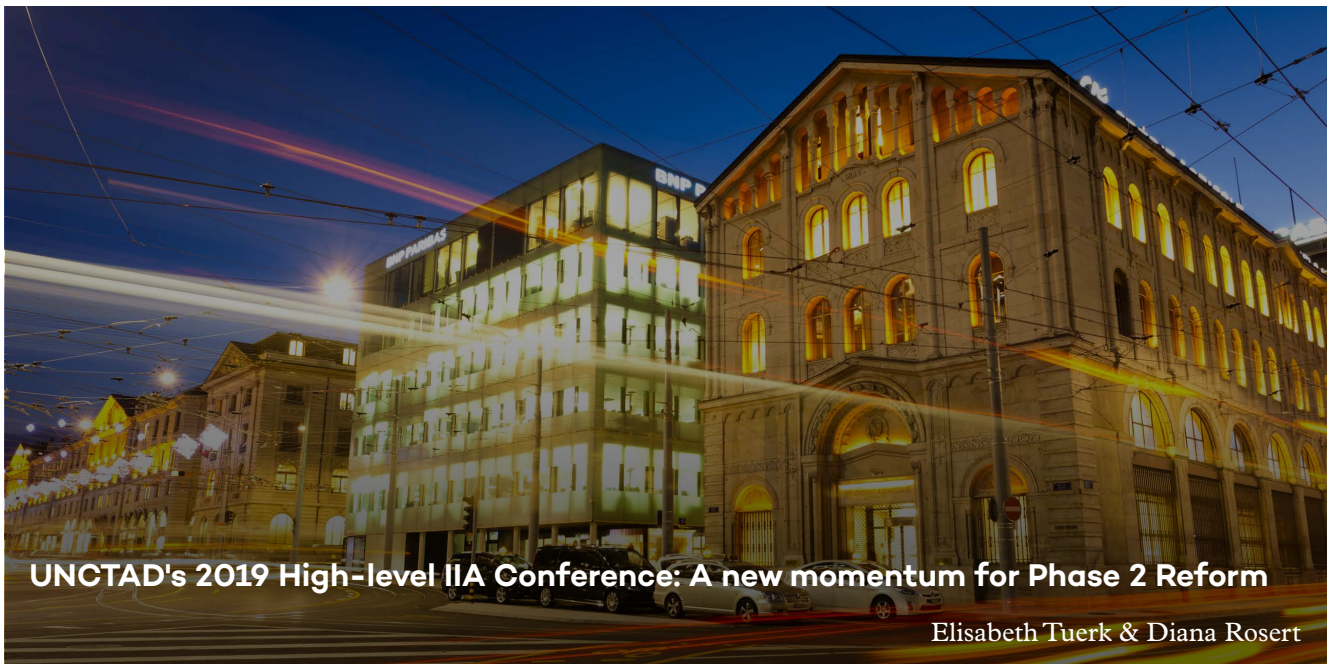




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UNCTAD's 2019 High-level IIA Conference: A new momentum for Phase 2 Reform

Elisabeth Tuerk & Diana Rosert



Business and Human Rights Treaty Negotiation Sees a Light at the End of the Tunnel

Joe Zhang



What to Expect in the January 2020 Session of UNCITRAL Working Group III on ISDS Reform

Nathalie Bernasconi-Osterwalder & Lise Johnson





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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

UNCTAD's 2019 High-level IIA Conference: A new momentum for Phase 2 Reform

Elisabeth Tuerk & Diana Rosert



Multiple reform processes—either planned or envisaged—document a new momentum to address decades-old treaties that typically lack reform-oriented features. These IIA reform processes involve countries at all levels of development and from all geographical regions.

At UNCTAD's High-level IIA Conference, held on November 13, 2019, in Geneva, over 80 speakers from governments, regional and international organizations, business, civil society and academia reviewed IIA reform progress and identified promising reform paths for the IIA regime.

Taking stock of sustainable development-oriented IIA reform

In 2017, UNCTAD launched its 10 Options for Phase 2 of IIA Reform, putting forward a set of approaches aimed at modernizing the existing stock of old-generation treaties. The 10 Options built on reform actions emerging at country and regional levels at that time and, since their publication, have spurred additional action to reform—interpret, amend, cancel or replace—existing treaties. UNCTAD combined its policy tools into the Reform Package for the International Investment Regime in 2018 to help investment policy-makers find tailor-made solutions for Phases 1 (new treaties), 2 (old treaties) and 3 of IIA Reform (coherence and synergies, for example, with national investment laws).¹

¹ United Nations Conference on Trade and Development (UNCTAD). (2018). *UNCTAD's reform package for the international investment regime*. Geneva: United Nations. Retrieved from <https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition->

The abundant amount of recent country and regional examples suggests that IIA reform is on course.² At the same time, the stock of old-generation agreements still amounts to some 3,000 (85 per cent of which are in force)—this is 10 times the number of new, reform-oriented treaties. Almost all of the over 70 known ISDS cases initiated in 2018 were based on old-generation treaties.

Core areas of IIA reform and reform processes by region

Discussions in focused breakout sessions addressed four reform objectives identified by UNCTAD (in the morning) and IIA reform processes by groups of countries (in the afternoon).

The morning breakout sessions focused on multilateral processes related to investment policy-making, including ECT “modernization,” ISDS reform at UNCITRAL Working Group III, the amendment of ICSID rules and regulations, structured discussions on investment facilitation at the WTO, the UN Guiding Principles on Business and Human Rights and the process to elaborate a binding treaty on business and human rights. The actual or potential contribution of these processes to IIA reform was discussed in four sessions, corresponding to core IIA reform objectives identified by UNCTAD:

- Preserving the right to regulate, while providing protection
- Reforming investment dispute settlement
- Promoting and facilitating investment
- Ensuring responsible investment

² United Nations Conference on Trade and Development. (2019, September 2). *Note by the UNCTAD secretariat, Recent developments in the international investment regime: Taking stock of phase 2 reform actions* (TD/B/C.II/42). Geneva: United Nations. Retrieved from https://unctad.org/meetings/en/SessionalDocuments/ciid42_en.pdf



In the second round, comprising four additional breakout sessions in the afternoon, participants discussed national and regional IIA reform processes in developing countries in Africa and Asia, in transition economies and in developed countries.³

1. Preserving the right to regulate, while providing protection

Speakers confirmed that preserving the right to regulate remained a key IIA reform objective and a balancing act. Countries and regions shared experiences in implementing or exploring different approaches to safeguard this objective (for example, new model BITs, new domestic legislation, termination of old-generation treaties, treaty interpretation and amendment). The specific circumstances of a country or region influenced the choice of the reform path and resulting challenges. Particular attention was given to the modernization of the ECT as a reform process with the potential to contribute to Phase 2 efforts. Civil society representatives attending the session were skeptical about the ECT reform process and suggested more profound reform actions. The urgency of climate action also shaped the debate. Beyond investment treaties, a few speakers mentioned that investor–state contracts deserve attention as they also interact with the right to regulate.

2. Reforming investment dispute settlement

Speakers widely recognized the need to improve investment dispute settlement. Several countries participating in the session had developed ISDS reform approaches at the national or regional level and were engaged in multilateral reform processes (for example, at UNCITRAL and ICSID).

Some speakers expressed a preference for broader institutional or “systemic” reform, such as the options of an investment court or an appeals mechanism. Others focused on options for “incremental” modernization (for example, improved ISDS

arbitration procedures in individual treaties), although the delineation was not always clear cut. The predictability and consistency of ISDS outcomes, the independence and impartiality of adjudicators, the costs of ISDS cases and the transparency of proceedings were frequently mentioned.

Several speakers were concerned about the adverse impact of ISDS cases on developing countries—including challenges to policy measures and damages awards—and the asymmetric nature of investor–state arbitration. A few questioned the benefits of ISDS and suggested deeper reforms to reorient the IIA regime toward sustainable development. Refocusing on domestic legal systems, including through a requirement to exhaust local remedies, was mentioned as a possible means in this regard.

3. Promoting and facilitating investment

The speakers shared experiences in implementing measures to promote and facilitate investment (for example, one-stop shops and focal points for investors), informed by UNCTAD’s Global Action Menu for Investment Facilitation.⁴

The speakers covered many issues related to the structured discussions on investment facilitation (IF) at the WTO, for example: the transparency of discussions and access to information for non-WTO members and stakeholders, the specific concerns of developing countries, the WTO trade facilitation agreement, market access obligations, differences between trade in goods and foreign investment, the usefulness of guidelines compared to binding instruments and the alignment of IF tools with the SDGs.

It was noted that IF was widely absent in IIAs. Questions were raised about the concrete contribution that a possible WTO framework on IF would have for the modernization of old-generation IIAs. More research and discussions on the interaction of possible WTO IF rules with IIA clauses and IIA reform were considered necessary. Surveys and empirical and impact analyses of IF measures could also prove helpful.

³ This article highlights selected issues that speakers discussed at UNCTAD’s High-level IIA Conference 2019 (written statements are available at <https://investmentpolicy.unctad.org/pages/1056/high-level-ii-a-conference-2019-speakers-and-co-chairs>) and academic rapporteurs summarized during the closing plenary (audio recording is available at https://conf.unog.ch/digitalrecordings/index.html?guid=public/60.2172/417FB8A4-94FE-441A-BD82-790FDBC5FEE9_15h09&position=0). The program and related information are available at <https://investmentpolicy.unctad.org/pages/1047/high-level-ii-a-conference-2019>

⁴ United Nations Conference on Trade and Development. (2017, May). *Global action menu for investment facilitation*. Geneva: United Nations. Retrieved from <https://investmentpolicy.unctad.org/publications/148/unctad-global-action-menu-for-investment-facilitation>



4. Ensuring responsible investment

The session's point of departure was the SDGs' imperative to step up work on responsible investment, also in the context of IIA reform. While many national and international policy-making processes were mainstreaming the SDGs and related standards or guidelines on responsible investment, IIAs were considered to lag behind (despite exceptions, such as the SADC model BIT). Progress was emerging through innovative clauses in model IIAs, actual treaties and national frameworks, both in developing and developed countries.

Increasing interaction between different policy areas and allowing for some policy experimentation was considered important. The process to elaborate a binding treaty on business and human rights could be one example of "breaking the silos."

The way forward for the theme of investor responsibility in IIAs could benefit from recognizing that many companies are integrating responsibility objectives and advocating for clearer and more coherent regulation that creates a level playing field. UNCTAD's work on corporate sustainability reporting, related to the program on International Standards of Accounting and Reporting (ISAR), might offer insights.

5. Developing countries: Africa

The session on IIA reform processes in Africa provided many examples of countries and regional organizations proactively designing policy instruments to foster sustainable development and quality investments. This included new national investment laws and regional initiatives, including the Pan African Investment Code and the negotiations of the Investment Protocol to the African Continental FTA. Various processes aim at making national, regional and continental policies more coherent.

The four core IIA reform objectives discussed in the first round of sessions again figured prominently. With regard to Phase 2, the speakers noted that decades-old treaties presented a considerable challenge to African countries and exposed them to ISDS. One country, South Africa, has taken the initiative to terminate its BITs and adopted new domestic legislation.

It was considered important to have ownership over reform processes occurring within Africa and to design investment policy approaches in line with development priorities, while benefiting from the support of organizations and

think tanks, including UNCTAD and IISD.

6. Developing countries: Asia

The speakers considered the core IIA reform areas identified by UNCTAD important to bring about a more sustainable development-oriented IIA regime. Several Asian countries recently reviewed their treaties, adopted new approaches or are drafting new models. Some have already taken steps to renegotiate or amend old-generation treaties. One country, India, has terminated existing treaties with a view to negotiating new ones. Generally, the region was more cautious about signing IIAs today than some decades ago. The speakers noted that overlapping treaty commitments between the same countries in the Asia-Pacific and the lack of consolidation efforts posed challenges (for example, in the context of RCEP and CPTPP).

It was pointed out that difficulties existed to renegotiate treaties with partner countries and coordinate such processes within a country. More work would be needed by UNCTAD and others to identify ways to jointly modernize the large stock of old treaties.

7. Economies in transition

The IIA reform approaches of the Western Balkan countries are taking place in the region's very specific context of engagement with the EU. Speakers shared common features and challenges for IIA reform, with all of them currently undergoing comprehensive reviews. The discussion then focused on EU accession prospects and the region's cooperation on related issues. Aligning frameworks and treaties with the EU's approach is one central objective. Some countries have reviewed their IIAs and decided not to sign any new treaties until other processes are completed, such as developing a new model.

The speakers referred to the *Achmea* decision's implications for intra-EU BITs⁵ and a potential joint instrument to terminate them. This issue is high on the agenda since the Western Balkans have many BITs in place with EU member states that could become intra-EU BITs upon accession. The ECT was also seen as an issue that merits attention.

⁵ Case 284/16 Slovak Republic v. Achmea EU:C:2018:158, judgement, March 6, 2018. Retrieved from <http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0284&lang1=en&type=TEXT&ancre>



Renegotiations of existing treaties with third countries not likely to be covered by EU negotiations could be an option. However, agreeing on this with partner countries proved difficult, especially in cases of state succession of treaties, a challenge faced by ex-Yugoslavian countries.

8. Developed countries

The speakers gave examples of how their countries or regions were extensively using all available reform tools for Phases 1 and 2, including those identified by UNCTAD—for example, joint interpretation, modification, replacement of outdated treaties, consolidation of existing BITs through plurilateral treaties and references to global standards. A part of the discussion centred on whether investment chapters were needed in agreements between developed countries. Another part focused on reform of investment dispute settlement at bilateral and multilateral levels. Several speakers stated that their countries or regions applied a nuanced approach to ISDS, for example, by including procedural improvements and refinements, replacing ISDS with a standing tribunal or, in some cases, not including ISDS. The countries participating in the session were engaged in the work of the UNCITRAL Working Group III, the ICSID amendment process and in work in other forums, such as the Asia–Pacific Economic Cooperation (APEC) and the OECD.

Conclusions

Many policy-makers and treaty negotiators are well versed in the different types of reform actions at their disposal. However, challenges persist and hold back Phase 2 of IIA reform at the level of individual countries and regions as well as at the cross-regional and multilateral levels. While some multilateral processes have the potential to contribute to Phase 2 outcomes, such effects are not necessarily automatic. Moreover, not all of the multilateral processes discussed promise concrete contributions to sustainable development-oriented Phase 2 outcomes. To scale up and accelerate Phase 2 of IIA reform, new methods and mechanisms may be needed, and particular attention needs to be given to overcoming barriers to reform.

Investment policy-makers and treaty negotiators from all regions referred to UNCTAD's policy tools on IIA reform, the organization's IIA and ISDS databases (the "Navigators"), technical assistance (including on IF) and multistakeholder and inter-governmental deliberations as helpful support in designing and

implementing IIA reform actions adapted to the circumstances of individual countries.

In his closing remarks, the Director of UNCTAD's Division on Investment and Enterprise announced that UNCTAD will expand its existing databases through a Navigator for IIA Reform Actions per Country and Region (IIA Reform Navigator), a pilot project based on research outputs from UNCTAD's [World Investment Reports](#). The IIA Reform Navigator could facilitate peer learning among policy-makers and offer a platform for identifying matching reform partners.

Further work will be undertaken, as a joint project with others, on lessons learned for IIA reform from global tax treaty reform (which may involve not only "do's" but also "don'ts"). A more in-depth look into the multilateral instrument developed in the context of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project to update international tax rules may provide insights for the reform of old-generation IIAs.

Authors

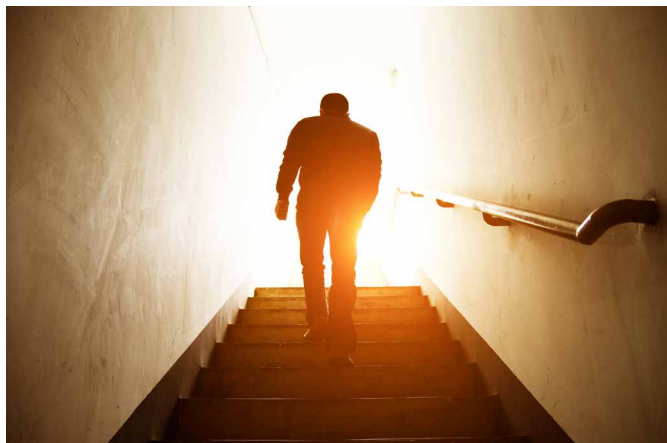
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INSIGHT 2

Business and Human Rights Treaty Negotiation Sees a Light at the End of the Tunnel

Joe Zhang



A preamble: Argentina's water crisis

Starting from the 1990s, as part of the process of privatizing its water utility services, Argentina granted many concessions to foreign investors to provide water and sewage services in many parts of the country.¹ As its 2001 economic crisis loomed, jeopardizing the health and the environment of local communities living in extreme poverty, Argentina adopted a series of measures to ensure sufficient water supply.

As a result of these measures, many of these projects encountered significant challenges. A suite of foreign investors initiated ISDS proceedings against Argentina seeking damages for alleged breach of various investment treaties that it had entered into with their home countries. Many were awarded compensation amounts ranging from tens of millions to several hundred million U.S. dollars.²

In one of those cases, *Urbaser v. Argentina*,³ Argentina also tried to seek compensation from the investors

by filing a counterclaim against them based on their alleged human rights abuses against Argentinian citizens. Even though the tribunal affirmed its jurisdiction over the counterclaim, and even though it concluded that individuals and other private parties—and not only states—have an obligation to refrain from committing acts violating human rights,⁴ the tribunal still failed to find any *positive* obligation under international law requiring investors “to put their policies in line with human rights law.”⁵ With some recent developments in international human rights law, there could soon be more guidance and clarification for tribunals on the obligations of investors under international law.

Fifth session of the OEIGWG

The United Nations Human Rights Council established the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG) in 2014. The mandate of the working group is “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”⁶

¹ Alcazar, L., Abdala, M. & Shirley M. (2000, April). *The Buenos Aires water concessions* (World Bank Policy Research Working Paper No. 2311). Retrieved from <http://documents.worldbank.org/curated/en/718361468769245711/pdf/multi-page.pdf>

² See for example, *Azurix v. Argentina*, ICSID Case No. ARB/01/12; *Suez v. Argentina*, ICSID Case No. ARB/03/17; *SAUR v. Argentina*, ICSID Case No. ARB/04/4; and *Impregilo v. Argentina*, ICSID Case No. ARB/07/17, all available at <http://www.italaw.com>

³ *Urbaser v. Argentina*, ICSID Case No. ARB/07/26, Award, Dec. 8, 2016, para. 1110 et seq. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf

⁴ Referring to “an obligation to abstain, like a prohibition to commit acts violating human rights,” the tribunal held that “[s]uch an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties.” *Id.*, para. 1210. For a detailed analysis of the *Urbaser* case, see Schacherer, S. (2018, October). *Urbaser v. Argentina*. In N. Bernasconi-Osterwalder & M. D. Brauch (Eds.), *International investment law and sustainable development: Key cases from the 2010s* (25–30). Geneva: IISD. Retrieved from <https://www.iisd.org/sites/default/files/publications/investment-law-sustainable-development-ten-cases-2010s.pdf>

⁵ *Id.*, para. 1195.

⁶ Human Rights Council. (2014, July 14). *Resolution 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights* (UN Doc. A/HRC/RES/26/9). Retrieved from <http://undocs.org/A/HRC/RES/26/9>. For earlier ITN coverage on the negotiation process, see Zhang, J., & Abebe, M. (2017, December). *The journey of a binding treaty on human rights: Three years out and where is it heading?* *Investment Treaty News*, 8(4), 3–4. Retrieved from <https://www.iisd.org/itn/2017/12/21/the-journey-of-a-binding-treaty-on-human-rights-three-years-out-and-where-is-it-heading-joe-zhang-and-mintewab-abeb>; Zhang, J. (2015, November). *Negotiations kick off on a binding treaty on business and human rights*, *Investment Treaty News*, 6(4), 10–11. Retrieved from <https://www.iisd.org/itn/en/2015/11/26/negotiations-kick-off-on-a-binding-treaty-on-business-and-human-rights>



From October 14 to 18, 2019, the working group held its fifth session in Geneva, with active participation from more than 400 representatives, including delegates representing over 90 governments as well as those representing international organizations, national human rights institutions and civil society organizations.

Prior to this session, the chair of the working group had circulated a revised draft Legally Binding Instrument (LBI).⁷ Based on this version, which contains “ground-breaking improvements”⁸ from an earlier draft,⁹ government delegates made and examined many proposals during the session.

For example, on scope (Art. 3), participants shared views on whether to expand the LBI to cover “all business activities” regardless of whether they are of a transnational character. As for the rights of victims (Art. 4), participants focused on delimiting the scope of protection to be offered by the LBI as well as ensuring meaningful access to these protections, including discussions on access to evidence and reversed burden of proof, among other procedural issues.

Article 5 of the revised draft LBI requires states to adopt measures to ensure that businesses conduct due diligence to prevent human rights abuses arising from their own business activities or from their “contractual relationships.”¹⁰ Some shared their concerns that more efforts should be put into this article so that the provisions can accurately reflect the dynamic business realities in the era of global value chains. Others suggested that there should be incentives for businesses to carry out due diligence, for example, by allowing businesses to raise their compliance with due

diligence obligations as a defence in future proceeding against them, or by shifting the burden of proof back to the victim once prima facie evidence of due diligence is established.

"Investment tribunals have expanded the scope of application of investment treaties and interpreted the obligations of states widely. This has contributed to an increased fragmentation of the international legal framework governing transnational investment activities."

On Legal Liability (Art. 6), Jurisdiction (Art. 7) and Applicable Law (Art. 9), there was a clash of views on whether the LBI can provide innovative thinking to long-standing legal principles enshrined in the domestic laws of many countries in situations involving human rights abuses. These issues include, for example, extraterritorial jurisdiction, general principles of corporate law and criminal liability of legal persons.

Linkage between human rights law and international investment law

The drafters of the LBI are fully aware that decisions such as the one rendered by the *Urbaser* tribunal in Argentina’s counterclaims can seriously undermine the effectiveness of the future LBI. After all, on important issues such as standard of protection, legal liability, due diligence requirement and jurisdiction, no matter what rules state parties may agree to after lengthy negotiations, those rules would be of no use to the affected communities if adjudicators decide not to apply them.

Over the years, investment tribunals have expanded the scope of application of investment treaties and investment chapters in FTAs and interpreted the obligations of states widely. In large part, they have done this in isolation of other areas of international law. This has contributed to an increased fragmentation of the international legal framework governing transnational investment activities.¹¹

⁷ OEIGWG. (2019). *Revised draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*. Retrieved from https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf

⁸ Lopez, C. (2019, October). The revised draft of a treaty on business and human rights: Ground-breaking improvements and brighter prospects. *Investment Treaty News*, 10(4), 11–14. Retrieved from <https://www.iisd.org/itm/2019/10/02/the-revised-draft-of-a-treaty-on-business-and-human-rights-ground-breaking-improvements-and-brighter-prospects-carlos-lopez>

⁹ OEIGWG. (2018, July 16). *Zero draft of legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business entities*. Retrieved from <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>. For an analysis of the Zero Draft, see Lopez, C. (2018, October). Toward an international convention on business and human rights. *Investment Treaty News*, 9(3), 13–16. Retrieved from <https://www.iisd.org/itm/2018/10/17/toward-an-international-convention-on-business-and-human-rights-carlos-lopez/>

¹⁰ OEIGWG, *supra* note 7, Art. 5(3)(a). The wording of “contractual relationship” does not accurately reflect the intent of the drafters. As the chair explained, the purpose is to extend the due diligence obligation beyond a company’s own activities, but also to cover the conducts of its subsidiaries and supply chains. It was suggested changing the wording to “business relationship.”

¹¹ For an analysis of the decision-making process of investment tribunals, see Van Harten, G. (2018, May). Leaders in the expansive and restrictive interpretation of investment treaties: A descriptive study of ISDS awards to 2010, *European Journal of International Law*, 29(2), 507–549. Retrieved from <http://www.ejil.org/pdfs/29/2/2877.pdf>



In order to address this concern, Art. 12 of the LBI attempts to provide some guidance to state parties and future interpreters on the relationship between this instrument and other international laws. In particular, Art. 12(6) specifies that “any bilateral or multilateral agreements, ... on issues relevant to this (Legally Binding Instrument) and its protocols, shall be compatible and shall be interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols”. This ensures that the effect of the LBI extends to the interpretation of other treaties, or even toward international courts or tribunals, when considering issues relating to business and human rights. If appropriately implemented, this will ensure a more inclusive, mutually supportive and less fragmented application of international law and will be particularly important where binding adjudicative systems are in place.

"The ongoing negotiation of the LBI offers a rare opportunity to develop a set of legally binding international rules that can contribute to a harmonized international legal and governance framework for sustainable development."

To ensure the success of this provision, however, it would be helpful to put into place a process to identify agreements and areas of law for which the LBI may be relevant and criteria to make such a determination. This could be done either in the text of the treaty itself or through a commentary or interpretative guidance at a later point. Further, in order to ensure consistent and predictable interpretation, it is also advisable to establish a mechanism where a panel of experts can issue binding interpretations on human rights-related issues that can reflect the joint understanding of state parties. The LBI could also take a step further and allow state parties, through institutional arrangements such as pre-established independent expert panels, to conduct fact-finding missions and provide professional assistance to adjudicators depending on the complexity involved in a dispute.

Conclusion

Until now, many of the discussions regarding the current human rights regime and the international investment law regime take place in an isolated way within the two respective circles. The ongoing negotiation of the LBI offers a rare opportunity to break the silos and bring together the two worlds to develop a set of legally binding international rules that can contribute to a harmonized international legal and governance framework for sustainable development.

The working group is accepting inputs and textual suggestions on the revised draft LBI until the end of February, after which time the chair will prepare a second revised draft for further debate at the working group's sixth session in late 2020.

Author

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INSIGHT 3

What to Expect in the January 2020 Session of UNCITRAL Working Group III on ISDS Reform

Nathalie Bernasconi-Osterwalder & Lise Johnson



In January 2020, Working Group III (WG III) of UNCITRAL will convene in Vienna to work on possible ISDS reform. This will be the sixth week-long meeting that WG III has held on the topic since July 2017, when, prompted by widespread discontent with ISDS, the governing body of UNCITRAL gave WG III a broad mandate to pursue the issue. This note reviews developments at the most recent session of WG III in October 2019 and highlights key issues relevant for January and beyond.

1. Meetings to date

In its deliberations thus far, WG III has identified a wide range of concerns relating to ISDS, grouping them into four general categories: (1) costs and duration of proceedings; (2) inconsistency, incoherence, unpredictability and incorrectness of decisions; (3) arbitrators and decision-makers; and (4) third-party funding. WG III has agreed that reform solutions should be sought at the multilateral level for all of these.¹

Delegates have also identified a set of cross-cutting issues that should be taken into account when crafting reform solutions, including:

- Means other than arbitration to resolve investment disputes as well as dispute prevention methods
- Exhaustion of local remedies
- Implications for third parties, and the role of third-party participation
- Investor obligations and counterclaims
- Regulatory chill
- Damages.²

Beginning with the October 2019 meeting, WG III discussions entered the critical Phase 3 of the mandate, during which delegates will develop solutions to be recommended to UNCITRAL. Phases 1 and 2 focused on articulating concerns and gauging the desirability of multilateral efforts to resolve them. Phase 3 will shape the breadth and depth of change actually being pursued.

2. What happened in October 2019

2.1. Scheduling the work

The 38th session, held in October 2019, began with the elaboration of a workplan—a rough timeline for addressing issues and crafting reforms. WG III agreed to focus in that October meeting on (1) a potential advisory centre or other assistance mechanism or mechanisms, (2) codes of conduct and (3) third-party funding. In January 2020, WG III will focus on a (4) stand-alone review or appellate mechanism, (5) a standing MIC and (6) the selection and appointment of arbitrators and adjudicators. Finally, in April 2020 it will discuss a range of issues, including dispute prevention and mitigation; treaty interpretation by states; security for costs; frivolous claims; multiple proceedings including counterclaims; reflective loss and shareholder

¹ Brauch, M. D. (2018, December 21). Multilateral reform is desirable: What happened at the UNCITRAL meeting in Vienna and how to prepare for April 2019 in New York. *Investment Treaty News*, 9(4), 4–7. Retrieved from <https://www.iisd.org/itn/2018/12/21/multilateral-isds-reform-is-desirable-what-happened-at-the-uncitral-meeting-in-vienna-and-how-to-prepare-for-april-2019-in-new-york-martin-dietrich-brauch>

² For a discussion of these topics, see Columbia Center on Sustainable Investment (CCSI), International Institute for Environment and Development (IIED) and International Institute for Sustainable Development (IISD). (2019, July 15). *UNCITRAL working group III on ISDS reform: How cross-cutting issues reshape reform options*. Retrieved from <https://www.iisd.org/sites/default/files/uploads/uncitral-submission-cross-cutting-issues-en.pdf>



claims; and a possible multilateral instrument or instruments for implementing reform solutions; it would also consider how to plan its future work.³

2.2. More voices and evolving issues

One notable aspect of the October session was how states focused on two issues—third-party funding and damages—that had not been highlighted in the UNCITRAL secretariat’s early catalogues of ISDS-related concerns.⁴ However, they have been gaining increased attention throughout the process as delegates—particularly developing country governments—voiced their concerns.⁵

In October 2019, WG III tasked the secretariat with conducting further research on third-party funding and drafting text that could be deployed in arbitration rules, treaties or a multilateral convention to restrict or otherwise regulate the practice.⁶ While some delegations highlighted the importance of coordinating with ICSID in developing solutions, others emphasized that the issues identified in, and reform options open to, the UNCITRAL process were broader than in ICSID, meaning that the UNCITRAL results need not be tied to ICSID’s. With respect to damages, delegates articulated concerns relating to their calculation and compensation in April 2019 and further emphasized them in the October 2019 meeting.⁷ While some asked whether these issues fell under the mandate of WG III, the working group nevertheless requested that the secretariat consider how possible work on damages could be undertaken.⁸

3. What to look forward to in January

Per the workplan, the January 2020 session is “to consider the following reform options: (i) stand-alone review or appellate mechanism; (ii) standing multilateral investment court; and (iii) selection

and appointment of arbitrators and adjudicators.”⁹ Exploring these options offers governments and other stakeholders the opportunity to consider what is needed in international investment-related dispute settlement today and what type of dispute settlement system best meets those needs. Some of the issues relevant to that broad framing are previewed below.

3.1. Stand-alone review or appellate mechanism

Several countries have expressed their desire to discuss the option of an appellate mechanism, in particular as a tool for helping achieve the potentially competing goals of reducing inconsistency and incorrectness of ISDS decisions. This mechanism could take appeals from the existing regime of arbitration-based ISDS as well as from a new standing or court-type ISDS system.¹⁰

In this context, delegates will consider whether, to what extent and under what circumstances a review mechanism can address their concerns and will also seek to identify and avoid any unintended, undesirable consequences. While there are myriad practical and policy matters to address, some fundamental questions relate to the scope and purpose of review, balance between control by states and by an appellate body, and the impacts on the existing ISDS regime.

a. Scope and purpose of review

One critique of ISDS is that existing review mechanisms are too limited. In this context, states will consider additional grounds for final or interlocutory review. To what extent, for instance, are states concerned about tribunals’ abuses of discretion, erroneous interpretations of international law and errors of fact, including in assessments of domestic law?

The nature of the concern will inform what type of additional review is appropriate for both correcting individual cases and sending signals to arbitrators and adjudicators to prevent future errors. If, for instance, delegations perceive that tribunals have made errors in the appreciation of domestic law, how can they design a review mechanism to identify and correct those errors? Will the proper review mechanism always be up to another international level; or for some issues, down to courts, technical, or political officials of the host state or treaty parties?

³ UNCITRAL. (2019, October 23). *Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019)* (A/CN.9/1004), paras. 25, 27, 104. Retrieved from <https://undocs.org/en/A/CN.9/1004>

⁴ Some early notes by the secretariat did briefly reference third-party funding, but did not catalogue the range of concerns related to it that have since been raised in WG III. See UNCITRAL. (2017, September 18). *Possible reform of investor–State dispute settlement (ISDS)* (A/CN.9/WG.III/WP.142), para. 44. Retrieved from <https://undocs.org/en/A/CN.9/WG.III/WP.142>

⁵ The evolution of the discussion on third-party funding can be seen in the reports of WG III meetings, from the 34th through to the 38th sessions, all available at https://uncitral.un.org/en/working_groups/3/investor-state

⁶ UNCITRAL (2019), *supra* note 3, para. 97.

⁷ UNCITRAL (2019), *supra* note 3, para. 24.

⁸ UNCITRAL (2019), *supra* note 3, paras. 102–104.

⁹ UNCITRAL (2019), *supra* note 3, para. 25.

¹⁰ The UNCITRAL secretariat is preparing a document, A/CN.9/WG.III/WP.185, on review, appellate and multilateral court mechanisms. As of the time of writing, it was not yet available.



Other critiques relate to issues of consistency, which can relate to consistency of awards under one treaty, across different investment treaties, across different areas of international law, and with states' policies and interpretations of their treaties.¹¹ Not all review mechanisms will equally address the different types of consistency challenges. For example, an appellate mechanism that is independent and strong in relation to its states parties may be effective in harmonizing jurisprudence on investment protection standards across investment treaties and with other areas of international law. But the outcomes will not necessarily be consistent with all states' understandings of their treaties.

As developments around the WTO's Appellate Body help highlight, it will be important to consider the desired relationship between political and judicial power when it comes to interpreting and applying the treaties. It will similarly be important to identify what course-correction mechanisms would be desirable and available if one or more states (or other stakeholders) considered appellate decisions to be erring in their development of the law.

b. Balance between state control and appellate review in terms of enforcement

Related issues arise from the relationship between the reviewed award and subsequent domestic enforcement and challenge. Would the product of an international appellate process be like an ICSID award, relatively shielded from additional scrutiny by domestic courts? Or will there be some grounds under which courts at the seat of the ISDS award or the place of eventual enforcement can examine the award or the appellate decision for inconsistency with mandatory law or public policy? Assuming that an appellate mechanism would not be examining whether decisions are consistent with the public policy of the enforcing state, are states willing to forego that basis for review—even if only exceptionally successful—in the interest of increasing the finality of appealed awards?

c. Intersection between an appellate mechanism and existing ISDS mechanisms

Other important questions arise with respect to whether and how a review mechanism would operate in relation to ad hoc ISDS. Having an appellate body

sit over ad hoc arbitrations may address some oft-cited concerns with ISDS, but also leaves core parts of the current system intact. For example, this constellation may fail to address such issues as those related to adjudicator independence and impartiality, incentives toward expansive interpretations of jurisdictional and substantive standards, and costs of proceedings.

3.2. Standing multilateral investment court

Several delegations, led by the EU and its member states, wish to discuss the idea of a MIC. Unlike an appellate mechanism, a new court would—for states that to sign up to it—replace the current ad hoc ISDS system. Notable issues that arise in this context relate to standing and jurisdiction, the relationship with other legal norms and institutions, and the structure of a two-tier mechanism in case some type of review is desired.

a. Standing and jurisdiction

One issue for delegates to consider is whether a MIC would be open for ISDS only. One concern about that approach is that setting up a special court providing legal privileges to just one narrow group of stakeholders—foreign investors—would be a difficult political sell for such an ambitious international law project. Another is that it would offer incomplete or, worse, misguided solutions. Investment disputes are commonly complicated matters that emerge from, and have effects that go well beyond, those considered in ISDS and involve a range of stakeholders.

A MIC could, however, be designed to avoid institutional myopia by having jurisdiction over other types of claims relating to investment, including, for instance, state–state cases, torts cases against investors and certain types of contract cases. Also related to jurisdiction and scope is the ability of interested and affected third parties to intervene to protect their rights and interests,¹² as well as the ability of a respondent to invoke counterclaims.

Details pertaining to these issues, including the range of causes of action a court could hear and the types of disputes over which it may take jurisdiction, might not

¹¹ See Johnson, L. and Sachs, L. (2019). *Inconsistency's many forms in investor–state dispute settlement and implications for reform*. Retrieved from <http://ccsi.columbia.edu/2018/11/27/inconsistencys-many-forms-in-investor-state-dispute-settlement-and-implications-for-reform>

¹² For additional discussion of issues relating to the rights and interests of third parties in the context of ISDS and reform options, see, for example, CCSI, IIED and IISD. (2019, July 15). *Third-party rights in investor–state dispute settlement: Options for reform*. Retrieved from <https://www.iisd.org/sites/default/files/uploads/uncitral-submission-third-party-participation-en.pdf> support for exhaustion of local remedies, which were made, for instance, in the 38th session by a number of governments (for example, Colombia, the Dominican Republic, Indonesia and Sri Lanka), discussed in the third intersessional.



be discussed in January. Nevertheless, WG III could take intermediate steps, such as agreeing in principle to pursue a broad approach to investment-related dispute settlement, one that is not limited to cases of investment protection and that is designed to ensure that the rights and interests of non-parties are not adversely affected.

b. Relationship with other legal norms and institutions

Other sets of considerations relate to how a MIC would interact with other norms and institutions at domestic and international levels. The system could, for instance, build in referral mechanisms to ensure a profound understanding of and coherence with other bodies of law, such as international labour, human rights and environmental law and domestic law. This could help address concerns that rulings on investment protection focus too narrowly on investment law and fail to adequately or correctly incorporate norms from other spheres.

An additional set of considerations relates to the role of a potential new MIC relative to domestic law. Some delegations have emphasized the need to ensure that ISDS is an exceptional remedy, a system of last resort.¹³ With that aim in mind, what principles of complementarity and subsidiarity can be integrated into the court design and how can they be operationalized?

c. Combining the standing court with an appellate mechanism

The EU MIC submission proposes a two-layer institution, including a first-instance tribunal and an appellate mechanism. WG III could examine the rationale for this, going beyond the experience at the WTO and considering the structure of other courts, including human rights courts such as the European Court of Human Rights and the Inter-American Commission and Court on Human Rights.

3.3. Selection and appointment of adjudicators

The topic of selection and appointment of adjudicators intersects with a range of issues, such as those relating to the independence, impartiality, quality, competence and other desired characteristics of adjudicators; ensuring diversity (including in terms of

gender, nationality and cultural and socioeconomic background); and balancing potentially competing qualities of independence and accountability.¹⁴ WG III will likely consider these issues with respect to each scenario explored: under existing investor–state arbitration, an appeals mechanism or a MIC.

Each of these scenarios will generate overlapping, but also distinct, questions and responses. For example, addressing multiple hatting would be relevant for all scenarios, but a requirement not to have outside professional activities would be relevant only for full-time adjudicators. The method of selection and appointment will vary across all options. Consequently, discussions will need to address fundamental issues such as the disputed importance of party autonomy in appointing adjudicators, the design and use of rosters, practical options for nomination and selection and the terms of more permanent roles.¹⁵

Even adjudicators in a court or appellate mechanism may be mindful of their professional prospects as counsel and ISDS arbitrators upon expiration of their tenure. Thus, it will be important for WG III to also consider cooling-off periods or other approaches to address concerns about financial incentives that may cause—or be perceived to cause—adjudicators to favour claimant-friendly interpretations of treaty provisions.

4. Conclusion

UNCITRAL WG III offers a platform for countries to creatively discuss the reform of investment-related dispute settlement. The January 2020 meeting is a key moment for delegates to demonstrate whether and how they will seize the moment and push for real change.

Authors

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¹³ Comments to this effect were made, for instance, by Colombia in the 38th session (October 14, afternoon). Other relevant comments related to meeting in Guinea, and have also been highlighted in written submissions, including those from Indonesia, Mali, Morocco and South Africa. The written submissions and report from the Guinea intersessional are available at https://uncitral.un.org/en/working_groups/3/investor-state. The audio recordings are available at <https://uncitral.un.org/en/audiorecordingstemporary>

¹⁴ For more on these and other issues, see, for example, UNCITRAL. (2019, 31 July). *Possible reform of investor–State dispute settlement: Selection and appointment of ISDS tribunal members* (A/CN.9/WG.III/WP.169). Retrieved from <https://undocs.org/en/A/CN.9/WG.III/WP.169>; Larsson, O., Squatrito, T., Stiansen, Ø., and St John, T. (2019, September 17). *Selection and appointment in international adjudication: Insights from political science* (Academic Forum on ISDS Concept Paper 2019/10). Retrieved from <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/larsson-selection-and-appointment-isds-af-10-2019.pdf>

¹⁵ For further discussion of some issues and options, see, for example, sources cited *id.*



NEWS IN BRIEF

UN Forum on Business and Human Rights highlights the importance of coherent policies

From November 25 to 27, 2019, the Office of the UN High Commissioner for Human Rights hosted this year's [United Nations Forum on Business and Human Rights](#) in Geneva, Switzerland. The forum's [mandate](#) is to discuss trends and challenges in implementing the [UN Guiding Principles on Business and Human Rights \(UNGP\)](#), identify good practices, and promote dialogue and cooperation.

This year's forum attracted over 2400 participants. Following the message from the 2018 forum, which called on governments to step up their action and leadership, the 2019 forum focused on the need for all governments to demonstrate progress, commitments and plans in moving the UNGP from paper to practice.

The UNGP received the approval of the Human Rights Council over eight years ago and features over 30 principles that give further explanation of commitments that states have already taken on in other contexts, binding or otherwise, while not setting out any new requirements of its own. The principles are designed not just for governments, but also for companies, given the national and international legal frameworks regarding human rights that already apply to businesses operating within state borders.

The forum was held under the theme "Time to Act: Governments as Catalysts for Business Respect for Human Rights." Delegates representing governments, businesses, civil society organizations and affected groups spent the [three days of the forum engaging in open dialogues focused on practical solutions](#).

Recalling that compliance with the UNGP envisions governments setting out mandatory and voluntary measures at both national and international levels, participants examined the role of governments in fostering business respect for human rights, shared best practices, and identified room for future improvement and opportunities for immediate actions.

Throughout the sessions—and as noted in the [latest report](#) of the UN Working Group on Business and Human Rights—policy coherence has been identified as one of the instrumental elements for the effective implementation of the UNGP. Statements made during the sessions are available [here](#).

UNCTAD IIA Conference: WTO talks on investment facilitation take centre stage in break-out session

The [UNCTAD High-Level IIA Conference](#), held in Geneva, Switzerland, in November 2019 featured a session dedicated to investment facilitation and promotion. Participants focused largely on an initiative backed by over 90 [WTO](#) members to develop a multilateral framework on investment facilitation. *(Editor's note: for a detailed update on the full High-Level IIA Conference, see the related [Insight](#) in this edition of ITN.)*

The structured discussions among various [WTO](#) members for a multilateral framework on investment facilitation were the subject of significant debate.

At the UNCTAD session, some participants raised this potential framework as a useful opportunity to draw from the lessons learned in negotiating the [WTO's Trade Facilitation Agreement \(TFA\)](#) and adapting them to investment. Others questioned whether the [WTO](#) was the appropriate forum for such an effort and whether binding disciplines subject to that organization's dispute settlement mechanism could prove counterproductive.

South African Ambassador to the [WTO](#) Xolelwa Mlumbi-Peter noted that different [WTO](#) members will have varying levels of capability in implementing some of the disciplines currently being considered in the structured discussions. For example, she noted that her country has one-stop shops for facilitating investments at both the national and provincial levels, but that their capacities are not at the same level across the board, which would prove difficult when facing the same [WTO](#) commitments.

Samira Sulejmanovic, head of the department devoted to bilateral trade relations within Bosnia and Herzegovina's Ministry of Foreign Trade and Economic Relations, was also among the speakers at the session. She questioned whether a clear link could be drawn between the TFA, which deals with cutting red tape and streamlining customs procedures for goods being traded across borders, and investment facilitation, which deals with a wider range of issues. She also highlighted the need for greater transparency in the [WTO](#) process and the potential for overlap with



the work already being done at UNCTAD.

Related concerns were raised by Kinda Mohamadiéh, a legal advisor and senior researcher at Third World Network in Geneva. She noted the broad scope of the topics discussed in the investment facilitation initiative. She also pointed out that while the WTO's GATS involved a positive-list approach where members could choose which services sectors would involve commitments at the global trade club, the current approach in investment facilitation appeared to be that of a negative list. Improved targeting of investment-related measures to achieve sustainable development objectives is also key, she said.

Meanwhile, Matthew Stephenson, Policy and Community Lead on Trade and Investment at the World Economic Forum, described some of the work underway at his organization with firms in developing countries to get a better sense of which investment facilitation measures are effective in achieving their aim and are also supportive of sustainable development.

Opeyemi Abebe, an advisor on trade competitiveness for the Commonwealth Secretariat, noted that while the Commonwealth does not have a specific position on the structured discussions, it is a process that they are watching closely. She also noted that the discussion would need to have sustainable development at its core and warned against that getting lost if a multilateral framework on investment facilitation goes ahead at the WTO.

ECT modernization: Energy Charter Conference adopts mandate, confirms December talks

On November 6, 2019, the Energy Charter Conference confirmed that it would hold the first session of its “Modernization Group” on December 12, 2019, kicking off the process to revise the decades-old ECT.

The decision setting out the start date and mandate also includes a tentative timetable for subsequent negotiating sessions. These will be held in April, July and October 2020, after which the Conference will convene for a December 2020 stocktaking session. Each meeting will span approximately four days, and the negotiating documents will be restricted, though brief public summaries will be issued after each meeting if all parties agree. Aside from the December 2019 meeting, which will be held in Albania, the location of the other meetings has not yet been confirmed.

The news comes just one month after the Energy Charter Conference circulated a [57-page document](#) laying out proposed policy options for consideration in the upcoming “modernization” talks, compiling submissions from various [ECT](#) signatories on how the agreement should evolve, if at all.

The range of views expressed in that document is varied. Some signatories, such as Japan, have suggested that the ECT's terms do not require any changes. Others, such as the EU (in line with its [negotiating directives](#)) have outlined a detailed set of changes, and have suggested that the energy-focused treaty modernization should also incorporate potential changes to investment law and policy being discussed in other forums, such as the deliberations at [UNCITRAL Working Group III](#) on ISDS reform. Five signatories—including Albania, Azerbaijan, Luxembourg, the EU and Turkey—refer specifically to the need to align the ECT with climate change goals under the Paris Agreement.

The document is broken down into various sections, including opening summary statements from some signatories. There are also dedicated sections to various topics, of varying levels of ambition: among these are sections on the pre-investment phase, the right to regulate, the MFN clause, a clarification on “most constant protection and security,” compensation for losses, the umbrella clause, denial of benefits, transfers related to investments, frivolous losses, transparency, security for costs, valuation of damages, [third-party funding](#), sustainable



development and corporate social responsibility, access to infrastructure, and the legal relationship between the ECT and members of a regional economic integration organization (REIO).

Also under consideration is whether certain ECT provisions are obsolete and should be dropped entirely or changed, with a subsequent question detailing various provisions that may be considered obsolete and suggested approaches on how to address them specifically.

Other sections of the document are devoted to how certain terms in the ECT are defined, such as charter, economic activity in the energy sector, investment, investor, FET, indirect expropriation, transit, and tariff-setting and related principles.

The sections are built around the [list of topics for modernization endorsed in November 2018](#), and each section includes any issues that specific signatories have raised, their reasoning for doing so and their proposals going forward.

Asia–Pacific leaders clinch RCEP trade and investment deal, pledge to continue talks with India

Leaders from 15 of the countries negotiating the [Regional Comprehensive Economic Partnership \(RCEP\)](#) announced on November 4, 2019, that they had clinched a deal that would govern trade and investment across a wide swath of the Asia–Pacific region. India, however, did not endorse the outcome, though left open the prospects of joining the pact at a later date.

“We noted 15 RCEP Participating Countries have concluded text-based negotiations for all 20 chapters and essentially all their market access issues; and tasked legal scrubbing by them to commence for signing in 2020,” leaders said in a [joint statement](#), while noting that they would continue working with India in the hopes that the country will later come back on board.

The 20 chapters of the RCEP accord include various aspects of goods and services trade, as well as electronic commerce, competition, investment,

intellectual property, government procurement, economic and technical cooperation, and small and medium-sized enterprises.

The full RCEP text is not yet available publicly, though it [will be published](#) upon being signed. Summaries of its contents have been circulated by some of the participating governments. According to [an overview](#) provided by Australia’s Department of Foreign Affairs and Trade, the agreement reportedly includes various provisions aimed at investment facilitation, though further details on what this would entail are not yet known. Other outcomes on investment include MFN treatment to foreign investors, along with provisions involving investment protection, such as an FET standard and compensation in instances of conflict or expropriation.

“RCEP will reserve the right of parties to regulate in areas of particular sensitivity. Parties will retain current flexibility to regulate for important public welfare objectives, including public health,” the outcomes summary notes.

Importantly, RCEP will reportedly not include an ISDS mechanism, a matter that participating countries will continue to discuss in the future.

India stated its continued interest in the agreement and has not ruled out the option of continuing with RCEP pending further negotiations with the other countries while expressing concern that the deal as written would hurt domestic industry and that it might lead to “unsustainable trade deficits.”

Various leaders from the RCEP countries [expressed their hope](#) that the final version of the agreement ultimately includes India, noting both the commercial significance as well as the strategic importance of linking these economies.

The RCEP process was launched in 2012 and has featured 28 negotiating rounds, as well as various intersessional and ministerial meetings, along with leaders’ gatherings. The participating countries in this initiative include all 10 members of the Association of Southeast Asian Nations (ASEAN) and their six FTA partners, namely Australia, China, India, Japan, New Zealand and South Korea.



Joint initiative on investment facilitation looks to “meaningful outcome” for WTO ministerial

The joint initiative being pursued by 92 WTO members on developing a multilateral framework on [investment facilitation](#) has reached a new phase, with various new participants involved and a push for significant progress ahead of a December stocktaking meeting. The group coordinator—who gave a public update in October about the results of the [January–July 2019 meetings](#)—has said that those involved are working toward some type of “meaningful outcome” by the global trade body’s 12th Ministerial Conference (MC12) in Nur-Sultan, Kazakhstan.

The Friends of Investment Facilitation for Development (FIFD)—the group of some developing country WTO members that helped launch the joint initiative—held a session at the WTO Public Forum in October 2019 to provide an update on the discussions to date. The group’s new coordinator, Eduardo Gálvez of Chile, told audience members at the Public Forum that a “meaningful outcome” by June 2020 is the goal, without specifying further what that might entail. Gálvez added that there is interest from some WTO members that are not currently signatories to the joint initiative, some of whom have made substantive contributions to the discussions to date.

The subsequent “mini-ministerial” in Shanghai in November saw the addition of several WTO members to the joint initiative, bringing the number up from just over 70 to 92, with a Chinese official later telling participants at the UNCTAD IIA High-Level Conference that same month that four more additions were forthcoming. Gálvez had flagged both the Shanghai meeting as well as the December stocktaking meeting in Geneva as important milestones for gauging the shape of an MC12 outcome. The framework would involve binding disciplines for those involved.

The joint initiative was launched at the WTO’s Buenos Aires Ministerial Conference in December 2017. The group spent the first seven months of 2019 discussing various examples of investment facilitation measures and other steps that could potentially be applicable to this conversation, which resulted in a “Compendium of Text-Based Examples,” as well as a working document prepared by the group’s outgoing coordinator, Juan Carlos González, Colombia’s WTO Ambassador at the time. Both documents are currently restricted on the WTO’s online portal.

Examples considered include national-level legislation, certain aspects of bilateral investment treaties, provisions from the services chapters of regional and FTAs, and the WTO’s Trade Facilitation Agreement.

In line with an [agreed schedule](#), the group has held a series of thematic meetings devoted to the different sections of the working document. These include meetings held on October 17–18, October 31–November 1 and November 25–26, as well as the stocktaking meeting on December 12–13.

The working document that is guiding this next phase has seven sections, the first and last involving scope and general principles, as well as institutional arrangements and final provisions. The other five cover “transparency and predictability of investment measures; streamlining and speeding up administrative procedures and requirements; contact/focal point/ombudsperson types of mechanisms, arrangements to enhance domestic coordination and cross-border cooperation; special and differential treatment for developing and least-developed country members; and cross-cutting provisions,” according to a [summary](#) of the schedule.

Nord Stream 2: Pipeline spat with EU evolves into ECT dispute

A long-simmering row over plans for [two new pipelines](#) that would carry natural gas from Russia into Germany has advanced quickly in recent months, after gas company Nord Stream 2 [submitted](#) a notice of arbitration against the EU under the [ECT](#) on September 26, 2019. At issue, according to Nord Stream 2, is a set of changes to existing EU regulations that were announced two years ago, which [it claims](#) hurt the company’s investments on various grounds.

Nord Stream 2—owned by Russian gas company Gazprom but [headquartered](#) in the Swiss city of Zug—is aiming to build two pipelines that would [complement](#) the current pipelines under the original Nord Stream project. Nearly 2,000 kilometres of pipeline have already been built in the Baltic Sea, according to an [August 2019 announcement](#) on the company website.



If completed, these pipelines would allow for Russian natural gas to be transported directly to northern Germany, while bypassing Poland and Ukraine by constructing these pipelines underwater rather than over land.

In its notice of arbitration, according to excerpts reported in the news, Nord Stream 2 claims that the EU's move to [revise its Gas Directive](#) of its Third Energy Package [two years ago](#), and thus apply the same regulations to gas pipelines from third countries entering the EU market as what applies to purely internal pipelines, has [violated](#) the FET standard under the ECT. The company has also claimed that the treatment is discriminatory.

The revisions will affect those parts of the pipeline in the territorial waters of EU member states, and Nord Stream 2 does not have the option to negotiate a reprieve from its changes due to its start date for operations.

"Nord Stream 2 AG has now decided to ask the arbitral tribunal to determine that the European Union is in breach of its international law commitments under the [treaty] and to make orders requiring the EU to discontinue its breach," [said Sebastian Sass](#) on the company's behalf, according to comments reported by various news outlets. Notably, the company has also lodged a [similar complaint](#) against the European Parliament and the European Council at the CJEU, asking that the changes be annulled.

The European Commission, for its part, has [previously described](#) the move to revise the Gas Directive, which deals with gas pipelines that enter and operate in the EU market, as "not aimed at preventing the construction of any new gas pipelines" in response to questions over whether the move was linked to the Nord Stream 2 plans. Brussels said that the situation with that company is one of many showing the need for "legal clarity" in this area, given the multiple regulatory frameworks previously involved.

These developments come just as ECT members [prepare for negotiations](#) on modernizing the decades-old agreement, which has faced harsh scrutiny on numerous counts over the years, including the famously high levels of compensation awards. Questions have also been raised over whether the ECT members should consider [termination or withdrawal as options](#).



AWARDS AND DECISIONS

Substantial damages awarded to Perenco for FET breach and expropriation; Ecuador also awarded compensation under environmental counterclaim

Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6

Matthew Levine

A long-standing tribunal under the France–Ecuador BIT has issued its final award on compensation. The award orders Ecuador to compensate oil and gas investor Perenco Ecuador Limited (Perenco) almost USD 449 million for Ecuador’s imposition of a 99 per cent windfall profit tax and subsequent expropriation of the investment. Under the host state’s environmental counterclaim, the tribunal ordered the investor to compensate Ecuador USD 54 million.

Background and claims

Perenco is an Ecuadorian subsidiary of a multinational oil and gas company. Perenco invested in Ecuadorian participation contracts for two hydrocarbon blocks in the Amazon (Block 7 and Block 21).

As oil prices rose, Ecuador imposed windfall taxes ultimately reaching 99 per cent on oil exports. Subsequently, Ecuador’s state-owned oil company Petroecuador took over the operation of both blocks.

In April 2008, Perenco initiated ICSID arbitration against Ecuador and Petroecuador. Ecuador’s December 2011 counter-memorial raised an environmental counterclaim and an infrastructure counterclaim.

In its 2014 Decision on Remaining Issues of Jurisdiction and on Liability, the tribunal found Ecuador liable for the violation of the BIT’s FET and expropriation provisions as well as the underlying investment contracts. In its 2015 Interim Decision, the tribunal indicated that it would likely hold Perenco liable for compensation under the counterclaims, while inviting the parties to reach an amicable settlement and postponing the decision on the counterclaims.

The tribunal’s award of September 27, 2019, which is reviewed below, addressed both the compensation to be paid by Ecuador to Perenco under the BIT and

the participation contracts, on the one hand, and the compensation to be paid by Perenco to Ecuador under the counterclaims, on the other.

Of note, Perenco invested in the contracts as part of a consortium with Burlington Resources Inc. Burlington pursued a separate arbitration under the United States–Ecuador BIT. In December 2012, that tribunal found Ecuador had unlawfully expropriated Burlington’s investments. On February 7, 2017, the *Burlington* tribunal quantified the damages owed to Burlington at USD 380 million and awarded USD 41 million to Ecuador under its environmental and infrastructure counterclaims.

Tribunal staggers valuation of BIT and contract breaches

The tribunal began by recalling that the assessment of damages “whether in contract, tort or under a treaty, is ‘not an exact science’” (para. 69) and that its task was not to consider questions of economic theory. Instead, it focused its analysis on the appropriate dates for valuing the investor’s damages for each breach.

The investor argued that its expropriation under the contract in 2010 was the relevant date for the valuation of damages. Ecuador responded that it was necessary to distinguish between damages stemming from the FET violation, which had taken place in 2007, and the expropriation, which occurred in 2010.

The tribunal agreed with Ecuador that it should employ two valuation dates. Specifically, it determined the damages due to the FET breach as starting on the date thereof and running until the date of expropriation. It then determined, through a discrete analysis, the damages from the date of the expropriation onward.

Extension of participation contract was likely but tribunal cannot speculate about terms

More than a third of Perenco’s total request was based on its expectation that the participation contracts would have been extended. Ecuador insisted on its discretion and that an extension would have been unlikely. The tribunal disagreed, on the basis that most similar contracts in Ecuador had been extended and that technical complexity of oil extraction favoured maintenance of the status quo.



The tribunal, however, declined to endorse Perenco's submissions about the terms of an eventual extension. It found that while the investor should be compensated for the loss of opportunity to agree to an extension, it was also the case that "any estimation of the value of the loss of opportunity is an exercise of discretion and therefore [the tribunal] decided to award a nominal value" of USD 25 million (paras. 324–326).

Ecuador's claim of contributory fault is not sustained

Ecuador argued that Perenco's compensation should be reduced on the basis of its contributory fault.

The tribunal recalled Article 39 (Contribution to the Injury) of the [International Law Commission \(ILC\) Draft Articles on the Responsibility of States for Internationally Wrongful Acts](#): "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."

The tribunal found that while the inclusion of the word "wilful" broadens the scope of Article 39 beyond negligence, such broadening was not substantial. It therefore proceeded on the basis that in order for Ecuador's submissions to succeed, the tribunal must be satisfied that Perenco manifested a lack of due care for its own property or rights. As such, the tribunal rejected the alleged contributory fault.

Tribunal considers potential reconsideration of jurisdiction over counterclaims

Turning to the counterclaims, Perenco had asked the tribunal to reconsider certain earlier decisions bearing on jurisdiction over the counterclaim.

First, Perenco argued that it should be considered an alter ego of its consortium partner, Burlington. This argument had been rejected in 2017 and 2018, as jurisdiction over the counterclaim was seen by a majority of the tribunal's members as an already adjudicated matter (*res judicata*). The same two arbitrators affirmed that position in the award.

Second, Perenco argued that the substance of either the Burlington award or the settlement agreement between Burlington and Ecuador negated the Perenco tribunal's jurisdiction over the counterclaim. Although arbitrator Kaplan dissented, the majority rejected these arguments.

Independent expert's report reveals "contamination egg" at the blocks

Ecuador alleged that Perenco had left behind an

environmental catastrophe necessitating approximately USD 2.5 billion in compensation. Perenco argued that its liability did not exceed USD 10 million.

Following the 2015 Interim Decision and the parties' failure to negotiate a settlement of the environmental counterclaim, the parties jointly appointed an independent expert tasked with reporting back to the tribunal on the costs of remediating the environmental damage.

The tribunal makes extensive reference to the independent expert report, which concluded that the cost of remediating the total measured contamination in Blocks 7 and 21 amounted to almost USD 160 million.

Tribunal attempts to unscramble "the contamination egg"

Perenco attempted to persuade the tribunal that other operators were responsible for most of the contamination. Ecuador responded that a failure to prove that other operators had caused the contamination meant that Perenco must be responsible. The central question for the tribunal was thus how much of the contamination was Perenco's responsibility.

The tribunal was willing to attribute some liability to past operators. Although specific evidence was limited, the arbitrators considered that past operations had taken place under domestic environmental regulations that were less demanding.

It ultimately determined that more than USD 93 million of the remediation estimate was attributable to Perenco's operations. However, it also considered that Perenco's operation had taken place as part of a consortium with Burlington, and therefore returned to the contentious relationship between the Burlington and Perenco counterclaims.

In short, the tribunal concluded that it could subtract the USD 39 million paid by Burlington for Ecuador's environmental counterclaim from the approximately USD 93 million required for remediation. As a result, it ordered Perenco to pay Ecuador slightly more than USD 54 million under the environmental counterclaim.

Second counterclaim yields no extra damages, as Burlington tribunal already compensated Ecuador

The *Burlington* tribunal had awarded Ecuador approximately USD 2.5 million under the infrastructure counterclaim. The *Perenco* tribunal declined to award anything, given that Ecuador had submitted almost identical claims in the two proceedings as regards this second counterclaim, and that the *Burlington* award



had entrusted the *Perenco* tribunal with guarding against double recovery.

Tribunal declines to direct Ecuador on how to spend compensation

Perenco had requested, and Ecuador had agreed, that the host state be ordered to deposit the counterclaim monies into an environmental remediation fund. The tribunal, however, declined to follow the parties. It saw such “continued monitoring” as inconsistent with the role of an ICSID tribunal.

Dispute between parties continues over enforcement of award

Perenco filed a petition to enforce the award in the United States, dated October 3, 2019. Ecuador initiated ICSID annulment proceedings, registered on October 4, 2019, and obtained a stay of enforcement.

Notes: The tribunal was composed of Peter Tomka (president appointed by ICSID Administrative Council, Slovak national), Neil Kaplan (claimant’s appointee, English national) and J. Christopher Thomas (respondent’s appointee, Canadian national). The award of September 27, 2019 is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10837.pdf>

Dominant and effective nationality objection prevails in CAFTA-DR arbitration

Michael Ballantine and Lisa Ballantine v. The Dominican Republic, PCA Case No. 2016-17

Juan Carlos Herrera-Quenguan

On September 3, 2019, an UNCITRAL tribunal declined jurisdiction over a claim filed in 2014 against the Dominican Republic by two dual nationals based on an allegedly discriminatory denial of real estate projects in environmentally sensitive and protected areas. The claimants alleged breaches of the FET standard and the expropriation provision of the Dominican Republic–Central America Free Trade Agreement (CAFTA-DR), among others.

Background and claims

In 2000, U.S. nationals Michael and Lisa Ballantine first carried out Christian missionary work in the Dominican Republic. They remained connected to the country, even acquiring Dominican nationality. The couple observed that there was no successful luxury real estate development with infrastructure and amenities around the Jarabacoa mountains. Consequently, they started acquiring land for the Jamaca de Dios Project, which consisted of two phases: the first, begun in 2005, entailed infrastructure and individual luxury homes; the second, started in 2009, entailed the construction of a luxury hotel and spa, among other amenities.

The Ballantines acquired less than half of the land intended for Phase 2 and incurred substantial expenses for the construction of roads, infrastructure, reforestation, high-speed internet, maintenance, security, among others. However, Presidential Decree No. 571-09 of August 7, 2009 created the Baiguante National Park to protect and preserve the Baiguante Waterfall, a highly diverse and fragile ecosystem. Furthermore, conflicts arose regarding the use of a road passing through the Ballantines’ property. Ultimately, some violent episodes occurred, and several local authorities became involved.

After completing Phase 1 of the project, the claimants could not complete Phase 2 because the Ministry of Environment, since 2011, had refused to grant several environmental permits. Consequently, in 2014, they initiated UNCITRAL arbitration for breaches of several CAFTA-DR provisions: national treatment, MFN treatment, minimum standard of treatment, expropriation and compensation, and transparency (para. 189).



The burden of proof and standard of interpretation

The tribunal noted that the CAFTA-DR does not contain any provision addressing the issue of burden of proof. It held that, since Article 27(1) of the UNCITRAL Rules provided that each party has the burden of proof to support their claim or defence, both parties had to demonstrate whether or not the tribunal had jurisdiction over the dispute. This holding was in accordance with the general approach of other CAFTA-DR tribunals (for example, *Pac Rim LLC v. El Salvador*).

As for the standard of interpretation, the tribunal held that VCLT Articles 31 and 32 applied to the identification of (i) who is entitled to submit a claim to arbitration and how to do so (CAFTA-DR Article 10.16) and (ii) the requirements for a national or an enterprise to be an investor and in turn a claimant (CAFTA-DR Article 10.28). Regarding the latter, the tribunal held that “[t]he concept of national is particularly fundamental ... and has a bearing on the issue of jurisdiction” (para. 514).

Considering that the claimants were dual nationals (U.S. and Dominican), the tribunal determined that it had to establish, which was the dominant and effective nationality. For that purpose, it established that it needed to answer two fundamental questions that relate to each other: “(i) what are the relevant times in which an individual shall comply with the nationality requirement? and (ii) what is the legal standard ... to determine [the] dominant and effective nationality[?]” (para. 515).

Relevant times, and dominant and effective nationality

The majority of the tribunal answered the first question by indicating that the relevant times (or critical dates) to examine the compliance with the nationality requirement were (i) the time in which the alleged breach was committed (September 12, 2011), and (ii) the time of the filing of the claim (September 11, 2014); such dates provided temporal context in which to interpret Article 10.28 in light of the VCLT. On the other hand, the tribunal held that the moment in which the investment was made is not relevant for such an examination.

As for the second question, the tribunal established that the CAFTA-DR did not “prescribe specifically the factors that may be considered to determine the dominance and effectiveness” (para. 530). Hence, it turned to determine the applicable legal standard first by resorting to the specific meaning of the treaty terms and then to explore customary international law, given

that the CAFTA-DR and rules of international law formed the governing law, pursuant to CAFTA-DR Article 10.22.

Because the tribunal found that the treaty did not provide more guidance for interpretation, it resorted to analyzing the jurisprudence of other international courts and tribunals (the International Court of Justice, the Iran–United States Claims Tribunal and the Italian–U.S. Conciliation Commission). In doing so, the tribunal considered that the criteria previously indicated in its Procedural Order No. 2 were applicable, namely: the claimants’ (i) habitual residence, (ii) personal connections, (iii) economic and family centre and (iv) acquisition of the second nationality.

In analyzing these criteria, the majority of the tribunal asserted that it did not intend to determine whether the claimants ceased to be U.S. nationals or to have connections to that country. Nonetheless, the majority concluded that the Dominican nationality took precedence during the relevant times, and, therefore, the Ballantines did not qualify as investors under CAFTA-DR Article 10.28. On this point, arbitrator Cheek dissented.

Consequently, by majority, the tribunal declared that it had no jurisdiction over any of the claims.

Decision on costs

The tribunal considered that the complexity of the proceedings, the novelty of the issues of fact and law and other relevant circumstances rendered the costs of the arbitration reasonable in accordance with UNCITRAL Arbitration Rule 40(2)(e). Arbitration costs amounted to USD 900,000; claimants’ legal fees and expenses to USD 1.8 million; and respondent’s legal fees and expenses, USD 3.2 million.

The majority of the tribunal (arbitrators Hernández and Cheek) decided to split the arbitration costs evenly between the parties and ordered each party to bear its own costs. On this point, arbitrator Vinuesa dissented.

Partial dissenting opinions

Arbitrator Cheek partially dissented as to the relevance of the moment in which the investment was made. In her view, when examining the claimants’ ties to the United States and the Dominican Republic, the tribunal should have established that not only the critical dates were relevant but also the entire life of the claimants, as customary international law prescribes.

Arbitrator Vinuesa partially dissented as to the



apportionment of costs. He considered that “PCA’s costs, including the tribunal’s fees and expenses, should be borne entirely by the claimants,” given that the majority made a value judgement by stating that “the claimants brought a credible case,” a finding that had not been previously endorsed in CAFTA-DR arbitrations. Moreover, Vinuesa was of the opinion that the Ballantines’ opposition to bifurcating the proceedings could not have been overlooked, primarily because this “demanded considerable time and effort and greater costs to the Parties throughout the procedure” (Vinuesa’s dissent, paras. 29–35).

Notes: The tribunal was composed of Ricardo Ramírez Hernández (presiding arbitrator, appointed by the parties, Mexican national), Marney Cheek (claimant’s appointee, U.S. national) and Raúl Vinuesa (respondent’s appointee, Argentinian national). The award of September 3, 2019, including the dissenting opinions, is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10818.pdf>

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All claims dismissed by ICSID tribunal in energy investor’s ECT case against Italy

Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40

Trishna Menon

An ICSID tribunal has dismissed the ECT case initiated by Luxembourg-incorporated Belenergia S.A. (Belenergia) against Italy. Belenergia contested Italy’s changes to the legal regime governing investments in the photovoltaic (PV) sector.

Background and claims

Through Legislative Decree No. 387/2003 and five successive schemes (Energy Accounts), Italy provided incentives for the generation of energy from PV plants. The PV plant owner could request the state-owned energy regulatory agency Gestore dei Servizi Energetici (GSE) to purchase electricity at a minimum price to feed directly into the grid.

Between September 2011 and December 2013, Belenergia invested in 10 Italian special purpose vehicles (SPVs) operating 20 PV plants in Italy. These SPVs concluded conventions with the GSE on feed-in tariffs (FITs) and on minimum prices under the applicable Energy Account regime.

Italy repealed the minimum price incentives on December 23, 2013, by Legislative Decree No. 145/2013 (Destinazione Italia Decree), and reduced the FITs applying to all PV plants with a capacity above 200 kW by Legislative Decree No. 91/2014 (Spalma Incentivi Decree) on June 24, 2014.

Belenergia initiated ICSID arbitration on August 7, 2015, claiming that the two decrees frustrated its legitimate expectation based on those incentives. According to Belenergia, Italy breached its obligations under the ECT, including the FET standard, the umbrella clause, the most constant protection and security obligation, and provisions prohibiting unreasonable and discriminatory measures. Belenergia sought damages of around EUR 18 million.

Tribunal dismisses Italy’s jurisdictional and admissibility objections

Italy first objected to the tribunal’s jurisdiction to hear intra-EU disputes. Relying on VCLT Article 30 and an alleged practice of EU member states objecting to the jurisdiction of ECT tribunals, Italy argued that the EU’s 2009 Lisbon Treaty prevails over the ECT to the extent of any incompatibility.



In the tribunal's view, the two treaties did not have the same subject matter, which is required in order for VCLT Article 30 to apply. It also held that the CJEU's decision in *Achmea* and its interpretation by EU member states were matters for the EU legal order and could not be transposed to the ECT regime.

Secondly, Italy argued that the broad terms of the choice of forum clause under the GSE conventions triggered the fork-in-the-road provision under ECT Articles 26(2) and 26(3), which provides for an exception to investor–state arbitration for some states, in cases where a dispute settlement procedure had been previously agreed to with the investor. Alternatively, Italy relied on *SGS v. Philippines* and *BIVAC v. Paraguay* to submit that the choice of forum clause precluded Belenergia's umbrella clause claim under ECT Article 10(1).

The tribunal clarified that the fork-in-the-road clause applied only to disputes already submitted to a different forum. In any event, it noted that only Belenergia's SPVs (and not Belenergia itself) were parties to the GSE conventions and held that the clause would not apply absent identity of parties. The tribunal also disagreed with the approach in *SGS v. Philippines*, which would deprive the ECT's umbrella clause of its meaning, because any contract would be subject to domestic courts based on default rules on conflicts of jurisdiction. Instead, it endorsed the *SGS v. Paraguay* approach that umbrella clause claims could not be presumed to be co-extensive with contract claims, finding that Belenergia's umbrella clause claim was admissible.

Belenergia also complained of Italy's measures imposing "imbalance costs" on PV plant owners to compensate for costs incurred by the electricity grid due to the difference between the electricity amount planned to be injected into the grid by PV plant owners and the amount actually injected. The tribunal upheld Italy's jurisdictional objection to this claim, holding that it was covered by the ECT's tax carve-out in Article 21.

No violation of the FET standard

Belenergia argued that Italy breached the ECT's FET standard, specifying that it made its investments with the legitimate expectation that the FITs and the minimum prices had become acquired rights and could not be modified in relation to existing PV plants.

Relying on the findings in *Electrabel v. Hungary* assessing "the amount of information that the investor knew and should reasonably have known at the time of the investment" (para. 583), the tribunal held that

the GSE conventions on FITs merely referred to the various incentives provided by the general legislation and did not amount to any commitments addressed specifically to Belenergia.

The tribunal also found that the GSE conventions on minimum prices were subject to a maximum one-year duration and provided for possible amendments, such that Belenergia could not have any expectation that this scheme would not be amended.

Finally, the tribunal's review of Italian laws and regulations showed that PV investors should have expected reductions in PV incentives, thus dismissing Belenergia's FET claim.

Tribunal rejects umbrella clause, and protection and security claims

Belenergia argued that irrespective of their contractual nature, the GSE conventions constituted commitments undertaken by Italy protected by the ECT's umbrella clause. The tribunal disagreed with Belenergia that the GSE conventions on FITs and minimum prices contained specific commitments entered into with Belenergia; the amount and duration of the FITs and the minimum prices were already set forth in Italian legislation and merely replicated in the GSE Convention.

The tribunal relied on *Isolux v. Spain* to hold that the Italian legal and regulatory framework before the Spalma Incentivi and Destinazione Italia Decrees was addressed to national and foreign investors and could not be interpreted as creating obligations specifically "entered into with" Belenergia.

While the tribunal agreed with Belenergia that the ECT Article 10(1) standard could extend beyond the protection of physical security in certain situations, it held that the standard could not protect investments against the state's right to regulate in a manner that negatively affects them. Belenergia's claim in this regard was dismissed.

No unreasonable or discriminatory measures found

Italy objected to Belenergia's claim of unreasonable and discriminatory measures, arguing that it overlapped with the FET claim and that ECT Articles 10(2) and (3) applied only to establishing or acquiring new or additional investments as defined in ECT Article 1(8).

The tribunal agreed with Italy's treaty interpretation and dismissed the claim. Belenergia failed to satisfy its burden



of proving that the alleged discriminatory character of the measures affected the establishment or acquisition of new or additional investments in the PV sector.

The changes to Italy's regulatory framework were not found to be unreasonable, disproportionate or unpredictable. While Belenergia argued that Italy's measures lacked public interest goals, such as environment or public health protection, and a "rational policy," the tribunal found that it sufficed that the true purpose of the measures was to reduce the cost of subsidies.

The tribunal also dismissed Belenergia's argument that the regulatory differentiation linking the reduction of FITs to the nominal capacity of PV plants discriminated against medium-sized and large PV plants. The differentiation was based on legitimate and objective grounds, and the special protection of smaller plants was justifiable insofar as it sought to guarantee free competition in the energy sector.

Decision and costs

Therefore, the tribunal dismissed all claims on the merits. It ordered both parties to bear the costs of the arbitration equally, and each party to bear its own legal costs and expenses.

Notes: The tribunal was composed of Yves Derains (president, French national), Bernard Hanotiau (claimant's appointee, Belgian national) and José Carlos Fernández Rozas (respondent's appointee, Spanish national). The award, dated August 6, 2019, is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10759.pdf>

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Colombia is ordered to pay over USD 19 million for frustrating Glencore's legitimate expectations

Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6

Sofia de Murard

An ICSID tribunal found that Colombia frustrated the legitimate expectations of Swiss mining company Glencore and its investment in Colombia in breach of the non-impairment and FET clauses of the Colombia–Switzerland BIT. The tribunal ordered Colombia to pay Glencore over USD 19 million in compensation plus interest, roughly half of its legal costs and full arbitration costs.

Background and claims

In 1995, Glencore acquired Prodeco, a Colombian company that had a coal mining exploration and exploitation contract with Carbocol, the Colombian mining agency. Three agencies later replaced Carbocol: Ingeominas, the Colombian Geological Service (SGC in its Spanish acronym) and the National Mining Agency (ANM in its Spanish acronym).

The parties renegotiated the contract in December 2009: Ingeominas agreed to lower royalties in exchange for Prodeco's further investments in the mining operation. The amendment could not be registered with the Colombian Mining Registry because it was contrary to Colombia's interests. After further negotiations, a new amendment in favour of Colombia was registered.

Subsequently, the Colombian agency supervising public funds, Contraloría, launched an investigation into Ingeominas. The investigation report indicated that the amendment reduced Colombia's revenues, against the country's interests. Prodeco, in turn, argued that the revenue had to be calculated throughout the contract's entire duration and not just during 2010, which inevitably reduced Colombia's revenues.

In 2012, SGC requested the amendment's annulment in domestic administrative courts. In 2015, Contraloría used the report to hold Prodeco and Ingeominas officers jointly liable for a fiscal liability fine. Prodeco paid the USD 19.1 million fine but challenged it, first administratively and later judicially. At the time the award was issued, both SGC's proceeding to annul the amendment and Prodeco's legal challenge to the fine were pending.

Finally, in March 2016, Glencore and Prodeco (jointly, Glencore) initiated ICSID arbitration. They claimed that Colombia's actions—namely, the fiscal liability fine and the annulment proceedings—breached the



FET and non-impairment standards and the umbrella clause of the BIT. They requested that the tribunal order Colombia to reimburse the fine, honour its obligations under the contract and its amendment, and stop the annulment proceedings.

Tribunal dismisses jurisdictional and admissibility objections, but declines to exercise jurisdiction over umbrella clause claim

Colombia argued that the contract was negotiated in violation of Prodeco's good-faith obligations and was thus illegal. However, the tribunal was not convinced, since the allegation only arose during the arbitration and there was no direct evidence of Prodeco's deliberate misrepresentation.

The tribunal also rejected Colombia's fork-in-the-road objection, since Prodeco had made the clear choice to pursue arbitration. It reasoned that previous negotiation and conciliation attempts with Colombian agencies did not trigger the clause.

Colombia argued that the claims were not ripe for adjudication and were therefore inadmissible. The arbitrators rejected this argument, finding that Prodeco complied with the BIT by pursuing administrative proceedings for six months before initiating arbitration. The tribunal held that since the contract annulment proceeding was not an administrative action, the claimants were not required to pursue it.

However, the tribunal rejected Glencore's umbrella clause claim on jurisdictional grounds, because BIT Article 11(3) expressly excludes the umbrella clause from the scope of the state parties' consent to arbitration.

Merits: Arbitrators discuss threshold of non-impairment clause

The tribunal pointed out that BIT Article 4(1) on non-impairment prohibits "unreasonable or discriminatory measures" rather than the more common "arbitrary or discriminatory" measures. It found that "unreasonable" measures are broader than "arbitrary" ones since they included biased *and* irrational measures, not only biased ones.

The arbitrators found that Colombia acted unreasonably in affirming that the amendment has caused damages to Colombia and in calculating those damages. They found that Contraloría's report was outdated, lacked necessary reasoning and employed overly simplistic and biased calculation methods since it focused on a single year (2010).

Tribunal holds that Colombia's violation of the non-impairment clause also breached legitimate expectations under FET—but rejects other FET violations

Glencore argued that Colombia breached the FET standard under BIT Article 4(2) by denying due process to Prodeco during the fiscal liability proceedings. In particular, it contended that the charges against some civil servants were dropped after they changed their statements to incriminate Prodeco and that Prodeco was denied the chance to present additional evidence.

However, the arbitrators found that due process was not denied because Glencore failed to prove that Contraloría's inquisitorial powers were used in violation of FET and due process. In effect, the tribunal noted that Contraloría did not use the modified statements in its prosecution and that Prodeco had never mentioned them before the arbitration.

Additionally, the tribunal rejected Glencore's argument that the former Comptroller General was biased against Prodeco, noting that the authority was replaced before the final fiscal liability decision.

Glencore also argued that its legitimate expectations were violated by the fiscal control regime itself, the arbitrary manner in which it was imposed, and by SGC's challenge of the amendment before administrative courts.

Although the FET clause does not expressly reference legitimate expectations, the tribunal decided that its assessment had to consider "whether the state made specific representations to the investor before the investment was made and then acted contrary to such representations" (para. 1310).

The tribunal found that Glencore failed to prove that the fiscal control regime itself was a violation of legitimate expectations. It held that "a mere contractual breach by the State will not *per se* result in a violation of the international law FET standard," but that an additional factor—such as acts of "puissance publique"—was required (para. 1378).

According to the tribunal, investors must be aware of the host state's legal framework when making an investment. This meant that Prodeco should have known that fiscal controls were routine in Colombia and so could not have had the legitimate expectation that the company would be exempt from them. Even if Prodeco had legitimate expectations, they were not breached because the fiscal control acted in accordance with domestic law.



However, the arbitrators found that the fiscal control was executed arbitrarily and unreasonably (see section above on non-impairment) and thus violated Glencore's legitimate expectations to a reasonable fiscal control.

The tribunal did not find a BIT breach in the different Colombian government agencies' diverging positions. According to the tribunal, "[t]he modern nation-state typically endows different agencies with different legal and policy responsibilities and objectives" (para. 1420).

Finally, the tribunal did not find the amendment proceedings to be a violation of Prodeco's legitimate expectations, considering that initiating them was within SGC's rights under both the contract and domestic law, thus Prodeco could not have the legitimate expectation it would refrain from such action.

Decision: Compensation and costs awarded, but specific performance rejected

Finding that Colombia's investigation report and fiscal liability fine impaired the use of Glencore's investment and breached FET, the tribunal ordered Colombia to restore the USD 19.1 million fine paid by Prodeco as compensation, plus interest. It also ordered Colombia to pay the arbitration costs (USD 1.3 million), Colombia's legal expenses (USD 3.4 million) and approximately 50 per cent of Glencore's (USD 1.69 million).

The tribunal denied Glencore's request to order ANM to continue to perform the contract, cease local court proceedings and promise to avoid initiating similar proceedings. Without answering whether a tribunal could issue such an order, it held that the "reparation of the international wrong committed by Colombia requires full reparation... achieved by restitution... not by ordering Colombia to perform the Eighth Amendment" (para. 1667).

Notes: The tribunal was composed of Juan Fernández-Armesto, (president appointed by both parties, Spanish national), Oscar M. Garibaldi (claimant's appointee, American and Argentinian national) and Christopher Thomas (respondent's appointee, Canadian national). The award of August 27, 2019 is available at https://www.italaw.com/sites/default/files/case-documents/italaw10767_0.pdf

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As claimants lacked a protected investment and could not import consent to arbitration via MFN, UNCITRAL tribunal dismisses case against Mauritius on jurisdictional grounds

Professor Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius, PCA Case No. 2018-37

Pietro Benedetti Teixeira Webber

An UNCITRAL tribunal dismissed the claims of two French nationals against Mauritius on jurisdictional grounds, concluding that the claimants did not make a qualifying investment and that Mauritius did not consent to arbitration. The award was issued on August 23, 2019.

Background and claims

Christian Doutremepuich was the founder and director of Laboratoire d'Hématologie Médico-Légale, a laboratory of forensic hematology situated in Bordeaux, France. Antoine Doutremepuich was the laboratory's manager and head of external relations.

In 2009, the two claimants initiated a project to establish a laboratory for genetic and DNA analysis, in the context of Mauritius seeking to enhance its forensic capability. Mauritius received their project proposal in 2013, and the Prime Minister stated in 2014 that there were no objections to it. After the claimants registered three project companies in Mauritius, the Prime Minister rejected their project in 2016 without providing reasons.

The claimants initiated arbitration based on the 1973 France–Mauritius BIT, arguing that the rejection of the project amounted to a breach of FET and requesting damages of EUR 11.6 million. In declining jurisdiction over the case, the tribunal addressed two issues: (i) whether the claimants made a qualifying investment under the BIT; and (ii) whether the claimants were entitled to apply the MFN clause in the BIT to invoke the arbitration agreement under the Finland–Mauritius BIT.

The standard to analyze whether the Doutremepuichs made an investment

The claimants argued that they planned several investment activities in Mauritius, which included purchasing land and equipment, building infrastructure, and hiring and training employees. However, the tribunal found no evidence that any of these activities happened. Thus, the claimants' alleged



investment consisted in the creation of three companies in Mauritius (to which they transferred funds of EUR 300,000) and in the contribution of know-how.

The arbitrators established three criteria to analyze the claimants' alleged investment according to Art. 1(1) of the France–Mauritius BIT, determining that a protected investment needs to (i) provide a contribution to the development of the host state, (ii) be of a certain duration and (iii) entail participating in the risks of the operation. Finding that the claimants failed to meet all three criteria, the tribunal concluded that it did not have jurisdiction over the case.

The alleged investment did not provide a contribution to Mauritius

The tribunal held that contributions to the host state could take several forms, including non-financial inputs that have an economic value. In view of bank statements indicating that only Christian Doutremepuich transferred EUR 300,000 to the companies registered in Mauritius, it concluded that Antoine Doutremepuich did not make any financial contribution.

In addition, the arbitrators found that Christian Doutremepuich did not contribute to the host state since he had transferred the money to bank accounts controlled by himself. In 2016, after Mauritius rejected the project, Christian Doutremepuich repatriated almost EUR 224,000 back to his account in France. Consequently, the tribunal concluded that he never lost control over the money and was never dispossessed of it.

The claimants also alleged that they had transferred know-how, including the layout of the laboratory and the training of qualified personnel. However, the tribunal concluded that the claimants failed to provide evidence of any actual transfer or contribution of know-how of economic value.

The alleged investment did not have a minimum duration

The tribunal held that it could not establish in abstract the minimum duration required for protected investments, but that it had to assess the reasonable duration in light of all circumstances. In light of the facts of the case, the tribunal concluded that there was no duration at all since the alleged investments were one-off payments for goods or services that were incurred as part of the preparations for the project.

The arbitrators also pointed out that the time during which the funds were deposited in bank accounts

in Mauritius was short—from May 2015 to May 2016. Although holding that such a duration did not in itself disqualify a contribution as an investment, they highlighted that projects of this kind would take “much more time to assimilate in a new environment” (para. 144).

The alleged investment did not entail risks

Although the project's business plan described the laboratory's commercial risks, the tribunal noted that the project never got off the ground. Hence, it could only consider the risks associated with the transfer of funds. Since the claimants always remained in control over the funds and could transfer or repatriate them whenever they wished, the tribunal held that they did not make a contribution that entailed participating in the risks of the operation.

The application of the MFN clause to dispute resolution

The parties did not dispute that the France–Mauritius BIT does not contain an arbitration agreement for investor–state disputes. All Article 9 of the BIT provides for is a contracting state's obligation to include an arbitration agreement in investment contracts concluded with nationals of the other contracting state.

The claimants invoked the MFN clause in the France–Mauritius BIT, asking the tribunal to apply the investor–state arbitration agreement contained in Article 9 of the Finland–Mauritius BIT, which, according to the claimants, consisted in more favourable treatment granted to Finnish investors, since “it does not contain any obligation to settle the dispute amicably and offers the investor a choice between different arbitral institutions” (para. 181).

The tribunal held that MFN clauses may apply to dispute resolution provisions in other agreements, provided that this was the intention of the contracting states. According to the tribunal, the interpretation should follow the standards provided by VCLT Article 31 and the principle of *ejusdem generis*.

The tribunal found that the MFN clause applied only to matters governed by the France–Mauritius BIT other than those referred to in its Article 7, which deals with tax matters. Considering that investor–state arbitration was not a matter governed by the BIT, it concluded that the MFN clause could not extend to this matter. “Using the MFN clause to import such consent would create obligations Mauritius never undertook,” the tribunal indicated (para. 219).



Finally, the tribunal addressed the issue of post-treaty practice, as France and Mauritius signed a new BIT in 2010 but did not ratify it. As the tribunal noted, the draft bill requesting the French Parliament to ratify the 2010 BIT indicated that the treaty was important because it would allow the possibility of "resort[ing] to international arbitration on the basis of the consent expressed by the State." (para. 232, note 342). For the tribunal, this indicated that France was not convinced that its nationals had access to arbitration against Mauritius via the MFN clause of the 1973 BIT.

Decision and costs

The tribunal decided it lacked jurisdiction over the case and ordered the claimants to bear the arbitration costs in full, each party bearing its own legal costs.

Notes: The tribunal was composed of Maxi Scherer (presiding arbitrator appointed by the co-arbitrators, British national), Olivier Caprasse (claimants' appointee, Belgian national) and Jan Paulsson (respondent's appointee, U.S. national). The award of August 23, 2019, is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10817.pdf>

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Laos prevails in defending its first known treaty-based ISDS cases

Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6, and Sanum Investments Limited v. Lao People's Democratic Republic, UNCITRAL, PCA Case No. 2013-13

Joe Zhang

On August 6, 2019, tribunals in two parallel proceedings against the People's Democratic Republic of Lao (Laos) issued final awards dismissing all claims raised by the claimants while awarding Laos legal fees and arbitration costs.

Background

The two proceedings arose from the same facts. In 2007, two American businessmen—John Baldwin and Shawn Scott—established several gambling facilities in Laos via Macau-registered Sanum Investments (Sanum), a subsidiary of their Dutch holding company Lao Holdings N.V. (LHNV). After a few years of operation, several disputes arose between the investors and their Laos local partner centred on issues relating to profit sharing and the early termination of several planned expansions.

Alleging that the government of Laos interfered during the process by conspiring with the foreign investors' local partner to seek to drive them out of Laos, the investors launched two separate proceedings: LNHV initiated ICSID arbitration under the 2003 Netherlands–Laos BIT; Sanum initiated a PCA-administered UNCITRAL arbitration under the 1993 China–Laos BIT. (At the jurisdictional phase, the *Sanum* tribunal found the China–Laos BIT applies to Macao under the customary international law rules of state succession.) The proceedings were never consolidated but for the most part were conducted jointly by the two tribunals.

Corruption and bad faith

At the outset of the proceedings, Laos asked the tribunals to dismiss all claims, alleging the investors conducted illegal activities such as bribery and corruption at both the inception and during the operation of the investment. Seeing this as a merits issue, not a jurisdictional challenge, the tribunals provided a detailed analysis of Laos' defence.

The tribunals first looked at the applicable laws. Recalling that the parties agreed that domestic law is relevant in determining whether an investment needs to be made and operated according to the law of the host state, the tribunals found that "there is



no doubt that bribery and corruption are contrary to the domestic laws of Laos” (*Sanum* award, para. 95; *LHNV* award, para. 97).

Turning to international law—in particular citing relevant provisions of UN Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions—the tribunal recognized that as “a principle of customary international law,” corruption should not be used “to obtain or retain business or other undue advantage in relation to the conduct of international business” (*Sanum* award, para. 103; *LHNV* award, para. 105). Further, the tribunals considered that “proof of corruption at any stage of the investment may be relevant” (*Sanum* award, para. 103; *LHNV* award, para. 105).

The tribunals moved on to examine the applicable standard of proof, and concluded that “given the seriousness of the charge, and the severity of the consequences ... ‘clear and convincing’ evidence ... must point clearly to corruption,” in other words, “a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt” (*Sanum* award, para. 107–108; *LHNV* award, para. 109–110).

After reviewing the evidence submitted by Laos, although the tribunals found certain transactions “suspicious” or even found plausible evidence indicating that the investors illicitly channelled money to Lao government officials (*Sanum* award, paras. 147–156; *LHNV* award, paras. 148–157), the tribunals were disturbed by the fact that “no prosecutions have been brought against any persons alleged to have accepted bribes, nor has there been evidence of due diligence in any investigation” (*Sanum* award, para. 111; *LHNV* award, para. 112). As Laos failed to provide a convincing explanation for its failure to track down bribe-takers, the tribunal found it failed to meet its burden of proof per the required standard of “clear and convincing” evidence for those corruption allegations.

On the other hand, the tribunal confirmed that investors have “good faith obligations ... in the host country” and that serious conduct incompatible with such obligations “is not without Treaty consequences, both in relation to their attempt to rely on the guarantee of [FET], as well as their entitlement to relief of any kind from an international tribunal” (*Sanum* award, para. 104; *LHNV* award, para. 106).

After a review of the evidence, the tribunal found that the circumstances disclosed met a lower standard of

“balance of probabilities,” which cast doubts as to the investors’ good faith and the legitimacy of their claims. This, in turn, resulted in the tribunal’s later decision to dismiss all of the investors’ claims.

Expropriation claims

The investors presented a series of expropriation claims, but the tribunals found that none of them merited relief.

First, the investors referred to a contract dispute between them and their local Lao partner, which resulted in a multi-stage local court proceeding and a later commercial arbitration award in favour of the investors, which they were unable to enforce. Despite their claim that the government had interfered during the earlier judicial process, the tribunal found “simply no persuasive evidence” supporting their argument of alleged interference, and hence no merit in the claim.

(In 2016, the investors filed two separate proceedings claiming that their alleged inability to enforce the commercial arbitration award was a violation of their treaty. These proceedings were consolidated as *Lao Holdings N.V. and Sanum Investments Limited v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/16/2, ICSID Case No. ADHOC/17/1 and are still pending.)

Second, the investors challenged the government’s termination of a project development agreement due to an alleged breach of its terms by the investors. After examining the facts, the tribunal found that shareholder John Baldwin demonstrated bad faith throughout his dealings with the government and that such bad faith was attributable to the subsidiaries directly or indirectly held by the investors.

Third, the investors challenged the government’s refusal to renew an operation licence for one of their investments. However, the tribunal found that the investors did not have a right to the renewal of their investment and that the investors or investments did not attempt to renew the licence. Once again, the tribunal attributed Baldwin’s bad-faith activities to the companies.

Last, the investors challenged the government’s revocation of a licence to open a gambling facility days after its issuance. Noting lack of insufficient evidence of bad faith on either side in this setting, the tribunals found the licence was mistakenly issued in the first place and concluded that “it was simply a commercial possibility that never reached the stage of agreement” (*Sanum* award, para. 250; *LHNV* award, para. 225).



Other claims

Sanum could not bring claims other than expropriation as China–Laos BIT Art. 8(3) only allows for “disputes over the amount of compensation for expropriation.” As arbitration under the Netherlands–Laos BIT has a broader scope, the ICSID tribunal entertained LNHV in reviewing its claims that Laos allegedly violated other treaty rights, including the provisions on FET, denial of justice, non-discrimination and the umbrella clause.

However, the LHNH tribunal concluded that all those allegations failed on the facts (para. 239). LHNH’s testimonies only served to confirm the tribunal’s conclusion that “in no doubt ... Baldwin and LHNH exhibited manifest bad faith in various efforts not only to manipulate the Government to advance their gambling initiatives but...to manipulate the arbitration process itself” (para. 239). Reiterating that “the bad[-]faith conduct of the investor is relevant to the grant of relief under an investment treaty” (para. 237), the tribunal found that Baldwin’s bad-faith conduct provided “added reasons to deny the Claimant LHNH the benefit of Treaty protection” (para. 280).

Dispositions

The tribunals dismissed all claims and ordered the claimants to bear all costs of the arbitrations, totalling USD 3.5 million, and to pay Laos for its legal costs incurred in defending the two proceedings, amounting to USD 2.6 million.

Notes: Both tribunals were composed of Bernard Hanotiau (claimants’ appointee, Belgian national) and Brigitte Stern (respondent’s appointee, French national). The *Sanum* tribunal was presided over by Andres Rigo Sureda (appointed by the Secretary-General of the PCA, Spanish national). The *LHNH* tribunal was presided over by Ian Binnie (appointed by the parties, Canadian national). The *Sanum* award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10708.pdf>, and the *LHNH* award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10703.pdf>

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Tribunal finds Pakistan breached FET, expropriation and non-impairment obligations in the context of a mining joint venture with Australian investor Tethyan Copper Company

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

Sofia de Murard

An ICSID tribunal ordered Pakistan to pay more than USD 5.9 billion in compensation, interest and legal costs to Tethyan Copper Company (Tethyan) for breaches of the Australia–Pakistan BIT.

Background and claims

Tethyan—a joint venture registered in Australia—established a Pakistani subsidiary in 2000. In 2006, it replaced BHP as a party to the Chagai Hills Exploration Joint Venture Agreement (CHEJVA) with the Pakistani province of Balochistan through a novation agreement, taking on BHP’s rights to 75 per cent of the joint venture and the right to explore and develop any gold and copper deposits found.

After expanding its exploration and discovering large gold and copper deposits, Tethyan applied for a mining licence in 2011, but Balochistan denied the application. Tethyan’s subsidiary initiated an administrative appeal, which Balochistan rejected. Following a domestic court action, the Pakistani Supreme Court decided in 2013 that the CHEJVA was void, because Balochistan had exceeded its powers by signing it, and invalid, because it was contrary to public policy. In addition, Tethyan filed an ICC arbitration claim based on the CHEJVA and obtained a favourable preliminary ruling in 2014.

In November 2011, Tethyan initiated ICSID arbitration against Pakistan, claiming that the denial of the mining lease breached the FET, expropriation and non-impairment obligations under the BIT.

Tribunal rejects corruption-based objection based on lack of evidence

In June 2015, Pakistan presented evidence of corruption by Tethyan and presented jurisdictional and admissibility objections. In a March 2017 decision, the tribunal affirmed its jurisdiction, rejecting Tethyan’s claims that the evidence resulted from an interception of Tethyan’s communications with its lawyers. However, it rejected the objections for lack of evidence.

At that time, the tribunal had already written the merits award, so it deviated from ICSID protocol



and sent the parties a draft award to comment. The decision on jurisdiction and liability was published on November 10, 2017.

Decision on jurisdiction and liability

The tribunal first decided that Tethyan had a valid investment under the BIT as it exercised control over its subsidiary and its 75 per cent interest in the joint venture. Pakistan argued that because the CHEJVA was void according to the Supreme Court, the investment did not respect Pakistani law and thus was outside the treaty's scope. However, the tribunal rejected the argument, reasoning that the treaty covered investments accepted into the host state at the time of their establishment, not only legally established investments. It noted that Pakistan did not mention CHEJVA's potential invalidity when negotiating the 2006 novation agreement and that the Pakistani Supreme Court decision was based on Balochistan's breach of its internal laws, not Tethyan's actions.

The tribunal also refused to apply domestic laws to the dispute, holding that only ad hoc tribunals must apply domestic law, while ICSID tribunals must apply customary international law rules. Under these rules, the tribunal concluded that Balochistan's actions were attributable to Pakistan.

FET breach: denial of mining lease frustrated Tethyan's legitimate expectations, lacked due process

The tribunal found that the treaty's FET clause is an autonomous treaty standard as it does not mention customary international law. According to the tribunal, "a dominant principle of the FET standard is the protection of the investor's legitimate, investment-backed expectations" (para. 811).

It decided that Tethyan had a legitimate expectation of receiving the mining lease because of Pakistan's assurances in the CHEJVA, its regulatory framework and direct assurances from its government officials. The tribunal held that even if the contract was ultimately declared void, it had given the right to the mining license at the time of its conclusion, noting that, "up to early 2011, all parties involved in the conclusion and performance of the CHEJVA acted on the assumption that it was valid" (para. 905). It considered that Pakistani authorities did not have enough discretion in assessing the licence requirements to shake Tethyan's expectation of receiving its mining licence and that government officials—including Pakistan's President and Prime Minister—gave Tethyan sufficient assurances to justify a legitimate expectation.

The tribunal rejected Pakistan's arguments that the denial of the licence had valid grounds and concluded that the denial violated Tethyan's legitimate expectations. It found evidence that Pakistan planned to establish its own mine and rejected Pakistan's assertion that its alternative plans at the Reko Diq site were for a different smelter project.

In addition, the tribunal rejected Pakistan's grounds for denying the mining licence. First, it found that requiring an applicant to hold 100 per cent interest in the exploration licence violated the good-faith obligations of joint ventures. Second, considering that the CHEJVA did not include Tethyan's obligation to provide for smelting and refining minerals in Pakistan, it concluded that the failure to carry out those activities was not a valid ground to deny the licence. Finally, it considered that the lack of economic viability of a mining project occurred in the mining industry and did not breach Pakistani law.

The tribunal also found that the licence refusal procedure lacked due process, given that the grounds of the decision were insufficient and that further details or meetings with Tethyan were denied. It refused to admit the new grounds raised during the arbitration because this would violate Tethyan's right to be heard and in any event did not prove Pakistan's case.

Expropriation and non-impairment

The tribunal found that the denial of the licence was equivalent to expropriation, because it substantially deprived the investment of its value. It held that the indirect expropriation breached the BIT as it was discriminatory and without a convincing public purpose or compensation. The tribunal also found that the refusal of the licence also breached the BIT's non-impairment obligation as the measure denied Tethyan the use of its investment.

Tribunal accepts jurisdiction over three counterclaims by Pakistan but rejects them on the merits

The tribunal accepted jurisdiction over Pakistan's counterclaims—based on Tethyan's violations of the CHEJVA, domestic law and the BIT—finding them to be closely tied to the dispute and therefore within the parties' consent to arbitration under the BIT. However, the tribunal found that Pakistan lacked standing to raise the contractual and domestic law counterclaims since Pakistan was not a party to the contract and the domestic laws were not enacted by Pakistan, but by Balochistan. It rejected the BIT-based counterclaim on the same grounds presented in the jurisdictional phase: the BIT did not require the investment to be legal, simply admitted into Pakistan.



Decision on quantum

The tribunal decided that discounted cash-flow (DCF) would be used for the valuation of the investment's market value because the method presented certain advantages in this case and there were no fundamental uncertainties that would make it inappropriate. Citing *Crystallex v. Venezuela* and other cases, the tribunal noted that DCF valuation was taken into account by mining bodies, such as the Canadian Institute of Mining, Metallurgy and Petroleum, rejecting Pakistan's argument that it was not part of the mining business practice.

Compensation was reduced after the tribunal considered that Pakistan probably would have offered Tethyan a 15-year tax compensation and might have declined to renew the licence, and after it found that some of Tethyan's security risk assessments were inadequate. The amount Tethyan would have to spend to restore social and environmental damages was also deducted. The tribunal rejected Pakistan's argument that Tethyan's lack of planning for social and environmental restoration made the investment less valuable since it might face public opposition. Instead, it noted that even in the absence of planning, Pakistan's low standards in these areas would likely be met. It also dismissed Pakistan's request to reduce compensation because obtaining land rights would cause delay and community opposition, considering such risks were unlikely and had been taken into account.

Rejecting Pakistan's argument that compound interest was unlawful under domestic law, the tribunal set a compound interest rate according to international law authorities. This led to a compensation figure of USD 4.087 billion, plus interest, in addition to USD 62 million for the legal costs of both parties, in light of Pakistan's unsuccessful defences, corruption allegations and counterclaims. The tribunal found that the project's evolution over time justified compensation in an amount much higher than Tethyan's original investment of USD 150 million.

Notes: The tribunal was composed of Klaus Sachs (president appointed by both parties, German national), Stanimir Alexandrov (claimant's appointee, Bulgarian national) and Leonard Hoffmann (respondent's appointee, British national). The decision on jurisdiction and liability of November 10, 2017 is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10738.pdf>; the decision on quantum of July 12, 2019 is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10737.pdf>

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In yet another renewable energy case, Spain held liable for FET breach for frustrating French and Luxembourg investors' legitimate expectations under the ECT

Cube Infrastructure Fund SICAV and Others v. The Kingdom of Spain, ICSID Case No. ARB/15/20

Maria Bisila Torao

On February 19, 2019, an ICSID tribunal ordered Spain to pay damages to French and Luxembourg investors in compensation for its breach of the FET standard under ECT Article 10(1), as well as half of the investors' legal costs. The tribunal awarded EUR 33.7 million in damages for lost profits.

Background and claims

Between 2008 and 2012, Cube Infrastructure Fund SICAV, Cube Energy SCA and Cube Infrastructure Managers SA (collectively, Cube), and Demeter 2 FPCI and Demeter Partners SA (collectively, Demeter) made investments in the Spanish photovoltaic (PV) and hydro sectors. The investors were allegedly relying on guarantees provided in Royal Decree (RD) 661/2007, which formed part of Spain's regime of incentives for investments in the energy sector.

In 2010 and 2013–2014, Spain implemented changes to this regime, including tariff adjustments and limits to eligibility requirements for incentives. In response, Cube and Demeter filed for arbitration against Spain on April 16, 2015, claiming a breach of ECT Articles 10 (Promotion, Protection and Treatment of Investments) and 13 (Expropriation). In particular, they argued that Spain's regulatory changes violated their legitimate expectations for PV and hydroelectric investments.

Tribunal dismisses Spain's EU law and corporate personality objections but upholds objection to jurisdiction to address taxation measures

In its first jurisdictional objection, Spain argued that the claimants were not from the area of another ECT Contracting Party because France, Luxembourg and Spain are EU member states.

The tribunal reasoned that ECT Article 26(1) does not differentiate between different classes of contracting parties and, therefore, the ECT also applies to disputes involving the EU and its member states (para. 124). Moreover, the tribunal indicated that ECT Article 16 establishes that the contracting parties, including Spain and the EU, did not agree that EU law would take precedence over other sources. Neither did it



agree that the ECT jurisdictional clause would become inapplicable should any inconsistency be found.

The tribunal also examined the effect of the CJEU's *Achmea* judgment on the case. For the tribunal, *Achmea* cannot apply to an arbitration brought under the ECT and the ICSID Convention because they are multilateral treaties, whose scope of application extends beyond the boundaries of the EU. The tribunal indicated that legitimacy originates from the consent of all signatories and that no single state party can impose a specific requirement for an ECT or ICSID tribunal. Accordingly, it dismissed Spain's jurisdictional objection based on EU law.

Further, Spain invoked the "no reflective loss" principle, arguing that the claimants did not own the plants and, therefore, had no legitimacy to bring claims for losses. However, the tribunal rejected the objection, explaining that this was an issue of quantum rather than jurisdiction (paras. 162–164).

Spain also argued that because of the tax carve-out contained in ECT Article 21, it has not consented to arbitrate issues surrounding the tax on the value of production of electrical energy (the TVPEE) and the levy on the use of continental waters to produce electrical power (the Water Levy). The tribunal agreed and declined jurisdiction, interpreting the meaning of the term "taxation measures" under ECT Article 21 based on principles of international law.

Spain created and subsequently frustrated legitimate expectations of stability, tribunal holds

The tribunal considered that Spain created legitimate expectations by enacting legislation that created a special regime of benefits and incentives. It averred that there is no need for specific commitment for a legitimate expectation to arise, especially when it comes to highly regulated industries. For the tribunal, expectations are created deliberately when a regulatory regime is established with a clear intention to attract investment subject to an advantageous regulatory scheme and policy. The tribunal added, "to the extent that those expectations are objectively reasonable, they give rise to legitimate expectations when investments are, in fact, made in reliance upon them" (para. 388).

The tribunal explained that under RD 661/2007, Spain committed to applying a special regime to power plants. According to the arbitrators, while the 2010 modifications merely adjust the special regime, the 2013–2014 changes amounted to a breach of the investor expectations because they completely removed

the benefits, eliminating essential features of the special regime (para. 476).

The full tribunal found that Spain breached legitimated expectations for PV investments, and the majority of the tribunal considered the 2013–2014 measures a breach of the investors' legitimate expectations with respect to the hydro investments.

Expropriation and umbrella clause claims rejected

Cube and Demeter claimed that Spain's modifications of the RD 661/2007 expropriated their investment breaching ECT Article 13 (para. 456). The tribunal rejected the claim as it concluded that the regulatory changes were not discriminatory or unreasonable but rather a reasonable public policy measure. It also held that the means for its implementation did not discriminate against the claimants (para. 450). The tribunal concluded that "where each alleged interference with an individual property right has already been considered in the context of a claim based on breach of the standards in Article 10 ECT, it is hard to see that any purpose is served by making a further determination on the question whether it also constitutes an expropriation in violation of Article 13 ECT" (para. 456).

The tribunal did not find a violation of the ECT's umbrella clause, given that there was no implied engagement between Spain and the claimants or their investments. The tribunal further explained that it "does not consider legislative measures to be engagements of this kind" (para. 452) agreeing with the approach taken by the tribunal in *Charanne v. Spain*, where the tribunal concluded that measures addressed to a limited group of investors do not constitute specific commitments made to each of those investors.

Damages and costs

The claimants argued that the discounted cash flow (DCF) method should be used to calculate the loss in value of the investments. In turn, Spain maintained that a cost-based method should be used to determine the internal rate of return on the plants since Spain consistently aimed at securing a reasonable rate of return for investors (paras. 469–471).

The tribunal sided with the claimants, awarding EUR 2.89 million in respect of losses caused to the PV investments and around EUR 30 million in respect of losses caused to the hydro investments. The tribunal also ordered Spain to cover half of the claimants' legal fees and part of the arbitration costs.



Tomuschat's dissenting opinion: no expectation of stability of hydro investments

In a partial dissent, arbitrator Tomuschat reasoned that when the investors acquired the hydro plants, the original legal framework had been altered, changing “the conditions of the regime significantly” (dissent, para. 7). He noted how, in 2009, the deficit in the electricity system “had reached a critical major dimension ... which must have put on alert every investor” (dissent, paras. 8 and 14). He concluded that, at the time the claimants made the investment, the stability of hydro investments was not guaranteed. Therefore, the regime could not have created legitimate expectations for any professional investor.

Notes: The tribunal was composed of Vaughan Lowe (president appointed by the parties, British national), James Jacob Spigelman (claimants' appointee, Australian national), Christian Tomuschat (respondent's appointee, German national). The award of February 19, 2019, including the dissent, is available at <https://www.italaw.com/cases/7477>

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Despite a win for Estonia, ICSID arbitrators continue to resist CJEU's Achmea judgment

United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v. Republic of Estonia, ICSID Case No. ARB/14/24

Theodore M. Amarendra

An ICSID tribunal rejected all claims against Estonia, finding that the state did not breach the FET standard regarding legitimate expectations, other FET standards, the non-impairment standard or the umbrella clause under the Netherlands–Estonia BIT (the BIT). Nonetheless, this tribunal joined others before it in refusing to give up jurisdiction following the CJEU's Achmea judgment.

Background and claims

Aktsiaselts Tallinna Vesi (ASTV), an Estonian company originally owned fully by the City of Tallinn, was privatized in 2001, leading to a 35.3 per cent shareholding by the Dutch joint-venture company United Utilities (Tallinn) BV (United Utilities). ASTV is active in the management of local water supply and sewage in Tallinn. Particularly relevant to this dispute, ASTV's management authority allowed it to set up water tariffs, and the determination of such tariffs is regulated under the privatization contracts that United Utilities entered into.

The government of Estonia took certain measures related to the determination of ASTV's water tariffs, which, in ASTV and United Utilities' understanding, affected existing arrangements in place and United Utilities' investment in ASTV. Such measures included (i) the enactment of the Anti-Monopoly Bill (AMB), which effectively created a new mechanism and methodology to determine water tariffs; (ii) the rejection of ASTV's application for a proposed tariff revision under the AMB; and (iii) a legal investigation by the Chancellor of Justice against ASTV. Challenging those measures as breaches of the BIT and claiming damages in the sum of ASTV's lost revenue (totalling up to EUR 130 million), United Utilities and ASTV initiated ICSID arbitration as co-claimants against Estonia on October 15, 2014.

Tribunal determines that it had jurisdiction over the case

The tribunal concluded that it had jurisdiction over the claims, after dealing with the issues of (i) ASTV's nationality and the alleged status of United Utilities as a shell company, (ii) the effect of an ongoing claim in



the Estonian court (*ratione voluntatis* jurisdiction) and (iii) the compatibility of the BIT with EU law.

First, even though ASTV is an Estonian company, the tribunal has jurisdiction over its claims as it meets the “foreign control” element under ICSID Convention Article 25 and the “controlled, directly or indirectly” element under BIT Articles 1 and 9. Crucially, the tribunal found that at the relevant times—that is, before the dispute arose and at the time consent to arbitration was given—United Utilities exercised operational and strategic control over ASTV, despite a non-majority shareholding.

Further, the tribunal dismissed as irrelevant the allegation that United Utilities is merely a shell company controlled by an ultimate owner. It viewed that such an issue does not preclude the finding that United Utilities controls ASTV for the purpose of establishing jurisdiction.

Second, the tribunal deemed that an ongoing claim in the Estonian court related to the same facts did not impede its jurisdiction by virtue of ICSID Convention Article 26 (the *ratione voluntatis* or consent-based jurisdiction) because the legal issues at dispute were not substantially the same. It found that the tribunal would deal with issues of Estonia’s international obligations while the Estonian court was dealing with ASTV’s rights solely under Estonian law.

Third, the award joined other international investment tribunals that refuse to give up jurisdiction following the CJEU’s *Achmea* judgment, which found arbitration clauses in intra-EU BITs to be unlawful and incompatible with EU law. For the tribunal, this issue was not of a *jus cogens* nature that would permit automatic termination of a treaty, and thus the mechanics of treaty termination or suspension in VCLT Articles 30, 59 and 65 must be observed. The tribunal found that the elements of treaty termination or suspension in the VCLT were not met in the case, and therefore the BIT and the tribunal’s jurisdiction were not in jeopardy. In reaching its decision, the tribunal admitted and took into account an *amicus curiae* submission by the European Commission.

On merits, tribunal rejects breaches of FET standard regarding legitimate expectations, other FET and non-impairment standards and umbrella clause

First, the tribunal dealt with the issue of legitimate expectations under the FET obligation in BIT Article 3(1). In assessing the facts, the tribunal searched for specific commitments building up the legitimate

expectations of United Utilities when ASTV was privatized and after its privatization.

The claimants primarily argued that when ASTV was privatized, they had a legitimate expectation that the water tariff set out in their privatization contracts would not be radically overturned. After analyzing the facts, the tribunal concluded that no specific commitment to the effect of the claimants’ argument had been made by Estonia (either by the City of Tallinn or the national government). In the tribunal’s view, post-privatization events bore little to no relevance to the arguments related to legitimate expectations.

Second, the tribunal assessed other claims under the FET and non-impairment standards under BIT Article 3(1). While rejecting Estonia’s attempt to use the police power doctrine as an affirmative defence to its FET obligation, the tribunal sided with the respondent in all other elements of its analysis. It held that the claimants failed to prove that Estonia breached due process in the rejection of ASTV’s tariff revision, in the development of the tariff calculation methodology in the AMB, or in the Chancellor of Justice’s investigation measures. It also noted that, even if there had been a breach of due process, the claimants did not suffer damage due to the investigation. The tribunal also affirmed that the negative publicity against ASTV due to issues on water tariffs could be attributed to Estonia, did not amount to any breach of international obligations and caused no damage to the claimants. It also decided not to look into the claim of unreasonable and discriminatory measures, deeming it redundant with other arguments brought by the claimants.

Finally, the tribunal rejected the claims of breach of the umbrella clause in BIT Article 3(4). It found that the primary issue in the case was not the non-performance of the privatization contracts, but the changes in Estonia’s legislative and regulatory framework affecting the privatization contracts, issues already dealt with in the previous parts of the merits analysis.

Decision and costs

Conclusively, by majority, the tribunal rejected all claims against Estonia. The arbitrator appointed by the claimants, David A. R. Williams, issued a dissenting opinion, disagreeing with the majority’s conclusion. He viewed that (i) the claimants had legitimate expectations, which Estonia breached in fundamentally altering the tariff calculation, and (ii) the facts presented should have been sufficient to conclude a breach of due process.



On costs, the tribunal decided that the claimants must reimburse Estonia (i) 25 per cent of its legal costs, fees and expense and (ii) 25 per cent of its expended portion of share of the advance on costs. The tribunal made such conclusion after mentioning that it has broad discretion on this matter, that other tribunals have followed the approach where the winning party should be awarded its costs (the “costs follow the event” approach) and that, overall, Estonia won on merits but lost in jurisdiction.

Notes: The tribunal was composed of Stephen L. Drymer (president, appointed by the co-arbitrators, Canadian national), David A. R. Williams (claimants’ appointee, New Zealand national) and Brigitte Stern (respondent’s appointee, French national). The award of June 21, 2019 is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10648.pdf>. The dissent by David A. R. Williams is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10649.pdf>.

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RESOURCES AND EVENTS

RESOURCES

China, the EU and International Investment Law: Reforming investor-state dispute settlement

By Yuwen Li, Tong Qi and Cheng Bian (Eds.), published by Routledge, October 2019

This book analyzes subjects being negotiated in the China–EU Comprehensive Agreement on Investment (CAI). It focuses on the pathway of reforming ISDS from both Chinese and European perspectives. Part I examines critical and controversial issues, including market access, sustainable development and human rights, as well as comparing distinct features between the China–EU CAI and the China–United States BIT. Part II focuses on the institutional reform of investor–state arbitration with an analysis of the EU approach to replacing the private nature of investment arbitration with the public nature of an investment court. Part III addresses the core substantive and procedural issues concerning ISDS, such as the role of domestic courts, the status of state-owned enterprises as investors, transparency and the protection of victims in investment dispute resolution. Available at <https://www.routledge.com/China-the-EU-and-International-Investment-Law-Reforming-Investor-State/Li-Qi-Bian/p/book/9780367338466>

Global Investment Trend Monitor No. 32

By UNCTAD, published by UNCTAD, October 2019

Global FDI flows in the first half of 2019 were 24 per cent higher than in the first half of 2018. However, the underlying FDI trend (removing the effects of one-off transactions and intra-firm financial flows, including repatriations driven by the 2017 U.S. tax reforms) was up only 4 per cent. Developed economies saw FDI reaching USD 269 billion in 2019H1, almost doubling the anomalously low 2018H1 value. Flows to developing economies, largely unaffected by repatriations, remained relatively stable

at an estimated USD 342 billion, a decline of 2 per cent compared to 2018H1. FDI flows to transition economies were up 4 per cent from 2018H1 to an estimated USD 28 billion. Prospects for the full year remain in line with earlier projections of a 5 to 10 per cent increase. Available at <https://investmentpolicy.unctad.org/publications/1209/global-investment-trend-monitor-no-32>

Contributory Fault and Investor Misconduct in Investment Arbitration

By Martin Jarrett, published by Cambridge University Press, August 2019

Investors must be held to account for their flawed contributions or otherwise wrongful conduct, but opinions vary on whether such circumstances are relevant to admissibility, jurisdiction, liability or remedies. This book suggests that they are relevant only to liability, meaning that the legal concepts that they activate, contributory fault and illegality, are defences. It identifies three defences: mismanagement, investment reprisal and post-establishment illegality. In detailing their legal content, the author pays special attention to resolving the problems that they raise relating to causation, apportionment of liability, distinguishing these defences from their conceptual cousins and arbitral tribunals' jurisdiction over pleas based on investor misconduct. The result is a restatement of the rules on contributory fault and investor misconduct applicable in investment arbitrations. Available at <https://www.cambridge.org/academic/subjects/law/international-trade-law/contributory-fault-and-investor-misconduct-investment-arbitration>



The Right of States to Regulate in International Investment Law

By Yulia Levashova, published by Wolters Kluwer, July 2019

This book addresses the balance between the host state's right to regulate and the investor's right to obtain a FET standard under international investment law. Due to the recent ongoing expansion of public interest issues worldwide, the state's right to regulate has been recaptured as a prominent concept in international investment law. This book seeks to clarify the field by offering an in-depth analysis of the application of the state's right to regulate in relation to FET standard provisions in IIAs and to decisions by arbitral tribunals in FET cases. Available at <https://irus.wolterskluwer.com/store/product/the-right-of-states-to-regulate-in-international-investment-law>

Investment Arbitration in Central and Eastern Europe: Law and practice

By Csongor Nagy (Ed.), published by Edward Elgar, 2019

Central and Eastern Europe (CEE) are the respondents of most investment arbitration cases initiated against EU member states. Taking a systematic country-by-country approach and covering all the CEE jurisdictions, each chapter of this book provides detailed information and insight into the respective jurisdiction, setting out the policy and treaty landscape, the legal status of investor-state arbitration and alternative remedies. This is supplemented by a detailed analysis of the investor-state arbitration decisions in each country. Available at <https://www.e-elgar.com/shop/investment-arbitration-in-central-and-eastern-europe>

Master Class on International Investor–State Arbitration: What is it? How does it work?

By Jeswald W. Salacuse and the Fletcher School of Law and Diplomacy at Tufts University, published by Harvard Law School Program on Negotiation, 2019

In the 1h45min video, Jeswald W. Salacuse, Distinguished Professor and Henry J. Braker Professor of Law at the Fletcher School of Law and Diplomacy at Tufts University, provides a comprehensive study of international investor–state arbitration from historical background and procedures to real-world application and in-depth analysis. Part One, “The Nature of Investor–State Arbitration,” lays out a conceptual framework by explaining the nature of arbitration, providing appropriate historical background, situating it within the various available methods for resolving international conflicts and highlighting its essential elements. Part Two, “Anatomy of an Investor–State Arbitration: The case of Aguas Argentinas,” examines the ISDS case, which arose from Argentina's efforts to modernize its water and sewage system. Available at <https://www.pon.harvard.edu/shop/master-class-on-international-investor-state-arbitration>



EVENTS 2019

December 10–11

30th MEETING OF THE ENERGY CHARTER CONFERENCE, at Plaza Tirana Hotel, in Tirana, Albania, <https://www.eventleaf.com/Attendee/>

December 12

SEMINAR “THE BELT AND ROAD INITIATIVE IN AFRICA,” International Chamber of Commerce, in Paris, France, <https://2go.iccwbo.org/the-belt-and-road-initiative-in-africa.html>

December 12–13

STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT: Stocktaking Meeting, World Trade Organization (WTO), in Geneva, Switzerland, <http://www.wto.org>

EVENTS 2020

January 23–24

8th ITA–IEL–ICC JOINT CONFERENCE ON INTERNATIONAL ENERGY ARBITRATION, Institute for Transnational Arbitration, Institute for Energy Law of the Center for American and International Law, ICC International Court of Arbitration, in Houston, United States, <https://2go.iccwbo.org/ita-iel-icc-joint-conference-on-international-energy-arbitration.html>

February 22–28

SINGAPORE INTERNATIONAL ARBITRATION ACADEMY, Centre for International Law, National University of Singapore, in Singapore, <https://cil.nus.edu.sg/event/singapore-international-arbitration-academy-2020-siaa-2020>

January 20–24

39th SESSION OF UNCITRAL WORKING GROUP III, “INVESTOR–STATE DISPUTE SETTLEMENT REFORM,” United Nations Commission on International Trade Law, Vienna, Austria, https://uncitral.un.org/en/working_groups/3/investor-state

February 18–20

13th ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS, IISD and Government of Thailand, in Bangkok, Thailand, <https://www.iisd.org/event/13th-annual-forum-developing-country-investment-negotiators>

March 30–April 3

40th SESSION OF UNCITRAL WORKING GROUP III, “INVESTOR–STATE DISPUTE SETTLEMENT REFORM,” United Nations Commission on International Trade Law, New York, United States, https://uncitral.un.org/en/working_groups/3/investor-state



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