an effect of the state measures, the assets as such were neither expropriated nor affected by measures having an effect equivalent to an expropriation, and Novenergia was still the untouched owner of its plants and the direct or indirect holder of the companies' shares and relevant capital. The tribunal concluded that, although in violation of the FET standard, Spain's measures did not affect Novenergia's proprietary rights.

#### Damages and costs

The tribunal ordered Spain to pay EUR 53.3 million in damages for its violation of ECT Article 10(1) and an additional EUR 2.6 million for the claimant's arbitration costs, plus compound interest.

#### Post-award developments: *Achmea* decision issued, clarification requested but dismissed, enforcement stayed

On March 6, 2018, the Court of Justice of the European Union (CJEU) issued its judgment in *Slovak Republic v. Achmea BV*, holding that investor–state arbitration clauses in intra-EU BITs are not compatible with EU law. However, the judgment is not clear as to whether it applies to intra-EU ECT claims.

On March 13, 2018, Spain made a request to rectify, clarify and complement the final award, including with respect to the applicability and relevance of EU law and its relationship with the ECT provisions. However, the tribunal found that it was not empowered to make a renewed assessment of Spain's case on the merits and dismissed the request on April 9, 2018.

On May 16, 2018, the investor filed a petition in the U.S. Court for the District of Columbia for an order and judgment confirming, recognizing and enforcing the award. On the same day, however, upon Spain's request, the Swedish Svea Court of Appeal stayed the enforcement of the award based on the decision in *Achmea*.

*Notes:* The tribunal was composed of Johan Sidklev (Chairperson appointed by the SCC), Antonio Crivellaro (claimant's appointee) and Bernardo Sepúlveda Amor (respondent's appointee). The award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf>.

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## RESOURCES AND EVENTS

### RESOURCES

#### **IGF Guidance for Governments: Local content policies**

By Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), Published by IISD, July 2018

The guidance focuses on mining sector local content policies—a suite of policies aimed at leveraging mining investment to, for example, increase local employment, boost mining companies' local purchases and foster entrepreneurs in non-mining sectors. It aims to help resource-rich countries move away from commodity dependency and diversify their economic base. Local content policies are being increasingly used, particularly as governments review or revise their mining and investment codes and contracts. The guidance document also covers three cross-cutting themes: ensuring goals are achieved in a gender-equitable way, exploring the relationship between local content policies and countries' obligations under trade and investment law, and exploring the implications of technological advances on the success of local content policies. Available at <https://www.iisd.org/library/igf-guidance-governments-local-content-policies>

#### **World Investment Report 2018: Investment and new industrial policies**

By UNCTAD, Published by UNCTAD, June 2018

The 2018 World Investment Report presents foreign direct investment (FDI) trends and prospects at global, regional and national levels; analyzes the latest developments in national policy measures on investment; highlights trends in investment treaties and investment dispute settlement; and presents progress and next steps in the reform of the investment treaty regime. The report argues that modern industrial policies, especially those aimed at positioning for the new industrial revolution, call for a strategic review of investment policies. While FDI remains the largest external source of finance for developing countries, global FDI flows fell by 23 per cent to USD 1.43 trillion, with a slower rate of expansion of international production and a decrease in rates of return on foreign investment to 6.7 per

cent from 8.1 in 2012. The report also indicates that growth in global value chains has stagnated and that projections show fragile growth of global FDI in 2018. Available at <http://worldinvestmentreport.unctad.org/world-investment-report-2018>

#### **IIA Issues Note: Investor–State Dispute Settlement: Review of developments in 2017**

By United Nations Conference on Trade and Development (UNCTAD), Published by UNCTAD, June 2018

UNCTAD's annual review of investor–state dispute settlement (ISDS) contains an overview of cases initiated pursuant to international investment agreements (IIAs), overall case outcomes and an in-depth analysis of decisions. At least 65 treaty-based arbitrations were filed in 2017, reaching 855 known cases in total. Investors brought many of the new cases under IIAs that date back to the 1980s and 1990s. This points to the importance of addressing “old-generation” treaties as part of the so-called Phase 2 of IIA Reform. Decisions rendered in 2017 generally covered regulatory changes under fair and equitable treatment (FET), the police powers doctrine, indirect expropriation, provisions limiting ISDS access, host state law compliance, the scope of the most-favoured-nation (MFN) and umbrella clauses. Available at <http://investmentpolicyhub.unctad.org/Publications/Details/1188>

#### **The Rise of Investor–State Arbitration: Politics, law, and unintended consequences**

By Taylor St John, Published by Oxford University Press, May 2018

Why did governments create a special legal regime in which foreign investors can bring cases directly against states? This book takes readers through the key decisions that created investor–state arbitration, drawing on internal documents from several governments and extensive interviews to illustrate the politics behind this new legal regime. It argues that, at the creation of the investor–state regime, the lobby of corporations and law firms that dominate investor–state arbitration today were not present. It shows that powerful states



did not have a strong preference for the specific dispute settlement regime and that there was no evidence that it would facilitate investment. The book explains how the actions of international officials with peacebuilding and development aims kicked off a process of gradual institutional development. It argues that institutions do not determine the purposes to which they may be put and illustrates how unintended consequences emerge and why institutions persist regardless of a pre-determined objective. Available at <https://global.oup.com/academic/product/the-rise-of-investor-state-arbitration-9780198789918>

### **International Investment Law and Arbitration: Commentary, awards and other materials**

By Chin Leng Lim, Jean Ho & Martins Paporinskis, Published by Cambridge University Press, May 2018

The book offers a comprehensive introduction to international investment law and dispute settlement. Presenting the facts of daily legal practice and the largely unaltered aims of the subject alongside a broad selection of key awards and original materials, historical developments are discussed in the context of the changing directions in arbitral jurisprudence and the current treaty and arbitration reform debate. Available at <http://www.cambridge.org/academic/subjects/law/international-trade-law/international-investment-law-and-arbitration-commentary-awards-and-other-materials>

### **IIA Issues Note: Recent Developments in the International Investment Regime**

By UNCTAD, Published by UNCTAD, May 2018

The note highlights that the number of new IIAs concluded in 2017 was the lowest since 1983, and that, for the first time, the number of effective treaty terminations outpaced the number of new IIAs. Reform is well under way across all regions. Since 2012, over 150 countries have taken steps to formulate a new generation of sustainable development-oriented IIAs. They have reviewed their treaty networks, revised their treaty models and are beginning to modernize the existing stock of old-generation treaties. An increasing number are issuing interpretations, and replacing and consolidating their older agreements. Many have also been engaging in multilateral reform discussions, including with regard to ISDS. After improving the approach to new treaties and modernizing existing treaties, the piece calls for the last step in the reform process (Phase 3): ensuring coherence with national

investment policies and other bodies of international law. Available at <http://investmentpolicyhub.unctad.org/Publications/Details/1186>

### **The WTO and International Investment Law: Converging systems**

By Jürgen Kurtz, Published by Cambridge University Press, April 2018

International law has historically regulated foreign trade and foreign investment differently, leading to variances in treaty form, institutional culture and dispute settlement. However, economic, legal and sociological factors are now pushing the two systems together. Jürgen Kurtz explores the dynamics of this convergence phenomenon, proposing a framework to understand the deepening relationship between them. The book offers reform ideas and possibilities, providing theoretical insights and doctrinal models that can guide actors in building a commonality between the two legal systems. Available at <http://www.cambridge.org/academic/subjects/law/international-trade-law/wto-and-international-investment-law-converging-systems>

### **International Council for Commercial Arbitration (ICCA)–Queen Mary Task Force Report on Third-Party Funding in International Arbitration**

By ICCA & Institute for Regulation and Ethics, School of International Arbitration, Queen Mary University of London, Published by ICCA, April 2018

The ICCA-Queen Mary Third Party Funding Taskforce, comprised of representatives drawn from among all relevant stakeholders and interested members of ICCA, convened to systematically study and make recommendations regarding the procedures, ethics and related policy issues relating to third-party funding in international arbitration. This report presents the task force's findings and recommendations. Available at <http://www.arbitration-icca.org/publications/Third-Party-Funding-Report.html>



## EVENTS 2018

### July 30–August 9

**EXECUTIVE TRAINING ON INVESTMENT TREATIES AND ARBITRATION FOR GOVERNMENT OFFICIALS**, Columbia Center on Sustainable Investment (CCSI), at Columbia University, New York, United States, <http://ccsi.columbia.edu/2018/07/30/executive-training-on-investment-treaties-and-arbitration-for-government-officials>

### September 11

**2018 ENERGY CHARTER TREATY FORUM**, International Centre for Settlement of Investment Disputes (ICSID), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Energy Charter Secretariat (ECS) & Permanent Court of Arbitration (PCA), at World Bank, Paris, France, <https://icsid.worldbank.org/en/Pages/Events.aspx?CID=179>

### September 24

**RENEWABLE ENERGY AND THE SDGS: EXPLORING LINKS WITH EXTRACTIVES, AGRICULTURE, AND LAND USE**, UN Sustainable Development Solutions Network's Thematic Network on Good Governance of Extractive and Land Resources (SDSN Thematic Network), Columbia Center on Sustainable Investment (CCSI) & partners, at Columbia University, New York, United States, <http://ccsi.columbia.edu/2018/09/24/renewable-energy-and-the-sdgs-exploring-links-with-extractives-agriculture-and-land-use>

### September 27–28

**INTERNATIONAL INVESTMENT LAW & COMPETITION LAW COLOQUIUM**, University of Zaragoza Faculty of Law, Athens Public International Law Center of the National and Kapodistrian University of Athens Faculty of Law, Research Centre of University Paris II Panthéon-Assas (CERSA), Research Centre of the University of Burgundy (CREDIMI), French National Centre for Scientific Research (CNRS), at University of Zaragoza Faculty of Law, Zaragoza, Spain, <https://eventos.unizar.es/16674/detail.html>

**13TH ANNUAL COLUMBIA INTERNATIONAL INVESTMENT CONFERENCE**, “Multinationals in the Age of Sustainable Development: New Thinking on the Role of International Investment Agreements,” CCSI, at Columbia University, New York, United States, <http://ccsi.columbia.edu/2018/09/27/13th-annual-columbia->

[international-investment-conference-multinationals-in-the-age-of-sustainable-development-new-thinking-on-the-role-of-international-investment-agreements](http://ccsi.columbia.edu/2018/09/27/13th-annual-columbia-international-investment-conference-multinationals-in-the-age-of-sustainable-development-new-thinking-on-the-role-of-international-investment-agreements)

### October 1–5

**21ST SESSION OF THE WORKING GROUP ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES**, at Palais des Nations, Geneva, Switzerland, <https://www.ohchr.org/EN/Issues/Business/Pages/WGSessions.aspx>

### October 13

**2018 GLOBAL INFRASTRUCTURE FORUM**, “Unlocking Inclusive, Resilient and Sustainable Technology-Driven Infrastructure,” Asian Development Bank (ADB), at Laguna Villas, Bali, Indonesia, <https://www.adb.org/news/events/2018-global-infrastructure-forum>

### October 15–19

**ANNUAL GENERAL MEETING 2018**, Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), at the Palais des Nations, Geneva, Switzerland, <http://igfmining.org/agm-2018/>

**COMMITTEE ON WORLD FOOD SECURITY CFS 45**, Food and Agriculture Organization (FAO), Rome, Italy, <http://www.fao.org/cfs/home/plenary/cfs45>

### October 22–26

**WORLD INVESTMENT FORUM 2018**, United Nations Conference on Trade and Development (UNCTAD), at the Palais des Nations, Geneva, Switzerland, <http://worldinvestmentforum.unctad.org>

### October 23–25

**8TH INVESTMENT TREATY ARBITRATION CONFERENCE**, Ministry of Finance of the Czech Republic & KPMG Czech Republic, at Lichtenstein Palace, Prague, Czechia, <https://home.kpmg.com/cz/en/home/insights/2018/10/8th-investment-treaty-arbitration-conference.html>

### October 29–November 2

**36TH SESSION OF UNCITRAL WORKING GROUP III**, “Investor–State Dispute Settlement Reform,” United Nations Commission on International Trade Law (UNCITRAL), Vienna, Austria, [http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Investor\\_State.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html)





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