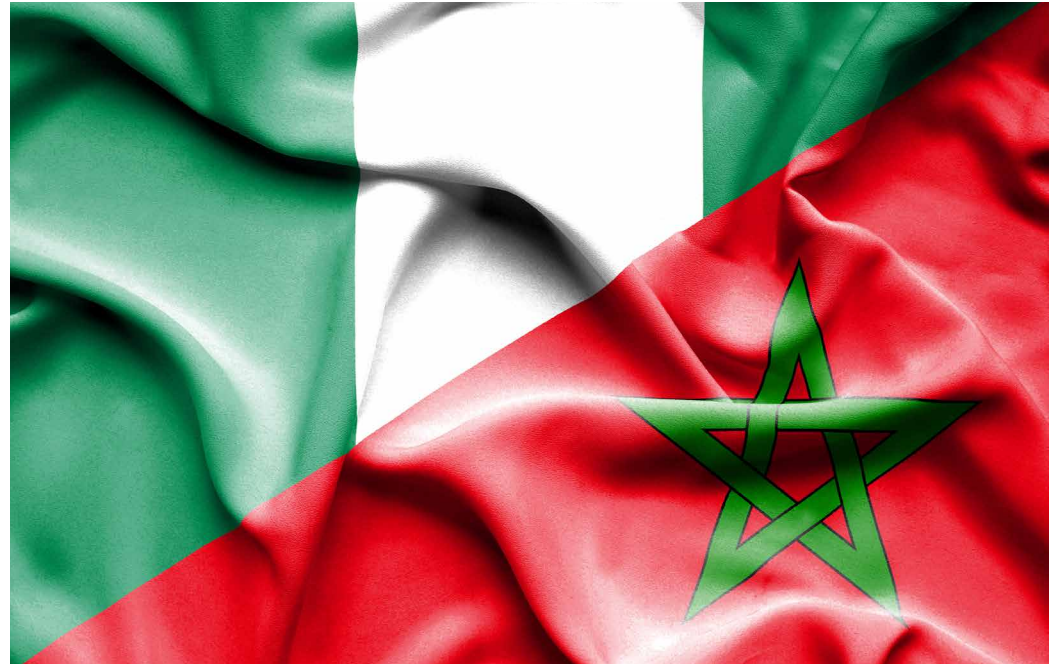
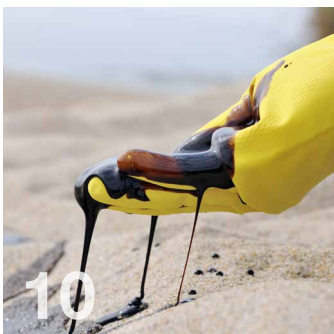




## The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties

Tarcisio Gazzini



### A Look into China's Slowly Increasing Appearance in ISDS Cases

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**Also in this issue:** Also in this issue: First rounds of NAFTA renegotiation held; EU launches consultation on resolution of intra-EU investment disputes; UNCITRAL receives mandate to work on ISDS reform; EU and Japan reach agreement in principle on EPA; *Isolux v. Spain*; *Teinver v. Argentina*; *Capital Financial Holdings Luxembourg v. Cameroon*; *Eiser v. Spain*; *WNC v. Czechia*; *Burlington v. Ecuador*

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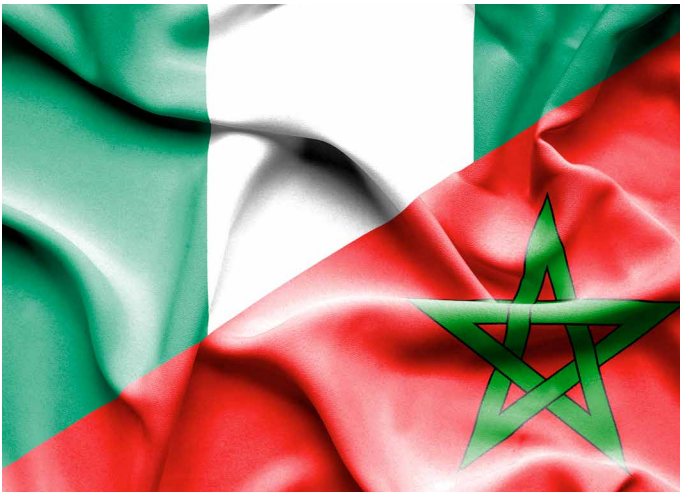
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# The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties

Tarcisio Gazzini



On December 3, 2016, Morocco and Nigeria signed one of the most innovative and balanced bilateral investment treaties (BITs) ever concluded. Although it has not entered into force yet, the BIT is a valuable response from two developing countries to the criticism raised in the last few years against investment treaties, most prominently unbalanced content, restrictions on regulatory powers and inadequacies of investment arbitration.

## 1. Background

In the last couple of decades, Africa has functioned as a normative laboratory for investment treaties.<sup>1</sup> Several sub-regional organizations, including the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of West African States (ECOWAS), the East African Community (EAC) and the Southern African Development Community (SADC), have prepared templates and concluded investment treaties that contain largely innovative provisions aimed at better calibrating the legal protection of the interests of the different stakeholders. However, at the same time, African governments—as well as countries in other continents—have become more reluctant to ratify new BITs and have even denounced several existing BITs. Moreover, African states have been hesitant to adopt the Pan African Investment Code (PAIC) in the form of a binding treaty and in 2016 SADC Members adopted an amendment to the Protocol on Finance and Investment removing the provisions on investor–state dispute settlement (ISDS).

In this context, the Morocco–Nigeria BIT is a remarkable attempt made by two developing countries to bring investment treaties in line with the recent evolution of international law. The four references to sustainable development contained in the preamble immediately reveal the overarching objective of the treaty. The definition of investment in Art. 1(3) further requires that investments contribute to sustainable development, while under Art. 24(1) investors “should strive to make the maximum feasible contributions to the sustainable development of the host State and local community.”

From the institutional standpoint, the treaty establishes a Joint Committee composed of representatives of both Parties. It has the following responsibilities:

- (a) to monitor the implementation and execution of the treaty (including facilitate the exchange of information and when appropriate set corporate governance standards).
- (b) to debate and share opportunities for the expansion of mutual investment.

- (c) to promote the participation of the private sector and civil society.

- (d) to seek to resolve any issues or disputes concerning Parties’ investment in an amicable manner.

## 2. Standards of protection

The definition of investment contained in Article 1(3) the treaty is inspired by the *Salini* decision<sup>2</sup> and requires, in addition to the contribution to sustainable development, the following characteristics: commitment of capital, search for profit, assumption of risk and certain duration. Importantly, the definition of investment excludes portfolio investments.

While ensuring a level of substantive protection comparable to that traditionally contained in BITs, the treaty clearly specifies the obligations of the host state. Starting with contingent standards, the national treatment standard applies in like circumstances, which are indicated in the non-exhaustive list of Article 6(3). Under Article 7 investors are entitled to the minimum standard of treatment (MST) guaranteed under customary international law. The same provision further elucidates that fair and equitable treatment (FET) includes “the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of a Party,” while full protection and security refers to “the level of police protection required under customary international law.” The remaining substantive provisions, including that on expropriation, transfer of funds and subrogation, largely reflect consolidated BITs practice.

## 3. Obligations for foreign investors

The treaty introduces a series of obligations upon investors. They must comply with environmental assessment screening and assessment processes in accordance with the most rigorous between the laws of the host and home states, as well as a social impact assessment based on standards agreed within the Joint Committee (Art. 14(1) and 14(2)).

After establishment, investors:

- (a) must apply—alongside the host state—the precautionary principle (Art. 14(3)).
- (b) must maintain an environmental management system and uphold human rights in accordance with core labour and environmental standards as well as labour and human rights obligations of the host state or home state (Art. 18).
- (c) may never engage or be complicit in corruption practices.
- (d) must meet or exceed national and internationally accepted standards of corporate governance (Art. 19).
- (e) are expected to operate through high levels of socially responsible practices and apply the ILO Tripartite Declaration on Multinational Investments and Social Policy (Art. 24).

## 4. Regulatory powers

The BIT addresses perceived undue restrictions imposed by some investment treaties upon host state regulatory power by recognizing the parties’ right to exercise discretion “with respect to regulatory, compliance, investigatory, and prosecutorial matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities” (Art. 13(2)). Moreover, nothing in the treaty prevents them from adopting, maintaining, or enforcing, in a non-discriminatory manner, any measure otherwise consistent with the treaty that they consider appropriate to ensure that investment activity in their territory is undertaken in a manner

sensitive to environmental and social concerns (Art. 13(4)).

### 5. Procedural provisions

The treaty provides for mandatory settlement of both investor–state (Art. 27) and state–state disputes (Art. 28). With regard to the first category, Art. 27 provides investors—and investors only—access to arbitration at the International Centre for Settlement of Investment Disputes (ICSID) or in an ad hoc tribunal under the rules of the United Nations Commission on International Trade Law (UNCITRAL) or any other rules.

The treaty also contains an innovative—yet, as discussed below, rather problematic—provision according to which, before initiating arbitral procedure, “any dispute between the Parties shall be assessed through consultations and negotiations by the Joint Committee” upon a written request by the State of the concerned investor (Art. 26(1) and 26(2)). Representatives of the investor and the host state (or other competent authorities) participate, whenever possible, in the “bilateral meeting” (Art. 26.2). The procedure ends at the request of “any Party” and with the adoption by the Joint Committee of a report summarizing the position of “the Parties.” If the dispute is not settled within six months, the investor may resort to international arbitration after exhausting domestic remedies (Art. 26(5)).

The BIT provides that arbitral proceedings must be transparent. In particular, the notice of arbitration, the pleadings, memorials, briefs submitted to the tribunal, written submissions, minutes of transcripts of hearings, orders, awards and decisions of the tribunal must be available to the public (Art. 10(5)).

Finally, the treaty introduces a novel provision on the liability of investors, who “shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state” (Art. 20).

### 6. Preliminary assessment of the treaty

The substantive provisions of the treaty replicate in good substance those commonly found in BITs. The specifications on “like circumstances” for purposes of national treatment may be expected to facilitate the interpretation and application of the standard. The reference to the making of an investment and the conduct of business in the most-favoured-nation (MFN) provision presumably excludes the application of the standard to procedural provisions, although an express clarification in this sense could have been appropriate. The provision on MST conveys the cautious approach of the Parties through the careful demarcation of FET and the confinement of protection and security to police protection. The significance of the treaty lies with four main largely innovative elements.

First, the treaty counterbalances the protection granted to investors with a series of obligations on the conduct of investment. While not entirely novel,<sup>3</sup> these obligations—especially those related to environmental and social impact assessment, human rights, corruption, and corporate governance and responsibly—greatly increase the legitimacy of the treaty.

Second, the treaty effectively safeguards the policy space of the host state. With regard to environmental and social measures, in particular, it is worth noting that their adoption depends on the good-faith judgment of the host state without any necessity test being applicable. Arbitral tribunals are thus expected to show a great deal of deference to the host state action.

The treaty does not allow states to initiate international arbitration against investors; perhaps more surprisingly, it remains silent on both counterclaims<sup>4</sup> and non-disputing Party submissions.<sup>5</sup> The third innovation, with regard to dispute settlement, is the—intriguing yet rather ambiguous—involvement of the Joint Committee in the peaceful settlement of disputes. Article 26 deals with investor–state disputes, but refers to “disputes between the Parties” and “a solution between the Parties,” without clarification. Moreover, it does not indicate what the position of the investor is in the whole exercise beyond the participation “whenever possible” in the “bilateral meeting” of the Joint Committee. Equally important, it does not define the nature and legal significance of the “assessment” of the dispute, or the meaning of “consultations and negotiations.”

Art. 26 blurs the roles and positions of states and investors. It undermines the essence of the settlement of investor–state disputes, namely their insulation from political considerations, hazards and pressure. The very fact that the procedure under Art. 26 is activated by the national state is questionable and may raise several problems, also with regard to the jurisdiction of arbitral tribunals under Art. 27.

The final innovation is the provision on the investor liability before the tribunals of the home state, which may have a considerable impact on domestic litigation against investors—especially multinational companies—and help overcome jurisdictional hurdles and most prominently the *forum non conveniens* doctrine. This can be considered as an important development from the standpoint of the responsible conduct of investments, the redress of wrongful doings and the role of the home state.

### 7. Conclusion

Morocco and Nigeria have shown confidence in the BIT as an instrument to foster economically, socially and environmentally sustainable investments. The treaty offers protection to investors without compromising on the host state’s capacity to meet its responsibilities. It also contains several innovative provisions that recalibrate the legal protection of the interests of all stakeholders.

With regard to procedural matters, the provision on liability of investors before the tribunals of the home state is an important development. The drafting of the provisions on the involvement of the Joint Committee in the settlement of disputes, on the contrary, raise several questions that the Parties may consider addressing through an exchange of letters, a protocol, or any other suitable means.

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#### Author

Tarcisio Gazzini is Professor of Law at the University of East Anglia. This article is based on “Nigeria and Morocco move towards a ‘New Generation’ of Bilateral Investment Treaties,” published on *EJIL Talk!* in May 2017, <http://www.ejiltalk.org>.

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#### Notes

<sup>1</sup> See Schill, S. W. & Mbengue, M. M. (Eds). (2017). Africa and the reform of the international investment regime [Special issue]. *Journal of World Investment & Trade*, 18(3). Retrieved from <http://booksandjournals.brillonline.com/content/journals/22119000/18/3>.

<sup>2</sup> Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco, ICSID ARB/00/4, Decision on Jurisdiction, July 23, 2001, para 52. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/ita0738.pdf>.

<sup>3</sup> See, for example, Supplementary Act A/SA.3/12/08 adopting community rules on investment and the modalities for their implementation with ECOWAS, December 19, 2008. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3266>.

<sup>4</sup> See, for example, Government of the Republic of India. (2015, December). *Model text for the Indian bilateral investment treaty*, Art. 14.11. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560>.

<sup>5</sup> See, for example, Treaty between the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment, February 19, 2008, Art. 28(2). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2241>.

## A Look into China's Slowly Increasing Appearance in ISDS Cases

Dilini Pathirana



### Introduction

Recent decades have been marked by China's economic, military and diplomatic rise, and its increasing integration into the international order.<sup>1</sup> China's accession to the World Trade Organization (WTO) and its expanded web of international investment agreements (IIAs) effectively illustrate the country's enhanced immersion in the fields of international trade and investment—two branches of international economic law greatly shaped by Western ideologies.

Regarding foreign investment in particular, China has sustained robust inbound as well as outbound flows of foreign direct investment (FDI).<sup>2</sup> It has concluded 139 bilateral investment treaties (BITs) and 21 treaties with investment provisions, such as trade agreements including investment chapters.<sup>3</sup> On the one hand, expanding its web of IIAs is an effort to promote the view that China is a legally secure investment destination, with a foreign investment framework that is aligned with international investment law norms.<sup>4</sup> On the other hand, China has sought to establish an international legal framework to protect outward Chinese investments following the adoption of the "Going Global" strategy, aimed at encouraging Chinese companies to invest abroad.<sup>5</sup> The web of Chinese IIAs reflects its gradual espousal of international norms aimed at promoting and protecting cross-border investments.

China's gradually changed stance toward investor-state dispute settlement (ISDS) is one of the best illustrations in this respect.<sup>4, 5, 6</sup> This note sheds light on China's increased appearance in ISDS cases, either as home or host state.

### China and the ISDS mechanism

Initially, China was disinclined to accept ISDS as a method to resolve investment disputes based on its suspicions of international law and international arbitration, as well as its emphasis on state sovereignty. Therefore, its earliest BITs, such as the 1982 China-Sweden BIT, included state-state dispute settlement only. In subsequent BITs, such as the 1987 China-Sri Lanka BIT, international arbitration was

accepted as a method to resolve investment disputes, but only those regarding the amount of compensation resulting from expropriation; all other disputes would be subject to the competent court of the home state. Some of the BITs, such as the 1987 China-Japan BIT, allow international arbitration of any dispute subject to specific consent by both parties.

Only in late 1990s China changed its approach more deeply, by providing foreign investors with unobstructed access to international arbitration. Treaties such as the 1998 China-Barbados BIT allow foreign investors recourse to international arbitration to resolve any investment dispute that could not be amicably settled within six months. Since then, the liberal approach has continued, and most of China's recent BITs, such as the 2011 China-Uzbekistan BIT and the 2013 China-Tanzania BIT, include comprehensive dispute settlement clauses.

It is however surprising to observe China's seemingly rare involvement in ISDS mechanism either as host or home state, compared to its increased role in inbound and outbound investments and its expanded web of IIAs. Based on publicly available information, Chinese investors did not use ISDS mechanisms until 2007, and the first known ISDS case against China was initiated in 2011. On the one hand, some have suggested China's lack of affinity for international arbitration and its preference for settling disputes informally through diplomatic consultations possible reasons for the low number of cases initiated by China as an investor.<sup>5, 6</sup> On the other hand, several studies have identified some of the possible reasons for the rareness of ISDS cases against China. Among these reasons are foreign investors' concerns over endangering future dealings with China, the long-held view that only disputes involving the amount of compensation resulting from expropriation can be arbitrated under most Chinese BITs and the opinion that foreign investors could gain more benefits through negotiations.<sup>7</sup>

The next sections provide an overview of the five known claims by Chinese investors and three known claims against China initiated in the past decade.<sup>8</sup>

### ISDS cases involving China as home state

#### 1. *Tza Yap Shum v. Peru*<sup>9</sup>

In the first known ISDS case involving China as home state, the claimant indirectly owned TSG del Perú S.A.C., a Peruvian company engaged in the manufacturing of fishmeal and their exportation to Asian markets. The investor initiated arbitration under the 1994 China-Peru BIT alleging that measures adopted by Peru's national tax authority following a 2004 audit resulted in indirect expropriation of his investment in TSG and violated fair and equitable treatment and full protection and security.

Peru challenged the tribunal's jurisdiction based on the limited consent to arbitration under the BIT, but the tribunal affirmed its jurisdiction to entertain the expropriation claim. In its reasoning, the tribunal stated

that the words “involving the amount of compensation for expropriation” in the dispute settlement clause of the BIT must be interpreted as including “not only the mere determination of the amount but also other issues that are normally inherent in an expropriation” (para. 188). It stated that concluding otherwise would undermine the arbitration clause, which precludes the possibility of arbitration if the investor has already submitted the other issues to a competent court of the host state.

In its final award, the tribunal found in favour of the investor, holding that the measures taken by Peru’s tax authority and upheld by the Peruvian tax court were arbitrary and tantamount to expropriation, as they substantially frustrated the operational capacity of the business.

Peru applied for annulment. The committee found in favour of the investor, holding that the tribunal did not exceed its power by interpreting the dispute settlement clause of BIT widely so as to include issues that are generally involved in an expropriation, and that the tribunal interpreted the phrase “dispute involving the amount of compensation for expropriation” in the overall context of the dispute settlement clause (para. 98).

## 2. *China Heilongjiang v. Mongolia*<sup>10</sup>

In a claim brought under the 1991 China–Mongolia BIT, three Chinese investors challenged Mongolia’s decision to cancel their mining license regarding the Tumurtei iron ore mine. This case was concluded on June 30, 2017, and the award is not public. According to Mongolia’s counsel, the tribunal dismissed the case on jurisdictional grounds as the dispute settlement clause of the BIT confines jurisdiction to “disputes which involve the amount of compensation for expropriation” only.<sup>11</sup> It is thus apparent that the tribunal has adopted the narrow interpretation towards China’s conventional dispute settlement clause, which differs from the broad approach taken by *Tza Yap Shum* tribunal affirmed by the annulment committee.

## 3. *Ping An Life Insurance v. Belgium*<sup>12</sup>

Under the 1986 and 2009 BITs between China and the Belgian–Luxembourg Economic Union (BLEU), the Chinese investors alleged that the corporate rescue plans implemented by Belgium with respect to Fortis Bank SA/NV (FBB) expropriated their investment in the Fortis Group. The fundamental difference between the dispute settlement clauses of the two BITs is that the 1986 BIT restricted arbitration to disputes arising from the amount of compensation for expropriation, while the 2009 BIT allows investors to submit disputes either to the competent court of the host state or to the International Centre for Settlement of Investment Disputes (ICSID), at the investor’s choice. The claimants submitted the dispute to ICSID, relying on the procedural remedy of the 2009 BIT as well as the substantive provisions of the 1986 BIT.

Accepting Belgium’s temporal objection to jurisdiction, the tribunal decided that “the more extensive remedies under the 2009 BIT” are not available to “pre-existing disputes that had been notified under the 1986 BIT, but not yet subject to arbitral or judicial process” (para.

231). In the tribunal’s point of view, the expansive interpretation suggested by the claimants would provide investors with an opportunity to employ the broad dispute resolution clause included in the 2009 BIT to bring claims notified under the 1986 BIT, which limited the substantive scope of dispute settlement.

## 4. *Sanum Investments v. Lao People’s Democratic Republic*<sup>13</sup>

The Macao-based investor Sanum alleged that taxes imposed by Laos deprived her investment in Laos’ gaming industry of several standards of protection guaranteed by the 1993 China–Laos BIT. Rejecting the jurisdictional objections by Laos, the tribunal found that the BIT applies to Macao and that jurisdiction covered the investor’s expropriation claims, following *Tza Yap Shum*’s broad interpretation of the dispute settlement clause.

Laos successfully challenged the award on jurisdiction before the Singaporean High Court, which rejected the applicability of the BIT to Macao and the tribunal’s broad interpretation of the treaty’s dispute settlement clause. However, the Singapore Court of Appeal overturned the High Court’s decision, finding in favour of Sanum. The investor and Laos eventually agreed to an amicable settlement, but the investor yet again initiated an arbitration proceeding before ICSID challenging the conduct of Laos after the settlement.<sup>11</sup> The case is still pending.<sup>14</sup>

## 5. *Beijing Urban Construction v. Yemen*<sup>15</sup>

Chinese state-owned enterprise Beijing Urban Construction Group Co. Ltd. (BUCG) alleged under the 2002 China–Yemen BIT that Yemen unlawfully deprived it of its investment in constructing a portion of new international terminal at Sana’a International Airport. The tribunal rejected Yemen’s objection that BUCG was a state agent, having found that in the relevant fact-specific context it acted as a commercial contractor, not discharging governmental functions. Yemen also objected to the tribunal’s subject matter jurisdiction based on a narrow interpretation of the dispute settlement clause of the BIT. However, the tribunal dismissed the objection, considering that the words “relating to the amount of compensation for expropriation” in the dispute settlement clause must be construed to “include disputes relating to whether or not an expropriation has occurred” (para. 87) as it promotes the BIT’s overall purpose and objective. This case is currently at its merit phase and the decision is pending.

## ISDS cases involving China as host state

### 1. *Ekras Berhad v. China*<sup>16</sup>

The investor brought the first known case against China, under the 1990 Malaysia–China BIT, to challenge the revocation of its right of leasehold land by local authorities of the Hainan Special Economic Zone on the grounds that the investor had failed to develop the land as stipulated in the pertinent local legislation. The parties agreed to suspend the case, which did not reach the award stage.

### 2. *Ansung Housing v. China*<sup>17</sup>

Ansung Housing Co., Ltd, a privately-owned company

incorporated under the laws of the Republic of Korea, brought the second case against China, under the 2007 China–Korea BIT. Ansong alleged that measures by Chinese local governments violated the investment agreement to develop a golf course and related facilities including luxury condominiums and a clubhouse.

China argued that Ansong's claims were time-barred as the investor initiated arbitration more than three years after acquiring knowledge of the loss or damage. Finding in favour of China, the tribunal emphasised that the "limitation period begins with an investor's first knowledge of the fact that it has incurred loss or damage, not with the date on which it gains knowledge of the quantum of that loss or damage" (para. 110).

To save its time-barred claim, Ansong invoked the most-favoured-nation (MFN) clause of the BIT, pointing to other Chinese BITs that do not provide for three-year limitation periods. However, the tribunal found that the MFN clause did not extend to a state's consent to arbitrate with investors or to the temporal limitation period for investor–state arbitration. It also pointed out that the BIT offers specific MFN protection in relation to an investor's "access to courts of justice and administrative tribunals and authorities," without making any reference to international dispute resolution. Accordingly, the tribunal dismissed the case for lack of jurisdiction.

### 3. *Hela Schwarz v. China*<sup>18</sup>

On June 21, 2017, a German-owned investor initiated a third known claim against China, under the China–Germany BIT. The notice of arbitration is not public, and information about the case is scarce.

#### Final remarks on China's appearance in ISDS cases

Compared to China's robust FDI flows, the number of ISDS cases in which it is involved as home or host state—all of them initiated in the last decade—is considerably low. Therefore, it is difficult to make definite observations regarding ISDS cases involving China.

Almost all ISDS cases already decided denote the hurdle that Chinese investors must overcome when bringing claims under first-generation BITs that provided for limited consent to international arbitration. On the one hand, the broad interpretation adopted in *Tza Yap Shum*, followed in *Sanum* and *Beijing Urban Construction*, rebuffed the view that the restrictive dispute resolution clause found in China's early BITs limits arbitration to disputes regarding the amount of compensation in case of expropriation, providing Chinese investors with more room to arbitrate expropriation claims. On the other hand, narrow interpretations such as the one adopted in *Heilongjiang* could limit access to arbitration to cases in which the occurrence of expropriation has been already declared or determined.

As Chinese FDI outflows increase, Chinese investors may increasingly rely on broad arbitration clauses to protect their investment-related interests, leading to more cases like *Ping An*. At the same time, the success in defending itself in cases such as *Ansong* could boost

China's confidence in the ISDS mechanism also as a respondent host state.

The ISDS regime has been under fire, among other reasons, due to its impact on states' right to regulate in the public interest.<sup>19</sup> Several states have been calling for ISDS reform, by creating appeals mechanisms or a permanent international investment court, by emphasizing state–state dispute settlement or by turning to alternative dispute resolution methods.<sup>20</sup> In this context, it remains to be seen whether China would support reform initiatives or whether it would be more inclined to maintain the existing regime.

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#### Notes

- 1 Ikenberry, G. J. (2008). The rise of China and the future of the West. *Foreign Affairs*, 87(1). Retrieved from <https://www.foreignaffairs.com/articles/asia/2008-01-01/rise-china-and-future-west>; Huisken, R. (Ed.). (2009). *Rising China: power and reassurance*. Canberra: ANU E Press.
- 2 United Nations Conference on Trade and Development (UNCTAD). (2017). *World investment report 2017: Investment and the digital economy*. New York and Geneva: United Nations. Retrieved from [http://unctad.org/en/PublicationsLibrary/wir2017\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf).
- 3 UNCTAD. (2017). *International investment agreements navigator*. Retrieved from <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iialnnerMenu>.
- 4 Schill, S. W. (2007). Tearing down the Great Wall: The new generation investment treaties of the People's Republic of China. *Cardozo Journal of International and Comparative Law*, 15(1), 73 et seq.
- 5 Berger, A. (2008). China's new bilateral investment treaty programme: Substance, rational and implications for international investment law making. Retrieved from [https://www.die.gdi.de/uploads/media/Berger\\_ChineseBITs.pdf](https://www.die.gdi.de/uploads/media/Berger_ChineseBITs.pdf).
- 6 Qingjiang, K. (2003). Bilateral Investment Treaties: The Chinese approach and practice. In K. Sik, M. Masahiro, M. Pinto & S. Subedi (Eds.), *Asian Yearbook of International Law 1998/1999*. Leiden, Boston: Martinus Nijhoff Publishers; Shan, W., & Su, J. (Eds.). (2015). *China and international investment law: twenty years of ICSID membership*. Leiden, Boston: Brill Nijhoff.
- 7 Trackman, L. (2015). Geopolitics, China and investor–state Arbitration. In L. Toohy, C. Picker & J. Greenacre (Eds.), *China in the international economic order: New directions and changing paradigms*. New York: Cambridge University Press.
- 8 *Phillip Morris Asia Limited v. The Commonwealth of Australia*, a case initiated under the 1993 Hong Kong–Australia BIT, is not covered by this article.
- 9 *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6. Retrieved from <https://www.italaw.com/cases/1126>.
- 10 China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia, UNCITRAL, PCA Case No. 2010-20. Retrieved from <https://www.italaw.com/cases/279>.
- 11 Herbert Smith Freehills. (2017). *China-related investment arbitrations: three recent developments*. Retrieved from <http://hsfnotes.com/arbitration/2017/07/17/china-related-investment-arbitrations-three-recent-developments>.
- 12 *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29. Retrieved from <https://www.italaw.com/cases/3088>.
- 13 *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13. Retrieved from <https://www.italaw.com/cases/2050>.
- 14 *Sanum Investments Limited v. Lao People's Democratic Republic*, ICSID Case No. ADHOC/17/1. Retrieved from <https://www.italaw.com/cases/5776>.
- 15 *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30. Retrieved from <https://www.italaw.com/cases/5391>.
- 16 *Ekran Berhad v. People's Republic of China*, ICSID Case No. ARB/11/15. Retrieved from <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/11/15>.
- 17 *Ansong Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25. Retrieved from <https://www.italaw.com/cases/5391>.
- 18 *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19. Retrieved from <https://www.italaw.com/cases/5973>.
- 19 See, for example, Public Statement on the International Investment Regime, August 31, 2010. Retrieved from <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010>; Waibel, M., Kaushal, A., Chung, K.-H., & Balchin, C. (Eds.). (2010). *The backlash against investment arbitration: Perceptions and reality*. Austin & Alphen aan den Rijn: Kluwer Law International.
- 20 UNCTAD. (2013, June). Reform of investor-state dispute settlement: in search of a roadmap. *IIA Issues Note*, 2. Retrieved from [http://unctad.org/en/PublicationsLibrary/webdi-aepcb2013d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdi-aepcb2013d4_en.pdf).

## Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada

### Gus Van Harten and Dayna Nadine Scott



Does the prospect of foreign investor claims against countries in investor–state dispute settlement (ISDS) lead to regulatory chill? This question is difficult to answer because information about ISDS and government decision-making is typically not public. Considering the reputational risk for governments, such information is presumably unlikely to become public where it involves changes aimed at appeasing foreign investors.

We studied the question—primarily in the context of Ontario, Canada—by interviewing 51 policy insiders, mostly current or former officials in ministries with an environmental or trade mandate. We focused on whether ISDS contributed to changes in the internal vetting of government decisions on environmental protection. We note that this context may differ from other jurisdictions and, even for Ontario, the findings are not meant to be comprehensive. Here is a summary of our main findings, reported in detail elsewhere.<sup>1</sup>

#### *1. Government ministries have changed their decision-making to account for concerns resulting from trade and investment agreements, including ISDS.*

It was clear that concerns related to trade and investment agreements, including ISDS, are considered in decision-making processes of environment-related ministries. For example, a government lawyer in an environment-related ministry in Ontario reported that trade issues began to cross the lawyer’s desk after the early 2000s. Asked what issues tended to come up, the lawyer pointed to the World Trade Organization (WTO) and the ISDS provisions in Chapter 11 of the North American Free Trade Agreement (NAFTA), remarking that “Chapter 11 is the one that really bites.” The lawyer reported reviewing one or two, sometimes three or four, proposals for legislation, a regulation, or a policy each year for trade compliance.<sup>2</sup>

Similarly, in another large Canadian province, a trade ministry official said that proposed measures in that province were reviewed for trade compliance on hundreds of occasions yearly and that the trade ministry had a team of a dozen people. The measures reviewed could include legislative, regulatory, or policy changes or existing policies and confirmed that ISDS was certainly on their radar.<sup>3</sup>

#### *2. ISDS puts pressure on government decision-making due to the financial and political risks and the opportunity costs that ISDS creates.*

Various interviewees acknowledged that the financial risks of ISDS influence government decision-making and that the overall culture in government is risk averse. For example, when asked about financial risks arising from ISDS, a policy advisor in an environment-related ministry stated: “The way we do business, risk aversion is right in the foundation. We don’t like to take risks with taxpayer resources—resources that belong to the citizens of Ontario. We take that really seriously.”<sup>4</sup> Presented with the prospect of a litigation risk carrying potentially billion-dollar liability, a former political advisor to the Ontario Cabinet was clear that the risk would be considered “the second it hits the political staffer’s desk”. According to the former advisor: “If you’ve got a billion-dollar risk and there’s a substantial risk associated with the lawsuit, that’s going to have a huge impact on the decision.”<sup>5</sup>

ISDS also create other kinds of pressure for governments. According to a former senior advisor at an environment-related ministry, policy-makers consider political and non-political risks.<sup>6</sup>

For the political, it’s more about the success of landing the thing they’re working on and that they put their political capital on. For the non-political, it’s about wasted resources, putting time and energy into something that either can’t proceed or is perceived negatively, or it can only be half done.

Various interviewees stressed the risk of lost time and resources, and corresponding deterrent effects, due to ISDS litigation.<sup>2,7</sup> We also heard that trade and investment issues were more prominent in a ministry’s decision-making after the ministry’s became the subject of a NAFTA case. A former lawyer in a federal environment-related ministry recalled that, in the late 1990s, the *Ethyl* claim against Canada under NAFTA Chapter 11 had caught the federal government off guard.<sup>8</sup> On this point, a former high-level policy advisor in the federal trade department at the time of *Ethyl* stated that the claim “really spooked officials and they became very, in my view, intimidated by Chapter 11 challenges.”<sup>9</sup> The former advisor added: “in my view, it led to bad advice from officials in the sense that they were really fearful of developing any productive policy because they viewed that every policy would be subject to some type of trade scrutiny and Canada would lose.”

These findings suggest that governments may respond to early ISDS cases against them in ways that become publicly known, but may then adapt their decision-making to avoid ISDS risks by vetting proposals internally. By implication, public information about the ISDS impacts on governments would become less available after the initial shock.<sup>10</sup>

#### *3. ISDS is not an all-powerful factor in government decision-making. ISDS pressures may be overcome, especially if there is a strong political commitment to a proposed measure, backed by a legal capacity to scrutinize purported ISDS risks critically and throughout the policy-making process.*

Despite its clear impacts, ISDS did not emerge as an overwhelming factor in government. Other considerations



could crowd out or override ISDS concerns. Foremost among them, it seemed, was a political commitment to “do the right thing,” especially if that sentiment was accompanied by broad public support for a proposal.<sup>11</sup>

Ontario’s Cosmetic Pesticides Ban Act of 2008—which restricted cosmetic use of chemical pesticides on health and environment grounds—was cited by several interviewees as an example of how political commitment to a decision could override an ISDS threat, although most also conveyed that it was doubtful the act would have proceeded without political momentum and overwhelming public support.<sup>2, 6, 12</sup>

Along the same lines, we heard that ISDS risks may be accommodated before proposals reach senior political decision-makers. A former Ontario minister said that he expected ISDS concerns to be worked out below the minister’s office, saying that civil servants would have discussions and that government lawyers would shape proposals in order to limit trade and ISDS risks. According to a former political advisor to the Ontario Cabinet:<sup>5</sup>

My view is that if you ask the average minister if there’s a legal chill associated with trade law, they’d probably say no because they’ve probably never seen a decision get to their desk.... But if you’d asked... an honest lawyer working for government that regularly assesses legal risk of that sort, if they were being honest, they would say that there is.

Some interviewees commented that governments may discount ISDS financial risks because the amounts involved are manageable. Some interviewees described a CAD15 million settlement in one NAFTA case against Canada as “pocket change” or a “rounding error.”<sup>13</sup> Yet this view was contradicted by others. A former official in an environment-related ministry told us that, “to a ministry like [the environment-related ministry], CAD\$15 million is a lot of money”, regardless of whether it comes out of the ministry’s budget or the general revenue, because the ministry “can’t be responsible for imposing that [cost] on the system as a whole”.

#### 4. *The assessment of trade or ISDS risks involves value choices. The changes to decision-making processes that we have documented elevate the role of “trade values” and foreign investor protection over competing values.*

Unsurprisingly, there are conflicting views in government about whether and how to prioritize foreign investor interests that are in tension with health or environmental goals. Indeed, it appeared that some officials may invoke “trade values” as a foil to health or environmental priorities. One Ontario trade official told us that some trade officials, especially at the federal level, are “true believers” in trade agreements and everything they do. Interviewees who had experience in health or environmental regulation expressed a similar view. According to a policy expert with extensive experience in federal environmental regulation:<sup>14</sup>

... the federal government has an army of trade lawyers whose job it is to pounce on any breath, any thought of departure from the trade disciplines. They’re there to crush, as much because they’re true believers in trade liberalization as to whatever they think is really a risk.... This was a sledge hammer that the trade people were more than happy to use vis-à-vis initiatives of other departments.

Putting aside this characterization of some trade lawyers, the provincial trade officials we interviewed appeared to have a more balanced and pragmatic approach, albeit still rooted in a version of trade values. These officials cited principles of non-discrimination and the avoidance of economic benefits for local firms and expressed concern about laws being designed for economic purposes and disguised as environmental.

However, other officials expressed a contrasting view that environmental measures tend to be portrayed in economic terms as destroying jobs or discriminating in favour of one or another economic interest.<sup>6</sup> Either way, environmental aims are frustrated by those asserting trade values. One government lawyer who was well informed about trade law and ISDS commented that there is no such thing as a “pure” environmental measure that is free from economic impacts,<sup>2</sup> and several political decision-makers stated that environmental initiatives would not proceed if some economic benefit is not shown.<sup>15</sup>

#### Conclusion

Our research into environmental decision-making in Ontario, Canada, reveals that ISDS puts pressure on governments to vet regulatory proposals for their impact on foreign investors, especially in risk-averse bureaucracies. The deterrent effect of ISDS appears to be exacerbated by the opportunity cost of defending a measure against foreign investor claims. Even minor ISDS cases can consume large amounts of time and other resources. ISDS risk assessments, which are often presented as legal or technical advice, can lead to environmental initiatives being characterized as either unduly harmful or unduly beneficial to the economy and, in turn, as undesirable. The fact that ISDS permits foreign investors alone to bring claims elevates their interests, relative to those of other constituencies, in government decision-making. In these respects, we think it safe to conclude that ISDS leads to regulatory chill.

#### Authors

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#### Notes

<sup>1</sup> Van Harten, G., & Scott, D. N. (2016). Investment treaties and the internal vetting of regulatory proposals: A case study from Canada. *Journal of International Dispute Settlement*, 7(1), 92–116. Retrieved from <https://doi.org/10.1093/jnlids/idv031>; Van Harten, G., & Scott, D. N. (2017, forthcoming). Investment treaties and the internal vetting of regulatory proposals: A case study from Canada (Part 2). In A. K. Bjorklund, (Ed.), *Yearbook on International Investment Law and Policy*. Oxford: Oxford University Press.

<sup>2</sup> Interview with AH (March 25, 2013).

<sup>3</sup> Interview with BK, BL, and BM (June 23, 2014).

<sup>4</sup> Interview with BJ (March 28, 2014).

<sup>5</sup> Interview with AX (November 22, 2013).

<sup>6</sup> Interview with AE (April 15, 2011).

<sup>7</sup> Interviews with BH (March 24, 2014) and BP (July 14, 2014).

<sup>8</sup> Interview with AW (November 22, 2013).

<sup>9</sup> Interview with AM (October 8, 2013).

<sup>10</sup> We are grateful to Andreas Follesdal for this point.

<sup>11</sup> Interview with AF (April 15, 2011).

<sup>12</sup> Interviews with AL (October 4, 2013) and BA (December 3 and 10, 2013). See also Cooper, K., Bell-Pasht, K., Nadarajah, R., & McClenaghan, T.L. (2014). Seeking a regulatory chill in Canada: The Dow Agrosciences NAFTA Chapter 11 challenge to the Quebec Pesticides Management Code. *Golden Gate University Environmental Law Journal*, 7(1), 5, p. 31. Retrieved from <http://digitalcommons.law.ggu.edu/gguelj/vol7/iss1/4>.

<sup>13</sup> Interview with AD (April 15, 2011).

<sup>14</sup> Interview with AG (April 14, 2011).

<sup>15</sup> Interview with AU (November 15, 2013).

## insight 4

## Can Foreign Investors Be Held Liable for Human Rights Violations? International Human Rights Law and Beyond

### Carlos Andrés Sevilla Albornoz



It is not unrealistic to consider that multinationals can violate human rights. In Ecuador, for example, Chevron's oil extraction and mismanagement of toxic waste harmed the country's natural environment and the health and integrity of Ecuadorian communities.

In reaction to the damage caused by multinationals, host states have had the challenge to protect their citizens and have developed legal instruments to establish the responsibility of foreign entities for human rights violations. Some states, like Ecuador, have legally established that any private entity, including foreign companies, can be held responsible for human rights violations under domestic law and in national courts.<sup>1</sup> More recently, states have been discussing a potential human rights instrument directly applicable to private entities.

This paper explains the bases of states' obligations under international human rights law and how foreign investors—including multinationals and other private entities—may be held responsible for human rights violations.

### 1. What obligations do states have under international human rights treaties?

Constitutions grant rights that the state must enforce. Many of these rights result from the ratification of multilateral human rights treaties concluded under the auspices of the United Nations, such as the International Covenant on Civil and Political Rights (ICCPR), and other treaties concluded in regional frameworks, such as the African Charter of Human and People's Rights (ACHPR), the American Convention for Human Rights (ACHR) and the European Convention of Human Rights (ECHR). Through these international instruments, states assume the obligations to respect and guarantee people's human rights in its territories, as well as to adapt their legal systems and not to discriminate.

The obligation to *respect* human rights requires the state and its agents not to violate human rights,<sup>2</sup>

“directly or indirectly, by any action or omission.”<sup>3</sup> On the other hand, the obligation to *guarantee* human rights “requires the State to take the necessary actions to ensure that all persons subject to the jurisdiction of the State are in a position to exercise and enjoy them.”<sup>3</sup> As explained by the judges of the Inter-American Court of Human Rights, this obligation implies states' duty to organize the entire governmental apparatus and, in general, all the structures through which the exercise of public power is manifested, so that they are able to legally secure the free and full exercise of human rights.<sup>4</sup>

When international human rights instruments enter into force in a state's territory, they become part of the state's domestic law. Therefore, the state has to develop the content of each right in its domestic legislation, complying with its *legal adaptation* obligation. In doing so, states have a margin of discretion to choose the appropriate mechanisms for the guarantee of human rights.<sup>5</sup> Given that the international protection of human rights reflects “a conventional nature or a complementary protection to the one offered by the domestic law of States,”<sup>6</sup> the margin of appreciation also works as a connection system between domestic and international law, applied for the fulfillment of the obligations assumed under the treaty.

The *non-discrimination* obligation is linked to the respect and guarantee obligation: each state must respect and guarantee the rights of persons subject to its jurisdiction “without discrimination on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, birth or other status.”<sup>7</sup>

### 2. What happens when states fail to comply with their human rights obligations?

If a human rights violation occurs in a state that has committed to respect and guarantee human rights within one of the regional human rights regimes or the UN regime, the affected person could present her case before an international forum—such as the Human Rights Commission of the United Nations, the Inter-American Court of Human Rights, the African Court of Human and People's Rights or the European Court of Human Rights—which could declare the international responsibility of the state for that violation. After the legal process is carried out, the competent international human rights authority would be able to sanction the state. Under the Inter-American regime, for example, the state could be sanctioned for not “preventing, investigating and punishing any violation of the rights recognized by the Convention.”<sup>4</sup>

As states are the ones that conclude international human rights instruments, they are the ones obligated to enforce these instruments, assuming the role of

human rights guarantors, and are the ones responsible in case of human rights violations. This also explains why, among other considerations, one could conclude that private entities cannot be held responsible for human rights violations under existing international human rights law.

### 3. Under international human rights law, what happens if a private entity violates human rights?

States' human rights obligations mentioned above are the bases on which states can be held responsible for acts committed by private entities. Under the obligation to guarantee human rights, states must prevent, investigate and sanction any human rights violation within their territories to avoid international responsibility. When national law establishes human rights obligations for private entities, any human rights violation by a private entity implies that if there's an absence of sanction or reparation, the state is going to be responsible for the lack of protection of those human rights.<sup>7</sup> This also relates to states' legal adaptation obligation.<sup>8</sup>

Therefore, in the presence of actions or omissions of private individuals, human rights violations "can also be considered as 'acts of the State' capable of generating international responsibility if they constitute a breach of an international obligation."<sup>9</sup> Human rights treaties allow for certain decisions to be taken at a national level, one of which is the definition of the responsibility of individuals for violations of human rights.

### 4. How can states ensure that foreign investors are held liable for human rights violations?

To establish their business abroad, investors need to formalize their operation in the host country. They must comply with legal processes like the domiciliation or establishment of the company under host state laws. As a result, the company acquires rights and obligations under the domestic law of the host country, especially under the constitution of the state.

In order to comply with the obligation to respect and guarantee human rights, states have a margin of discretion that allows them to decide how they are going to guarantee them. Based on their obligations under human rights treaties, states can adopt legislation that ensures private entities, whether domestic or foreign, are held responsible for their human rights violations.

### 5. Are those measures enough?

Although ensuring that private entities can be held responsible for human rights violations under domestic law is a very important step taken by states, it is necessary to consider whether this measure is enough to stop foreign investors from violating human rights. Corrupt practices by economically powerful

multinationals can undermine the legal systems in many countries. Multinationals can escape liability through their corporate structures and removal of assets from the country. There may also be risks resulting from the economic imbalance between multinationals and the victims, often poor individuals and communities. This is why other initiatives are now being considered in order to enforce human rights protection. In this sense, some countries from the Global South presented to the UN Human Rights Council an initiative to create a binding international instrument on human rights violations by multinationals, which is currently under negotiation.<sup>10</sup>

It is not yet clear what approach states will take in establishing the international responsibility of multinationals in this instrument. If successful, this instrument could advance international human rights protection and extend responsibility from states to private companies, and take the types of domestic initiatives adopted in Ecuador's to an international scale. It could also establish a new relation between foreign direct investment and human rights protection, creating new standards and imperative rules of conduct for multinationals.

#### Author

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#### Notes

1 Article 41 of Ecuador's Organic Law on Jurisdictional Guarantees and Constitutional Control allows any person to initiate a constitutional action against a private entity under circumstances including the causation of a serious injury and a state of subordination or defenselessness of the affected person against an economic, social, cultural or religious or any other power. Retrieved from <http://www.justicia.gob.ec/wp-content/uploads/2015/05/LEY-ORGANICA-DE-GARANTIAS-JURISDICCIONALES-Y-CONTROL-CONSTITUCIONAL.pdf>.

2 Gross, H. (1991). *La Convención Americana y la Convención Europea de Derechos Humanos*. Santiago: Editorial Jurídica de Chile, p. 16.

3 *Id.*, p. 65.

4 Velásquez Rodríguez vs. Honduras Case, 1989 Inter-American Court of Human Rights (ser. C) No. 4 (July 29, 1988). Retrieved from [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf).

5 Contreras, P. (2014). Control de convencionalidad, deferencia internacional y discreción nacional en la jurisprudencia de la Corte Interamericana de Derechos Humanos. *Ius et Praxis Año 20*, No. 2. Retrieved from <http://www.scielo.cl/pdf/iusetp/v20n2/art07.pdf>.

6 Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/RES/47/135/Annex (Dec. 12, 1948). Retrieved from [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/217\(III\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III)).

7 American Convention on Human Rights (Pact of San José, Costa Rica), November 22, 1969. Retrieved from [https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.pdf](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf).

8 Courtis, C. (2005). La eficacia de los derechos humanos en las relaciones entre particulares. *Baigún, D., & Argibay, C. (Coords.). Estudios sobre justicia penal*. Buenos Aires: Editores del Puerto, p. 817.

9 Medina, C. (2005). *La Convención Americana: Vida, integridad personal, libertad personal, debido proceso y recurso judicial*. Santiago: Centro de DDHH de la Facultad de Derecho de la Universidad de Chile, p. 18.

10 United Nations International Law Commission. (1971). *Third report on state responsibility, by Mr. Roberto Ago, special rapporteur: The internationally wrongful act of the state, source of international responsibility*. U.N. Doc. A/CN.4/246 and Add.1-3, para. 186. Retrieved from [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_246.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_246.pdf).

11 U.N. HRC Res. 26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014). Retrieved from [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/26/9](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9). See also: United Nations Human Rights Council. (2017). *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*. Retrieved from <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx>; Statement on behalf of a group of countries at the 24th session of the Human Rights Council regarding Transnational Corporations and Human Rights, Geneva, September 2013. Retrieved from: <http://www.cancilleria.gob.ec/wp-content/uploads/2013/09/DECLARACION.pdf>.

## news in brief

### Canada, Mexico and United States hold first rounds of NAFTA renegotiation

Following U.S. President Trump's **initiative to renegotiate** the North American Free Trade Agreement (NAFTA), the first round of negotiation took place in Washington, D.C. from August 16–20, 2017 and the second in **Mexico City from September 1–5, 2017. Additional rounds are scheduled** for September 23–27, 2017 in Canada and October in the United States.

The U.S. Trade Representative (USTR) published its **negotiating objectives** on July 17, 2017. The objectives with respect to investment are to “reduce or eliminate barriers to U.S. investment in all sectors” and to secure rights for U.S. investors in NAFTA countries “while ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors.” The USTR is also reportedly preparing a **proposal requiring NAFTA countries to opt in** to the investor–state dispute settlement (ISDS) mechanism.

On August 14, 2017 Canadian Foreign Affairs Minister Chrystia Freeland outlined **Canada's core objectives**. She stated that “NAFTA should be made more progressive” by including strong provisions on labour, environment, gender equality and indigenous peoples. Freeland also stressed the need to reform ISDS “to ensure that governments have an unassailable right to regulate in the public interest.”

### Report on third-party funding in international arbitration opened for public comment

The International Council for Commercial Arbitration (ICCA)–Queen Mary Task Force on Third-Party Funding in International Arbitration **opened** its **draft report** for public comment. Chapter Eight of the draft report examines third-party funding in investment arbitration. Comments may be sent to [tpftaskforce@arbitration-icca.org](mailto:tpftaskforce@arbitration-icca.org) by October 31, 2017.

The Task Force aims at promoting multilateral dialogue about the issues third-party funding raises in international arbitration and greater consistency in addressing these issues at an international level. It comprises over 50 members from over 20 jurisdictions, including arbitrators, government officials, arbitration practitioners, academics and third-party funders.

### HKIAC invites comments on including investment arbitration provisions in revised rules

The Rules Revision Committee of the Hong Kong International Arbitration Centre (HKIAC) **invited** public comments on **proposed amendments** to the 2013 HKIAC Administered Arbitration Rules. It is also seeking views on whether to include express provisions applicable to investment treaty arbitration and on what provisions should be included. Comments may be sent to [rules@hkiac.org](mailto:rules@hkiac.org) by October 2, 2017.

### EU launches consultation on prevention and resolution of intra-EU investment disputes

On July 31, 2017 the European Commission **launched** a consultation on the prevention and amicable resolution of disputes between investors and public authorities within the European Union. According to Commission Vice-President Valdis Dombrovskis, responsible for Financial Stability, Financial Services and the Capital Markets Union, the objective is to investigate whether to set up a dispute settlement framework “to save time and money both for EU

investors and national authorities.”

The consultation seeks to collect evidence on the need for such framework, its desirable characteristics and the need for greater clarity on the rights of EU investors. Among the policy options envisioned in the consultation's **Inception Impact Assessment** are establishing a network of “Investment Contact Points,” an EU legal framework for mediation, and permanent mediation agencies in each member state. The **questionnaire is open** until November 3, 2017.

### UNCITRAL receives mandate to work on ISDS reform; Transparency Convention to enter into force on October 18, 2017

On July 14, 2017, the United Nations Commission on International Trade Law (UNCITRAL) **entrusted** its Working Group III with a broad mandate to work on the possible reform of investor–state dispute settlement (ISDS). The working group will identify concerns regarding ISDS, consider whether reform is desirable and, if so, develop recommendations. Discussions will begin at the working group's **34th session**, scheduled to take place in Vienna between November 27 and December 1, 2017, and are expected to benefit from expertise from all stakeholders.

In 2013 UNCITRAL adopted **Rules on Transparency** in Treaty-based Investor–State Arbitration, applicable to cases initiated under UNCITRAL Arbitration Rules and based on investment treaties concluded since April 1, 2014. The UN Convention on Transparency in Treaty-based Investor–State Arbitration, also developed by UNCITRAL, provides an opt-in mechanism for states that wish to extend the application of such Transparency Rules to cases under treaties concluded before April 1, 2014. The **Transparency Convention** will enter into force on October 18, 2017.

### Canada–EU CETA to be provisionally applied as of September 21, 2017

After Canada's ratification of the Comprehensive Economic and Trade Agreement (CETA) on May 17, 2017, Canada and the European Commission **agreed** to start the provisional application of the agreement on September 21, 2017. **As reported in ITN**, investment protection provisions will only enter into force once all EU member states have ratified the agreement.

### EU and Japan reach agreement in principle on EPA; ISDS remains fully open

The European Union and Japan **announced** on July 6, 2017 that they reached an **agreement in principle** on the main elements of an Economic Partnership Agreement (EPA). In negotiation since 2013, the treaty will include a specific commitment to the Paris Agreement on climate change. Although negotiations are not yet concluded, the negotiating partners have **published certain texts** covered by the agreement in principle—including chapters on **sustainable development** and **investment liberalization**—for information purposes.

Investment protection is outside the scope of the agreement in principle, as the negotiating partners could not agree on the issue of investment dispute resolution. The European Commission, which proposed its reformed Investment Court System (ICS) to Japan, **clarified** that “under no conditions can old-style ISDS provisions be included in the agreement.” The negotiating partners are working toward concluding negotiations by the end of 2017.

# awards and decisions

## All claims by Isolux Infrastructure Netherlands against Spain are dismissed

*Isolux Infrastructure Netherlands B.V. v. the Kingdom of Spain, SCC Case No. V2013/153*

**Claudia Maria Arietti Lopez**

An arbitral tribunal administered by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) dismissed all claims brought against Spain by Isolux Infrastructure B.V. (Isolux). The case was initiated in 2013 based on the Energy Charter Treaty (ECT).

### *Background and claims*

Isolux, a company incorporated in 2012 under Dutch laws, initiated the arbitration as the majority shareholder of several Spanish companies, including Grupo T-Solar Global S.A (T-Solar), which controls T-Solar Global Operating Assets S.L. (TGOA). TGOA and Tuin Zonne Origen S.L.U., in turn, held the majority of the shares in 117 Spanish companies owning photovoltaic solar plants in Spain.

Isolux claimed that Spain attracted its investment with the promise of maintaining a long-term feed-in-tariff (FIT) for the production of photovoltaic energy under a special regime, but later abolished it, thus breaching ECT Article 10 on fair and equitable treatment (FET). Isolux also alleged that Spain breached ECT Article 13 (expropriation) on the grounds that the abolition of the special regime destroyed the economic value of its investment. Isolux asked for compensation of around €80 million.

### *Tribunal accepts jurisdictional objection based on carve-out for taxation measures*

Before examining the merits, the tribunal dismissed all of Spain's jurisdictional objections, except for one, relating to the introduction of a tax on the value of electricity production (TVEP) by Spain in December 2012. Spain had argued that this measure was excluded from ECT application under the carve-out provision contained in Article 21(1).

To decide whether a tax measure was covered by the carve-out provision, the tribunal established that it was necessary to determine whether the purpose of the tax was actually taxing, that is, whether it was enacted in good faith. The tribunal found that Isolux failed to meet its burden of proving that the TVEP was not promulgated in good faith. Consequently, it concluded that it had no jurisdiction to hear the claim regarding alleged ECT violations due to the introduction of the TVEP.

### *Spain did not violate its obligation to provide FET to Isolux's investments*

Isolux alleged that Spain created legitimate expectations derived from its regulatory framework regarding the long-term FIT and that it breached those expectations by abolishing and replacing the special regime.

In reaching its decision, the tribunal considered the *Perenco v. Ecuador* award and stated that "a central aspect of the analysis of an alleged violation of the FET standard is the investor's reasonable expectations regarding the future treatment of his investment by the

host state" (para. 777).

The tribunal established that, to determine whether there was a violation of FET, it first had to determine whether, at the time when the investment was made, the existing regulatory framework created a legitimate expectation for Isolux that it would not be modified, as it ultimately was. The court concluded that it did not, because when Isolux decided to invest in Spain (October 29, 2012), the regulatory framework for renewable energy had already been modified and was undergoing several studies that made its modification inevitable. Consequently, no reasonable investor could expect that this regulatory framework would remain unchanged.

In addition, the tribunal noted that Isolux had specific knowledge that would not allow it to have the legitimate expectation that the FIT would last throughout the life of the plants. In an administrative appeal filed by Isolux Corsan S.A., the parent company of the Isolux Group, before the Spanish Supreme Court, Isolux Corsan S.A., expressly referred to Supreme Court case law establishing that the only limit to the power of the government to modify the regulatory framework is the guarantee of a reasonable return given by the law governing the energy sector. This was ratified by the decision taken by the Supreme Court in that case, notified to Isolux Corsan S.A. in September 2012. The Tribunal found that Spain did not breach its obligation to provide FET to Isolux's investments since at the time when Isolux made the decision to invest in Spain, it had knowledge of case law allowing the government to modify the regulatory framework while guaranteeing a reasonable return on investment to the investor.

### *Spain did not indirectly expropriate Isolux's investment*

Isolux alleged that Spain indirectly expropriated its investment, which consisted of its shareholding in T-Solar and the yields from T-Solar's commercial activities. Spain, on the other hand, argued that Isolux's investment should be limited to its shareholding in T-Solar and to the indirect ownership that it may have had, through T-Solar's subsidiaries, of the holding companies of the plants.

The tribunal considered that, pursuant to ECT Article 13, Isolux had an investment and was entitled to protection against any substantial violation by Spain of its shareholding in T-Solar, which implied protection of both the ownership of the shares and their value. To determine whether there was an expropriation, the tribunal established that it had to determine whether Isolux's yields had suffered, as a result of Spain's measures, a decrease of such importance as to reflect an indirect expropriation.

The parties agreed to use the test in the case *Electrabel v. Hungary* to determine the expropriatory effect of the measures taken by Spain. The test states that for an expropriation to occur, there must be "a substantial, radical, severe, devastating or fundamental deprivation of rights or virtual annihilation, effective neutralization or de facto destruction of the investment, its value or enjoyment" (para. 837).

Based on the above, the tribunal held that the impact of measures taken by the host state on the rights or assets of the investor must be of such a magnitude that its investment loses all or a very significant part of its value, amounting to a deprivation of property. Accordingly, the tribunal considered that it had to assess whether Spain's measures resulted in a loss of profitability of those plants of such magnitude that could substantially affect the investment.

Spain introduced into the record a May 2011 Deloitte report originally presented by both Isolux Corsan S.A. and the companies of the T-Solar Group before the Spanish Supreme Court. The report indicates that the profitability forecast of the plants was of 6.19 per cent, while the profit recorded by Isolux after Spain's allegedly expropriatory measures was of 7.19 per cent after taxes.

In light of the report, the tribunal concluded that Isolux could not argue that its investment had been expropriated since its current profitability is higher than 6.19 per cent. The tribunal considered that, to prove expropriation, Isolux's current profitability would have to be lower than 6.19 per cent in such proportion so that the deprivation was substantial and significant.

Based on the above, the tribunal found that there was no expropriation of Isolux's investment, since there was no severe or radical loss.

#### Costs

The tribunal decided that Isolux would be responsible for the 70 per cent of the arbitration costs and expenses and that Spain would be responsible for the remaining 30 per cent.

#### *Dissenting opinion of arbitrator Santiago Tawil*

According to Tawil, a breach of legitimate expectations occurs when an investor complies with all the requirements under the law of the host state to obtain a specific benefit, and the host state subsequently denies such benefit to the investor. He concluded that, even though Spain had the right to modify or suppress the special regime, the elimination of the benefit granted to Isolux under that special regime without payment of adequate compensation breached the investor's legitimate expectations and, therefore, the FET clause of the ECT.

*Notes:* The tribunal was composed of Yves Derains (President, appointed by the SCC, French national), Guido Tawil (claimant's appointee, Argentinian national) and Claus von Wobeser (respondent's appointee, Mexican national). The award dated July 11, 2016 is available in Spanish at <https://www.italaw.com/sites/default/files/case-documents/italaw9219.pdf>.

#### **Argentina ordered to pay over USD320 million for unlawful expropriation in airlines case**

*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1*  
**Maria Florencia Sarmiento**

A majority tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has held Argentina liable for unlawful expropriation and for

failure to accord fair and equitable treatment (FET) in a case relating to Argentinian airlines, awarding over USD320 million in damages.

#### *Background and claims*

Three Spanish companies—Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.—brought the case against Argentina under the Argentina–Spain bilateral investment treaty (BIT). The dispute arose out of Argentina's measures related to the claimants' investments in two Argentinian airlines: Aerolíneas Argentinas S.A. and Austral-Cielos del Sur S.A.

In 2001 the claimants' Spanish subsidiary Air Comet purchased Interinvest, an Argentinian intermediary company that owned the majority of the shares of the airlines and operated them. In July 2008 Argentina and the three claimant companies concluded the purchase agreement of the two airlines, which provided that the price would be determined by agreement of two different valuers appointed by each party, or by a third and neutral valuator in case of disagreement. Argentina rejected the investors' valuation, refused to agree on a neutral valuator and decided that a formal expropriation using a different valuation method was the only way to keep the airlines operating.

The claimants initiated arbitration in December 2008 alleging that Argentina violated the BIT, international law and Argentinian law by unlawfully expropriating their investment and failing to accord FET, among other breaches.

Argentina asserted that the claimants' mismanagement was the cause of the declining financial condition and ultimately of the insolvency of the airlines. It also raised a counterclaim for damages for its losses due to the poor state of the airlines at the time of expropriation, allegedly caused by the claimants' failure to undertake proper due diligence of the airlines.

#### *Tribunal finds breaches of FET and expropriation clauses and dismisses counterclaim*

The claimants alleged that Argentina took a series of measures that breached the expropriation and FET clauses.

The first act analyzed was Argentina's alleged failure to set economically reasonable airfares. The claimants stated that Argentina set the airfares too low, impairing their right to earn a reasonable return. After examining Argentinian law, the tribunal concluded that airlines had a substantive right to the setting of economically reasonable airfares and that airfares set below a reasonable threshold entitled airlines to compensation under domestic law. Furthermore, the tribunal pointed out that the airfare increases did not match the increases in the costs incurred by the airlines.

The second issue was whether the investment was not profitable because of the claimants' management or because of Argentina's failure to establish economically reasonable airfares. The tribunal concluded that while some of Argentina's criticism to the claimants' performance appears to be valid and may have had affected the investment, ultimately the low airfares

had a “substantial impact” on the profits (para. 637). However, the tribunal concluded that Argentina’s conduct in the setting of airfares and the denial to increase them between 2001 and 2008 did not constitute an FET breach.

Regarding the allegation that Argentina violated its FET obligation by frustrating the investors’ legitimate expectations, the tribunal analyzed the language of the treaty guided by the Vienna Convention on the Law of Treaties (VCLT). It considered that “while the term legitimate expectations is also not found in the Treaty, the fair and equitable treatment language has been interpreted to oblige a State not to frustrate an investor’s legitimate expectations” (para. 667). Even so, it concluded that the claimants could not reasonably have had the expectations claimed, in light of the state of the Argentinian economy and the financial difficulties faced by the airlines when the investment was made.

In sum, the only FET breach the tribunal found concerns Argentina’s failure to comply with the valuation method for the purchase of Interinvest’s shares in the airlines under the July 2008 purchase agreement (para. 857).

In its defence to the expropriation claim, Argentina asserted that, by providing a symbolic compensation of ARS1 (roughly USD0.06) for the shares of Interinvest given that the investment was unprofitable at the time of expropriation, it complied with the adequate compensation requirement. However, according to the tribunal, Argentina failed to provide adequate compensation by rejecting the agreed upon valuation method and proceeding to a formal expropriation on a different valuation methodology. The tribunal held that an unlawful expropriation took place because Argentina failed to pay adequate compensation as well as because it was not made in accordance with the law.

Finally, the tribunal dismissed Argentina’s counterclaim, having found that Argentina did not identify any substantive right or obligation on which it could rely or any legal basis under the BIT.

*Tribunal rejects attempt to import umbrella clause through MFN, but accepts importation of full protection and security clause*

The claimants also relied on the most-favoured-nation (MFN) provision of the BIT to attempt to import clauses of the Argentina–United States BIT.

First, the tribunal decided that the MFN clause was not restricted to the FET provision only, as Argentina had argued, but that it could be used to import more favorable provisions in respect to “all matters” governed by the BIT. It then went on to consider the claimants’ request to import the umbrella clause and the full protection and security (FPS) provisions from the Argentina–United States BIT as the Argentina–Spain BIT included no such provisions.

The tribunal rejected the importation of the umbrella clause, considering that it would imply the incorporation of a new right or standard that was not included in the

base treaty while the MFN language specifically referred to “all matters” governed by the treaty.

Turning to the FPS clause, the tribunal accepted its importation, noting that Article III(1) of the Argentina–Spain BIT establishes the protection of investments as a matter governed by the treaty. Even so, the tribunal ultimately found no breach of the FPS standard, relying on its findings regarding the FET standard related to the regulatory framework governing airfares (para. 906).

*Decision and costs: Argentina to pay over USD320 million in compensation*

The tribunal decided by majority that Argentina unlawfully expropriated the claimants’ investment, breached its FET obligation and took unjustified measures that interfered with claimants’ rights to the investment. It awarded compensation of USD320,760,000 plus interest and requested Argentina to pay USD3,494,807 toward the claimants’ reasonable legal and other costs of these proceedings.

*Dissenting opinion: was there really a protected investment?*

Arbitrator Kamal Hossain noted that the award failed to settle certain unresolved jurisdictional issues, particularly regarding the claimants’ identity. The award merely explains that the claimants owned Air Comet, which acquired Interinvest, the Argentinian entity that owned and controlled the airlines. However, the dissent indicates that, when Air Comet bought the shares in Interinvest, Air Comet was owned by only two of the three claimants.

According to Hossain, in the award the term “claimants” appears to refer not only to the three companies but also to Air Comet and Interinvest. Given that Air Comet is formally not a claimant and that the claimants did not purchase any shares, the dissenting arbitrator indicated that the three claimant investors failed to prove their investment in the airlines.

In Hossain’s view, the acquisition of shares in Air Comet by the three Spanish claimants could not be treated as a protected “investment” under the BIT, considering Air Comet is also a Spanish entity. Accordingly, Hossain concluded that the tribunal had no jurisdiction given that the claimants failed to establish that they are investors protected under the BIT.

*Notes:* The arbitral tribunal was composed by Thomas Buergenthal (President appointed by the Chairman of the ICSID Administrative Council, U.S. national), Henri C. Alvarez (claimant’s appointee, Canadian national), and Kamal Hossain (respondent’s appointee, Bangladeshi national). The Award and the Dissenting Opinion of July 21, 2017 are available in English and Spanish at <https://www.italaw.com/cases/1648>.

**An ICSID tribunal dismisses its jurisdiction as investor abused its rights by “reviving” a company to access arbitration**

*Capital Financial Holdings Luxembourg SA v. Republic of Cameroon, ICSID Case No. ARB/15/18*

**Suzy Nikièma**

In a June 22, 2017 decision, a tribunal at the

International Centre for Settlement of Investment Disputes (ICSID) ruled that it lacked jurisdiction to hear an arbitration case against Cameroon, accepting the objections on jurisdiction related to the existence of an investment and the investor's nationality. In particular, it ruled that the investor did not have a head office in Luxembourg and had abused its rights to "give the impression that it had a Luxembourg head office" (para. 365).

#### *Background and claims*

Capital Financial Holdings Luxembourg SA (CFHL), a Luxembourg-registered company constituted in 2005, is owned 90 per cent by the company Fotso Group Holding Limited (FGH), a Cypriot company, itself owned 99.8 per cent by the Cameroon national Yves-Michel Fotso. Between 2006 and 2008, CFHL acquired 46.47 per cent of the shares in Commercial Bank Cameroun (CBC) and granted it shareholder loans. CBC is a financial company under Cameroon law in which Yves-Michel Fotso and his father were already founder shareholders.

Following an audit of CBC's activities in 2006 because of irregularities in certain transactions, the Central African Banking Commission (COBAC) took several measures which led to CBC being placed in provisional administration in 2009. Thus, the Cameroon government set in motion a procedure for the restructuring of CBC, and a Cameroon court order the seizure of CFHL's shares in CBC in 2013.

On April 15, 2015, CFHL filed a request for arbitration with ICSID against Cameroon for violation of the bilateral investment treaty (BIT) concluded with the Belgium-Luxembourg Economic Union (BLEU). The company considered that it had suffered expropriation of its investment in CBC because of the measures taken by Cameroon and sought compensation. Cameroon contested the jurisdiction of the tribunal based on the ICSID Convention and the BIT, and further invoked abuse of rights by CFHL.

#### *Cameroon's consent to ICSID arbitration (competence ratione voluntatis)*

The principal question raised here was whether the procedure of prior six-months amicable settlement envisaged in the BIT was "a necessary condition for the consent of the Parties" to the arbitration (para. 143), and, if so, whether CFHL has satisfied that condition. In the event, the BIT envisaged a direct arrangement between the parties to the dispute, and, failing that, by diplomatic means between the state parties.

Having decided not to rule on the question of whether it was a question of jurisdiction or admissibility, the tribunal concluded that the parties had an obligation of means (para. 159). After observing that the Claimant had taken adequate steps within its power to reach an amicable settlement, it concluded that the conditions for the consent of Cameroon were fulfilled.

#### *The Luxembourg nationality of the investor (competence ratione personae)*

The tribunal then turned to the question of CFHL's nationality under the BIT, the ICSID Convention

and Luxembourg law. While several aspects were discussed, the judgment focused on the definition of "siège social." Indeed, the BIT provides two cumulative nationality criteria for legal persons: the place of registration (which Cameroon did not dispute) and the place of the head office.

After deciding that it was necessary to define the concept of "siège social" under Luxembourg law (para. 211), the tribunal analysed Luxembourg case law and arbitration decisions which discussed similar questions, notably the *Tenaris & Talta-Trading c. Venezuela* case. Following the reasoning of the arbitration panel in *Tenaris* (para. 263), the tribunal finally concluded that "siège social" referred to the "actual headquarters" and thus meant the place of the company's central management. It then identified four elements for determining the "siège social": the place of shareholders' general meetings, the place of meetings of the board of directors, the place of the company's accounting, and the place where the company and accounting documents are kept (para. 237). It reached the same conclusion interpreting the concept of "siège social" in customary international law ("droit international autonome") (para. 268). From its analysis of the ICSID Convention, the tribunal determined that CFHL's nationality and in particular the existence of a head office in Luxembourg should be assessed on the date when the parties consented to submit the dispute to arbitration, namely April 15, 2015.

After a detailed examination of CFHL's activities from 2005 to 2015, the tribunal concluded that "it cannot admit that the Claimant had its actual "siège social" in Luxembourg at the time of the facts" (para. 356). Furthermore, the artificial nature of the "siège social" led the tribunal to examine the existence of an abuse of rights, as invoked by Cameroon. On this point, it found that "the total absence of activity of the Claimant for such a long period and its sudden 'revival' after the notification of the dispute are indicative, in this respect, of a purely formal existence at the critical date... Even if the Claimant had not been specially formed to enjoy the protection of the Treaty, it was certainly 'revived' to give the impression that it had a "siège social" in Luxembourg, to satisfy the conditions of nationality laid down in the Treaty. Consequently, the Claimant's conduct must be qualified as abusive, thus depriving it of the benefit of the procedural and substantive provisions of the Treaty" (paras. 364 and 365).

#### *Existence of a protected investment (competence ratione materiae)*

Cameroon also contested the existence of an investment in the meaning of the ICSID Convention and the BIT. The tribunal adopted three criteria for objective definition of investment, namely the substantial financial contribution, the duration and economic risk. In this case, it found a confusion of assets in the management of the CFHL, FGH and CBC companies, the circularity of the transactions between these companies and the absence of evidence of a financial counterparty for the purchase of the CBC shares and the loans granted to it by CFHL. The tribunal therefore concluded that the



Claimant “did not make a substantial contribution on its own account to CBC ... [and] neither did it incur any risk in relation to these transactions” (para. 457). CFHL, therefore, according to the tribunal, did not make any investment in Cameroon.

#### *Decision and costs*

In short, the tribunal declared that it lacked competence to hear the case. The arbitrator appointed by the Claimant gave a dissenting opinion contesting the analysis and conclusion of the majority on the nationality of CFHL and the existence of its investment.

The tribunal, considering its discretion and the existence of an abuse of process by the Claimant, ordered CFHL to bear all the costs of arbitration of the two parties to the dispute, each party to settle its own expenses and legal costs.

*Comments:* The tribunal was composed of Pierre Tiercer (Chairman appointed by the parties, of Swiss nationality), Alexis Moore (appointed by the Claimant, of French nationality), and Alain Pellet (appointed by the respondent, of French nationality). The judgment is available in French only at <https://www.italaw.com/sites/default/files/case-documents/italaw9017.pdf>. The dissenting opinion of Alexis Moore is available only in French at <https://www.italaw.com/sites/default/files/case-documents/italaw9018.pdf>.

#### **Investors triumph over Spain in a claim concerning Spain’s regulatory overhaul for clean energy** *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36* **Gladwin Issac**

In an award rendered on May 4, 2017, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) ruled that Spain’s new regulatory regime for renewable energy, adopted in the wake of an economic meltdown, breached its obligations under the Energy Charter Treaty (ECT) to accord fair and equitable treatment (FET) to foreign investments. In particular, the tribunal held that Spain “crossed the line” and violated its FET obligation by replacing its regulatory regime by an entirely new one (para. 458).

#### *Background and claims*

Aiming at establishing itself as a global leader in clean energy, Spain provided for grants, tax incentives, soft loans and loan guarantees to subsidize new renewable energy investments. Between 2007 and 2011, London-based private equity fund Eiser Infrastructure Limited (Eiser) and its Luxembourg-based subsidiary Energía Solar Luxembourg S.à.r.l. made initial investments of around €126 million in the construction and operation of three thermos-solar power plants in Spain.

However, starting 2008 Spain began to reduce incentives to address a significant tariff deficit as revenue from the state-subsidised prices failed to cover costs, leading to a total elimination of these incentives in solar power sector. It subsequently adopted a new methodology for remuneration based on the amount invested. With the application of the new methodology

to existing investments, Eiser’s revenue fell below the value of what was required to cover financing and operating costs or provide a return on investment. On December 9, 2013, Eiser and its subsidiary initiated arbitration against Spain contending that it violated several of its ECT obligations, including the articles on expropriation and FET.

#### *The intra-EU objection*

Spain contended that the ECT does not apply to disputes involving investments made within the EU by investors from other EU countries and that therefore the tribunal lacked personal jurisdiction. Spain pointed out that ECT Article 26 on arbitration covers disputes between “a Contracting Party” and “an Investor of another Contracting party,” and argued that as both Spain and the European Union are parties to the ECT, this “inevitably implies the exclusion of the said Article” in intra-EU disputes. Relying on the jurisdictional ruling in *RREEF v. Spain*, the claimants contended that the ordinary meaning of Article 26 demonstrates that Spain has consented to arbitration of their claims and that the claims fall within the treaty, which contains no exceptions for intra-EU disputes.

The tribunal relied on *RREEF* and concluded that had there been an implicit exception for intra-EU disputes, it would have been made clear in the text, rather than being a “trap for the unwary” (para. 186). Thus, it concluded that the ordinary meaning of the relevant provisions of the ECT, construed in accordance of the rules of the Vienna Convention on the Law of Treaties, support the claimants’ ability to assert their claims, and dismissed the objection accordingly.

#### *Shareholder claims for damages*

Another objection was that the tribunal lacked subject-matter jurisdiction to entertain claims for alleged damage directly incurred by the operating companies in which the claimants held minority shareholdings. Spain argued that shareholders’ claims for alleged damages suffered by companies in which they have invested are barred by public international law and by advanced national systems of commercial law. In response to this, the claimants, relying on the decisions of investment tribunals such as *Azurix v. Argentina*, contended that the definition of covered investments under the ECT includes both their rights to ownership of their shares and their indirect rights in the assets of the Spanish operating companies. Accepting the claimants’ contention, the tribunal noted that it would account for the value of the companies in which claimants held interests while assessing damages.

#### *No jurisdiction over taxation measures*

In December 2012, Spain adopted a law imposing a 7 per cent tax (TVPEE) on the total value of all energy fed into the National Grid by electricity producers. Spain contended that TVPEE was a taxation measure and that under ECT Article 21(1) the tribunal lacked jurisdiction to hear FET claims allegedly resulting from taxation measures.

The tribunal noted that the power to tax is a core

sovereign power and that ECT Article 21(1), like corresponding provisions in various other investment treaties, reflects states' intent to save tax matters from arbitration, save in carefully limited circumstances. Therefore, the tribunal concluded that damages flowing from the TVPEE cannot be considered in any possible award of damages.

The tribunal also accepted Spain's objection that the claimants failed to refer their claim regarding the alleged expropriatory effect of the TVPEE law to competent tax authorities as required by ECT Article 21(5)(b)(i).

#### *Tribunal finds that Spain breached FET*

Taking into account considerations of judicial economy and relying on *SGS Société Générale v. Paraguay*, the tribunal concluded that the FET claim provided the most appropriate legal context for assessing the complex factual situation and multiple alleged breaches.

Asserting that FET under the ECT is an autonomous standard which must be construed in light of the ECT's object and purpose, the claimants contended that the drastic regulatory overhaul by Spain defeated their legitimate expectations of stability and the promised characteristics and any possible advantages of the old regime. In response, Spain contended that the claimants could not reasonably expect the freezing of the regime for 40 years, and that they failed to conduct a "proper due diligence" which could have informed them about a potential regulatory shift.

In its analysis, the tribunal acknowledged that the fair and equitable standard does not give rise to a right to regulatory stability *per se*. However, it clarified that the question here was the extent to which FET under the ECT may be engaged and give rise to a right to compensation as a result of the exercise of a state's right to regulate.

To determine the extent of FET under ECT, the tribunal distinguished the present case from *Charanne BV v. Spain*, in which the tribunal rejected the investors' claims that other changes to Spain's regulatory regime violated the ECT. It asserted that the factual and legal situations in the two cases are fundamentally different, with the measures challenged in *Charanne* having only marginally decreased the profitability of investors whereas the measures in the present case created "a new regulatory focus" and were applied in a manner which "eliminated the financial bases" of existing investments (para. 367).

Next, the tribunal agreed with the claimants that in interpreting the FET obligation under the ECT, the interpreters must be mindful of the context, object and aim of the ECT and the agreed objectives of legal stability and transparency. Relying on several investment tribunal decisions, most notably the decision in *CMS v. Argentina*, the tribunal affirmed that the FET obligation means that "regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their

investment's value" (para. 382). The tribunal observed that the claimants were entitled to expect that Spain would not drastically and abruptly revise the regime, in a way that destroyed the investment's value completely.

#### *Damages and costs*

The tribunal agreed with the claimants' request to use a discounted cash-flow (DCF) analysis in the calculation of damages. It awarded €128 million in lost profits as per the calculations by claimants', with pre-award interest at Spain's borrowing rate, 2.07 per cent, compounded monthly from the date of the breach (June 2014), and post-award interest at 2.5 per cent, also compounded monthly.

*Notes:* The tribunal was composed of John Crook (President appointed by the Chairman of the ICSID Administrative Council, U.S. national), Stanimir Alexandrov (claimants' appointee, Bulgarian national) and Campbell McLachlan (respondent's appointee, New Zealand national). The award is available in English and Spanish at <https://www.italaw.com/cases/5721>.

#### **WNC v. Czechia: tribunal dismisses expropriation claim and determines that it has no jurisdiction over all other claims**

*WNC Factoring Limited v. The Czech Republic, PCA Case No. 2014-34*

#### **Andrej Arpas**

On February 22, 2017, a Permanent Court of Arbitration (PCA) tribunal dismissed all claims by WNC Factoring Ltd. (WNC) against the Czech Republic (Czechia). The tribunal decided that it lacked jurisdiction to hear claims regarding the fair and equitable treatment (FET) and most-favoured-nation (MFN) obligations of the United Kingdom–Czechia bilateral investment treaty (BIT). On the remaining expropriation claim, it declared that Czechia did not breach the relevant provisions. Consequently, it ordered the British company to pay Czechia's legal costs (CZK35,940,599.34) and Czechia's share of the arbitration costs (USD425,500).

#### *Background*

Between 2007 and 2008, WNC successfully partook in a public tender to acquire a Czech state-owned enterprise, Škoda Export, for approximately CZK210 million (about USD9.5 million). WNC participated in the tender through its subsidiary ČEX, a.s., later renamed FITE Export, a.s.

WNC claimed that, following the acquisition, it found Škoda Export to be in substantially worse shape than presented during the due diligence phase of the tender: its books were CZK860 million shorter vis-à-vis the data communicated by the former management (para. 3.44).

Škoda Export informed the then Czech finance minister Kalousek that there was a risk of serious economic difficulties. The company sought state guarantees as to the acquisition of operational financing from an export bank, but the minister refused. It also applied for credit between CZK1 and 1.3 billion with the bank, and filed a petition for the payment of more than CZK1 billion with the municipal court in Prague against the finance ministry a couple of weeks later.

In 2009 Škoda Export's board of directors resigned en masse, and the Czech police's money-laundering unit froze the company's accounts. Although in summer 2009 they were unfrozen, in November 2009 Škoda Export was declared bankrupt. Two years later, the municipal court approved its sale to another company.

*Two-prong objection to the tribunal's jurisdiction to hear any of the investor's claims.*

Czechia argued that the tribunal did not have jurisdiction to hear the claims because the BIT's arbitration clause had been superseded by European Union (EU) law; and alternatively, that it lacked jurisdiction with respect to all save one (expropriation) of the BIT claims (para. 5.64).

*EU law vs. intra-EU BITs*

The intra-EU jurisdictional objection itself comprised two limbs. One was that since the signing of the BIT, another treaty—the Treaty on the Functioning of the European Union (TFEU)—had been signed, “relating to the same subject-matter,” as per Art. 59(1) of the Vienna Convention on the Law of Treaties (VCLT). Czechia argued that because EU law provides for investor protections of the type embodied by the treaty, the TFEU superseded the BIT's arbitration clause. Another limb stemmed from VCLT Arts 59(1) (b) and 30(3), stipulating that where this earlier treaty has not been terminated under Art. 59, it applies “only to the extent that its provisions are compatible with those of the later treaty.” According to Czechia, Art. 59 then nipped the BIT's applicability in the bud: should the two treaties' incompatibility be so great as to render them impossible to be simultaneously applied, the earlier treaty “shall be considered as terminated,” resulting in the sole application of the TFEU, to the exclusion of the BIT. Essentially, Czechia was trying to present the case that EU law and the BIT were incompatible, as opposed to “the same” as per the former limb. The tribunal rejected the objection regarding both limbs.

Although acknowledging that EU law was being developed, and that the European Court of Justice would “define its position more precisely in due course” with respect to intra-EU investment treaties and their compatibility with EU law (para. 6.311), the tribunal concluded that the substantive protections afforded to investors in investment treaties were not available under EU law. Specifically, it relied on the decision of the tribunal in *Eastern Sugar B.V. v. Czechia*, which had resolved that EU rights with respect to capital flows hardly “co-ordinate[d] with the right to FET and the prohibition on expropriation” (para. 6.301).

Likewise, the tribunal considered that while the freedom to move capital in and out of different EU jurisdictions is a TFEU prerogative, “treatment afforded to investments while operating *in situ*” (para 6.305) under BITs was another matter altogether. For the tribunal, while WNC was falling back on the FET standard both during Škoda Export's acquisition and its subsequent treatment by the Czech Export Bank, a.s. (CEB), only the former was protected by EU law:

“While free movement of capital might complement the FET standard in respect to the acquisition, it is difficult to see how it could be invoked with respect to the treatment of FITE or Škoda Export (as domestically incorporated companies) by a Czech bank” (para. 6.305).

*The umbrella clause, MFN and FET*

While Czechia's EU-related jurisdictional objections failed, it fared better with its alternative argument that the tribunal had jurisdiction over claims pertaining to expropriation only.

The tribunal's jurisdiction derived from BIT Art. 8 (dispute settlement), delimiting the precise contours of obligations susceptible to arbitration. In turn, these had to do with, broadly speaking, compensation, expropriation, repatriation, and—importantly—a clause concerning the promotion and protection of investment (BIT Art. 2(3)).

BIT Art. 2(3) contains an umbrella clause: “Each Contracting Party shall, with regard to investments of investors of the other Contracting Party, observe the provisions of these specific agreements, as well as the provisions of this Agreement.” WNC invoked this clause in an attempt to bring within the tribunal's jurisdiction the FET claim regarding the purchase of Škoda Export by its subsidiary FITE. Alternatively, it sought to establish jurisdiction pursuant to BIT Art. 3(1) (MFN) by bringing its MFN claim under the umbrella clause. Absent a direct avenue for the tribunal to hear disputes arising under Art. 3, WNC argued that the umbrella clause is activated by the existence of the specific agreement. It further contended that the clause extended jurisdiction “to all substantive obligations in the BIT” (para 6.351).

The tribunal found that the umbrella clause depended on the existence of a “specific agreement” (here, FITE's Škoda Export acquisition), and that the article did not serve to extend jurisdiction beyond the scope provided for in BIT Art. 8(1). Thus, seeing that FITE had been incorporated in Czechia and was therefore not a British investor, the tribunal determined that the acquisition was not, *prima facie*, a “specific agreement” within the meaning of the umbrella clause (para. 6.318). Neither was it moved by WNC's argument that such “restrictive interpretation” could lead to manifestly absurd results should a state condition an acquisition by domestic incorporation, thus circumventing its BIT obligations (para. 6.340).

This determination had the domino effect of quashing both the investor's FET and MFN claims in one logical succession. Considering that no article can operate to extend its jurisdiction under BIT Art. 8(1), the tribunal concluded that, in the absence of a “specific agreement,” no jurisdiction could arise from the umbrella clause to cover WNC's FET claim (paras 6.362 and 6.365).

WNC also sought to use the MFN clause under BIT Art. 3(1) to rely on more favourable umbrella clauses contained in other BITs to which Czechia is a party. However, the tribunal considered that its jurisdiction

stemmed from BIT Art. 8(1) and noted that Art. 3(1) is manifestly missing (paras 6.349 and 6.358).

#### *Expropriation*

WNC's basic position was three-fold: (i) Czechia coordinated with financial institutions to deliberately offer export financing on conditions that it knew were impossible for Škoda Export to fulfil; (ii) these institutions tried diverting Škoda Export's projects to another contractor; and (iii) CEB froze Škoda Export's accounts on fabricated grounds, following which Czechia failed to see the freeze lifted in due course; and (not) doing so permitted its insolvency to eventuate. In other words, that Czechia was directly responsible for the venture's failure. After inspecting the available evidence, the tribunal determined that there was no evidence of a conspiracy and that the freezes were legitimate. Importantly, the tribunal concluded that no behaviour on the part of Czechia amounted to expropriation under BIT Art. 5.

*Notes:* The PCA tribunal was composed of Gavan Griffith (presiding arbitrator appointed by the co-arbitrators, Australian national), Robert Volterra (claimant's appointee, Canadian national) and James Crawford (respondent's appointee, Australian national). (Crawford was later also elected to be a Judge of the International Court of Justice [ICJ], but continued to serve as arbitrator in the case.) The award is available in English at <https://www.italaw.com/sites/default/files/case-documents/italaw8533.pdf>.

#### **ICSID tribunal awards roughly USD380 million in compensation for illegal expropriation by Ecuador** *Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5* **Matthew Levine**

The 2008 arbitration between U.S. oil and gas company Burlington Resources Inc. (Burlington) and Ecuador under the United States–Ecuador bilateral investment treaty (BIT) has now reached the quantum stage. A tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has issued its Decision on Reconsideration and Award on February 7, 2017.

#### *Background*

Burlington Oriente, a wholly-owned subsidiary of Burlington, entered into Production Sharing Contracts (PSCs) with Ecuador pertaining to oil blocks 7 and 21 in the Amazon. Under the PSCs, Burlington assumed the entire risk of exploitation in exchange for a share of the oil produced. As international oil prices soared, Ecuador unsuccessfully attempted to renegotiate the PSCs.

Ecuador subsequently imposed a windfall levy of 99 per cent on oil revenues. When Burlington refused to pay the tax, Ecuador initiated proceedings to seize Burlington's share of oil production under the PSCs. Burlington suspended operations because the investment had become unprofitable, and Ecuador took possession of blocks 7 and 21. Finally, Ecuador terminated the PSCs.

Burlington initiated ICSID arbitration in 2008, and the

tribunal issued its Decision on Jurisdiction in June 2010. The December 2012 Decision on Liability found that, by taking over the oilfields, Ecuador unlawfully expropriated Burlington's investments.

In the course of the arbitration, Ecuador raised counterclaims for damage to the environment and the oilfields' infrastructure, and the parties entered into an agreement conferring the tribunal with jurisdiction over the counterclaims. In its Decision on Counterclaims, also dated February 7, 2017, the tribunal found liability and ordered Burlington to pay Ecuador compensation of roughly USD41 million.

The award concerns the quantum of compensation owed by Ecuador and arbitration costs.

#### *Although not res judicata, decisions preliminary to award should only be re-opened in exceptional circumstances*

As a preliminary matter, the tribunal considered Ecuador's motion to reconsider the decision on liability. It observed that neither the ICSID Convention nor the Rules contain provisions dealing with the power of tribunals to reconsider their decisions.

In that context, earlier tribunals had held that decisions preliminary to an award "that resolve points in dispute between the Parties" are vested with *res judicata* and therefore cannot be reopened. However, more recently, the *SCB v. Tanesco* tribunal held that pre-award decisions are not *res judicata*, and that "there may be circumstances where a tribunal should consider reopening a decision that it has made" (para. 85).

In line with *SCB v. Tanesco*, the tribunal held that a pre-award decision does not carry *res judicata* effects. It sought to clarify, however, that a lack of *res judicata* does not mean that such decisions can necessarily be reopened. Considering that an issue resolved once in the course of an arbitration should in principle not be revisited in the same proceedings, the tribunal concluded that the decision on liability should be reconsidered only in exceptional and very limited circumstances.

As for the nature of the exceptional circumstances, the tribunal turned to a test based on an analogy to ICSID Convention Article 51. It therefore required that (i) a fact is discovered; (ii) of such a nature as decisively to affect the pre-award decision; (iii) which was unknown to the tribunal and to the applicant when the pre-award decision was rendered; (iv) the applicant's ignorance not being due to negligence; and (v) the request for reconsideration being made within 90 days after the discovery of the fact.

On the facts, the tribunal found that the above test was not satisfied and denied Ecuador's motion.

#### *Appropriate standard of compensation is full reparation as set out in ILC Articles*

BIT Article III(1) only describes the conditions under which an expropriation is considered lawful. The provision does not set out the standard of compensation for expropriations resulting from

breaches of the BIT. The tribunal held that the appropriate standard of compensation is the customary international law standard of full reparation set out in Article 31 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission (ILC Articles), applied by analogy.

In this respect, the tribunal observed that Part Two of the ILC Articles setting out the legal consequences of internationally wrongful acts, to which Article 31 belongs, is not applicable to the international responsibility of states vis-à-vis non-states. However, the tribunal found it to be generally accepted that the ILC Articles can be transposed to the context of investor–state disputes.

*Compensation for Burlington’s expropriated investment quantified on DCF method*

Applying the ILC standard of compensation, Burlington was entitled to full reparation for those losses that resulted from Ecuador’s unlawful expropriation. However, the tribunal considered that only one of the three heads of damages proposed by Burlington constituted a compensable loss.

In brief, it found that potential contract claims accruing to Burlington subsidiaries, which had withdrawn from the treaty arbitration, were not compensable. Furthermore, the lost opportunity to extend the Block 7 PSC was too speculative to be compensable. Therefore, only Burlington’s own investment up until the point of expropriation, but not the entire value of the project, was compensable.

With respect to the valuation of Burlington’s investment, the parties agreed on the use of the Discounted Cash Flow (DCF) method, although disagreeing on several variables and assumptions to be used. Ultimately, the tribunal ordered Ecuador to pay USD379,802,267 as compensation for the expropriation of Burlington’s investment.

*One arbitrator disagrees on calculation under DCF method*

Based on customary international law, the majority of the tribunal found that compensation due to Burlington should be calculated based on a date—August 31, 2016—that was a proxy for issuance of the award. Arbitrator Stern, however, disagreed with the resulting analysis as it made use of *ex post* information and added profits between the date of the expropriation and the deemed date of the award.

Despite this disagreement, Stern does not appear to have issued a dissent. Instead, the award contains reference to her dissent on the same issues in a previous case—*Quiborax v. Bolivia*.

*Ecuador ordered to pay preponderance of arbitration costs*

Pursuant to Article 61(2) of the ICSID Convention, the tribunal exercised broad discretion to allocate the costs of the arbitration. This triggered an analysis of all the circumstances of the case, including the extent to which a party contributed to the costs and whether

that contribution was reasonable and justified.

The tribunal found that it was appropriate for Ecuador to bear 65 per cent of the costs of the arbitration with Burlington bearing 35 per cent. Each party was ordered to bear its own legal costs and expenses.

*Notes:* The tribunal was composed of Gabrielle Kaufmann-Kohler (President appointed by the parties, Swiss national), Stephen Drymer (claimant’s appointee, Canadian national), and Brigitte Stern (respondent’s appointee, French national). The Decision on Reconsideration and Award is available at <http://www.italaw.com/cases/documents/5141>.

### **Ecuador awarded USD41 million in counterclaim against U.S. oil and gas company Burlington Resources**

*Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5*

**Matthew Levine**

On February 7, 2017, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) issued its decision on the counterclaims raised by Ecuador against U.S. oil and gas company Burlington Resources Inc. (Burlington). The tribunal ordered Burlington to pay USD41 million in compensation to Ecuador for environmental and infrastructure damage.

#### *Background*

Beginning in 2000, Burlington started to acquire ownership interests in PSCs for the exploration and development of oilfields in Ecuador. In 2008 Burlington initiated ICSID arbitration to challenge measures by Ecuador that affected the company’s investment in the oilfields.

In a December 2012 **Decision on Liability**, the tribunal found that Ecuador unlawfully expropriated Burlington’s investments. In its **Decision on Reconsideration and Award** on February 7, 2017, it quantified the damages owed to Burlington in USD380 million.

In 2011, during the Burlington-initiated proceedings, Ecuador raised counterclaims for harm to the environment and certain related infrastructure. According to the environmental counterclaim, Burlington was liable under domestic tort law for soil remediation, groundwater remediation, and the abandonment of wells causing mudpits. According to the infrastructure counterclaim, Burlington had failed to maintain investment-related infrastructure prior to the expropriation. Ecuador’s counterclaims amounted to roughly USD2.8 billion.

The parties entered into an agreement in May 2011 conferring the tribunal with jurisdiction over the counterclaims. The tribunal issued its **Decision on Counterclaims** also on February 7, 2017.

*Both Ecuadorian law and international law applicable to the environmental counterclaim*

As a preliminary matter, the tribunal had to decide the legal basis on which Ecuadorian law applied to the substance of the counterclaims. In particular, the environmental counterclaim was brought under domestic

tort law but the choice of law provision in the Production Sharing Contracts (PSCs) between Burlington and Ecuador did not contain any reference to tort law.

The tribunal found that the applicability of Ecuadorian tort law was not the product of agreement between the parties as per the first leg of Article 42(1) of the ICSID Convention. Instead, Ecuadorian tort law was applicable as the domestic law of the host state under the second leg of Article 42(1). Having triggered this second leg, the tribunal observed that international law may also be applicable and that, according to the dominant approach, it was left to the tribunal's discretion to apply either domestic or international law depending on the type of issue to be resolved.

#### *Domestic law mandates strict liability for environmental harm*

The tribunal extensively reviewed statutory and judicial developments applicable to oilfield operations in Ecuador. Following the promulgation of the country's 2008 Constitution, it found a strict liability regime for environmental harm, under which the operator has the burden of proving the inexistence of harm, the operator is only responsible for the harm it caused, and environmental claims are imprescriptible. According to the tribunal, the absence of a requirement of fault meant that Burlington could not avoid liability by establishing that it had acted diligently.

Having found that the constitutional strict liability regime did not apply retroactively, the tribunal considered the parties' diverging views on the liability regime for hydrocarbons operations prior to

the 2008 Constitution. Burlington argued that the law was fault-based and that Ecuador accordingly needed to prove both that environmental harm took place and that it was caused by the investor's lack of diligence. The tribunal found this position untenable and decided instead, in line with Ecuador's arguments, that following a series of judicial developments through the Ecuadorian Supreme Court, strict liability governed environmental harm by hydrocarbon operators from, at the very latest, 2002.

The parties agreed that claims for harm caused after the 2008 Constitution were imprescriptible. Burlington argued, however, that most of Ecuador's counterclaims were tied to conduct taking place after the 2002 cut-off recognized above and prior to the 2008 Constitution. The tribunal rejected Burlington's position that this triggered a four-year statute of limitations in domestic law. Instead, it found that the limitation period only started to run from Ecuador's discovery of harm. As such, the tribunal decided that the preponderance of the environmental counterclaim was based on harm discovered after January 2007 and was therefore timely.

#### *Tribunal undertakes site-by-site analysis of environmental harm and remediation costs*

Having established that strict liability, either under the 2008 Constitution or Ecuadorian civil law, was applicable to the oilfields, the tribunal considered the

alleged environmental harm.

For the tribunal, the level of impermissible environmental harm had to be determined in light of domestic regulatory criteria. On this basis, it conducted a comprehensive examination of harm and the cost of remediation at no less than 40 sites distributed across the two oilfields explored by Burlington. This included a site visit by the tribunal.

The tribunal found environmental harm and a need for remediation at all the sites. For most sites, the valuation was placed at less than USD1 million. In the particular cases of one soil contamination site and one mudpit site, it awarded costs in excess of USD5 million per site. It also awarded remediation costs of more than USD5 million for ground water contamination in one site.

#### *Tribunal sustains infrastructure counterclaims of more than USD2.5 million*

According to the tribunal, certain clauses of the PSCs triggered by its termination established a complete legal framework for evaluating the infrastructure claims. Although cognizant of certain evidentiary limitations, it evaluated seven categories of infrastructure: fuel tanks, fluid lines and pipelines, generators, pumps, electrical systems, information technology equipment, and road maintenance.

Ecuador claimed that the investor had returned three fuel tanks—out of a total of 89 tanks deployed in the oilfields—in a state evidencing deterioration beyond normal wear and tear. For two of these tanks, the tribunal ordered compensation to Ecuador of slightly more than USD1 million.

The tribunal found that significant parts of two pipelines were beyond normal wear and tear. It thus granted the costs in the amounts identified by Ecuador's technical witness—slightly less than USD1.5 million. The tribunal further granted roughly USD500,000 for costs associated with Burlington's lack of regular maintenance on certain engines used in the oilfields.

*Notes:* The tribunal was composed of Gabrielle Kaufmann-Kohler (President appointed by the parties, Swiss national), Stephen Drymer (claimant's appointee, Canadian national), and Brigitte Stern (respondent's appointee, French national). The Decision on Ecuador's Counterclaims is available in English and Spanish at <https://www.italaw.com/cases/documents/5140>.

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# resources and events

## Resources

### **The Political Economy of the Investment Treaty Regime**

*By Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen & Michael Waibel, Published by Oxford University Press, July 2017*

This book synthesises and advances the growing literature on international investment law and policy by integrating legal, economic, and political perspectives. Based on an analysis of the substantive and procedural rights conferred by investment treaties, it asks four basic questions. What are the costs and benefits of investment treaties for investors, states, and other stakeholders? Why did developed and developing countries sign the treaties? Why should private arbitrators be allowed to review public regulations passed by states? What is the relationship between the investment treaty regime and the broader regime complex that governs international investment? Available at <https://global.oup.com/academic/product/the-political-economy-of-the-investment-treaty-regime-9780198719557>

### **The Independence and Impartiality of ICSID Arbitrators: Current case law, alternative approaches, and improvement suggestions**

*By Maria Nicole Cleis, Published by Brill | Nijhoff, June 2017*

The legitimacy of investor–state arbitration is a much-debated topic, with arbitrators’ independence and impartiality being one of the core concerns. The author explores how unbiased decision-making is ensured under the ICSID Convention. Juxtaposing existing disqualification decisions in the ICSID system against corresponding requirements in related dispute settlement systems, the book argues that the current approach to disqualification requests against ICSID arbitrators is too exacting considering the high stakes of investor–state disputes. The author’s analysis of the status quo is followed by novel suggestions for reforms (including a proposal for ICSID-specific guidelines on conflict of interest). Available at <http://www.brill.com/products/book/independence-and-impartiality-icsid-arbitrators>

### **Community Perspectives in Investor–State Arbitration**

*By Lorenzo Cotula & Mika Schröder, Published by the International Institute for Environment and Development (IIED), June 2017*

Although investment arbitration proceedings pit an investor against a state, the underlying dispute often also involves communities affected by, but not party to, the arbitration. Issues that have surfaced in such cases include concerns about communities’ enjoyment of human rights, their access to land and natural resources, exposure to environmental harm and public authorities’ responsiveness to community demands. This report examines whether and how investment tribunals consider community perspectives, interests and rights. It identifies 20 arbitrations where some form of community action was part of the facts of the case and was reflected – albeit partially and cursorily – in publicly available case documents. The analysis highlights the need to rethink arrangements for settling investment-related disputes. Available at <http://pubs.iied.org/12603IIED>

### **2017 World Investment Report: Investment and the digital economy**

*By United Nations Conference on Trade and Development (UNCTAD), Published by UNCTAD, June 2017*

The World Investment Report (WIR) focuses on trends in foreign direct investment (FDI) and emerging measures to improve its contribution to development. In Chapter III, “Recent Policy Developments and Key Issues,” of the 2017 WIR, UNCTAD presents and analyses the pros and cons of 10 policy options for phase 2 of IIA reform (modernizing the existing stock of old-generation treaties): jointly interpreting treaty provisions; amending treaty provisions; replacing “outdated” treaties; consolidating the IIA network; managing relationships between coexisting treaties; referencing global standards; engaging multilaterally; abandoning unratified old treaties; terminating existing old treaties; and withdrawing from multilateral treaties. Available at <http://www.worldinvestmentreport.org/world-investment-report-2017>

### **Equality in Agriculture: Investment in Agriculture Policy Brief #5**

*By Kathleen Sexsmith, Carin Smaller & William Speller, Published by IISD, May 2017*

Two broad agendas have emerged in response to global calls for greater gender equality, more sustainable trade and more responsible investment in the agriculture. The first, largely targeted at the private sector, are represented by the array of voluntary sustainability standards (VSS), such as fair trade labels. The second, largely targeted at governments, are the multitude of guidelines on responsible investment in agriculture. This policy brief explores how global standards and guidelines contribute to gender equality and

women’s empowerment, and whether more can be done through these instruments to improve the situation of women in agriculture. Available at <http://www.iisd.org/library/how-improve-gender-equality-agriculture-policy-brief-5-investment-agriculture>

## Events 2017

### **September 26–28**

**WTO PUBLIC FORUM 2017, “Trade: Behind the Headlines,”** Geneva, Switzerland, <http://www.wto.org/pf17>

### **October 5–6**

**COLLOQUIUM, “International Investment Law & the Law of Armed Conflict,”** Athens Public International Law Center (AthensPIL) of the National and Kapodistrian University of Athens Faculty of Law, Athens, Greece, <https://www.eventbrite.com/e/colloquium-on-international-investment-law-the-law-of-armed-conflict-registration-36507239135>

### **October 9–11**

**UNCTAD ANNUAL HIGH-LEVEL IIA CONFERENCE, “Phase 2 of IIA Reform,”** Geneva, Switzerland, <http://investmentpolicyhub.unctad.org/Pages/unctad-annual-high-level-ii-a-conference-phase-2-of-ii-a-reform>

### **October 10–13**

**WORLD BANK CIVIL SOCIETY PUBLIC FORUM,** World Bank Group and International Monetary Fund (IMF) Annual Meetings, Washington D.C., United States, <http://www.worldbank.org/en/events/2017/10/13/civil-society-policy-forum>

### **October 16–20**

**ANNUAL GENERAL MEETING 2017, “Managing Artisanal and Small-Scale Mining,”** Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), Geneva, Switzerland, <http://igfmining.org/agm-2017>

### **October 19**

**UNIGE–IISD LUNCH SERIES ON INVESTMENT DISPUTES,** University of Geneva (UNIGE) & International Institute for Sustainable Development (IISD), Geneva, Switzerland, <http://www.iisd.org/project/unige-iisd-lunch-series-investment-disputes>

### **October 23–27**

**3rd SESSION OF THE OPEN-ENDED INTERGOVERNMENTAL WORKING GROUP ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS,** UN Human Rights Council, Geneva, Switzerland, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>

### **October 24–25**

**REGIONAL CONFERENCE “International Investment Policies: The way forward,”** UNCTAD, Republic of Azerbaijan, International Energy Charter, Transnational Economic Law Research Center (Martin Luther University Halle-Wittenberg), Baku, Azerbaijan, <http://ipc baku.com>

### **November 2**

**INTERNATIONAL CONFERENCE “Global Currents in International Investment Law,”** Centre for International Law (National University of Singapore), Singapore, <https://cil.nus.edu.sg/siaa-2017-conference-global-currents-in-international-investment-law>

### **November 16–17**

**WORKSHOP “International Investment Treaties and National Governance,”** Centre for International Law (National University of Singapore), Singapore, <https://cil.nus.edu.sg/call-for-papers-international-investment-treaties-and-national-governance>

### **November 27–December 1**

**34th SESSION OF UNCITRAL WORKING GROUP III, “Investor–State Dispute Settlement Reform,”** United Nations Commission on International Trade Law, Vienna, Austria, [http://www.uncitral.org/uncitral/en/commission/working\\_groups/3/Investor\\_State.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3/Investor_State.html)

### **November 27–29**

**2017 UN FORUM ON BUSINESS AND HUMAN RIGHTS, “Realizing Access to Effective Remedy,”** Office of the UN High Commissioner for Human Rights (OHCHR), Geneva, Switzerland, <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2017ForumBHR.aspx>

### **November 30**

**UNIGE–IISD LUNCH SERIES ON INVESTMENT DISPUTES,** Geneva, Switzerland, <http://www.iisd.org/project/unige-iisd-lunch-series-investment-disputes>



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