



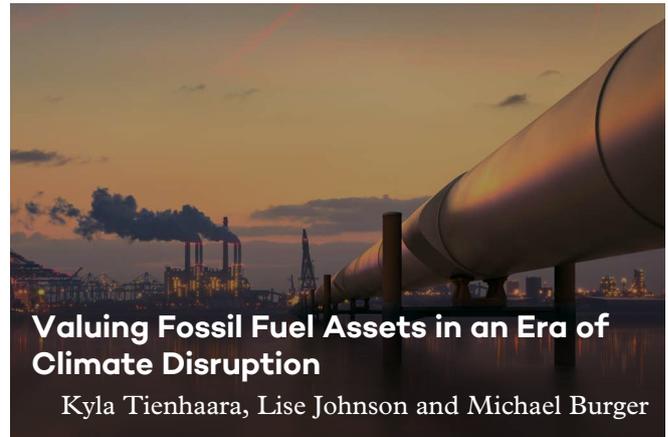
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Protecting Against Investor–State Claims Amidst COVID-19: A call to action for governments

Nathalie Bernasconi-Osterwalder,
Sarah Brewin and Nyaguthii Maina



Valuing Fossil Fuel Assets in an Era of Climate Disruption

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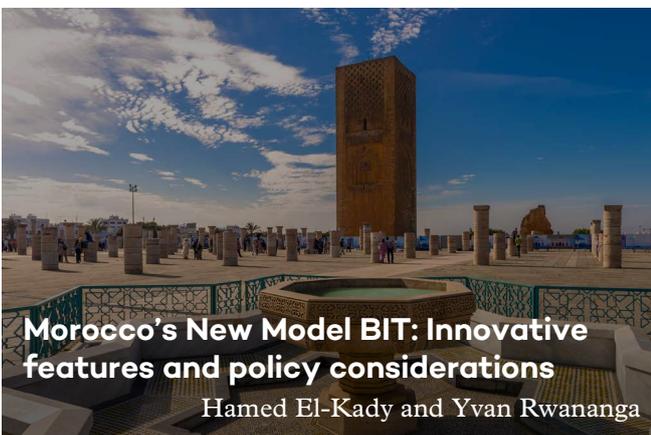
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LIST OF ACRONYMS

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



INSIGHT 1

Protecting Against Investor–State Claims Amidst COVID-19: A call to action for governments¹

Nathalie Bernasconi-Osterwalder, Sarah Brewin and Nyaguthii Maina



Introduction

COVID-19 has plunged the world into a massive health and economic crisis. Governments responded quickly to curb the spread of the virus through emergency interventions and measures such as lockdowns, strict containment, and travel bans. Now some of these measures are being eased or lifted at different rates, while others remain in place. Governments have also taken steps to ensure supplies of essential foods, medical equipment, and health care services. While crucial from a health perspective, this has left many businesses struggling. Ailing businesses will be tempted to use a range of legal tools to make up for lost profits, creating an unprecedented risk of investment arbitration available to foreign businesses under the nearly 3,000 investment treaties concluded worldwide.

Learning From the Past: Investor–state arbitration in times of crisis

We know from recent history that states' public interest measures in times of severe crises can be challenged by investors using treaty-based investor–state arbitration. Perhaps the most notable example is that of Argentina. In 2001, Argentina faced a near-total economic

collapse, marked by “a fall in GDP per capita of 50 percent, an unemployment rate of over 20 percent, a poverty rate of 50 percent, strikes, demonstrations, violent clashes with the police, dozens of civilian casualties and a succession of 5 presidents in 10 days.”² During this period, the government took a range of emergency measures, including freezing utility rates, nationalizing assets, abandoning a fixed exchange rate, and restructuring sovereign bonds. By the end of 2014, Argentina was respondent to over 50 investor–state dispute settlement (ISDS) cases, the majority of which stemmed from measures taken during the crisis.³ Known final awards against Argentina amounted to well over USD 2 billion,⁴ and several claims were settled in the hundreds of millions of dollars.⁵

The social and political upheaval of the Arab Spring in 2011–2012 was followed by a spike in ISDS claims against North African and Middle Eastern governments,⁶ some of which stemmed from state measures taken to address the impacts of the crisis. In Egypt, unprecedented levels of violence and social unrest resulted in a drop in domestic gas supplies, which the state considered to be “a threat to the basic functioning of society and the maintenance of internal stability.”⁷ The government's decision to suspend sales of gas to a Spanish-owned plant to prioritize the supply

² Lavopa, F. (2020). *Crisis, emergency measures and the failure of the ISDS system: The case of Argentina* (Investment Policy Brief #2). South Centre. https://www.southcentre.int/wp-content/uploads/2015/07/IPB2_Crisis-Emergency-Measures-and-the-Failure-of-the-ISDS-System-The-Case-of-Argentina.pdf

³ United Nations Conference on Trade and Development. (2015). *Recent trends in ILAs and ISDS*. https://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf

⁴ UNCTAD. (n.d.). *Investment policy hub: Argentina*. <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/8/argentina/>

⁵ See for example, El Gobierno pagó US\$ 677 millones por juicios perdidos ante el Ciadi, Oct. 19, 2013. *La Nación*. <https://www.lanacion.com.ar/1630428-el-gobierno-pago-us-677-millones-por-juicios-perdidos-ante-el-ciadi>

⁶ Foty, C. (2019). *Impact of the Arab Spring on the international arbitration landscape*. Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2019/07/26/impact-of-the-arab-spring-on-the-international-arbitration-landscape/>

⁷ Koroteeva, K. (2018). Egypt found liable for the shut-down of an electricity plant during the 2011 uprising. *Investment Treaty News*. <https://www.iisd.org/itm/2018/12/21/egypt-found-liable-for-the-shut-down-of-an-electricity-plant-during-the-2011-uprising-ksenia-koroteeva/>

¹ This article is adapted from a commentary of the same name published by the authors in April 2020, available here in English, French and Spanish.



of natural gas for domestic electricity markets resulted in an ISDS claim in which the investor was awarded over USD 2 billion.⁸

Potential legal defences, such as the necessity defense, are available to states in ISDS cases initiated by foreign investors to challenge measures taken during and in the aftermath of the COVID-19 pandemic and the resulting global economic crisis. However, past cases show that defences can be difficult for governments to use successfully to avoid a finding that they were in breach of a treaty and must pay compensation—even in times of crisis. This is because of the very high legal thresholds and their inconsistent application by investment tribunals considering the same or very similar factual circumstances.

The Need to Avoid Investor–State Claims Has Never Been Greater

At a time when states are facing public health and economic challenges on an unparalleled scale, the need to avoid ISDS claims has never been greater. Unless addressed proactively, the threat of investor–state arbitration will hang over governments for years to come. Multiple foreign investors will be able to file claims under identical material facts challenging the same measure with unpredictable outcomes. This is due to both the broad—and vaguely framed—treaty obligations in close to 3,000 investment treaties and the fact that each case brought to arbitration is decided by a different tribunal. Case law has led to inconsistent interpretation of both the treaty standards themselves and the customary international law that applies to all treaties. The divergent conclusions reached by different tribunals considering the same or similar sets of government measures in the Argentina cases mentioned above, as well as in a series of recent renewable energy arbitrations against Spain, provide examples of this.⁹

The lack of clarity of how vague treaty standards will apply to COVID-19 measures, and the fact that no tribunal is bound by a previous decision, may incentivize multiple claims challenging similar measures across the globe. The fact that claimants can resort to litigation funders who have a significant stake in the outcome of the case could further drive speculative

or marginal claims in times of crisis.¹⁰ Arbitration newsletters and law firms are already foreshadowing COVID-19 related investor–state arbitration, explaining how government measures could be formulated as treaty breaches,¹¹ and investors have started to bring or threaten lawsuits challenging COVID-19 related measures under domestic law.¹²

If found in breach, states could be ordered to pay large amounts in compensation to foreign investors. Previous tribunals have awarded compensation of over USD 100 million in at least 46 known treaty-based investor–state cases, with one award amounting to USD 40 billion.¹³ These “mega-awards” pose especially serious challenges for developing countries and their ability to fund their public health and economic recovery programs. In the Unión Fenosa gas case discussed above, Egypt was ordered to pay USD 2 billion plus interest.¹⁴ This figure represented 12% of Egypt’s combined national budget for health and education in 2018/19, which was USD 15.82 billion.¹⁵ In addition, defending an ISDS claim is resource intensive and time-consuming.¹⁶

⁸ *Unión Fenosa v. Egypt*. (2014). Investment Policy Hub. <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/567/uni-n-fenosa-v-egypt>

⁹ Reynoso, I. (2019). Spain’s renewable energy saga: Lessons for international investment law and sustainable development. *Investment Treaty News*. <https://www.iisd.org/itn/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-law-and-sustainable-development-isabella-reynoso/>

¹⁰ Some consider that the asymmetric structure of the investment treaty regime, lack of system of precedent in ISDS and the resulting inconsistency and unpredictability of arbitral outcomes lend themselves to third-party funding in speculative or marginal claims. See for example Garcia, F. (2018, July 30). The case against third party funding in investment arbitration. *IISD Investment Treaty News*; International Council for Commercial Arbitration & Queen Mary Task Force. (2017, October 17). *Third-party funding in investor-state dispute settlement*. Draft report for public discussion. Round Table Discussion of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration.

¹¹ Benedeteli, M. (2020). Could COVID-19 emergency measures give rise to investment claims? First reflections from Italy. *Global Arbitration Review*. <https://globalarbitrationreview.com/article/1222354/could-covid-19-emergency-measures-give-rise-to-investment-claims-first-reflections-from-italy>; Aceris Law LLC (2020), The COVID-19 pandemic and investment arbitration. *Aceris Law*. <https://www.acerislaw.com/the-covid-19-pandemic-and-investment-arbitration/>

¹² For example, the US car manufacturer Tesla brought, and shortly thereafter withdrew, a claim in the District Court against the Alameda County over its shutdown order. See Wong, J. (2020). Elon Musk reopens California Tesla factory in defiance of lockdown order. *The Guardian*. <https://www.theguardian.com/technology/2020/may/11/tesla-factory-reopening-elon-musk-california-lockdown>. In South Africa, alcohol retailers, hot food retailers, and tobacco manufacturers have threatened legal action over the government’s shutdown measures. See Ngoben, T. (2020). State Responsibility for COVID-19 Regulatory Measures under International Economic Law. *Afronomics Law*. <https://www.afronomicslaw.org/2020/05/09/state-responsibility-for-covid-19-regulatory-measures-under-international-economic-law/>.

¹³ *Hulley Enterprises Ltd. v. Russian Federation* (PCA Case No. 2005-03/AA226).

¹⁴ Charlotin, D. (2018). Arbitrators hold Egypt liable for more than \$2 billion as a result of unfair treatment of gas plant investors. *Investment Arbitration Reporter*. <https://www.iareporter.com/articles/arbitrators-hold-egypt-liable-for-more-than-2-billion-as-a-result-of-unfair-treatment-of-gas-plant-investors/>

¹⁵ Per the exchange rate of Egyptian Pounds to USD at October 2019.

¹⁶ The average arbitration costs amount to an average of USD 8 million per case, see Organisation for Economic Co-operation and Development. (2012) *Investor-state dispute settlement*. Public Consultation: 16 May–23 July 2012, p. 19. The Philippines spent USD 58 million to defend two cases brought by a German investor. See, Olivet, C., & Eberhardt, P. (2012). *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*. Transnational Institute; and Australia spent USD 28 million defending the Philip Morris tobacco labelling case, per the exchange rate of Australian dollars to USD at July 2018. Hutchens, G. & Knaus, C. (2018, July 1). Revealed: \$39m cost of defending Australia’s tobacco plain packaging laws. *The Guardian Australia*. <https://www.theguardian.com/business/2018/jul/02/revealed-39m-cost-of-defending-australias-tobacco-plain-packaging-laws>



Many governments are requesting and receiving support from the International Monetary Fund (IMF) or the World Bank to help them weather this crisis. Liabilities resulting from investor–state arbitration could undermine that. In 2019, an investment tribunal awarded foreign mining companies USD 6 billion in compensation against Pakistan.¹⁷ Just two months earlier, the IMF had agreed to a bailout with Pakistan to save its economy from collapse—also for USD 6 billion.¹⁸ COVID-19 related investor–state disputes could make future bailouts just as worthless.

In a time of a health crisis and severe economic stress, governments need to have the policy space to take all necessary action, and the fiscal space to issue economic support packages without risking an all-consuming wave of investment arbitration cases. To avoid such a wave, governments will have to take action to bar the application of treaty-based investor–state arbitration for all COVID-19 related measures.

The Need for Collective Action to Avoid a Surge of Investor–State Arbitration

In light of the risks outlined above, states should come together to address the potentially overwhelming surge of investment arbitration against cash-strapped governments. States can pursue a global, regional, or bilateral response to this risk to foster solidarity and shield host governments from a worst-case scenario. One option is for governments to agree to jointly suspend the operation of treaty-based ISDS with respect to COVID-related measures. To this end, IISD has developed language that could be used for a bilateral, regional, or multilateral suspension agreement, and has conducted consultations to seek stakeholder views on that language.

A multilateral response could be coordinated through the United Nations Conference on Trade and Development (UNCTAD) which has extensive expertise on investment treaties and related reform. Another platform is the United Nations Commission on International Trade Law (UNCITRAL), in particular its Working Group III, which is already set up to deal with ISDS reform. Alternatively, blocs of countries could jointly agree to

suspend the operation of ISDS provisions amongst themselves, or countries could reach out to their treaty partners and agree to a suspension at the bilateral level.

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¹⁷ Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1.

¹⁸ Masood, S. (2019, May 12,). Pakistan to accept \$6 billion bailout from I.M.F. *New York Times*. <https://www.nytimes.com/2019/05/12/world/asia/pakistan-imf-bailout.html>



INSIGHT 2

Valuing Fossil Fuel Assets in an Era of Climate Disruption

Kyla Tienhaara, Lise Johnson and Michael Burger



There have been more than 150 known ISDS cases brought by claimants whose businesses involve extracting, transporting, refining, selling, or burning fossil fuels for electricity.¹ Some of these cases have been triggered by measures aimed at addressing climate change; others have been brought in response to environmental measures more broadly; some have arisen from disputes regarding the distribution of public and private costs and benefits from extractive industry projects; and others have been triggered by different scenarios, including contract disputes between host state-owned firms and foreign investors. Seven of the top 10 all-time largest ISDS awards (according to UNCTAD data)—all exceeding USD 1 billion—have been granted in cases involving fossil fuel investments.²

Each type of dispute raises its own set of policy questions, including whether and under what circumstances ISDS is a proper forum for resolving the case. ISDS claims challenging measures adopted

and implemented to advance climate change solutions appear to be the most widely critiqued type of case. A number of commentators have argued for a climate-measure carve-out in IIAs, similar to those that have been introduced in other policy areas such as tobacco control.³ This would be designed to prevent investors from using ISDS to stop, slow, change, or shift the cost of climate-related policies. Some have also argued that the fossil fuel industry, as a general matter, should not be further “subsidized” through IIAs and the broad and free risk insurance the treaties provide.⁴ Under this approach, certain types of projects, such as development of new fossil fuel reserves or infrastructure, would be excluded from ISDS (or IIAs), meaning that investors in those projects would not be able to challenge government action irrespective of its purpose. Whether a government’s new tax was motivated by a desire, for instance, to increase government revenues or to curb the use of fossil fuels would be irrelevant. Companies seeking to challenge the measure would need to do so through routes other than ISDS.⁵

There is, therefore, a broad issue of whether fossil fuel sector investors should be ISDS claimants, and the narrower question of whether climate measures should be open to attack under ISDS. Presently, investment law answers “yes” to both questions. Given that reality, there is a third important—but generally unrecognized—issue to consider regarding fossil fuel-related claims.

¹ Based on a search of UNCTAD’s *Investment Dispute Settlement Navigator* for the terms “oil,” “gas,” “petroleum,” “hydrocarbons,” and “coal” on April 16, 2020. Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>

² *Hulley Enterprises v. Russia*, PCA Case No. 2005-03/AA226; *Veteran Petroleum v. Russia*, PCA Case No. 2005-05/AA228; *Unión Fenosa Gas v. Egypt*, Case No. ARB/14/4. (ICSID. 2014); *Yukos Universal v. Russia*, PCA Case No. 2005-04/AA227; *Occidental v. Ecuador*, Case No. ARB/06/11. (ICSID. 2006); *Mobil v. Venezuela*, Case No. ARB/07/27 (ICSID. 2007), *ConocoPhillips v. Venezuela*, Case No. ARB/07/30. (ICSID. 2007). Data available at: <https://investmentpolicy.unctad.org/investment-dispute-settlement>

³ Van Harten, G. (2015). An ISDS carve-out to support action on climate change. *Osgoode Legal Studies Research Paper Series*, 113. <http://digitalcommons.osgoode.yorku.ca/olsrps/113>

⁴ Johnson, L., Sachs, L. & Lobel, N. (2020). Aligning international investment agreements with the sustainable development goals. *Columbia Journal of Transnational Law*, 59, 71–79. <https://www.jtl.columbia.edu/journal-articles/aligning-international-investment-agreements-with-the-sustainable-development-goals>; Brauch, M. D., Touchette, Y., Cosbey, A., Gerasimchuk, I., Sanchez, L., Bernasconi-Osterwalder, N., Torao Garcia, M. B., Potaskaevi, T. & Petrofsky, E. (2019). Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: Aligning international investment law with the urgent need for climate change action. *Journal of International Arbitration*, 36(1), 7–35.

⁵ For a discussion of other alternatives, see, e.g., Johnson, L., Coleman, J., Güven, B., & Sachs, L. (2019, April). Alternatives to investor–state dispute settlement (ISDS). *CCSI Working Paper 2019*. <http://ccsi.columbia.edu/files/2019/04/Alternatives-to-ISDS-11-April-2019.pdf>



This is the question of how valuation and damages should be approached in light of climate change considerations and the contested value of fossil fuel resources. We believe that it is timely to consider this question due to the frequency and impact of claims involving fossil fuel assets, as well as the urgency of the climate crisis. It is also timely because delegates to UNCITRAL have already agreed that damages represent a “cross-cutting” issue to be considered in its work on ISDS reform.⁶ Here, we offer an initial and high-level outline of some issues and considerations. We hope to encourage further research, dialogue, and debate on these complex topics and the development of practical approaches that integrate climate change considerations into investment law norms.

How is compensation determined in international investment arbitration?

When it comes to determining compensation, there are very few constraints on investment arbitrators.⁷ Treaties are largely silent. They often direct that governments should pay the fair market value (FMV) of expropriated assets, but do not dictate the precise methods to be used to determine FMV nor specify what approaches should be used for other types of breach. Tribunals have attempted to fill this silence and, in doing so, have consistently reiterated two principles. One is that the Chorzów factory standard should apply, under which “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁸ A second principle is that speculative damages should not be awarded.⁹ Overall, the treaties’ silence and these principles leave significant room for tribunals to adopt climate-informed approaches to valuation and damages.

⁶ Columbia Center on Sustainable Investment (CCSI), International Institute for Environment and Development (IIED) & International Institute for Sustainable Development (IISD). (2019). *UNCITRAL Working Group III on ISDS reform: How cross-cutting issues reshape reform options*. <https://www.iisd.org/sites/default/files/uploads/uncitral-submission-cross-cutting-issues-en.pdf>

⁷ For a discussion on Compensation under investment treaties, see, e.g., Bonnitca J. & Brewin S. (2019, October). Compensation under investment treaties. *IISD Best Practices Series*. <https://www.iisd.org/sites/default/files/publications/compensation-treaties-best-practices-en.pdf>; NIKIEMA H. S. Compensation for expropriation. L’indemnisation de l’expropriation, (2013, March). *IISD Best Practices Series*. https://www.iisd.org/sites/default/files/publications/best_practice_compensation_expropriation_en.pdf

⁸ Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) (Judgment No. 13, Merits) (“Chorzów”), p. 47.

⁹ Beharry, C. (ed). (2018). *Contemporary and emerging issues on the law of damages and valuation in international investment arbitration*, 106–107, 136, 210–211, 337–340 (containing various chapters that refer to tribunals’ refusal to award unduly speculative damages).

What are the particular issues associated with valuing fossil fuel assets?

Fossil fuel prices are affected by a number of factors and are vulnerable to shocks. The volatility in the oil price over the past few months provides a dramatic illustration of this point. The measures taken to halt the spread of the coronavirus have led to a massive contraction in economic activity and fossil fuel consumption. The oil industry has been particularly hard hit as the crisis has coincided with a price war initiated by Russia and Saudi Arabia in March.¹⁰ The IEA suggested that the “scale of the collapse in oil demand...is well in excess of the oil industry’s capacity to adjust”¹¹ and that was before West Texas Intermediate (the U.S. benchmark price for oil) went negative in late April.¹²

Although the current situation is, in many respects, unprecedented, it is interesting to contemplate how the tribunal in *ConocoPhillips v. Venezuela* might have addressed the issue of valuation if it were delivering its award in March 2020 instead of March 2019. The tribunal speculated a 2020 oil price for the investment of about USD 58 per barrel and a 1.2% increase per year thereafter.¹³ The calculation of the expected price was based on a 0.4% differential from the Maya crude index (Mexican benchmark). In actual fact, for the month of March 2020, Maya crude was hovering around USD 15 per barrel, and in April it plunged to USD 5.15 per barrel, the lowest level in its history.¹⁴ It is difficult to predict when and by how much oil prices will rebound, but at the moment the USD 8.7 billion award is looking like a substantial windfall for ConocoPhillips.

¹⁰ Hussain, Y. (2020). Posthaste: It may be time to make up. The ill-timed oil war could cost Saudi Arabia and Russia \$260B this year alone. *Financial Post*. <https://business.financialpost.com/executive/posthaste-it-may-be-time-to-make-up-the-ill-timed-oil-war-could-cost-saudi-arabia-and-russia-260b-this-year-alone>

¹¹ IEA. (2020). *The global oil industry is experiencing a shock like no other in its history*. <https://www.iea.org/articles/the-global-oil-industry-is-experiencing-shock-like-no-other-in-its-history>

¹² Reed, S. & Krauss, C. (2020). Too much oil: How a barrel came to be worth less than nothing. *New York Times*. <https://www.nytimes.com/2020/04/20/business/oil-prices.html?action=click&module=RelatedLinks&pgtype=Article>

¹³ *ConocoPhillips v. Venezuela*, Case No. ARB/07/30. (ICSID. 2007). Award, 8 March 2019, p. 221.

¹⁴ Eschenbacher, S. & Parraga, M. (2020). *Mexico’s Maya crude lowest in almost two decades – Platts*. Reuters. <https://www.reuters.com/article/health-coronavirus-mexico-oil/update-1-mexicos-maya-crude-lowest-in-almost-two-decades-platts-idUSL1N2BB38D>; Garcia, M. (2020). *Mexico’s Maya crude price for USGC shipments hits record low \$5.15/b on NYMEX futures plunge*. S&P Global. <https://www.spglobal.com/platts/en/market-insights/latest-news/oil/042120-mexicos-maya-crude-price-for-usgc-shipments-hits-record-low-515b-on-nymex-futures-plunge>



How does climate change further complicate valuation?

While the 2020 pandemic and oil crash would have been impossible for the *ConocoPhillips* tribunal to predict, climate-related risks are widely discussed and modelled by academics, central banks, and financial regulators.¹⁵ These include physical risks (e.g., risks associated with severe weather events like flooding, droughts, storms, and extreme heat), which result from ongoing climate change, and transition risks (e.g., risks arising from legal change, reputational harm, and shifts in market preferences and technology). The implications for fossil fuel investments of commitments and action governments and other stakeholders take to keep the world within the “carbon budget”—the amount of greenhouse gas emissions that we can afford to burn while remaining within the warming limits set by the Paris Agreement¹⁶—are particularly important to consider in ISDS valuation exercises.

In order to have a reasonable chance of keeping below 1.5 °C of warming, the majority of remaining fossil fuel reserves must remain unused.¹⁷ In addition, “little or no new CO₂-emitting infrastructure can be commissioned, and ... existing infrastructure may need to be retired early (or be retrofitted with carbon capture and storage technology).”¹⁸ Thus, climate action will create stranded assets, which are “assets that have suffered from unanticipated or premature write-downs, devaluations, or conversion to liabilities.”¹⁹ There appears to be consensus that thermal coal assets (thermal coal is already in structural decline)²⁰ as well as high-cost oil reserves (for example, Alberta tar sands)²¹ and related

infrastructure are at highest risk for stranding in the near term. If an asset in dispute in an ISDS case cannot be further exploited or utilized if we are to remain within the carbon budget,²² then the cost of stranding should not be shifted from the investor to the state through a damages award.

If it remains possible to continue to extract a resource or utilize an asset without exceeding the carbon budget, it is still important for a tribunal to consider how climate risk affects the value of the resource or asset. For example, under certain policy scenarios, oil demand is expected to drop significantly between 2025 and 2050 as a result of the rapid uptake of electric vehicles.²³ As the current crisis demonstrates, reduced demand can depress the price of oil. Other studies also predict a decline in the oil price but on the basis of over-supply rather than reduced demand.²⁴ This type of scenario results from a “use it or lose it” mentality, which sees firms race to exploit their reserves as quickly as possible in order to avoid future government restrictions on extraction.²⁵ Both the reduced demand and over-supply scenarios cast doubt on the validity of the assumptions by tribunals (e.g., in *ConocoPhillips v. Venezuela*) that oil prices will increase over time or that they can be estimated on the basis of how they have behaved in the recent past.

There is clearly a high degree of uncertainty about the future value of fossil fuels and related infrastructure. Some have argued that the nature and scope of risks to particular sectors and actors are so uncertain that the costs are simply incalculable and should be approached through a “precautionary” approach that

¹⁵ See, for example, the Bank of England’s website on climate risk. Available at <https://www.bankofengland.co.uk/knowledgebank/climate-change-what-are-the-risks-to-financial-stability>

¹⁶ Tong, D., Zhang, Q., Zheng, Y., Caldeira, K., Shearer, C., Hong, C., Qin, Y., & Davis, S. J. (2019). Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target. *Nature*, 572(7769), 373–377.

¹⁷ McGlade, C., & Ekin, P. (2015). The geographical distribution of fossil fuels unused when limiting global warming to 2 °C. *Nature*, 517(7533), 186–190; SEI, IISD, ODI, Climate Analytics, CICERO, & UNEP. (2019). *The production gap: The discrepancy between countries’ planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C*. <http://productiongap.org/>

¹⁸ Tong et al., *supra* note 15, p. 373–377.

¹⁹ Caldecott, B., Howarth, N., & McSharry, P. (2013). *Stranded assets in agriculture: Protecting value from environment-related risks*. Smith School of Enterprise and the Environment, University of Oxford, p. 7.

²⁰ Buckley, T. (2019, November 25). *IEEFA update: Global coal power set for record fall in 2019* (IEEFA Press Release). <https://ieefa.org/ieefa-update-global-coal-power-set-for-record-fall-in-2019>

²¹ According to Carbon Tracker (2019), “in a Paris-aligned world, no oil sands projects would go ahead in at least the next 20 years.” Carbon Tracker. (2019). *Breaking the habit – Why none of the large oil companies are “Paris-aligned,” and what they need to do to get there*. <https://www.carbontracker.org/reports/breaking-the-habit>

²² Detailed modelling has been done by academics and organizations such as Carbon Tracker to indicate precisely when assets such as coal-fired power plants need to be decommissioned to keep within the Paris climate targets. See, e.g., Cui, R.Y., Hultman, N., Edwards, M.R. He, L., Sen, A., Surana, K., McJeon, H., Iyer, A., Patel, P., Yu, S., Nace, T., & Shearer, C. (2019) Quantifying operational lifetimes for coal power plants under the Paris goals. *Nature Communications* 10: 4759; Carbon Tracker. (2020). *How to waste over half a trillion dollars: The economic implications of deflationary renewable energy for coal power investments*. <https://carbontracker.org/reports/how-to-waste-over-half-a-trillion-dollars/>

²³ International Energy Agency (IEA). (2019). *World energy outlook 2019*. <https://www.iea.org/reports/world-energy-outlook-2019>; UN Principles for Responsible Investment. (n.d.). *Inevitable policy response scenario: Forecast Policy Scenario: Macroeconomic results*. <https://www.unpri.org/inevitable-policy-response/forecast-policy-scenario-macroeconomic-results/4879.article>

²⁴ Barnett, M. (2019). *A run on oil: Climate policy, stranded assets, and asset prices*. <https://www.frbsf.org/economic-research/events/2019/november/economics-of-climate-change/files/Paper-7-2019-11-8-Barnett-240PM-1st-paper.pdf>

²⁵ Kotlikoff, L., Polbin, A. & Zubarev, A. (2016). *Will the Paris Accord accelerate climate change?* (NBER Working Paper No. 22731). <https://www.nber.org/papers/w22731.pdf>



assumes the existence of risks.²⁶ This uncertainty arguably makes certain approaches to determining FMV unduly speculative. As previously noted, one principle that tribunals have widely articulated is that awards should not provide for speculative damages. Under this principle, trying to assess FMV by identifying what a hypothetical willing buyer would pay a hypothetical willing seller on the market for the fossil fuel assets, forecasting future profits under discounted cash flow (DCF) methods, or applying so-called “modern DCF” approaches would be inappropriate given climate change uncertainty.

Indeed, even alternative methods, such as assessments of sunk costs, would likely amount to overcompensation in certain cases, given that investors arguably can and should have anticipated²⁷ that any investments made in the last 25 years would be exposed to transition risk.

Opportunities and tools for recovering the social cost of carbon

If tribunals want to follow the principle that an award should put investors in the place they would have been “but for” the government’s wrongful measure, then they should also ensure they do not provide fossil investors socially harmful subsidies. Thus, the awards should take into account the fact that investors are increasingly expected (e.g., through carbon pricing and climate litigation) to pay for the costs inflicted on society by climate change. In our view, if a tribunal finds liability and awards compensation in a case involving fossil fuel assets, in addition to considering the issues outlined above, it should subtract these societal costs from the damages awarded.

To adjust awards, one practical option for tribunals would be to employ the social cost of carbon—a metric developed by academics and adopted by a number of governments.²⁸

The social cost of carbon (as well as the social cost of methane and nitrous oxide) has also been approved by U.S. domestic courts. These metrics can be used to assign a dollar value to the potential impacts of greenhouse gas emissions.²⁹ They offer estimates of costs, primarily based on predictions of future impacts (which vary by country) and a range of discount rates.³⁰ Taking the example of the U.S. at the high end of the possible impact spectrum, with a moderate discount rate of 3%, the social cost of carbon in 2020 is USD 123/tonne in 2007 dollars.³¹

The impact on awards could be significant. One study estimating the total and unpaid social cost of carbon from 1995 to 2013, for instance, found that it exceeded the fossil fuel sector’s profits, “indicating the fossil fuel industry would not be viable if it was made to pay for damages to society.”³² Absent approaches such as this, treaty awards would perpetuate the fossil fuel industry’s “legal looting” of society.³³

Conclusions

When an investment treaty decision awards compensation, there are financial and potential behavioural effects on the disputing parties, as well as for policy-makers and market actors not party to the case. Effects on investors can be to over-induce investment; and, on governments, to chill regulation.³⁴ While these issues are relevant regardless of the nature of the ISDS case, they are especially true when the investment in question is linked to the fossil fuel sector.

²⁶ Cullen, J. (2018). After ‘HLEG’: EU banks, climate change abatement and the precautionary principle. *Cambridge Yearbook of European Legal Studies*, 20, 61–87.

²⁷ As has been well-documented, fossil fuel companies have been aware of the reality of climate change and its implications since the 1960s. See further <https://exxonknew.org>

²⁸ States could also pre-empt this issue by launching counterclaims to cover these costs at the outset of any ISDS case with a fossil fuel company. States have recently begun to use counterclaims to cover the costs of remediating environmental damage that has directly resulted from investment projects, including those in the fossil fuel sector (see, for example, *Perenco v. Ecuador*). We recognize that counterclaims often fail and may be especially difficult to advance where the nexus between the claim and the challenged measure is unclear. However, launching them, at the very least, forces tribunals to address the issue head-on and provide justification for why they are not willing to at least consider imposing the costs of dealing with climate change on industry. Moreover, reforms to widen the scope of counterclaims are also possible through the UNCITRAL WG III process.

²⁹ See *Zero Zone Inc. v. United States Department of Energy*, 832 F.3d 654 (7th Cir. 2016) (upholding use of methodology for calculating social cost of carbon used by the Interagency Working Group on the Social Cost of Carbon).

³⁰ Rieke, K., Drouet, L., Caldeira, K. & Tavoni, M. (2018) Country-level social cost of carbon, *Nature Climate Change* 8, 895–900.

³¹ United States Environmental Protection Agency (EPA). (2016). *Factsheet: Social cost of carbon*. https://19january2017snapshot.epa.gov/climatechange/social-cost-carbon_.htm

³² Linnenluecke, M., Smith, T., & Whaley, R.E. (2018). The unpaid social cost of carbon: Introducing a framework to estimate “legal looting” in the fossil fuel industry. *Accounting Research Journal*, 31(2), 122–134, p. 123.

³³ “Looting is a term used in the economics and finance disciplines to refer to a situation in which society, through its government, agrees to an inefficient contract that persists through time. Looting occurs in the fossil fuel industry where companies are not required to fully pay for CO2 emissions damage.” *Ibid.*, p. 124.

³⁴ Bonnitca, J., & Brewin, S. (2019). *Compensation under investment treaties (advance draft)* (IISD Best Practices Series). <https://www.iisd.org/sites/default/files/publications/compensation-treaties-best-practices-en.pdf>; Tienhaara, K. (2018). Regulatory chill in a warming world: The threat to climate policy posed by investor–state dispute settlement. *Transnational Environmental Law*, 7(2), 229–250.



There is already concern that over-investment in the sector is creating a “carbon bubble” that, when it bursts, could cause a financial crisis.³⁵ An investment law regime that insulates investors from transition risks perpetuates the over-investment problem, with the potential to artificially prop up prices and unduly encourage (re) investments in assets that should be stranded and activities that should be discontinued.

A government that has to pay an investor the value of future years’ profits may also feel strong pressure to develop or use the assets. Leaving the oil, gas, and coal in the ground—after the government has effectively paid for its sale—could be politically and financially challenging. Thus, to the extent that arbitral valuation of fossil fuel assets fails to take into account these issues, awards will be further driving the climate crisis.

Given the silence of many treaties on issues of valuation and damages, even under the current regime, states and their counsel have wide leeway to raise these points, and arbitrators have wide discretion to integrate them in their assessments. Additionally, when considering reforms to ISDS, governments participating in the UNCITRAL process can seize the opportunity to address these issues at a multilateral level by advancing work on damages generally, and damages for fossil fuel-related investments more specifically.

Finally, it remains crucial to consider whether and to what extent IIA privileges for investors—particularly investors in the fossil fuel sector—align with countries’ priorities and produce public benefits that outweigh their public costs. Where risks and costs are deemed unduly high, then other actions, such as withdrawal of consent to ISDS and termination of treaties, remain important options for policy-makers to consider.³⁶

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³⁵ Mercure, J. F., Pollitt, H., Viñuales, J. E., Edwards, N. R., Holden, P. B., Chewprecha, U., Salas, P., Sognaes, I., Lam, A., & Knobloch, F. (2018). Macroeconomic impact of stranded fossil fuel assets. *Nature Climate Change*, 8(7), 588–593.

³⁶ See, for example, Columbia Center on Sustainable Investment (CCSI), International Institute for Environment and Development (IIED), and International Institute for Sustainable Development (IISD). (2019). *Draft treaty language: Withdrawal of consent to arbitrate and termination of international investment agreements: Submission to UNCITRAL Working Group III on ISDS Reform*. <https://www.iisd.org/sites/default/files/uploads/uncitral-submission-termination-withdrawal-en.pdf>; Johnson, L., Coleman, J., & Güven, B. (2018). Withdrawal of consent to investor–state arbitration and termination of investment treaties. *Investment Treaty News*, 9(1), 7–10. <https://www.iisd.org/itn/2018/04/24/withdrawal-of-consent-to-investor-state-arbitration-and-termination-of-investment-treaties-lise-johnson-jesse-coleman-brooke-guven>



INSIGHT 3

Why Do States Consent to Arbitration in National Investment Laws?

Tarald Laudal Berge and Taylor St John



Globally, 74 countries have national investment laws that mention investor–state arbitration, and 42 of these laws likely provide consent to it. That is, these laws provide a legal basis for an arbitration tribunal to decide they have jurisdiction over a claim brought by a foreign investor against the government. Consenting to arbitration in national law is puzzling for several reasons.

First, providing consent to arbitration can be extremely costly—many governments have found themselves paying large awards and high legal fees since over 60 arbitration cases have relied on national investment laws for jurisdiction.¹

Second, the benefits are uncertain—while governments may hope for additional investment, there is no evidence that consenting to arbitration in national law leads to more investment. Available evidence shows that providing investors with access to arbitration in investment treaties does not lead to additional investment, so there is little reason to believe that access to arbitration in national laws does.²

Third, governments are not following successful examples—no developed state has ever provided consent to arbitration in its national law, to our knowledge. So why do so many governments do it?

¹ Hepburn, J. (2018). Domestic investment statutes in international law. *American Journal of International Law*, 112(4), 658–706, p. 659.

² Bonnitca, J., Poulsen, L. N. S., & Waibel, M. (2017). *The political economy of the investment treaty regime*. Oxford University Press, pp. 158–166.

In a recent research article,³ we find that governments are significantly more likely to consent to arbitration in their national laws after they receive advice from a small part of the World Bank called the Foreign Investment Advisory Service (FIAS). According to our analysis, receiving FIAS advice on domestic law reform increases a country’s likelihood of adopting a law with arbitration by 650%. Of the 65 states that have received investment law advice from FIAS, 30 subsequently included arbitration in their law.

Who defines “best practice?”

FIAS provides “advice on host country policies that affect the flow of productive private investment.”⁴ One type of advice that FIAS advisers or consultants provide relates to the drafting of national investment laws. Their current advice is based on the 2010 *Investment Law Reform Handbook*, which defines best practice as providing access to arbitration.⁵

In interviews, FIAS officials provided further explanation, which was consistent with the *Handbook*:

To put things in perspective I think we advocate for ISDS as a good international practice. Also to ensure alignment with IIAs.⁶

I think the broad idea regarding investor rights is to ensure [the law] either gives rights that are higher than those ... already available in IIAs or BITs ... or to match them. That is the core message from our

³ Berge, T.L. & St John, T. (2020). Asymmetric diffusion: World Bank ‘best practice’ and the spread of arbitration in national investment laws. *Review of International Political Economy*, forthcoming. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3447365

⁴ FIAS. (2006). *FIAS, the facility for investment climate advisory services: 2006 annual report*. World Bank, p. 8. <<http://documents.worldbank.org/curated/en/314101468162556295/FIAS-the-investment-climate-advisory-service-FY2006-Annual-Report>>

⁵ FIAS. (2010). *Investment law reform: A handbook for development practitioners*. World Bank, p. 53. <<http://documents.worldbank.org/curated/en/306631474483143823/Investment-law-reform-a-handbook-for-development-practitioners>>

⁶ Interview with FIAS officials (A), 2019.



side. ... We say that it is always better to have your domestic law in alignment with your international laws that you have already accepted like 15–20 years ago in the form of a BIT.⁷

This definition of “best practice” is not widely shared. The World Bank is the only international organization that recommends governments provide access to investor–state arbitration in their national investment laws, to our knowledge. While the OECD and UNCTAD often include national investment laws in their work, they have never recommended that these laws provide consent to arbitration.

The process of FIAS advice

Formally, governments must ask FIAS to provide technical assistance. In practice, however, the idea for FIAS assistance emerges externally, often through suggestions by officials in other arms of the World Bank Group or from World Bank country offices.⁸ FIAS advisers are often invited to countries shortly after the end of armed conflict or in the early years after independence, as part of larger World Bank and donor programs. Donor countries can also influence which countries receive assistance since FIAS is donor-funded.

FIAS projects on investment law reform begin with the project being funded and an external consultant and local lawyer being hired. External consultants may work on investment laws in several countries. The consultant and possibly FIAS officials travel to the country for initial scoping exercises and problem diagnosis. The local lawyer then usually writes the first draft of the new investment law, using the *Investment Law Reform Handbook* as a template, as well as example clauses suggested by FIAS. Drafts of the law are sent to FIAS in Washington for comments.

FIAS officials emphasize that they do not write laws at any point, but they provide detailed comments whenever there is a draft.⁹ In many governments, a working group is set up to discuss a new investment law. When FIAS is involved, the external consultant and local lawyer will participate (even when FIAS is not involved, international actors often participate in

these working groups). A draft law typically moves from the working group to a ministry and then on to parliamentary debate before being enacted.

Evidence of a link between FIAS and arbitration clauses

Reviewing FIAS annual reports, we identified the countries and years in which FIAS advisers or consultants provided advice on investment law reform. We then collected national laws to identify the year in which countries pass their first investment law that mentions or provides consent to investor–state arbitration. In Table 1, we provide three examples of national laws: one mentions but does not consent to arbitration, the second is ambiguous, and the third consents to arbitration. We provide the text of all provisions in national laws that mention arbitration and explain why we believe they provide consent or not in an appendix to our forthcoming paper.¹⁰

The link between receiving FIAS advice and adopting investment laws with arbitration is strong. In Table 2, we list all countries that have passed a law with an arbitration clause between 1986, when FIAS was established, and 2015. The grey rows indicate countries that received FIAS advice prior to the adoption of the law.

Of the 74 countries that passed a law mentioning or providing consent to arbitration, 30 received FIAS advice on investment law reform. Almost half (30 out of 65) of the countries that FIAS advised then enacted new laws consenting to arbitration. This is strikingly high, given the potential for opposition to arbitration and the administrative and political hurdles to passing legislation.

In a statistical analysis, we checked whether a variety of other factors, including domestic institutional quality, market size, income level, or loans from the World Bank affected the link between FIAS advice and adoption of new laws with arbitration. The link between FIAS advice and law adoption remains significant and strong no matter what factors we include.

The only other finding from the broader statistical analysis is that governments with more experience—either having faced more investor–state arbitration cases or having ratified more investment treaties—are less likely to consent to arbitration in their national laws.

⁷ Interview with FIAS officials (B), 2019.

⁸ Interview with FIAS officials (B), 2019.

⁹ Interview with FIAS officials (A and B), 2019.

¹⁰ See Berge & St John, *supra* note 2.



Case study: The Kyrgyz Republic's 2003 Investment Law

The Kyrgyz Republic received technical assistance from FIAS in 1998, 1999, and 2001, and then passed an investment law with consent to arbitration in 2003. At the time, the World Bank had an extensive presence in the Kyrgyz Republic, along with other donors and aid agencies: 65% of all economic policy bills under consideration in 1998 were formulated by external advisers.¹¹

By 2000, there was a draft investment law, which FIAS officials reviewed, and then another draft they reviewed in 2001.¹² The investment law passed in March 2003, just before the approval of a large concessional loan from the World Bank. A new investment law was not one of the formal conditions the Kyrgyz government had to meet for the loan to be released, but the World Bank was undoubtedly in a commanding position.¹³

We did not find evidence of investors advocating for arbitration in the law. Mining companies were the main foreign investors interested in the Kyrgyz Republic, and even World Bank documents note that these companies sought to negotiate contracts with the government instead of relying on the national law: “many mining investors will still seek to negotiate separate investment agreements with the authorities, which can provide for better investment terms.”¹⁴

When asked to describe relationships with technical assistance providers, Kyrgyz actors note that foreign

advisers “don’t overpower” locals. One observed that there is often contestation in working groups, but it does not take the form of “foreign institutions pressuring and locals resisting”: instead, the splits usually depend on whose ministries or jobs will be affected by the new law.¹⁵ Yet this same individual noted that sometimes there are no splits within the Kyrgyz government. When asked to describe who would be for or against including arbitration in national law, they answered: “I think the government did not deliberate much in 2003, we didn’t have any cases. If we had, all of the Kyrgyz government would have been against it.”¹⁶

Since 2003, the Kyrgyz Republic has been a respondent in 14 known arbitration cases: in at least five of these cases, the jurisdictional claim was based on the 2003 investment law.¹⁷ For the Kyrgyz Republic, the costs of this law have been high.

Implications

A number of states have rewritten their investment laws to remove consent to arbitration, including Egypt and El Salvador. Côte d’Ivoire’s updates to its investment law, including the removal of consent to arbitration, were discussed previously in ITN.¹⁸ However, other governments continue to receive advice that providing consent to arbitration is best practice. For officials thinking about providing consent, we recommend studying the experiences of other states. There is clear evidence that consenting to arbitration in national law has come with high costs, and no evidence (that we know of) showing benefits.

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¹¹ Cooley, A., & Ron, J. (2002) The NGO scramble: Organizational insecurity and the political economy of transnational action. *International Security*, 27(1), 5–39. Page 19.

¹² World Bank. (2000). *Foreign Investment Advisory Service (FIAS) program bi-annual report for FY1999 and FY2000*. World Bank <<http://documents.worldbank.org/curated/en/157351468140977121/Foreign-Investment-Advisory-Service-FIAS-program-bi-annual-report-for-FY1999-and-FY2000>>;

World Bank. (2001). *Foreign Investment Advisory Service – FIAS – program annual report for FY2001*. World Bank. <<http://documents.worldbank.org/curated/en/232081468315279003/Foreign-Investment-Advisory-Service-FIAS-program-annual-report-for-FY2001>>

¹³ World Bank. (2009). *Implementation completion and results report on an IDA credit to the Kyrgyz Republic for a governance structural adjustment credit*. World Bank Poverty Reduction and Economic Management Unit, p. 5. <<http://documents.worldbank.org/curated/en/701871468088751662/Kyrgyz-Republic-Governance-Structural-Adjustment-Credit-Project>>

¹⁴ World Bank. (1998). *Memorandum of the President of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation to the Executive Directors on a joint country assistance strategy of the World Bank Group for the Kyrgyz Republic*. World Bank, p. 6. <<http://documents.worldbank.org/curated/en/701741468047937233/text/multi-page.txt>>

¹⁵ Kyrgyz officials (B), personal communication, 2019.

¹⁶ Kyrgyz officials (B), personal communication, 2019.

¹⁷ *Sistem v. Kyrgyzstan* (2006); *Nadel v. Kyrgyzstan* (2012); *Levitis v. Kyrgyzstan* (2012); *Stans Energy v. Kyrgyzstan* (II) (2015); *Consolidated Exploration v. Kyrgyzstan* (2013).

¹⁸ Kebe, M., Atteib, M., & Sangare, M. (2019). Ivory Coast’s new investment code: Focus on issues related to sustainable development and dispute settlement. *Investment Treaty News*, 10(3), 8–10. <https://www.iisd.org/itn/2019/09/19/ivory-coasts-new-investment-code-focus-on-issues-related-to-sustainable-development-and-dispute-settlement-mouhamed-kebe-mahamat-atteib-mouhamoud-sangare>



Table 1. Three examples of arbitration provisions in national laws

<i>No consent</i>	<p><i>Azerbaijan's Foreign Investment Law (1992), Article 42:</i> Disputes or disagreements arising between foreign investors and enterprises with foreign investments and state bodies of the Azerbaijan Republic, enterprises, public organizations, and other legal entities of the Azerbaijan Republic, disputes and disagreements between participants of the enterprise with foreign investments and such enterprise itself are to be settled in Law Courts of the Azerbaijan Republic or, on agreement between the Parties, in the Court of Arbitration, including those abroad.</p>
<i>Ambiguous</i>	<p><i>Belarus' Law on Investment (2013), Article 13:</i> If disputes not referred to the exclusive competence of courts of the Republic of Belarus, arisen between an investor and the Republic of Belarus are not regulated under a pre-trial procedure [...] then such disputes may, at the option of the investor, be regulated also:</p> <ul style="list-style-type: none"> • in an arbitration court being established for settlement of each specific disputed according to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), unless the parties agree otherwise; • at the International Centre for Settlement of Investment Disputes (ICSID) in the case if this foreign investor is citizen or legal person of a member state of the [ICSID Convention].
<i>Consent</i>	<p><i>Burundi's Investment Code (2008), Article 17:</i> Disputes resulting from the application of the present investment code between the Government and the investor, which are not settled amicably, shall be settled in accordance with the laws and regulations in force in Burundi. Disputes can be settled, according to the choice of the investor, by internal institutional arbitration or international arbitration. When the investor takes recourse to international arbitration, he will do so in accordance with arbitration rules of the International Centre for the Settlement of Investment Disputes as applicable at the time of execution of the investment which gave rise to the dispute.</p>

Table 2. National laws that mention or consent to arbitration

(Grey rows indicate countries that received advice from FIAS)

Country	Year of law with arbitration	
	Mention	Consent
Afghanistan		2005
Albania		1993
Algeria	1993	
Azerbaijan	1992	
Belarus		2013
Benin		1990
Bolivia	1990	
Bosnia and Herzegovina	1998	
Burkina Faso		1995
Burundi		2008
Cabo Verde		1993
Cambodia	1994	
Cameroon		1990
Central African Republic	2001	
Chad	2008	
China	1988	
Colombia	2000	
Côte d'Ivoire		1995
Dem. Rep. of the Congo		2002
Ecuador	1997	
El Salvador		1999
Fiji	2004	
Gambia		2010
Georgia		1996
Ghana		1994



Country	Year of law with arbitration	
	Mention	Consent
Guinea		1987
Guyana		2004
Honduras		2011
Indonesia	2007	
Iran	2002	
Iraq	2006	
Jordan		1994
Kazakhstan		1994
Kuwait	2013	
Kyrgyzstan		2003
Liberia		2010
Libya	2010	
Lithuania		1999
Madagascar		2008
Malawi	1992	
Mali		1991
Mauritania		2002
Moldova	2004	
Mongolia		2013
Montenegro	2011	
Mozambique	1993	
Namibia	1990	
Nepal		1992
Nicaragua		2000
Niger		1989
Nigeria		1995
Oman	1994	
Papua New Guinea	1992	
Paraguay	1992	

Country	Year of law with arbitration	
	Mention	Consent
Qatar	2000	
Russia	1999	
Rwanda	2015	
Sierra Leone		2004
Solomon Islands	2005	
Somalia		1987
South Sudan		2009
Sudan	2013	
Syria		2007
Tajikistan	2007	
Tanzania	1997	
Timor-Leste	2005	
Togo		1989
Tonga	2002	
Turkey	2003	
Uganda	1991	
Uzbekistan	1998	
Venezuela	1999	
Yemen		2010
Zambia	2006	



INSIGHT 4

The Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: A model to steer international law toward renewable energy investments and the low-carbon transition

Sofia de Murard



Most investment treaties do not explicitly distinguish between investments that contribute to sustainable development, such as renewable energy projects and those that do not. However, in light of growing concerns about climate change and in the wake of the Paris Agreement, states are incentivized to redesign international investment law to encourage renewable energy investments and facilitate the low-carbon transition.

In this piece, I analyze the Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation (“TSI”)¹, winner of the Stockholm Treaty Lab prize. First, I present the TSI as a model that states could adopt to foster international investment in the transition from carbon-intensive to low-carbon energy systems. Second, I comment on some challenges in implementing the TSI model and propose possible improvements in this regard. Third, I analyze how the TSI could be used to improve current and future bilateral investment treaties (BITs).

1. A critical commentary on the TSI as a renewable energy BIT model

The TSI specifies three main objectives: to demote “unsustainable investment”; to promote “sustainable investment”; and to ensure a just transition to sustainable economies and societies that will bring signatories in line with the goals set out in the Paris Agreement (Art. 1.2).²

The TSI allows each state party to choose which sectors, sub-sectors or activities qualify for that party as “sustainable investment” by outlining them in its schedule to Annex I. Similarly, each state party lists sectors, sub-sectors or activities it will consider as “unsustainable investment” for purposes of the TSI and outlines them in its schedule to Annex II. This allows each state party to adapt the definitions of “sustainable” and “unsustainable” investments to the current capacity of their economy and energy market.

The TSI aims to demote unsustainable investment by excluding it from protection under the treaty;³ it provides no right of establishment to new unsustainable investments and restricts the expansion of already existing unsustainable investments. It goes as far as to encourage discrimination between sustainable and unsustainable investment in order to ultimately eliminate the latter. Furthermore, it imposes obligations on all investors in order to set high standards of environmental performance. These investor obligations include corporate social responsibility, anti-corruption and transparency obligations, compliance with

¹ “The TSI was selected alongside another treaty, ‘Protocol for the Encouragement, Promotion, Facilitation and Protection of Investments in Climate Change Mitigation and Adaptation’ to receive the highest commendation by the Jury”.

² Throughout this article, parenthetical references to articles refer to: The Creative Disrupters. (2018). *Treaty on sustainable investment for climate change mitigation and adaptation* [TSI]. <http://stockholmtreatylab.org/wp-content/uploads/2018/07/Treaty-on-Sustainable-Investment-for-Climate-Change-Mitigation-and-Adaptation-1.pdf>. See also <https://sdg.iisd.org/commentary/guest-articles/tackling-climate-change-through-sustainable-investment-all-in-a-treaty>

³ The Creative Disrupters. (2018). *Treaty on sustainable investment for climate change mitigation and adaptation: Argumentation demonstrating how the model treaty meets the assessment criteria*, p. 4 [The Creative Disrupters’ Argumentation]. <http://stockholmtreatylab.org/wp-content/uploads/2018/07/The-Creative-Disrupters-Argumentation.pdf>



international and domestic laws in general, as well as with environmental, human rights, and labour standards, among many others.

On the other hand, the TSI extends treaty protections to investments defined as sustainable, while departing from the standard protections extended to investors under traditional BITs.⁴ The definitions it provides for expropriation, non-discrimination, and standard of treatment are very precise in order to avoid the far-reaching interpretations arbitral tribunals have had in the past. It expressly removes the standards of FET, full protection and security, legitimate expectations, and indirect expropriations as well as procedural rights for unsustainable investments (Arts. 3.3 and 3.4).

The TSI also creates incentives for states to protect the environment. It provides procedural avenues for citizens to challenge states, investors, or investments that fail to comply with their obligations under the TSI. States have the obligation to enforce existing international environmental agreements and to plan the phase-out of fossil fuel subsidies and other investment incentives to unsustainable investments over time.⁵

Regarding its objective to promote sustainable investments, the TSI creates a privileged position for sustainable investments since they benefit from procedural rights and standards. The TSI imposes on states the obligation to encourage sustainable investments through non-discriminatory treatment for investments in like circumstances.

The TSI acknowledges that its framework is one of many in public international law. As such it seeks to harmonize the TSI parties' international investment and international trade regimes by providing that TSI parties must agree not to launch WTO challenges against potential subsidies granted to sustainable investments in order to harmonize.⁶

The TSI also regulates the just transition to a sustainable society by putting an emphasis on the protection of workers' rights, as moving to a low-carbon economy will inevitably disrupt the labour market. Citizens also have procedural rights to challenge state action should they breach their treaty obligations, thus giving them a voice in the proceedings.⁷

The TSI rebalances the relationships between states and investors by including significant obligations for the latter and rights for the former. Indeed, the treaty extends the right to initiate an arbitration to states, making the dispute resolution two-sided. It also establishes a joint committee to aid in the interpretation and application of the treaty and a national contact point to help build relationships between investors and host states. It creates its own tribunal and appellate tribunal to develop consistent jurisprudence regarding the application of the TSI.

The TSI provides a radical rethinking of traditional model BITs, and aims to address the main criticisms that the regime has faced. Its strategy is therefore to provide new treaty standards that solely benefit sustainable investment and new tribunals to interpret and apply them consistently. Importantly, the TSI recognizes that the framework it proposes amounts to a fairly radical departure from the current investment regime and lays out provisions regarding a transition toward the ambitious goal it sets for the host states and taking account the level of development of each country.

2. Challenges in implementing the TSI and possible improvements

The TSI is a model targeted at leaders that are willing to engage in drastic reforms to address the climate crisis. Despite efforts to facilitate its adoption, such as offering states the opportunity to progressively designate more industries as “unsustainable” over time, the TSI's impact could be limited if only a few countries are willing to adopt the model. Indeed, several factors may complicate the TSI's adoption and ultimate impact.

Considering that the TSI provides a more balanced regime between investors and host states, investors could engage in “treaty shopping” for the protection of older, more advantageous treaties. Countries will, therefore, have to fully reform all their BITs before the TSI can have its full desired effect. In addition, the effects of the TSI might be mitigated by already-existing investment contracts that include access to ISDS under the traditional investment arbitration regime. The biggest obstacle to the TSI might, therefore, be the time needed to reform old-generation treaties and wait for old contracts to come to an end so that its full effects can be felt within the regime.

Another potential obstacle to widespread adoption of the TSI is the reality of unequal relative bargaining power between potential treaty signatories. Developing or smaller economies may find it difficult to impose

⁴ The Creative Disrupters' Argumentation, *supra* note 2, pp. 6–7.

⁵ The Creative Disrupters' Argumentation, *supra* note 2, pp. 7–8.

⁶ The Creative Disrupters' Argumentation, *supra* note 2, pp. 10–11.

⁷ The Creative Disrupters' Argumentation, *supra* note 2, pp. 15–16.



such a radical change on larger or more powerful treaty partners. The TSI, therefore, depends on forward-thinking and influential countries to adopt and promote this model of investment protection.

Additionally, some states may not have the expertise or economic resources to implement the institutional obligations of the TSI. The treaty addresses this potential challenge regarding the establishment of its joint committee, as it proposes alternative compositions depending on whether developing states are involved (Art. 10.1). However, developing countries would still need to select representatives of government agencies responsible for areas such as energy, environment, and climate change, among others, and to set up a national contact point. The TSI addresses the issue of state capacity to fulfill their TSI obligations in other articles by providing “*Party A shall provide technical assistance to Party B in the implementation of this Article*” (for example, Art. 6.3(4) on the transparency obligation to make laws and regulations of state parties publicly available). However, there is no such provision in the articles defining the TSI institutions; therefore, similar provisions should be included regarding the institutional obligations of the TSI to ease the burden on developing countries.

The revolutionary character of the TSI will, therefore, slow its expansion. Only states that are mindful of renewable energy technologies, eager to try new investment models, influential enough to impose the TSI’s extensive changes on other countries, and developed enough to implement new and potentially costly institutions will be able to adopt the TSI. Additionally, the TSI’s full potential depends on its widespread adoption. As such, it will probably have to wait sometime for its influence to be truly felt in the investment regime.

3. The TSI can inspire the next generation of BITs

The TSI can be used to improve the next generation of BITs by offering an example of a comprehensive approach to the current procedural and substantial challenges facing the international investment treaty regime. Many of the newer generation of BITs attempt to address these same issues but in a more piecemeal fashion. For example, CETA adopts a similar strategy to the TSI to address the regime’s procedural issues, through preappointed members to its own ad hoc and appellate tribunals. However, its substantive provisions, such as its most-favoured nation and national treatment standards, are very broad and could be improved

by adopting the TSI’s approach of defining some standards, such as national treatment, more precisely or excluding MFN altogether. The India Model BIT and the Morocco–Nigeria BIT both attempt to address substantive issues by redefining the treaty standards and innovating new ways to balance rights and obligations between investors and states. However, the India Model BIT could benefit from more explicit mention of sustainable development goals and the creation of an appellate tribunal to harmonize arbitral decisions. Similarly, the Morocco–Nigeria BIT would be greatly improved through the establishment of its own ad hoc arbitration tribunal and appellate tribunal. All of the aforementioned treaties could encourage distinguishing between sustainable and unsustainable investments in order to target the development of renewable energy investments by proving the former with more protections than the latter.

The TSI could, therefore, guide newer generations of BITs by providing a coherent strategy for addressing the current criticism facing the international investment treaty regime and promoting sustainable investment in a targeted fashion.

4. Conclusion

The TSI faces challenges due to the remaining infrastructure of the old investment regime and implementation complications. Even so, it addresses most of the criticisms that have led to a backlash against the old-generation investment treaties and their ISDS mechanisms. States aiming to carve out more policy space to promote sustainable investment could look to the TSI as an *avant garde* approach to investment protection that offers many improvements to existing investment treaties.

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INSIGHT 5

Morocco's New Model BIT: Innovative features and policy considerations

Hamed El-Kady and Yvan Rwananga



1. Background and introduction

In the face of the increasing number of claims brought by investors against host states on the basis of BITs and the exorbitant amounts awarded to investors by arbitral tribunals, Morocco has undertaken a review of its model BIT using a flexible and rational approach with a view to making the necessary adjustments while at the same time maintaining the Kingdom's policy of openness to FDI.

A working group was established in 2015 with the mandate to elaborate a new model BIT. It started with a general assessment of Morocco's old-generation BITs and a review of recent developments in international investment law in order to identify areas for reform. A first revised draft model BIT was finalized in 2016 and submitted for national consultation in 2017. Following the completion of a consultation process that involved various stakeholders, the draft model was submitted to UNCTAD for review in July 2018. Following the completion of UNCTAD's review in September 2018, the model was published by Morocco in December 2019.

Against this backdrop, we review selected core provisions of Morocco's new model BIT,¹ which will likely serve

as a basis for Morocco to (re)negotiate BITs and other regional investment agreements.

2. Preamble

From the outset, Morocco's new model BIT emphasizes that sustainable development is to be one of the cornerstones of its investment regime. The preamble clarifies that the desire of treaty parties to create and foster economic cooperation must be in line with the pursuit of sustainable development in its economic, social, and environmental dimensions. In addition, the corollary right of states to retain sufficient space to adopt and implement policy measures in vital areas (such as public health, environment, and labour) must not be compromised (preamble, para. 3). The preamble also emphasizes the key role to be played by investments in the promotion of sustainable development and in achieving the related objectives of poverty reduction, job creation, and human development.

Going beyond the mere mention of sustainable development in the preamble—and elevating it to one of the overarching objectives of the investment treaty—attests to the importance that Morocco attaches to sustainable development. While a treaty preamble does not lay down binding and enforceable obligations, it provides the context in light of which substantive obligations must be interpreted.² Therefore, placing sustainable development at the forefront of the preamble along with other objectives such as strengthening economic cooperation will inform the treaty interpreter of the parties' intention to accord sustainable development a central place. This strategy comports with the policy options developed in UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD).³

¹ Throughout this article, parenthetical references to articles refer to: Kingdom of Morocco. (2019, June). *Accord entre le Royaume du Maroc et ... pour la promotion et la protection réciproques des investissements*. [Moroccan Model BIT] <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download>

² Vienna Convention on the Law of Treaties, signed May 23, 1969, entered into force January 27, 1980 [VCLT], Art. 31. <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

³ United Nations Conference on Trade and Development. (2015). *Investment policy framework for sustainable development*. UNCTAD [UNCTAD's IPFSD], policy options 1.1.0 to 1.1.2. https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf



3. Definition of investment

Extending treaty protections and advantages exclusively to those foreign assets that bring concrete benefits to the host country is one way of targeting investments conducive to sustainable development. Doing so necessitates identifying indicators for assessing whether a given investment carries the benefits that the host country seeks and defining “investment” based on those indicators. This is the approach adopted in Morocco’s model BIT, in line with new generation BITs⁴ and with IPFSD policy options.⁵ An investment, pursuant to the model, is an asset that, over a certain duration, contributes to the sustainable development of the host party and entails the commitment of capital or other resources, the expectation of profits, and an assumption of risk (Art. 3.3).

While the criteria of commitment of capital, expectation of profits, and assumption of risk are now commonplace in modern IIAs, the requirement for an investment to contribute to the sustainable or economic development of the host state is still seldom used,⁶ although there is a growing trend to include it. This is perhaps due to the lack of agreement on the definition and the exact contours of this criterion, an ambiguity that has resulted in tribunals either rejecting this characteristic or applying it inconsistently.⁷ Anticipating this difficulty, Morocco’s model BIT proposes indicators for measuring an investment’s contribution to sustainable development: increased production capacity, economic growth, quality of jobs created, duration of the investment, technology transfer, and reduction of poverty (Art. 3.3). These non-exhaustive indicators will provide guidance to treaty interpreters, helping to avoid inconsistent interpretations and ensure legal certainty. The use of such indicators, a practice that is not yet widespread in new IIAs, attests to the innovative nature of Morocco’s model.

⁴ See, for example, Netherlands Model Investment Agreement, Art. 1. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>; Belgium–Luxembourg Economic Union Model BIT, Art. 2. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5854/download>; and EU–Vietnam Investment Protection Agreement, Art. 1.2. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download>

⁵ UNCTAD’s IPFSD, *supra* note 3, policy options 2.1.1 and 2.1.2.

⁶ Examples of other recent model BITs that do not use this characteristic include the Netherlands Model Investment Agreement and the Belgium–Luxembourg Economic Union Model BIT; see *supra*, note 4. See also the Burkina Faso–Turkey BIT. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5910/download>

⁷ Hussein, D. (2015). Contribution to the host state development: A marginalised criterion? *BCDR International Arbitration Review*, 2(2), 289–304. <https://www.kluwerlawonline.com/preview.php?id=BCDR2015015>

4. Definition of investor

The definition of “investor” contained in Morocco’s model BIT is consistent with the recent IIA practice of refining the scope of covered investors. According to the model, natural persons who are nationals of both the home state and the host state do not qualify as investors unless at the time of making the investment in the host state their primary residence and their main activity are in the territory of the other state. As for legal persons, the treaty covers only those entities that are constituted or organized in accordance with the laws of a party, have their seat and conduct substantial business activity in that party. For greater clarity, the model further provides a non-exhaustive list of indicative criteria for defining substantial business activity (Art. 3.4).

The model also allows the parties to deny treaty benefits to an investor or investment owned or controlled by persons of a third party or the denying party (Art. 25). Including these limitations on the definition of investor will help eliminate the risk of abuse through the use of “mailbox” companies, treaty shopping, and free riding by investors not conceived to be beneficiaries of treaty advantages.⁸

5. Fair and Equitable Treatment (FET)

FET has been one of the most controversial and contentious clauses in investment arbitration. Because old-generation treaties contained broadly worded and unqualified FET clauses (and due to the lack of clear legal prescriptions in international investment law concerning the notions of fairness and equity⁹) investors have perceived them as blanket protection and systematically used them to challenge—with considerable success—host state measures that they deemed to adversely affect their investments. To limit this possibility and curtail abuse of FET, Morocco’s model BIT carefully clarifies the meaning and delineates the scope of the FET by exhaustively setting out the obligations the breach of which would constitute a violation of the FET (Art. 6): denial of justice in criminal, civil, or administrative proceedings; fundamental breach of due process; discrimination on wrongful grounds, such as gender, race, or religious belief; or abusive treatment of investors, such as harassment, coercion, and pressure.¹⁰

⁸ UNCTAD’s IPFSD, *supra* note 3, p. 94. See also IPFSD policy options 2.2.1 and 2.2.2.

⁹ UNCTAD’s IPFSD, *supra* note 3, p. 83.

¹⁰ Earlier model BITs with similar FET formulations include those of the Belgium–Luxembourg Economic Union, Netherlands and Slovakia. All of them are available at <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements>



The model evidences a manifest effort to preserve states' right to regulate by explicitly specifying certain government actions and other circumstances that cannot be deemed to amount to a breach of FET. Chief among these is the express stipulation that the FET clause shall not preclude states from adopting regulatory measures to pursue legitimate policy objectives such as the protection of public order, public health, or environment. Safeguarding parties' policy space is paramount to achieving sustainable development objectives.¹¹

6. Non-discrimination provisions

The non-discrimination provisions found in Morocco's model are in accord with current international best practices, such as those compiled in UNCTAD's IPFSD. As is now standard, both national treatment and MFN treatment are circumscribed to investors that are "in like circumstances." Additionally, the model provides clear benchmark elements to be taken into account when carrying out an analysis of "like circumstances" (Art. 7.2).

In line with UNCTAD's IPFSD policy option 4.1.2, the model clarifies, with respect to the national treatment clause, that the host party retains the right to extend to investors of the other party and their investment treatment that is different from that accorded to its own investors in certain economic sectors. In situations where the national development agenda foresees the development of new domestic industries and the need to protect them during their infancy, allowing for the flexibility to differentiate and grant preferential treatment to domestic investors or investments vis-à-vis foreign investors in those sectors may prove an instrumental tool for implementing that agenda.¹²

Similarly, as concerns MFN treatment, the model is mindful of the need to avert any indirect diminishment of regulatory space through the incorporation of obligations contained in other IIAs. In this view, the scope of the MFN clause is thoroughly demarcated to avoid any expansive interpretation that could lead to such a result. One important scope limitation—consonant with IPFSD policy option 4.2.2—is the exclusion from MFN treatment of procedures for the resolution of investment disputes between investors and states provided for in other IIAs and trade agreements (Art. 8.3). The model

provides for further exceptions to the MFN and national treatment clauses to protect policy space (Art. 9).

7. Expropriation

As is established practice in investment treaty-making, Morocco's model BIT preserves the states' right to nationalize or expropriate, subject to the usual four conditions: the expropriation measure must be taken (i) in the public interest, (ii) following due process of law, (iii) in a non-discriminatory manner and (iv) against compensation (Art. 10.1). The expropriation provision in the model also reflects Morocco's policy decision to cover both indirect and direct expropriation (Art. 10.8) in contrast with recent practice of some states to deliberately omit indirect expropriation.¹³

Concerned with the uncertainty often arising from the lack of an exact borderline between indirect expropriation and legitimate public policy-making,¹⁴ Morocco's model specifies indicative factors to be taken into account in determining whether a measure amounts to an indirect expropriation (Art. 10.8(b)). More importantly, however, it emphasizes that non-discriminatory measures adopted in good faith to protect legitimate public interests—such as the protection of public health, safety, environment, or labour rights—do not constitute indirect expropriation and may not lead to compensation claims. By offering investors protection against indirect expropriation while ensuring that this does not encroach on a state's regulatory space, the model strikes a delicate balance between investor and state interests.

8. Investor obligations and responsibilities

Morocco's model BIT contains a section detailing investors' obligations and responsibilities. While the overarching principle of that section can be said to be that investors and investments must comply with the laws and regulations of the home state while present in its territory (Art. 18.1), the section imposes other specific and detailed obligations and responsibilities on

¹¹ UNCTAD's IPFSD, *supra* note 3, policy options 4.3.2 and 4.3.3.

¹² UNCTAD's IPFSD, *supra* note 3, p. 96.

¹³ Brazil's Cooperation and Facilitation Investment Agreements (CFIAs) systematically and explicitly exclude indirect expropriation. See for example Brazil–Guyana CFIA, Art. 7; Brazil–United Arab Emirates CFIA, Art. 7; Brazil–Suriname CFIA, Art. 7; all available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil>; see also Brauch, M.D. (2020). The best of two worlds? The Brazil–India investment cooperation and facilitation treaty. *Investment Treaty News*, 11(1).

¹⁴ UNCTAD's IPFSD, *supra* note 3, p. 99.



investors. Two of these are notable: the obligation for investors to manage and operate their investments in accordance with the contracting parties' international obligations in the fields of environment, labour, and human rights (Art. 18.7); and the obligation for investors not to engage in corruption, money laundering, or financing of terrorism, the violation of which will result in the deprivation of the right to have recourse to treaty-based dispute settlement mechanisms (Art. 19). Investors also have a responsibility to contribute to the sustainable development of the host state and the local community, to create employment and human capital formation, and to apply universally recognized norms, such as the International Labour Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the OECD's Guidelines for Multinational Enterprises (Art. 20).

The inclusion of a section devoted to investor obligations and responsibilities is a telling indicator of Morocco's intention to place sustainable development at the centre of its investment regime. Morocco aims to redress the asymmetry of obligations between states and investors, a quintessential defect of the IIA regime that has compounded—or caused—the reduction of the policy space that states need to pursue sustainable development. While there may yet be a general agreement in international law on whether international obligations can be imposed on investors,¹⁵ Morocco's progressive policy in this regard merits commendation. Like the other provisions of the model, this section also is in accord with UNCTAD's IPFSD policy options.¹⁶

9. Investor–State Dispute Settlement (ISDS)

Morocco's model BIT features modern and forward-looking ISDS provisions that take into account the need to reform ISDS and do not shy away from incorporating innovative proposals. The model's ISDS provisions significantly mirror the reform options contained in UNCTAD's IPFSD.

For example, as suggested by IPFSD policy options 6.2.0 and 6.2.1, the model narrows the range of disputes that can be subject to ISDS and circumscribes the scope of ISDS: only disputes concerning a violation of the states' treaty obligations are allowed (Art. 28.2) (as opposed to disputes that would be based on investment contracts), and there is a limitation period rendering ISDS unavailable for claims after three years have elapsed since the date the investor first acquired knowledge of the event giving rise to the claim (Art. 28.6). Another innovation worthy of note is that a host state may submit a counterclaim where the investor has not complied with its obligations, such as the obligations to comply with domestic laws and not to engage in corruption (Art. 28.4). Lastly, in accordance with IPFSD policy option 6.2.2, the model BIT requires the investor to exhaust local remedies before initiating international arbitration (Art. 32.2). By introducing this requirement,¹⁷ Morocco's model BIT may help reduce the inequality between foreign and domestic investors under BITs.¹⁸

10. Policy considerations

Morocco's new model meets the standards of a modern IIA. It contains concisely worded clauses and displays a high degree of innovation. Perhaps more importantly, it translates Morocco's will to prioritize sustainable development by cautiously striking a balance between investor rights and the safeguarding of adequate regulatory space for states.

The model, developed in close consultation with UNCTAD, is the culmination of national efforts aimed at modernizing Morocco's international investment policy strategy, which included a careful review of all of Morocco's existing BITs. The model should now be put to the test as Morocco engages in various IIA negotiations at the bilateral and regional levels.

Perhaps even more importantly, Morocco (and developing countries in general) could use opportunities such as this one (the elaboration of a new model) to reform their outdated BITs¹⁹ that include broadly

¹⁵ See López, C. (2019, October 2). The revised draft of a treaty on business and human rights: Ground-breaking improvements and brighter prospects. *Investment Treaty News*, 10(4), 11–14. <https://www.iisd.org/itn/2019/10/02/the-revised-draft-of-a-treaty-on-business-and-human-rights-ground-breaking-improvements-and-brighter-prospects-carlos-lopez>

¹⁶ UNCTAD's IPFSD, *supra* note 3, policy options 7.1.1, 7.1.3, and 7.1.4.

¹⁷ See Brauch, M.D. (2017, January). *Exhaustion of local remedies in international investment law* (IISD Best Practices Series). IISD. <https://www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law>

¹⁸ United Nations Conference on Trade and Development. (2015). *World investment report 2015: Reforming international investment governance*. UNCTAD, p. 149. https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf

¹⁹ Morocco has concluded over 80 treaties, 60 of which are more than 15 years old. See <https://investmentpolicy.unctad.org/international-investment-agreements/countries/142/morocco>



drafted provisions that may seriously limit their right (and duty) to implement measures needed to achieve the country's sustainable development objectives. In this endeavour, developing countries could be guided by UNCTAD's Roadmap for IIA Reform,²⁰ specifically Phase II of the reform, and the proposed actions that could be undertaken at the bilateral, regional, and multilateral levels. Because these actions are geared toward the reform of the existing stock of treaties, they would require enhanced collaboration and coordination between treaty partners. One strategy, for instance, would be for a developing country to identify among its current treaty partners those that are the most reform-oriented and that may be interested in modernizing existing treaties; or the treaty partners of those IIAs for which reform needs are most pressing. In doing so, countries could consider the extent of reform to be pursued, including whether to pursue a limited number of changes in a given treaty or opt for a more comprehensive overhaul of the treaty.

Depending on the approach chosen, a solution must be found on the matter of survival clauses and how to manage transition between treaties. In all of this, consideration would need to be given to the best possible "policy level" of reform action—that is, whether and which changes may best be pursued bilaterally (for example, modernizing a specific BIT), or at the regional level (for example, replacing intra-African and intra-Arab BITs with more modern instruments).

Ultimately, the success of the new model BIT is not the extent to which it will be reflected in Morocco's bilateral or regional (re)negotiations. Its true success is that it was driven by a transparent domestic process involving all stakeholders and that it raised domestic awareness of the urgent need for reform. The second advantage of the model is that it provides strong guidance and enhances the position of Morocco in future investment negotiations, be it for BITs, regional agreements, or even investment chapters in FTAs—such as the new Arab Regional Investment Agreement, currently under discussion—as well as for the negotiations for the new Investment Protocol of the African Continental FTA (AfCFTA).

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²⁰ United Nations Conference on Trade and Development (UNCTAD). (2018). *UNCTAD reform package for the international investment regime*. UNCTAD. https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf



INSIGHT 6

Domestic Procedures for the Payment of Damages by States in Investment Arbitration

Affef Ben Mansour



Scenarios in which states may face an obligation to pay damages as a result of international judicial or arbitral proceedings have proliferated as an increasing number of international courts have received state consent to their jurisdiction, including in international investment arbitration.

In the context of investment arbitration in particular, this obligation to pay damages can result from state responsibility in the violation of a BIT, an investment law, or an investment contract. Even though the obligation of *restitutio in integrum* (full compensation) involves “wip[ing] out all the consequences of the unlawful act,”¹ in actual practice, it usually results in an obligation for the state to pay² fairly high amounts.³

The increasing number of arbitral awards that include a requirement for obligated state parties to pay and the large sums awarded by these tribunals have been among the main criticisms levelled at ISDS mechanisms in recent years. These criticisms have led to initiatives for a possible reform of ISDS, including the discussions currently underway in the framework of UNCITRAL Working Group III.

Obligated state parties are required to comply with the arbitral award.⁴ Should the state refuse to comply, the ICSID Convention allows any investor to resort to enforcement mechanisms targeting the assets of the host state located in the territory of one of the 154 countries that are parties to the ICSID Convention. For awards rendered by *ad hoc* tribunals or on the basis of the ICSID Additional Facility, the enforcement can be requested in the 163 countries that are parties to the New York Convention.⁵

As recently as a few years ago, observers noted that states generally complied voluntarily with investment arbitral awards,⁶ whether such awards were rendered through ICSID arbitration or in an *ad hoc* context. Today, the trend is moving more and more toward “resistance.”⁷ This phenomenon is illustrated by the increase in annulment proceedings against investment arbitral awards as well as

¹ Case concerning the Factory at Chorzów, *judgement* of 13 September 1928, P.C.I.J., Serie A n° 17, p. 47. https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf

² Among the cases brought before a tribunal on the basis of the ICSID Convention or the ICSID Additional Facility, 66% give rise to an arbitral award. Of the latter, 48% result in an arbitral award attributing liability to the state. ICSID. (2019). *Affaires du CIRDI – Statistiques*, numéro 2019-2, pp. 26–27. [https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_\(English\).pdf](https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_(English).pdf)

³ See the list of the highest amounts of damages awarded by investment tribunals in Bonnitcha, J. et Brewin, S. (2019, octobre). *Compensation Under Investment Treaties* (IISD Best Practices Series). IISD, pp. 29–31. <https://www.iisd.org/library/iisd-best-practices-series-compensation-under-investment-treaties>

⁴ See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, entered into force on 14 October 1966, Art. 53(1); UNCITRAL. (2013). *UNCITRAL Arbitration Rules*, Art. 34(2). <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf>; see also the relevant provisions in BITs, the arbitration clauses of investment contracts, and the Arbitration Rules of arbitral institutions.

⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, Art. III. <https://treaties.un.org/doc/Publication/UNTS/Volume%20330/volume-330-I-4739-English.pdf>

⁶ See, in particular, Dugan, C. F. (2008). *Investor–state arbitration*. Oxford University Press, pp. 675–676; Alexandrov, S. A. (2009). Enforcement of ICSID awards: Article 53 and 54 of the ICSID Convention. *Transnational Dispute Management*, 1, p. 10. <https://www.transnational-dispute-management.com/article.asp?key=1345>

⁷ Van den Berg, A. J. (1989). Recent enforcement problems under the New York and ICSID Conventions. *Arbitration International*, 5(1), 2–20; Baldwin, E., Kantor, M., & Nolan, M. (2006). Limits to enforcement of ICSID awards. *Journal of International Arbitration*, 23(1), 1–24.



by enforcement procedures targeting state property.

Commentators on investment arbitration cases rarely focus on scenarios in which states voluntarily comply with investment arbitral awards. As a result, there has been little analysis to date of the legal issues encountered by states in mobilizing, within a reasonable period of time, the frequently very large amounts awarded by arbitral tribunals in favour of investors.

Among the many obstacles that states can encounter in the implementation of investment arbitral awards, one of the most important is the unsuitability of internal budgetary procedures for paying the pecuniary obligations decided by an arbitral tribunal (see Part 1). This difficulty is now attenuated in certain states that have adopted budgetary standards aimed at addressing such unexpected budgetary developments (Part 2).

1. Challenges related to traditional budgetary procedures for the payment of international pecuniary obligations

The implementation of a pecuniary obligation can appear simple at first glance: the award generally specifies the amount and currency of the sum that the state must pay, and sometimes the payment deadline. The state then has only to take the measures necessary to carry out the transfer of the amount of money to the investor's bank account, in the case of investor–state arbitration.

Nonetheless, this apparent simplicity hides a more complex reality. Indeed, apart from the principles of good faith and of a reasonable timeframe, no other international rule appears to oversee this post-award phase, other than that which provides for the payment to be made according to the internal procedures of the obligated state. Consequently, regardless of the origin of international obligation, the state retains control over the internal budgetary process relative to payment. That said, the state—and more specifically the executive authority—is subject to national budgetary rules in proceeding with the payment of the amount prescribed by the decision of the arbitral tribunal.

There are two principal challenges at this level.

First, the date of the award seldom corresponds to the timetable for voting on the annual state budget. In other words, the expected payment of damages is generally not provided for in the annual state budget. As a result, at the time when the award is rendered—and even for cases in which the state intends to comply with the award—the executive authority generally does not have the required authorizations to pay the amount specified by the arbitral tribunal.

Second, in accordance with the principle of separation of powers in democratic states, the governments of the obligated states are generally required to obtain parliamentary approval before being able to pay off their debt resulting from an arbitral award. This technique is not without practical and political difficulties for the state bodies responsible for the fulfilling of pecuniary obligations. Indeed, there is no guarantee that a parliament will agree to adopt the budget required to pay the state's international pecuniary obligation, and even less so within a reasonable timeframe. Such a situation can, therefore, give rise to a new dispute between the investor and the host state due to the non-execution of the arbitral award rendered.

2. Specific budgetary mechanisms for the diligent payment of damages

In order to ensure that international rulings and arbitral awards are implemented within a reasonable timeframe, some states, starting in the late 20th century, have developed internal budgetary mechanisms with the aim of facilitating the implementation of international pecuniary obligations.

2.1. A budgetary procedure based on anticipation: The examples of France, Peru, and Spain

Some states have introduced budgetary procedures based on foresight and anticipation, in order to deal—if necessary and within a reasonable timeframe—with the voluntary payment of damages issued by an investment arbitral award.

In France, with regard to pecuniary compensation following a one-time international dispute, the Ministry of Foreign Affairs had previously ensured payment from an evaluative line of credit appearing in its annual budget. Since the adoption of the Law relating to Finance Laws of 2005, the various bodies of the French state are now required to set up a projected budget, taking into account the possible pecuniary obligations of the state. In other words, they must include within their budgets a specific line of provision for risks and charges in the possible event of a “certain, or likely, outflow of resources.”⁸ Thus, when France is a party to a dispute

⁸ République Française. (2005). *Loi organique n° 2005-779 du 12 juillet 2005 modifiant la loi organique n° 2001-692 du 1er août 2001 relative aux lois de finances ; Norme comptable n° 12 de l'État*. <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000451379&fastPos=1&fastReqId=1951626294&categorieLien=cid&oldAction=rechTexte>



before an international court, the Ministry of Foreign Affairs must include an assessment of pecuniary risk in the budget for the following year.

A similar procedure exists in Peru. In this respect, the General Law on the National Budgetary System⁹ also provides for a budgetary reserve with the Ministry of Economy and Finance to comply with unforeseen pecuniary obligations, which, by their nature, are not included in the annual state budget. The payment of damages awarded by an arbitral tribunal can thus be carried out with an authorization from the Head of State and the Ministry of Economy and Finance. As an example, following the ICSID award in the case of *Bear Creek Mining Corporation v. Peru*,¹⁰ the Head of State, with the consent of the Ministry of Economy and Finance,¹¹ authorized the transfer of an additional amount to the Ministry of Energy and Mines in order to proceed with the payment of the damages awarded to Bear Creek Mining Corporation by the arbitral tribunal. The payment was made one year after the award was rendered.¹²

Difficulties in implementing an arbitral award can also arise due to the federal or more or less decentralized form of a state.¹³ Anticipating this issue, Spain—a unitary state composed of 17 autonomous communities—stipulates in its Law on Budgetary Stability that autonomous communities as well as public companies must include a specific line in their annual budgets enabling compliance with unforeseen financial obligations. Spain also organizes a procedure for examining internal responsibilities among state bodies whose acts have been declared unlawful by an international or European court. It is useful to note that Spain applied this principle long before the

adoption of this legislation. In the case of *Maffezini v. Spain*, the arbitral tribunal had assigned the acts of the SODIGA Company to Spain. Once the award was rendered, Spain forwarded the award to SODIGA, which made the payment and charged the expenditure to its annual budget.¹⁵

Clearly, an approach based on budgetary anticipation can facilitate the implementation of an international award within a reasonable timeframe. This approach is nevertheless not without its difficulties, given the irregular timetable of arbitration proceedings and the unpredictable nature of the assessment of the likely amount of compensation, if the international court or tribunal hearing the case determines that the state is responsible. Finally, budgetary anticipation is not enough to enable the implementation of the arbitral award within a reasonable timeframe, when the amounts awarded by an arbitral tribunal are exorbitant compared to the limited annual budgets of developing countries. An ICSID arbitral tribunal recently ordered Pakistan to pay USD 6 billion in damages,¹⁶ which represents approximately one-fiftieth of its annual GDP.¹⁷

2.2. An exceptional budgetary procedure: The examples of Guatemala and Bolivia

States can also provide for an exceptional procedure authorizing the executive to make certain budgetary modifications during the year without the authorization of parliament. It is within the framework of such exceptional procedures that Guatemala and Bolivia complied with the investment arbitral awards rendered in the cases of *Railroad Development Corporation v. Guatemala*¹⁸ and *Guaracachi v. Bolivia*,¹⁹ respectively.

⁹ Republic of Perú. (2012). *Law No. 28411, General Law of the National Budget System, approved by Supreme Decree No. 304-2012-E*, Arts. 44 and 45. http://transparencia.mtc.gob.pe/idm_docs/normas_legales/1_0_31.pdf

¹⁰ *Bear Creek Mining Corporation v. Republic of Perú, ICSID Case No. ARB/14/21, Award, 30 November 2017*. <https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf>

¹¹ Republic of Perú. (2018). *Supreme Decree No. 246-2018-EF, 30 October 2018*. <https://www.gob.pe/institucion/mef/normas-legales/213392-246-2018-ef>

¹² Correo. (2019). *Gobierno pago 32 millones de dólares a Bear Creek por caso Santa Ana*. <https://diariocorreo.pe/edicion/puno/gobierno-pago-32-millones-de-dolares-bear-creek-por-caso-santa-ana-862129>

¹³ Ben Mansour, A. (2011). *La mise en œuvre des arrêts et des sentences des juridictions internationales*. Larcier, pp. 257–259.

¹⁴ Kingdom of Spain. (2013). *Organic Law 2/2012 of Budgetary Stability and Financial Sustainability, Article 8 (1); modified by Organic Law 9/2013 of 20 December 2013 regarding the control of commercial debt in the public sector, Art. 1 (13)*. <https://www.boe.es/eli/es/lo/2012/04/27/2/con>

¹⁵ Consello de Contas de Galicia. (2001). *Informe de fiscalización, Ejercicio 2001, XesGalicia, SXEGR, S.A. y Sodiga Galicia, SCR, S.A.*, p. 48, para. 4.14. http://www.consellodecontas.es/sites/consello_de_contas/files/contents/documents/2001/XESGALICIA_2001_C.pdf

¹⁶ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Award, 12 July 2019*. <https://www.italaw.com/sites/default/files/case-documents/italaw10737.pdf>

¹⁷ See the data published on the World Bank website: <https://data.worldbank.org/country/pakistan>

¹⁸ *Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23, Award, 29 June 2012*. <https://www.italaw.com/sites/default/files/case-documents/ita1051.pdf>

¹⁹ *Guaracachi America, Inc. v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014*. <https://www.italaw.com/sites/default/files/case-documents/italaw3293.pdf>



In Guatemala, the Constitution²⁰ as well as the budget law²¹ provide for the possibility of an exceptional budgetary procedure involving various supervisory bodies. This procedure allows the executive to issue a decree authorizing a state body or a public enterprise to modify its annual budget in order to proceed with the payment of the amount due under an investment arbitral award and not provided for in the annual state budget. This procedure thus enabled the payment of damages awarded by an ICSID tribunal 11 months after the final award was rendered.²²

Even though the following example is not recommended due to the absence of a monitoring mechanism, in Bolivia, a presidential decree was sufficient (following the ad hoc arbitral award rendered in the case of *Guaracachi v. Bolivia*) to authorize the Minister of Hydrocarbons and Energy and the President of the National Electricity Company to sign an agreement with the investor regarding the payment of the USD 31.5 million owed by Bolivia—in exchange for a few concessions by the investor.²³ In this way, Bolivia, which received the arbitral award on January 31, 2014, fulfilled its pecuniary obligation a mere six months later.²⁴ Nevertheless, few of the world's constitutions allow the executive to release an amount of several million US dollars in a few months without parliamentary authorization or a pre-established exceptional budgetary procedure.

Without these exceptional mechanisms, it is likely that the voluntary implementation of these two arbitral awards would have required more time. This delay could be viewed by the investor as a refusal of the state to comply with the award and lead it to initiate

enforcement procedures applicable to the assets of the obligated state. The delay in the state's implementation of the investment arbitral award could constitute a new source of contention.²⁵ Nonetheless, these exceptional budgetary procedures, which are outside the traditional control of the legislature over the actions of the executive, must be managed and controlled to limit the possibility of abuses and excesses.

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²⁰ Republic of Guatemala. (1993). *Constitución política de la República de Guatemala*, Art. 183. [http://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/E36A11EC8CBB4D0105257E6C0070698F/\\$FILE/5_pdfsam_ConstitucionPoliticaDeLaRepublicaDeGuatemala.pdf](http://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/E36A11EC8CBB4D0105257E6C0070698F/$FILE/5_pdfsam_ConstitucionPoliticaDeLaRepublicaDeGuatemala.pdf)

²¹ Republic of Guatemala. (1997). *Decree No. 101-97 of the Congress of the Republic of Guatemala of 2 November 1997 relating to the Organic Budget Law*, Arts. 29 and 49. <https://www.contraloria.gob.gt/wp-content/uploads/2018/02/8-LEY-ORGANICA-DEL-PRESUPUESTO-DECRETO-DEL-CONGRESO-101-97.pdf>

²³ Plurinational State of Bolivia. (2014, 22 May). *Decreto supremo n° 2006*. <https://www.lexivox.org/norms/BO-DS-N2006.xhtml>

²⁴ Joint letter from the Bolivian State and the investor to the arbitral tribunal, 29 May 2014. <https://www.italaw.com/sites/default/files/case-documents/italaw3297.pdf>; see also the payment of the damages awarded by the ICSID tribunal in the case of *Quiborax S.A. and Non-Metallic Minerals S.A. v. The Plurinational State of Bolivia* (ICSID Case No. ARB/06/2, Award, 16 September 2015); Plurinational State of Bolivia. (2018, 6 June). *Decreto Supremo N° 3582*. <https://www.lexivox.org/norms/BO-DS-N3582.xhtml>

²⁵ See Achouk-Spivak, L., and Ben Mansour, A. (2015). Reconnaissance et exécution des sentences arbitrales, in Charles Leben (dir.), *L'avenir des traités de protection des investissements*. Pedone, pp. 1018–1023.



NEWS IN BRIEF

European Commission Releases Guidance for FDI Screening in Response to Global Pandemic

On March 25, 2020, the European Commission published a guidance for member states on FDI screening in the face of the COVID-19 pandemic, focusing on, but not limited to, health-related industries.

The new guidance comes a year after the release of the EU's new framework for screening FDI, which is set to come into force in October 2020. The 2019 framework allows member states to block or place restrictions on investment transactions that are deemed to pose a threat to "critical infrastructure, critical technologies, the supply of critical inputs, such as energy or raw materials, access to sensitive information or the ability to control information, or the freedom or pluralism of the media," according to a [factsheet](#) released last year.

According to the Commission, the pandemic has "increased potential risk to strategic industries, in particular but by no means limited to healthcare-related industries" and urges member states to ensure that the crisis "does not result in a sell-off of Europe's business and industrial actors, including SMEs [small and medium enterprises]." The guidance also identifies the potential danger of "predatory buying" of strategic assets with "a view to limit supply to the EU market."

The guidance notes that responsibility rests with member states to make full use of their current FDI-screening mechanisms to "take fully into account the risks to critical health infrastructure, supply of critical inputs, and other critical sectors as envisaged in the EU legal framework." At present, 14 member states have currently established FDI-screening mechanisms. The guidance further urges the 13 member states that have not already established FDI-screening mechanisms to do so, and in the meantime use other available policy options in cases in which foreign acquisition of a business or asset would create a risk for critical health infrastructure.

The guidance states that while portfolio investment is less likely to present a security risk, it may also be subject to screening if this is in compliance with TFEU provisions on the free movement of capital, which allow

restrictions that are put in place to address public security or policy concerns, including public health.

The guidance concludes by noting that the restrictions on the movement of capital from third countries may be subject to additional justifications.

Director-General of the World Trade Organization steps down unexpectedly

The director-general of the WTO, Roberto Azevêdo, announced on May 14, 2020, that he will be cutting his term short by one year and stepping down as of August 31. Azevêdo has served in the position since September 1, 2013, with his second term starting in 2017.

Azevêdo's tenure has seen the organization face some landmark moments, including the adoption and entry into force of the WTO's Trade Facilitation Agreement, which was the first global trade accord since the conclusion of the Uruguay Round, as well as the expansion of the Information Technology Agreement among some members.

More recently, the WTO has also encountered significant obstacles, including the highly acrimonious ministerial conferences of Nairobi and Buenos Aires in 2015 and 2017, respectively, and political challenges to the institution's relevance and functioning. Perhaps most notable among these struggles has been the refusal of the United States to approve the start of selection processes for new members of the WTO's Appellate Body or renew the terms of existing members.

The Appellate Body has thereby lacked a quorum to hear members' appeals of a WTO panel's decision, and has effectively been paralyzed, fuelling deep concerns over the health of the multilateral trading system without a fully functioning dispute settlement mechanism. Various members have since launched a "multi-party interim arrangement" that would allow for arbitration to take place among themselves in cases that



have reached the appeals stage until a solution is found for the Appellate Body crisis.

In his farewell [announcement](#), which came as a shock to trade circles, Azevêdo instead focused on the organization's future, including the importance of preparing for the organization's 12th Ministerial Conference, which he called a "stepping stone to the future of the WTO" that should lay the foundations for reform. Indeed, Azevêdo characterized his decision to step down as partly due to concerns that the politics of the replacement process not interfere with preparations for the upcoming conference, which had previously been planned for June 2020 and is now expected in 2021.

He further noted that, as the organization's activities have slowed due to the global pandemic, this is an opportune moment to initiate the process of choosing his successor.

Members must now move to nominate possible successors, which is then followed by the candidates outlining their visions to the General Council and an intense period of consultations to whittle down the list of candidates until consensus can be reached. Ordinarily, this process takes place in the nine months preceding the end of an incumbent's term, with the final decision confirmed by the WTO's General Council. Possible contenders for the position [reportedly](#) include Amina Mohamed, Kenya's former trade minister, who ran for the post against Azevêdo and seven others in 2013 and later chaired the WTO's Tenth Ministerial Conference in Nairobi, and Peter Mandelson, a UK national who was formerly the trade commissioner of the EU.

Aranca González, the Spanish Minister of Foreign Affairs, European Affairs and Cooperation is also considered a possible successor, given her previous experience as Executive Director of the International Trade Center and chief of staff to Pascal Lamy during his tenure as WTO Director General.

As of June 10, registered nominations include Abdel-Hamid Mamdouh of Egypt, Jesús Seade Kuri of México y Ngozi Okonjo-Iweala of Nigeria. More nominations are expected to be announced by July 8.

The process for choosing a successor may be complicated, however, in light of current coronavirus restrictions in Switzerland. WTO members have been meeting virtually during the pandemic, given current rules prohibit gatherings of more than five people, and

various members have said that they are uncomfortable taking binding decisions through virtual platforms. These restrictions may be relaxed in June, though whether the changes will be sufficient for the WTO to resume normal operations remains unclear.

EU Releases Proposal for ECT Modernization

The EU [released](#) a proposal for the modernization of the ECT on May 27, 2020. This latest draft of the EU's proposal includes changes to the treaty's definition of investment, an affirmation of parties' right to regulate, a narrower definition of FET, and reference to a multilateral investment court. The proposal also suggests several additional articles on sustainable development, frivolous claims, security for costs, interventions by third parties, third-party funding, and valuation of damages.

The proposal is the product of several rounds of talks with EU member states after the European Council [approved](#) negotiating directives for the EU's participation in negotiations to modernize the ECT in September 2019. The Energy Charter Conference had settled on a [list of topics](#) to be included in the modernization process in November 2018.

A copy of a [revised draft proposal](#), dated April 17, 2020, was released by Euractiv.com and included an explanatory note, outlining updates made since the circulation of an [earlier draft](#) in March. This news item makes reference to both the latest version as well as the draft's explanatory note.

Updated definitions of investment and investor

Articles 1.6 and 1.7 of the ECT provide definitions of investor and investment, respectively. To ECT's list of assets "controlled directly or indirectly" by an investor, the EU's proposal adds the following criteria: an investment must be of "a certain duration" and possess "other characteristics such as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk." The explanatory note clarifies that "a certain duration" is a mandatory characteristic, in a change from the March draft. The draft further clarifies that "a simple loan or financial contribution" does not qualify as an investment.



The term “Investment” in the proposal refers to all investments made in accordance with “the applicable law and the law of the host Contracting Party.”

Investors must be “engaged in substantive business activities in the territory of that Contracting Party.” This definition is likely aimed at addressing the use of “letterbox” companies to bring claims under the ECT, frequently the case with Dutch claimants in ECT disputes.

Proposal highlights environmental concerns

The EU proposal includes a new article explicitly affirming contracting parties’ right to regulate in order to achieve “legitimate policy objectives, such as the protection of the environment, including combatting climate change,” among others.

Other newly proposed articles explicitly mention states’ international commitments to protect the environment, such as the Rio Declaration of 1992 and the UN’s SDGs and reaffirm the right of parties “to adopt or maintain measures to further the objectives” of the environmental agreements to which they are a party.

Narrower definition of FET

Article 10.1 of the ECT – on the promotion, protection, and treatment of investments – includes a reference to FET, but no definition. The EU’s proposal provides a series of measures which would amount to a breach of FET, including:

- (a) denial of justice in [domestic judicial] proceedings; or
- (b) fundamental breach of due process . . . ; or
- (c) manifest arbitrariness; or
- (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
- e) abusive treatment such as harassment, duress, or coercion.

This section of the proposal further notes that an investor’s “legitimate expectations” may be considered by a tribunal when considered a potential breach of FET.

Proposed dispute settlement provisions include reference to a multilateral investment court and frivolous claims

Article 26 of the ECT provides for investor–state dispute settlement under ICSID, ICSID (AF), UNCITRAL, or SCC rules. While absent from the version of the

proposal circulated in March, the latest version includes as a possibility “the rules of a [multilateral investment court](#).” The new proposal also notes that nothing in the proposed revisions has any impact on the EU’s goal of establishing an Investment Court System.

The proposal also suggests a new article addressing procedures to facilitate the dismissal of frivolous claims.

Other new additions

The proposal includes references to several other topics that do not appear in the current ECT.

The draft includes an article on third parties that would allow the intervention of “any natural or legal person who can demonstrate a direct and present interest in the result of the dispute.”

Under the EU’s proposal, parties to a dispute would have to disclose [third-party funding](#) relationships.

The proposal also includes a new article allowing a tribunal to order a claimant to post security for all or part of the costs of the proceeding “if there are reasonable grounds to believe that the Investor risks not being able or willing to honour a possible decision on costs issued against it.”

The proposal additionally contains an article addressing the valuation of damages, which states that “monetary damages shall not be greater than the loss suffered by the investor” and that the tribunal “shall not award punitive damages.”

Finally, the proposal includes an Annex that places several restrictions on the submission of investment claims related to public debt restructuring. The explanatory note attached to the April draft states that this was included in light of the COVID-19 pandemic.



EU Member States Sign Agreement to Terminate Intra-EU BITs While German Investor Brings Claim Against the Netherlands Under the ECT

On May 5, 2020, 23 European Union member states* formally agreed to the termination of intra-EU BITs.

The Agreement for the termination of bilateral investment treaties between members of the European Union comes as no surprise; a decision to terminate intra-EU BITs was reached in October of 2019, following declarations in January of that year regarding the legal ramifications of the CJEU's ruling in the *Achmea v. Slovak Republic* case.

As readers will recall, the CJEU found that the TFEU precludes the ability of investors from one EU member state to initiate an international investment arbitration proceeding against a member state.

The newly signed Agreement terminates all BITs signed between the parties (listed in the Agreement's Annex), as well as the treaties' sunset clauses, which otherwise would extend treaty protection to already established investments for a specified period after a BIT's termination. The Agreement will enter into force 30 days after the Secretary-General of the Council of the EU, receives the "second instrument of ratification, approval or acceptance" from the member states (Art. 16).

While the Agreement does not affect concluded arbitration proceedings that ended with a settlement or award prior to March 6, 2018, it does have an impact on what it defines as "new" (initiated after March 6, 2018) and "pending" (initiated, but not concluded, prior to March 6, 2018) arbitration proceedings.

Regarding the former, Art. 5 of the Agreement states simply that "Arbitration Clauses shall not serve as legal basis for New Arbitration Proceedings."

Regarding the latter, Arts. 7–9 of the Agreement lay out a series of steps to be taken by the parties. First, Art. 7 requires that any arbitral tribunal hearing a "pending" case be informed of the legal ramifications of *Achmea*, while any competent member state court currently hearing proceedings related to a "pending" claim will be asked to set aside, annul, or refrain from recognizing or enforcing the relevant award.

The Agreement further outlines a path toward the settlement of these "pending" claims by means of a "structured dialogue" (Art. 9), led by an "impartial facilitator" – an expert in EU law who will be appointed

by EU authorities if the parties cannot agree on an appointment. These settlement proceedings must be initiated within six months of BIT termination, and may only be entered into if the CJEU or national court has found that the state measure contested in the original proceeding violated EU law.

Notably, the Agreement does not address the Energy Charter Treaty, of which 26 EU member states, as well as the EU itself, are signatories.¹ While separate negotiations regarding the modernization of the ECT are currently underway, new claims continue to be brought against EU member states that have signed onto the ECT. Most recently, entities owned by German energy company Uniper have notified the Netherlands of the existence of a dispute under the ECT. While public details remain sparse, this claim likely relates to the Netherlands' planned phaseout of coal-fired power plants by 2030, as specified by the EU's nationally determined contributions to the Paris Agreement.

Observers have frequently noted that ECT has the potential to stymie efforts to combat climate change.

*Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain.

¹ Italy withdrew from the ECT in 2014.



USMCA to Enter into Force on July 1 Following Canada's Rushed Ratification Earlier This Year

On April 24, 2020, USTR Robert Lighthizer announced that the USMCA would enter into force on July 1 of this year, one month later than was previously agreed upon.

The agreement, which replaces the NAFTA, was ratified by Mexico in June 2019. Following changes to the text to address concerns raised by US Democrats related to the stringency of labour and environmental provisions, the United States House of Representatives passed the agreement on December 19, 2019.

Following a delayed parliamentary vote due to the country's 2019 election, the agreement was tabled for debate in the Canadian Parliament in January 2020. While the agreement faced opposition from the Conservative party, with the support of the left-leaning NDP the ruling Liberals managed to fast-track a vote on the agreement before Parliament before was suspended on March 13, 2020, over concerns regarding the COVID-19 pandemic.

However, in light of the global pandemic, some US Senators, automakers' associations, and Mexican officials have requested a delay in implementation of the agreement until January 2021, citing time needed to update supply chains to comply with new rules of origin requirements in the new agreement. Under the agreement, 75% of auto content must be produced in North America. However, the pandemic has shuttered many auto factories across the continent, which may create difficulties for manufacturers in complying with the initial requirements of the agreement.

To date, no delay has been agreed upon.

COVID-19 Pandemic Pushes Back Start Date for AfCFTA Entry into Force

The entry into force of the African Continental Free Trade Area (AfCFTA) has been delayed due to the Covid-19 pandemic, according to the Secretary General of the AfCFTA Secretariat, Wamkele Mene. The first phase of the agreement will now take effect by January 2021 at the earliest.

Phase I of the AfCFTA, which covers trade in goods and services, was to begin on July 1, 2020, following the ratification of the agreement in June 2019. Subsequently, attention turned to negotiations for Phase II of the agreement dealing with protocols on investment, competition, and intellectual property rights. These negotiations were scheduled to be completed by January 2021 and will be followed by Phase III negotiations on e-commerce, the AU announced in February 2020.

In addition, Phase I details regarding trade in goods, services, and rules of origin were still to be ironed out at an extraordinary AU summit, which was to be held in South Africa on May 30. Among the key items pending from Phase I included the final goods and services schedules. This summit has been cancelled, and while attempts have been made to hold virtual meetings, these have reportedly been thwarted by Internet connectivity issues.

Beyond the delay in the AfCFTA's entry into force, the COVID-19 pandemic is predicted to slash the continent's predicted GDP growth as a result of falling demand for fuel, declining commodities prices, and a drop-off in tourism and remittance flows.

Nevertheless, according to Stephen Karingi, the pandemic represents an opportunity to reflect on ways that the AfCFTA can better address key issues that are bound to continue to challenge African countries over the next century, including pandemics and climate change. There have also been concerns raised over the level of capacity needed to implement Phase I effectively, though whether the delay will help provide sufficient time to address those questions remains to be seen.



Investment Facilitation Talks: WTO member group considers new consolidated text

The 101 WTO members discussing a proposed multilateral framework on investment facilitation are now considering a new “consolidated text,” which is meant to be a stepping stone for formal negotiations once these begin.

The informal consolidated text, prepared by the group’s coordinator under his own responsibility, was circulated in April 2020 this year. Building on the streamlined text circulated this past January, the updated text brings in textual proposals and suggestions from some WTO members, including multiple language alternatives for various provisions. Among the many areas for further discussion include how to address proposals on temporary entry of investment persons, or varying definitions of investment being considered and what they mean for the framework’s scope. Also unclear are institutional questions, such as how this might eventually fit into the WTO framework.

While the consolidated text reflects another milestone in the investment facilitation “structured discussions” launched in December 2017, the talks themselves have slowed as a result of the COVID-19 pandemic. The WTO Members involved in this initiative had previously aimed to launch negotiations in March and announce a “concrete outcome” at the Twelfth Ministerial Conference, which until recently had been planned for June 2020 in Kazakhstan.

The June event has since been postponed until at least mid-2021. Meanwhile, WTO Members in both the multilateral negotiating tracks and the “joint initiatives” on investment facilitation, electronic commerce, and micro, small, and medium-sized enterprises (MSMEs) have, to varying degrees, continued meeting virtually. However, some WTO Members have been reluctant to agree to any binding decisions or negotiating advances by virtual means.



AWARDS AND DECISIONS

ICSID tribunal declines jurisdiction *ratione voluntatis* over claims brought against Iraq under the OIC Investment Agreement

Itisaluna Iraq LLC and others v. Republic of Iraq, ICSID Case No. ARB/17/10

Maria Bisila Torao

On April 3, 2020, an ICSID tribunal declined jurisdiction over a claim brought under the Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of Islamic Cooperation (OIC). The majority of the tribunal found that the investors had failed to comply with a pre-claim conciliation requirement, and that Iraq's consent to ICSID arbitration under the OIC Agreement MFN clause could not be established.

Background and claims

Munir Sukhtian Investment LLC (MSI), a company incorporated in Jordan, entered into a national licence agreement with the Iraq National Communications & Media Commission in June 2016. MSI paid USD 20 million to acquire the licence and invested hundreds of millions in implementing the terms of the licence agreement.

MSI was granted rights under the licence agreement to install, construct, operate, manage, and provide a public telecommunications network in the country. MSI was also entitled to establish and operate international gateway services necessary to transmit telecommunications traffic. According to MSI, the General Secretariat of the Council of Ministers never allowed MSI to run its own international gateway as provided under the licence agreement, despite repeated pleas to various organs of the Iraqi state.

In March 2017, MSI, Itisaluna Iraq LLC (incorporated in Jordan), and VTEL Holdings Ltd. and VTEL Middle East and Africa Limited (both incorporated under the laws of Dubai), (collectively, "the investors"), filed for arbitration before ICSID. The investors claimed breaches of the OIC Investment Agreement and the Iraq–Japan BIT. Specifically, the investors alleged breaches of Article 3 of the Iraq–Japan BIT (national treatment obligations), and Articles 2, 4, 10, and 14 of the OIC Investment

Agreement (security and promotion of investment, expropriation, and FET).

In April 2017, the case was registered before ICSID. The following October, Iraq sought to raise an objection *ratione voluntatis and ratione temporis* to the tribunal's jurisdiction, arguing that there was no basis for concluding that Iraq did, in fact, consent to ICSID arbitration.

On October 27, 2017, the parties agreed that Iraq's objections to jurisdiction *ratione voluntatis* and any other preliminary objections should be addressed in a separate preliminary phase. On June 29, 2018, the tribunal announced that the proceedings would be bifurcated.

Interpretation and application of the OIC Agreement

One of the first matters addressed by the tribunal was the lack of precedent provided by the parties that would contain any guidance with respect to interpretation and application of the OIC Agreement or its interaction with bilateral investment treaties through the invocation of its MFN clause; in the words of the tribunal, "the case [did] not fit into the mould of wider investment treaty jurisprudence" (para. 65).

Multilateral nature and character of the OIC Agreement must be respected

The tribunal noted that contrary to what the investors argued, the terms of the OIC Agreement could not be read in a manner that would "enlarge jurisdiction" under its dispute settlement provision by referencing a BIT between a contracting party (Iraq) and a non-contracting party (Japan). It further explained that when interpreting the application of the OIC Agreement, which is a multilateral treaty, caution should be exercised to respect the plain and ordinary meaning of the treaty in light of the practice of all its contracting parties and not only the bilateral treaty practice of one party to the agreement.

Thus, the tribunal concluded that in the present case, the interpretation of the OIC Agreement had to carry the same meaning for all its contracting parties. Consequently, "its meaning could not be shaped by the unrelated treaty practice of one Contracting Party only [i.e., Iraq]" (para. 153).



The tribunal held that for the purpose of interpreting the application of a multilateral agreement, the bilateral treaty practice of one party, i.e., Iraq, cannot be relied upon. The tribunal explained that “The OIC Agreement, interpreted in the present case, must carry the same meaning for all its Contracting Parties and therefore its meaning cannot be shaped by the unrelated treaty practice of one Contracting Party only” (para. 153).

The relationship between Article 16 and Article 17 of the OIC Agreement: OIC contemplates internationalized investor–state arbitration

The parties’ positions on whether Iraq had consented to international investment arbitration depended on interpretations of Articles 16 and 17 of the OIC, which refer to domestic arbitration and diplomatic dispute settlement, respectively. The claimants argued that Articles 16 and 17 of the OIC Agreement should be read together because, when read as such, Article 16 confirms that the OIC Agreement contemplates ISDS, which covers international arbitration. Iraq, in contrast, argued that Articles 16 and 17 address two distinct issues. However, the tribunal concluded that for application purposes and considering general rules of treaty interpretation, Article 16 could not be disconnected from Article 17 and “read in isolation” (para. 160). The tribunal added, “Article 16 has [ISDS] in contemplation” as a reference to the object and purpose of the treaty and the intent of the parties “to provide and develop a favourable climate for investments.” It further explained that the language used in Article 16 of the OIC Agreement supports the argument that “the OIC Agreement contemplated the possibility of internationalised investor–State arbitration.”

The interpretation of Article 17 of the OIC Agreement: A bespoke dispute settlement mechanism was envisaged by the contracting parties to the OIC Agreement but not established

The tribunal observed that Article 17 clearly intended a bespoke mechanism for the settlement of disputes arising under the agreement but concluded in line with *Al-Warraq* tribunal that there is no basis to resolve that the International Islamic Court of Justice, established by the Charter of the OIC, is the suitable organ pursuant to Article 17. It added that “no OIC Agreement dispute settlement organ is presently operational and available to address investor–State claims” (para. 171). From this conclusion, the tribunal turned to the issue of whether attempted conciliation was a precondition to access to arbitration and if the investors had, in fact, fulfilled this requirement.

OIC Agreement contains consent to investor ISDS but subject to pre-claim conciliation

The investors argued that conciliation was optional and not mandatory. Conversely, Iraq argued that pursuant to Article 17(2) pre-claim conciliation was a binding precondition. After reviewing both parties’ certified translations of Article 17(2), the majority of the tribunal found that in both readings “the conditional “if ... then” language seemed to support a conclusion that resort to conciliation is a condition precedent to arbitration” and not a choice (para. 177).

The tribunal then went on to determine whether Article 17 of the OIC Agreement constituted consent to arbitration in general terms. In this regard, it found that the fact that Article 17 establishes consent to arbitration in general terms is precisely why this general consent to arbitration does not contain consent to ICSID arbitration.

The interpretation and application of Article 8 of the OIC Agreement: MFN clause can operate but not in this particular case due to public policy

The investors argued that Iraq’s consent to ICSID arbitration contained in Article 17(4)(a) of the Iraq–Japan BIT could be imported by operation of Article 8 of the OIC Agreement. The majority of the tribunal rejected this argument, noting that Article 8(2) of the OIC Agreement sets out express limitations on the application of the MFN clause. For instance, the MFN clause does not apply to the differential treatment given to investors of one contracting party to the OIC Agreement by another contracting party. The tribunal further clarified that some of the investors were able to invoke the Iraq–Jordan BIT. Still, the investors collectively chose to rely on the Iraq–Japan BIT instead, putting themselves outside of the framework of Article 8 and the exception contemplated by Article 18 of the OIC Agreement. The tribunal, therefore, averred that the investors “were cherry picking from the Iraq–Japan BIT” as they sought to rely on its ICSID consent to arbitration provision but wanting to circumvent the time-based limitation in Article 17(6) of the BIT (para. 193).

The tribunal clarified that these arguments, although not put forward by the parties, were relevant as they “shed light on the intent, effect and limitations of the MFN clause, and its public policy framework, on which the investors were seeking to rely” (para. 207). It further added that accepting the investors’ invocation of the Iraq–Japan BIT would put the claimants in a better position than Japanese investors investing in Iraq under the Iraq–Japan BIT.



Consequently, the tribunal considered that in such a case, a balance must be struck between preserving principles of investment treaty law and hindering overreaching and treaty shopping. The tribunal, referencing *Maffezini v. Spain*, noted that the application of MFN clauses should not override public policy considerations, as contracting parties might have envisioned specific requirements as essential conditions for their acceptance of an agreement. Examples of particular considerations are the exhaustion of local remedies, fork in the road, a particular arbitration forum, or a highly institutionalized system. These types of specific conditions seem to reflect the will of the sovereign parties and are, therefore, to be respected. As such, the tribunal further added that the OIC Agreement thus establishes a clearly defined framework, including an arbitration forum with bespoke characteristics that intentionally omits ICSID arbitration. Echoing reasoning in *Maffezini*, the tribunal, concluded that this choice was made “based on public policy considerations” (para. 218).

Costs

The tribunal ordered the investors to reimburse Iraq for legal fees and expenses incurred in the amount of USD 724,662,94 and the legal costs of the arbitration in the amount of USD 172,720.47.

The tribunal further decided that no interest shall be levied on the payment of the total amount of USD 897,383.41. This would apply within a period of three months from the date of the award. However, the tribunal imposed a pro-rata interest rate of 1.00% per year to be levied on any amount unpaid after three months from the date of the award until the date of payment.

Wolfgang Peter’s dissenting opinion

In a partial dissent, included as a section of the final award, Peter reasoned that the tribunal had jurisdiction in the case because Article 17 provides for conciliation and arbitration as separate forms of dispute resolution which may be used either sequentially or alternatively and therefore lack of pre-claim conciliation does not hinder access to arbitration. He added by quoting the Al-Warraaq tribunal that “no prior conciliation agreement is not an obstacle to an investor–state arbitration” (para. 234).

He also noted that the limitation on Article 8 of the OIC Agreement did not apply to the investors because they relied on the Iraq–Japan BIT, and Japan is not a contracting party of the OIC Agreement. He further observed that giving effect to the MFN clause included

in Article 8 of the OIC Agreement is consistent with an active and direct interpretation and application of this clause. Peter concluded that the investors’ argument that Iraq’s consent to ICSID is contained in Article 17(4) of the BIT and imported into the OIC Agreement by virtue of the MFN clause should be held because, ultimately, “the MFN clause is invoked to substitute an efficient procedure for a defective one and an effective appointing authority for a dysfunctional one” (para. 242).

Notes: The tribunal was composed of Daniel Bethlehem (president appointed by agreement of the parties, British national), Wolfgang Peter (claimants’ appointee, Swiss national), Brigitte Stern (respondent’s appointee, French national). The award of April 3, 2020, is available at <https://www.italaw.com/sites/default/files/case-documents/italaw11410.pdf>

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ICSID tribunal rejects intra-EU jurisdictional objection and upholds jurisdiction over mass claim

Theodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No. ARB/15/49

Marios Tokas

On February 7, 2020, the majority of an ICSID tribunal upheld its jurisdiction over mass claims brought against Cyprus by 951 natural persons and seven companies (the claimants) under the Cyprus-Greece BIT (1992) and the Cyprus-Belgium-Luxembourg Economic Union (BLEU) BIT (1991). Cyprus's nominee to the tribunal dissented, upholding a jurisdictional objection related to the intra-EU character of the case.

Background and claims

The claimants, Greek nationals and one Luxembourg company, held bonds and deposits in the Bank of Cyprus and Laiki Bank. In the wake of the 2012–2013 Cypriot financial crisis, both banks were “bailed in” after Cyprus came to an agreement with the European Commission, the European Central Bank and International Monetary fund (“TROIKA”) on a memorandum of understanding (MoU) on the adoption of an adjustment plan. The MoU led to the merger of Laiki Bank and Bank of Cyprus and the conversion of Bank of Cyprus bonds into bank equity and a haircut of deposits over USD 100,000 in both banks.

The claimants initiated arbitration under the aforementioned BITs in 2015, arguing that the conversion of bonds into bank equity rendered their investment worthless and reduced the value of their deposits, resulting in USD 300 million in losses. Cyprus challenged the jurisdiction of the tribunal to examine the claims mainly due to their intra-EU character and their submission as mass claims.

Tribunal rejects the intra-EU objection brought by respondent

Cyprus argued that in light of the *Achmea* judgment of the CJEU, the tribunal did not have jurisdiction over the claim, as intra-EU BITs have been superseded by the EU treaties in accordance with Article 30 and 59 of the VCLT.

The tribunal rejected those allegations by clarifying that the basis of jurisdiction of the tribunal was the relevant BIT and Article 25 of the ICSID Convention. In contrast, EU law would only be relevant when dealing with issues that required an examination of

either the respondent's domestic law or of other rules of international law (paras. 157–161). Regarding the latter, the tribunal did not consider the *Achmea* decision as binding as it dealt with the issue of intra-EU BIT compatibility only on the basis of EU law, while the tribunal's scope is different.

As such, the tribunal rejected the claim that EU law and BITs deal with the same subject matter, as EU law does not provide for an alternative dispute resolution to domestic courts while BITs do. Additionally, the operation of EU treaties is not prevented by the operation of the BITs. Rather they “can both operate side by side” since neither the operation of ISDS outside of the internal EU judicial system nor the possible minor inconsistencies in the examination of EU bail-in measures between the CJEU and an arbitral tribunal, could be considered an incompatibility under Articles 30 and 59 of the VCLT. The practice of EU Member States during the entry into force of the TFEU and after the *Achmea* judgment further underscores that the requirements of Article 59 of the VCLT have not been met (paras. 163–180).

Lastly, the tribunal clarified that it shall not decide on issues of rights and obligations under EU law since it will consider the EU-related measures as a matter of fact, while it did not consider crucial the fact that the intra-EU awards would not be easily enforceable within the EU (paras. 181–186).

The tribunal upheld jurisdiction over mass claims

The tribunal considered that the usage of singular terms in the relevant BITs and the ICSID Convention such as “dispute” and “investor” did not conclusively support the jurisdictional challenge of the respondent. In addition, the tribunal rejected Cyprus's argument that mass claims require special consent in addition to consent provided in BITs. Rather, the tribunal decided that the crucial question to be answered was whether the claims at hand were homogenous enough to constitute one single dispute (paras. 197–201, 205, 209). In this regard, the tribunal considered that the claims allege the same treaty breach, even if under two separate BITs, complain about the same illegality, and relate to the same measures involving the same two banks, in the same context. As such, they should be considered as being part of a single dispute.

Respondent's admissibility allegations were rejected

The tribunal focused on responding to the respondent's allegation that the admission of such mass claims would render the process unmanageable.



At the outset, the tribunal disagreed with the tribunal in *Abaclat*, which decided that a tribunal has the power to adapt the arbitral processes and adopt new special procedures in order to avoid a denial of justice to claimants since the BIT at hand did not provide for a specific right to bring a mass claim. Therefore, the tribunal had to examine whether the current rules and procedures under the ICSID Convention could process the mass claims. (paras. 242–246).

After examining a series of procedural issues such as document discovery, length of proceedings and verification of claims, the tribunal decided that the mass claim was manageable under the current framework without putting into jeopardy the procedural rights of the parties. (paras. 247–259). Finally, the tribunal considered it necessary to fix the pool of claimants at 956, meaning that none could withdraw without the respondent’s consent, and to propose a further bifurcation of the proceedings (liability and damages) as well as an application for security for costs on behalf of the respondent.

Further jurisdictional objections were rejected

The tribunal considered and rejected additional challenges to its jurisdiction over some of the claimants for allegations that the instruments (life insurance contracts, bonds) at hand did not constitute a qualified investment or that the Greece–Cyprus BIT does not cover beneficial ownership of investments.

Lastly, the tribunal rejected Cyprus’s allegations that some of the claimants failed to meet the pre-arbitral requirements, i.e., the mandatory notice and cooling-off period provided by the relevant BITs. The tribunal considered that the requirement of prior notice and the six-month waiting period began and was satisfied from the moment an initial group of 21 claimants sought the settlement of the dispute with the respondent. Cyprus failed to seek an amicable settlement within this six-month notice, and thus any additional investor “involved” can be considered to have satisfied said requirement (paras. 305–319).

Conclusion

The tribunal upheld its jurisdiction over the mass claims and considered them admissible. It invited the parties to submit their view on the further bifurcation of the dispute and reserved its decision on costs for a later stage.

Marcelo Kohen’s dissenting opinion

In his dissenting opinion, Marcelo Kohen, appointed by Cyprus, disagreed with the majority’s conclusions.

His dissenting opinion was primarily focused on the application of Article 30 of the VCLT in the present case. Kohen considered that the EU treaties and the intra-EU BITs cover the same subject matter as both regulate the substantial protection and treatment to be granted to investors and investments, and the enhancement of cooperation among contracting parties. As such, the accession of Cyprus to EU treaties renders Cyprus’s intra-EU-BITs obsolete, as these are incompatible with the common market and the related rules. As such, the arbitrator considered that the tribunal should have followed the authentic interpretation of the parties and give precedence to EU treaties over the intra-EU BITs.

Notes: The tribunal was composed of Donald M. McRae (president appointed by the ICSID Secretary General, Canada/New Zealand national), Alejandro Escobar (claimants’ appointee, Chile national) and Marcelo G. Kohen (respondent’s appointee, Argentina national). The decision of February 7, 2020, including the dissent, is available at <https://www.italaw.com/cases/7939>

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An HKIAC Tribunal Dismissed the Claims by U.S. Citizen Jin Hae Seo Against South Korea for Lack of Jurisdiction

Jin Hae Seo v. Republic of Korea, HKIAC Case No. HKIAC /18117

Yashasvi Tripathi

On September 27, 2019, a Hong Kong International Arbitration Centre (HKIAC) tribunal dismissed, on jurisdictional grounds, the expropriation claims brought by Jin Hae Seo, a U.S. citizen, against the Republic of Korea (Korea) under the United States–Korea FTA (KORUS FTA) and UNCITRAL rules.

Background and claims

The claimant had owned a two-story house in Seoul since 2001. In 2007, the Korean government designated the area where the house was located as a redevelopment area in order to improve living conditions. Owners of property in the area were given the choice to either buy their redeveloped property or opt for a cash settlement.

The claimant initially applied to buy the property but later withdrew her application. Korean authorities enforced an eviction order against her in 2016, and she later rejected the compensation offered by the local authority.

In 2016, the claimant had the land registry amended to reflect her U.S. nationality. After vacating the property, she brought expropriation claims against Korea under the KORUS FTA.

Korea's jurisdictional objection

Korea argued that the claimant did not make an investment under the KORUS FTA because none of the three characteristics of an investment under KORUS FTA was fulfilled and because the *Salini* criteria were not present. In turn, the claimant maintained that her property qualified as an investment, because it met the three characteristics in the exhaustive list contained in the KORUS FTA and because the *Salini* criteria would be inapplicable. The disputing parties further disagreed whether the property qualified as a “covered investment” under the FTA.

According to the tribunal, an asset qualifies as an investment under KORUS FTA only when it has the “characteristics of an investment.” The tribunal looked at the three characteristics expressly mentioned in Art. 11.28 of KORUS FTA: “the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” It noted that the phrase “including such characteristics as” before them denotes that the list is

non-exhaustive, and that “or” between them denotes that not all three must necessarily be present cumulatively and that none is indispensable (paras. 93–94). Further, the tribunal held that “or” also negated Korea’s assertion that all four *Salini* criteria should be present.

The tribunal rejected Korea’s argument that the plural of “characteristics” meant that at least two of them must be present, reasoning that the drafters did not include this requirement in the FTA (para. 95). Thus, the tribunal held that there should be a global assessment of characteristics, with the ones mentioned as the starting point, given that the drafters deemed them particularly important.

Further, it did not apply the *Salini* test, noting that it was developed in the context of the ICSID Convention, which does not define investment, while the KORUS FTA expressly defines it (para. 98). However, it noted that the non-exclusive definition in the FTA permits consideration of the *Salini* criteria.

“Commitment of capital” need not necessarily be foreign but should be significant

Rejecting Korea’s assertion, the tribunal held that Art. 11.28 does not necessarily require commitment of foreign resources as the definition. It also held that the requirement of a foreign element, which is implied by KORUS FTA’s preamble, is satisfied by other substantive requirements: “investor of the Other Party” or “an investor of a non-party” (para. 103).

Agreeing with Korea, the tribunal held that the commitment of capital is relevant, as the preamble mentions, “to raise living standards, promote economic growth and stability, create new employment opportunities, and improve the general welfare in their territories by liberalizing and expanding trade” (para. 104). However, while it held that individual investments cannot be expected to single-handedly achieve the treaty’s objectives, an investment that is so small as to be unable to make a meaningful contribution to the host state’s economy would not enjoy protection under the treaty. In this case, the tribunal held the claimant’s commitment of USD 300,000 was not “insignificant,” and would have unequivocally passed the “significant” threshold if the purpose of the investment was “clearly commercial in nature,” such as the purchase of an office or a factory (para. 106).

The predominant purpose at the time of the property’s acquisition—and not the purpose for which the profit is used—determines whether an “expectation of gain or profit” exists.

The tribunal held that the presence of an expectation of gain or profit depends on the predominant purpose of



the investment at the time of the acquisition of property (para. 125), which should be profit-making rather than, in this case, a private dwelling, and should not be for a different purpose that is subsequently changed to profit-making (para. 127).

The tribunal agreed with the claimant that the purpose for which the profit is used is irrelevant to determine if the characteristic exists (para. 109); therefore, the fact that the claimant's transferred the money made from renting the property to her parents was irrelevant. It held there is no requirement for engaging in commercial activity for the "expectation of gain or profit" to exist, as that requirement is inherent in "assumption of risk" (para. 110).

The tribunal noted that, as argued by Korea, the claimant purchased the property as a private dwelling and did not rent it for the first two years; only one unit unoccupied by her parents was rented out. It also noted that the claimant did not allege that she tried to find tenants and that she began renting the property shortly before moving to the United States. Accordingly, the tribunal concluded that as the predominant purpose of the property at the time of the acquisition was as a private dwelling and not as an income-generating investment (para. 126), it was reluctant to accept the presence of this characteristic.

The characteristics of an investment, including an "assumption of risk," must go beyond inherent aspects of an asset to qualify as an investment under KORUS FTA Art. 11.28.

The claimant argued that she undertook four risks: (1) the decline of property value after purchase, (2) the risk of the property's expropriation, (3) the fact that the property is subjected to the host state's laws, and (4) the non-materialization of predicted rental income.

Agreeing with Korea, the tribunal held that risks (1), (2) and (3) alone were not sufficient to constitute an "assumption of risk," noting that such risks exist for any property owner. For the tribunal, the required characteristics of an investment, including an assumption of risk, must go beyond the features that any asset automatically has; otherwise, the requirement of "characteristics of an investment" would be meaningless (para. 130). Further, the tribunal noted that if one acquires an asset in another state, then risks (2) and (3) are inevitable (para. 132).

The tribunal was ready to accept risk (4) as a criterion of an assumption of risk, as whenever there is an expectation of profit, there is a risk of it being frustrated. However, it noted that, since the expectation of gain or

profit was doubtful, the risk that it would not materialize was equally weak.

"Covered investment" under the KORUS FTA

Though concluding that the claimant's property did not qualify as an "investment," the tribunal nevertheless analyzed whether it could qualify as a "covered investment," by its "establishment" or "expansion" after KORUS was entered into force.

In the context of this analysis, the tribunal rejected the claimant's assertion that she established her purported investment when her U.S. nationality was registered in the land registry, for three reasons. First, she had her citizenship reflected in the land registry only after the alleged expropriation (para. 148). Second, her nationality is relevant to her personal status only as an "investor of the other party" and is irrelevant to the investment (para. 149). Third, only acts bringing an asset into existence would have "established" an investment, for example, building a factory or registering an IPR. Considering she only made small additional commitments and insignificant changes to the property—including fencing it, paving the car park, and changing the wallpaper—the tribunal held that the claimant did not "expand" the investment.

Moreover, the tribunal held that "covered investment" under the KORUS FTA seeks to exclude cases in which the investor did not have an involvement equivalent to holding, acquiring, or establishing the investment (para. 163). According to the tribunal, the claimant's change in nationality or the small changes to her property was not the required level of involvement.

Decision and costs

Dismissing all claims against Korea for lack of jurisdiction, the tribunal ordered each party to bear its own legal fees and expenses, and half of the fees and expenses of the tribunal and of HKIAC.

Notes: The tribunal was composed of Bruno Simma (presiding arbitrator, appointed by the co-arbitrators as per HKIAC rules), Benny Lo (claimant's appointee) and Donald McRae (respondent's appointee). The award of September 27, 2019, is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10880.pdf>

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All claims rejected on merits in Lidercón's case against Peru: Changing regulatory framework and judicial decisions did not breach the FET standard

Lidercón, S. L. v. Republic of Peru, ICSID Case No. ARB/17/9

Anna Sands

Lidercón, a Spanish company operating vehicle inspection centres in the Metropolitan Municipality of Lima, lost its claim against Peru on all counts in an ICSID arbitration. While foreign investors frequently complain of suffering from discrimination, this is an unusual case of a company claiming that it was entitled to the exclusion of competitors, both foreign and national, based on a clause in its concession contract. The company claimed that the changing regulatory framework, decisions of state authorities and courts regarding the exclusivity clause, and the competencies of the authorities to supervise Lidercón, resulted in a breach of the fair and equitable treatment standard.

Lidercón was ordered to reimburse Peru for 60% of the latter's contribution to the costs of the arbitration, as well as 60% of its legal fees, amounting to a total of over USD 4 million.

Background and claims

Lidercón entered into a concession contract with the Metropolitan Municipality of Lima (MML) in 2004 to build and operate vehicle inspection centres within the MML's territory. The supervision of the area by the local authority was an anomaly, as in the rest of the country the inspection was under the control of the Ministry of Transportation and Communications ("the Ministry"). However, the legislative framework underwent changes following Fujimori's rule, which was when Lidercón and MML signed the concession contract. The evolving regulations culminated in the 2008 National Vehicle Inspection Law ("Ley ITV"), which gave the Ministry exclusive competence for approval and oversight of vehicle inspections, superseding all contrary regulations.

The concession contract contained a clause that granted Lidercón exclusivity in the provision of inspection services. While initial reports of the Ministry and INDECOPI, the Peruvian competition authority, stated that exclusivity would be maintained, it was later found by INDECOPI to be an illegal bureaucratic barrier. In 2017 Lidercón challenged this decision in the

Corte Superior de Justicia de Lima, but INDECOPI's resolution was upheld.

Lidercón and MML had been involved in several domestic arbitration proceedings prior to the 2017 case. These ended with the 2011 award upholding the parties' concession contract. The Corte Superior declared the 2011 Award to be unenforceable to the extent that it called upon the MML to act beyond its competence in supervising Lidercón's work.

Lidercón contended that Peru breached the Spain–Peru BIT (the "Treaty") by failing to accord FET in the form of denial of justice and by non-transparent acts in bad faith that denied legitimate expectations. It also claimed that Peru imposed unjustified and discriminatory measures and breached the concession contract. The contractual breach was rejected by the tribunal based on the lack of an umbrella clause in the Treaty. The reasoning regarding the other claims is discussed below.

Provision of remedies for regulatory change in the contract relevant to legitimate expectations and discriminatory treatment

The tribunal rejected the claim that Peru breached the FET standard by denying Lidercón the right to exclusivity in the provision of services, in defiance of its legitimate expectations. It defined a legitimate expectation as one that is of a nature to induce reasonable reliance, and it found that Lidercón could not have had an expectation that the concession contract would be insulated from regulatory change. The principal reason was that the concession contract contained clauses that referred to the possibility of regulatory change altering the conditions of the concession and provided for remedies (paras. 197–206). The inclusion of these clauses in the concession meant that the parties had explicitly contemplated the possibility of regulatory change and agreed to the remedies. Similarly, the inclusion of these clauses also answered Lidercón's claim that it had been treated in a discriminatory manner.

"Familiar functioning" of a decision-making system does not breach the FET standard

The claimant alleged that the seemingly contradictory positions taken by INDECOPI, which initially accepted the exclusivity clause but later rejected it, breached the FET standard. The tribunal disagreed, finding that the changes were not proof of inconsistency, but constituted "familiar functioning of decision-



making concerning different circumstances at different moments in time” (para. 248). INDECOPI was making decisions in the context of a changing regulatory framework, and its resolutions after the Ley ITV (granting the Ministry exclusive competence over vehicle inspection), were necessarily going to be different than what it had found beforehand.

Treaty breach by judicial conduct: Tribunal rejects the claimant’s expansive interpretation and reaffirms narrower view based on *Alghanim v. Jordan*

The claimant alleged that the judicial decision that confirmed INDECOPI’s finding and rejected the exclusivity provision was a breach of the BIT. It argued that “if the original measure came so close to being a treaty breach that only the availability of local remedies prevented it from qualifying as such, *the host State may effectively have an obligation to provide redress through its domestic courts to avoid that consequence*. The failure to do so may well have the consequence that the original measure finally crystallizes into a breach, even in circumstances where the court proceedings do not give rise to a denial of justice” (para. 271, citing article by Hanno Wehland).

The tribunal found that this approach was not endorsed in previous decisions and agreed with Peru’s argument that *Alghanim v. Jordan* explicitly rejects it. As stated in that case, the tribunal’s role is not to determine the correctness of domestic courts, but only to consider whether their judgement was inexcusable (i.e., one that no reasonably competent court could arrive at), and thus constitutes a denial of justice. In that way, the tribunal in *Lidercón v. Perú* maintained a narrow view of when judicial conduct constitutes a treaty breach. It reaffirmed that denial of justice may take the form of (a) the failure of due process (which was not argued in the case) and (b) decisions so lacking in seriousness as to indicate bias (which the facts did not show) (para. 270). Further, the tribunal held that there was no autonomous standard in international law, above and beyond domestic law, which the Peruvian courts could have breached, and thus no way in which the tribunal’s assessment could trump Peruvian law (para. 273).

Absence of discrimination does not entail that governments are obliged to protect foreign investors from opposition by business competitors or legislators

Finally, in response to *Lidercón*’s argument that there

was hostility toward it from legislators, and that the INDECOPI’s resolutions had been fomented by its competitors, the tribunal found that mere opposition by business competitors or legislators not in favour of the company cannot of itself amount to discrimination under the Treaty (para. 244).

Notes: The tribunal was composed of Professor Jan Paulsson (president appointed by both parties, French and Swedish national), Dr. Francisco González de Cossío (claimant’s appointee, Mexican national) and Professor Hugo Perezcano (respondent’s appointee, Mexican national). The award of March 6, 2020, is available at <https://www.italaw.com/sites/default/files/case-documents/italaw11419.pdf>.

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ICSID tribunal decides Ukraine did not violate due process in reclaiming three land plots from British investors

Krederi Ltd. v. Ukraine ICSID Case No. ARB/14/17

Marios Tokas

On July 2, 2018, an ICSID tribunal denied that Ukraine violated its obligations under the 1993 Ukraine–United Kingdom BIT and rejected the due-process claims raised by the claimant, British investor Krederi Ltd. (Krederi). The tribunal ordered each party to bear its own legal fees and half of arbitration costs, while ordering Ukraine to reimburse Krederi the amount of USD 313,711.67, corresponding to half the costs of the proceedings that the investor had advanced.

Background and claims

Krederi’s subsidiaries acquired two Ukrainian companies that had recently purchased three land plots (Plots 1, 2, and 3) previously owned by the City of Kiev. The Kiev City Council (KCC) approved the land acquisitions, but in the years leading to the dispute they were invalidated through a series of judicial acts.

First, the Kiev City District Administrative Court, following a claim filed by the Deputy Prosecutor of Kiev (DPK), declared KCC’s approval of the acquisitions invalid for reasons of procedural irregularities in the decision making of KCC (Case 1). Second, the Economic Court of Kiev, in proceedings also initiated by DPK, declared the contracts between KCC and Krederi’s subsidiary for the acquisition of the Plot 1 invalid (Case 2). Third, the decision of the Kiev Economic Court ordered the restitution of Plot 1 to the City of Kiev, on DPK’s request (Case 3). Last, the DPK initiated a case to invalidate the KCC’s approval of the acquisition of Plots 2 and 3 by Krederi’s subsidiaries (Case 4).

Krederi launched ICSID arbitration against Ukraine in 2014. It argued that the four cases initiated by DPK were conducted in an irregular fashion and thus fell short of due process, constituting a denial of justice in violation of Article 2 of the BIT.

Ukraine’s jurisdictional objections rejected

In starting its analysis of Ukraine’s jurisdictional objections, the tribunal held that Krederi’s indirect full ownership of the Ukrainian subsidiaries constitutes a covered investment under the BIT. In this regard, the tribunal clarified that specific knowledge of the host state that the investor and its investment are covered by the BIT is not required.

Ukraine’s first jurisdictional challenge relates to its consent to ICSID arbitration. Article 8.2 of the BIT provides for three options for ISDS to which the disputing parties may agree to refer the dispute—among which ICSID—while stipulating UNCITRAL Arbitration as a fall-back “forum” in case of disagreement. Based on its reading of the Ukrainian version of the BIT, Krederi proposed that only the investor could choose a “forum.”

The tribunal attempted to reconcile the alleged difference in meaning by resorting to VCLT Article 33.4 (para. 271). By examining the two versions in light of the interpretative principle of *effet utile*, it decided to follow the English version and concluded that Ukraine did not consent to ICSID arbitration under the dispute settlement provision (Article 8.2) of the BIT (para. 280–281).

However, accepting Krederi’s alternative argument, the tribunal upheld its jurisdiction by virtue of the operation of the MFN clause contained in Article 3 of the BIT. According to the tribunal, the precise wording of the MFN clause clearly covers the ISDS clause (Article 8). The tribunal held that state parties to a BIT can agree to extend the reach of an MFN clause to importing a host state’s consent to jurisdiction from a more favourable third-party BIT (para. 283–325).

In the present case, the tribunal concluded that Ukraine effectively consented to ICSID arbitration under Article 8.1 and that the operation of the MFN merely extends the availability of ICSID to the investor (para. 327–340). In the tribunal’s view, access to ICSID is a more favourable treatment of investors provided for in other Ukrainian BITs, such as the 1994 Canada–Ukraine BIT (para. 341).

Also as a jurisdictional objection, Ukraine argued that the investment did not comply with the legality requirement under the BIT. The tribunal clarified that only sufficiently serious violations of domestic law would deprive an investor of its BIT rights (para. 348) and concluded that the possible violation of a registration requirement did not meet that threshold. Similarly, it concluded that the lack of clarity of the domestic law on the prohibition of financing the establishment of a company via intra-company loans could not deprive Krederi of its BIT rights (para. 370).

Lastly, the tribunal rejected Ukraine’s admissibility objection over bad faith, corruption, and “unclean hands,” finding no adequate or sufficient factual evidence to support the allegations (paras. 385–394).



Ukraine's probable judicial and administrative deficiencies did not amount to a denial of justice

The tribunal considered that due process and the prohibition of the denial of justice are core obligations of FET and are violated when serious deficiencies and failure to accord due process are identified (paras. 436–437). Elements to be considered are undue delay, exhaustion of local remedies, serious defects in the adjudicative process, denial of access to courts and egregiously wrong application of law (para. 449).

Here, the tribunal dismissed the denial of justice claim since the procedural irregularities that may characterize the four cases could not be equated to an “outrageous failure of the judicial system” (paras. 447, 469, and 631).

In Case 1, the tribunal recognized some merit in allegations that the case was wrongly litigated before administrative courts and that the statute of limitations had expired. However, it did not consider these irregularities sufficiently grave to satisfy a denial of justice allegation (para. 528).

In Case 2, Krederi reintroduced its argumentation on the violation of the statute of limitations and additionally alleged that the domestic court did not provide equal rights to one of Krederi's subsidiaries since the court failed to properly notify the subsidiary. However, the tribunal reiterated its analysis on the statute of limitations and further rejected the second argument as Krederi's subsidiary did not seek to become a party to the dispute in the first place (paras. 566–568).

In Case 3, the tribunal considered that the possible irregularities could not amount to gross violations of due process, finding no indication that the outcome was reached without any fundamental valid reason and noting that Krederi did not raise the due-process allegation during the domestic procedures (paras. 591–600).

Lastly, in Case 4, Krederi's arguments included a fundamentally wrong outcome and a wrongful application of domestic law. The tribunal reiterated that any possible misapplication of domestic law could not be considered an egregious breach of due process so as to amount to a denial of justice (paras. 622–624).

Tribunal dismisses all other FET, full protection and security (FPS), impairment and expropriation claims

Krederi raised various additional FET violations, such as failure to maintain a stable legal environment and lack of transparency, without substantial analysis, which the tribunal dismissed (para. 634–635).

The tribunal rejected as unfounded Krederi's allegation that Ukraine abusively harassed its subsidiaries via criminal investigations, as Krederi did not indicate in what regard Ukrainian authorities carried out those investigations (para. 639–640). Similarly, the tribunal considered Krederi's FPS claim meritless since Krederi had not substantiated how Ukraine failed in its due diligence obligation to prevent interference or attacks by third parties or state organs (paras. 651–656).

Regarding the allegation of unreasonable impairment of Krederi's investments, the tribunal reiterated its findings under the claim of denial of justice and added that the DPK's actions for the restitution of the land could not be considered as wholly discretionary (para. 672–673).

Lastly, the tribunal considered that the due-process obligation is inherent in expropriation clauses and that judicial actions could only amount to expropriation if a procedural illegality or denial of justice had occurred (paras. 706, 713–715)—which, as the tribunal reiterated, was not the case here.

Conclusions and allocation of costs and fees

The tribunal clarified that all claims were dismissed but raised concerns that the outcome was unsatisfactory and uncomfortable since the investment was retained by Ukraine while the investor did not recoup its original sale price (para. 718).

Examining the outcome of the arguments raised and the good-faith behaviour of the parties before and during the proceedings, the tribunal ordered each party to bear its own legal fees and half of arbitration costs (para. 739–741).

Notes: The tribunal was composed of August Reinisch (president appointed by the parties, Austrian national), Markus Wirth (claimant's appointee, Swiss national) and Gavan Griffith (respondent's appointee, Australian national). Excerpts of the award of July 2, 2018, are available at <https://www.italaw.com/sites/default/files/case-documents/italaw11040.pdf>

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RESOURCES AND EVENTS

RESOURCES

International Investment and Competition Law

By Katia Fach Gómez, Anastasios Gourgourinis, and Catharine Titi (Eds.), published by Springer, 2020

This is a special issue of the European Yearbook on International Economic Law. It examines the interaction between international investment law and competition law. The book discusses free trade agreements; investors' anti-competitive behaviour and illegal investments; state aid schemes and foreign investors' legitimate expectations; EU member states' compliance with investment awards as (illegal) state aid under EU law; state-owned enterprises and competitive neutrality; and interactions between public procurement, investment, and competition law. Available at <https://link.springer.com/book/10.1007/978-3-030-33916-6#about>

Indigenous Peoples and International Trade: Building equitable and inclusive international trade and investment agreements

By Jon Burrows and Risa Schwartz, published by Cambridge University Press, June 2020

This book examines the participation of Indigenous Peoples in international trade and investment and the development of law in these areas. It includes chapters on Indigenous Peoples' rights and investment law, trade, intellectual property rights protection, and the environment. Available at <https://www.cambridge.org/core/books/indigenous-peoples-and-international-trade/C5BC73A244A6460E985F300DEF434B3A>

Investment Trends Monitor Special Issue (March 2020)

UNCTAD's Investment Trends Monitor special issue on the impact of the Covid-19 pandemic on global value chains and FDI.

Available at https://unctad.org/en/PublicationsLibrary/diaeiainf2020d3_en.pdf

Investment Policy Monitor Special Issue (May 2020)

UNCTAD's Investment Policy Monitor special issue on the investment policy responses to the Covid-19 pandemic.

Available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf

International Protection of Investments: The substantive standards

By August Reinisch and Christoph Schreuer, published by Cambridge University Press, July 2020

This book outlines the common protection standards contained in international investment agreements and their application and interpretation by investment tribunals. It includes discussion of expropriation, fair and equitable treatment, full protection and security, the non-discrimination standards of national treatment and MFN, the prohibition of unreasonable and discriminatory measures, umbrella clauses, and transfer guarantees. Available at <https://www.cambridge.org/core/books/international-protection-of-investments/E05A3AA19C18103AA3C74EF5437086A9>



Adjudicating Trade and Investment Disputes: Convergence or divergence?

Szilárd Gáspár-Szilágyi, Daniel Behn, and Malcolm Langford, published by Cambridge University Press, June 2020

This book contributes to the debate on the fragmentation of international law and examines the possible convergence of international trade and investment law, with a focus on dispute settlement. It includes chapters on investment chapters in PTAs; the EU investment court system and similarities to the WTO; and dispute adjudicators, among other topics. Available at <https://www.cambridge.org/core/books/adjudicating-trade-and-investment-disputes/174DB8CDF54038C161AD7527F816CA14>

UNCITRAL Code of Conduct for Adjudicators in Investor–State Dispute Settlement

Draft with annotations.

Available at <https://uncitral.un.org/en/codeofconduct>

UNCITRAL Working Group III Webinars

Webinar topics include the establishment of an advisory centre; multilateral instrument on ISDS reform; treaty parties' involvement and control mechanisms on treaty interpretation; and mediation. Videos are available here. <https://uncitral.un.org/en/advisorycentrewebinar>

Africa Arbitration Academy Protocol on Virtual Hearings in Africa 2020

The Africa Arbitration Academy has just launched its Protocol on Virtual Hearings in Africa. The Protocol, in the main, details recommendations on virtual hearings and takes into account the specific challenges and circumstances that may arise in relation to remote hearings in Africa. Available at <https://www.africaarbitrationacademy.org/protocol-virtual-hearings/>

EVENTS 2020

June 24

An Interview with UNCITRAL Secretary Anna Joubin-Bret – 17th ITA–ASIL Conference. Virtual Event, 1 to 3 pm EST, <https://www.cailaw.org/Institute-for-Transnational-Arbitration/Events/2020/ita-asil-c.html>

July 23-24

International Arbitration Moot Competition. International Arbitration Moot Competition, <https://afaa.ngo/event-3777526>



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