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## The Journey of a Binding Treaty on Human Rights: Three Years Out and Where Is It Heading?

Joe Zhang and Mintewab Abebe



In 2015, ITN reported the beginning of an intergovernmental negotiation on a binding treaty on business and human rights.<sup>1</sup> From October 23 to 27, 2017, the third session of the negotiation was carried out in Geneva by the Open-ended Intergovernmental Working Group for the Elaboration of an International Legally Binding Instrument on Transnational Corporations (TNCs) and Other Business Enterprises (OBEs) with respect to Human Rights (the Working Group).<sup>2</sup>

Considering the formal and informal discussions that took place during the previous two years, the chair of the Working Group prepared a document containing elements for the future binding instrument (Elements Document)<sup>3</sup> and circulated it before the third session. The document provides a basis for substantive negotiations. The principles and provisions it proposes cover 10 topics: (1) general framework, (2) scope of application, (3) general obligations, (4) preventive measures, (5) legal liability, (6) access to justice, (7) jurisdiction, (8) international cooperation, (9) promotion, implementation and monitoring, and (10) general provisions. At this year's session, substantive negotiations were undertaken on each topic of the document. This article summarizes views presented on selected topics.

### Broad framework issues

Much of the discussions during the past two sessions centred on the scope of application of the future binding instrument—what entities it should govern and how to define them in a clear, comprehensive and accurate manner.<sup>4</sup> In response to these challenges, the Elements Document presents a new approach. It proposes that the scope of application should be based on the transnational character of the activities of enterprises.<sup>5</sup> While the focus on the types of activities rather than on the definition of the entities is constructive, it still calls for clarification of what the term “transnational activities” means.

Another area of discussion that attracted much attention during past sessions is the relationship between human rights law and other areas of international law and, more specifically, the question of whether there is a hierarchy within areas of international law. In the Elements Document, one of the principles included is the primacy of

human rights over international economic obligations on trade and investment.<sup>6</sup> At the third session, discussions evidenced both support and opposition to this principle. While it was accepted that the humanitarian, moral and philosophical justification of the primacy of human rights is undeniable, some indicated that the creation of hierarchies between areas of law has not been recognized by public international law jurisprudence. Others cautioned that implementing primacy on the ground may also be challenging. Accordingly, this issue may lead to a political impasse among states in adopting the treaty.

### General obligations

The United Nations (UN) Guiding Principles for Business and Human Rights (UNGPs)—the authoritative global reference point on business and human rights—establish that states have the duty to protect against human rights abuses by third parties, including business, and that corporations have the responsibility to respect human rights.<sup>7</sup> The Elements Document reaffirms these principles by proposing clear rules for states and other stakeholders (such as TNCs, OBEs and international organizations) involved in preventing and protecting human rights and in redressing human rights violations or abuses.<sup>8</sup>

During the debate, however, the delegates expressed different views on the extent to which these responsibilities should apply to each stakeholder. While the reaffirmation of the state's primary obligation to protect and promote human rights and to investigate, punish and redress human right violations was largely accepted, some cautioned that the future implementation of certain specific obligations may interfere with states' internal affairs. These obligations include the imposition of restrictions on public procurement contracts and contractual engagements of states. It was also suggested that a future binding instrument should provide states with the flexibility to determine how to best implement the treaty obligations.

One important step in terms of strengthening the international system is the proposal included in the Elements Document to impose direct obligations on TNCs and OBEs.<sup>9</sup> Some delegates raised concerns on the legal basis of such direct obligations, arguing that private businesses lacked the democratic mandate and enforcement capacity. However, others pointed to the precedents set forth by treaties such as Rome Statute of the International Criminal Court, the Convention on Civil Liability for Oil Pollution Damage, the UN Convention on the Law of the Sea and the Maritime Labour Convention—all of which imposed international law obligations directly on private parties. It was also pointed out that regardless of international obligations, the obligations of TNCs and OBEs could be established and enforced through national legislation, an approach adopted by the UN Convention against Corruption.

### Preventive measures

Unlike the discussions on general obligations, views quickly converged during the discussions on preventive measures. Such measures, including human rights due diligence activities, comprise different policies and measures that private businesses need to undertake,

as a minimum prudence, to meet their responsibility to respect human rights. In many cases, this requires private businesses to prepare due diligence plans, similar to the requirements of the recently adopted French [Law on the Corporate Duty of Vigilance](#).<sup>10</sup> To ensure a minimum and uniform standard of preventive measures worldwide, the Elements Document proposes binding obligations on states to see to the adoption of such measures or minimum standards by TNCs and OBEs and their business partners throughout their supply chains.<sup>11</sup>

However, concerns were raised on the practicability of imposing the measures onto entities beyond the direct control of TNCs and OBEs. Even so, delegates agreed that preventive measures should lie at the heart of the treaty. It was suggested that the proposed provisions could be further strengthened by requiring the use of independent assessors in impact studies, broadening their coverage of labour and environmental rights, including a gender perspective, requiring both *ex ante* and *ex post* impact assessments, and requiring free, prior and informed consent.<sup>12</sup>

#### Access to justice, effective remedy and guarantees of non-repetition

In recognition of the power imbalance between TNCs and victims, the delegates found it important to establish a binding obligation on states to remove barriers of access to justice and effective remedy. The Elements Document proposes provisions reducing regulatory, procedural and financial obstacles to access remedy, allowing human rights-related class actions, facilitating access to information and evidence, limiting the use of the *forum non conveniens* doctrine and reversing the burden of proof onto the accused.<sup>13</sup>

The delegates appreciated the inclusion of a provision emphasizing the need for access to justice for vulnerable groups. It was suggested that further clarification should be provided to ensure that non-judicial mechanisms complement but not replace judicial mechanisms, which should always be available and accessible by the injured.

#### Jurisdiction and liability

The Elements Document proposes broad jurisdictional grounds that grant victims access to justice, allowing the adjudicators to exercise jurisdiction over a TNC or OBE for activities carried out and injuries resulted not only in the company's host state, but also in its home state and in other states where the business has substantial presence.<sup>14</sup> The discussions were focused on whether to allow extraterritorial jurisdiction and its extent. Although it is not unusual for extraterritorial jurisdiction to apply by operation of a range of international and domestic instruments, some delegates and private sector representatives expressed concerns over potential violations of international law principles such as territorial integrity, sovereign immunity, exhaustion of local remedies and international comity. In this regard, while many thought that the Elements Document presented a good starting point, some called for more clarification and precision in the future instrument.

A related topic was the liability of TNCs and OBEs for violation of their human rights obligations. The Elements

Document proposes to impose obligations on states to establish and apply administrative, civil and criminal liability for human rights violations.<sup>15</sup> While most delegates welcomed this proposal, some found it difficult to impose criminal liability against legal entities under certain legal systems. As an alternative, some suggested to extend the criminal liability to shareholders.

#### The uncertain future of the process

As a part of the recommendations for next steps, the chair of the Working Group initially proposed to begin drafting a legally binding instrument building on the discussions that took place during the past three sessions, and to start negotiations on such draft instrument at its next session in 2018.

This seemingly logical conclusion and reasonable proposal for the way forward surprisingly faced resistance by a few state delegates, who called for a reassessment of the mandate of the Working Group. However, this view was not shared by most other delegates nor the secretariat, who confirmed the general understanding that the current mandate of the Working Group—as provided for in Resolution 26/9—continues until an international legally binding instrument is elaborated.

After multiple rounds of debate and lengthy informal negotiations, however, compromises were made in order to reach a consensus. All references to the timing and content of a next session were removed from the draft report of the third session.<sup>16</sup>

Much has been said on the need and importance of such a binding instrument. The past three years have seen the promising beginning of an important journey to bridge the gaps among stakeholders to ensure meaningful and effective remedies are provided to those injured by business-related human rights abuses. This process should not end anywhere short of that goal.

#### Authors

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#### Notes

<sup>1</sup> Zhang, J. (2015). Negotiations kick off on a binding treaty on business and human rights. *Investment Treaty News*, 6(4), 10–11. Retrieved from <https://www.iisd.org/itn/en/2015/11/26/negotiations-kick-off-on-a-binding-treaty-on-business-and-human-rights>.

<sup>2</sup> For further details of the Session, including agenda, participants and submissions, see <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

<sup>3</sup> Chairmanship of the OEIGWG. (2017). *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. Retrieved from [http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs\\_OBEs.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf) [Elements Document].

<sup>4</sup> Official reports of the previous sessions and participants submissions are available at the home page of the Working Group: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IWGOnTNC.aspx>.

<sup>5</sup> Elements Document, *supra* note 3, p. 4.

<sup>6</sup> *Id.*, pp. 3–4.

<sup>7</sup> United Nations. (2011). *Guiding principles on business and human rights*. Retrieved from [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>8</sup> Elements Document, *supra* note 3, pp. 5–6.

<sup>9</sup> *Id.*, p. 6.

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<sup>11</sup> Elements Document, *supra* note 3, p. 7.

<sup>12</sup> *Id.*, p. 14.

<sup>13</sup> *Id.*, pp. 9–11.

<sup>14</sup> *Id.*, p. 11.

<sup>15</sup> *Id.*, pp. 7–8.

<sup>16</sup> A draft report of the third session is available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftReportThirdSession.docx>.

# Government Regulatory Space in the Shadow of BITs: The Case of Tanzania's Natural Resource Regulatory Reform

Magalie Masamba

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## Introduction

Tanzania's natural resource sector has seen an eventful 2017. The most significant development came in July, when Tanzania passed three new laws that significantly change the regulatory landscape governing natural resources and the mining sector in particular:

- (1) Natural Wealth and Resources (Permanent Sovereignty) Act<sup>1</sup>
- (2) Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act<sup>2</sup>
- (3) Written Laws (Miscellaneous Amendments) Act<sup>3</sup>

These acts, which have been signed by the Tanzanian president and are now in force, introduce changes that raise questions on their relationship to the country's bilateral investment treaties (BITs). Tanzania has BITs in force with 11 countries—Canada, China, Denmark, Finland, Germany, Italy, Mauritius, the Netherlands, Sweden, Switzerland and the United Kingdom.<sup>4</sup> Tanzania, like many other African countries, concluded these agreements aiming to attract foreign investors.

Especially within the mining sector, however, the feeling has been that foreign investors are abusing the legal regime. In particular, based on the findings of an audit requested by the Tanzanian president in early 2017, the government accused mining companies of making partial disclosures on their exports of precious metals—resulting in a ban on such exports in May 2017. The Tanzanian government is in a related tax dispute with Acacia Mining Plc, and the company [has filed a notice of arbitration](#). Within this tense political context, some are even calling for Tanzania to withdraw from the International Centre for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA).<sup>5</sup> This article provides an overview of the most significant changes introduced by these new acts and seeks to assess the impact of these changes, particularly on investment arbitration under Tanzania's BITs.

## Tanzania's reform of its domestic regulation of natural resources

The Permanent Sovereignty Act reaffirms the country's permanent sovereignty over natural resources by mandating their exploitation in a manner that benefits Tanzanian people. The Review and Renegotiation of Unconscionable Terms Act permits the review of natural resource agreements and mandates the renegotiation and potential removal

of "unconscionable" terms in these agreements. Finally, the Miscellaneous Amendments Act introduces various amendments to Tanzania's Mining Act. These three laws are the first step in amending various laws affecting natural resources, including insurance, income tax and tax administration. The following sections analyze the key provisions introduced in them.

### 1. *The recognition of the principle of permanent sovereignty over natural wealth and resources*

The preambles of both the Permanent Sovereignty Act and the Review and Renegotiation of Unconscionable Terms Act recognize the principle of permanent sovereignty as expressed in the United Nations (UN) General Assembly Resolution 1803 of December 14, 1962. The Permanent Sovereignty Act gives the Tanzanian people the right to permanent sovereignty over all natural wealth and resources, which are held in trust by the Tanzanian president. Permanent sovereignty, among other things:

- makes it unlawful to enter into natural resource agreements for exploration, exploitation or acquisition and use without parliamentary approval, and requires that such activities should secure the interests of the Tanzanian people.<sup>6</sup>
- guarantees returns into the local economy.<sup>7</sup>
- requires that all authorizations be made to ensure that the government obtains an "equitable" share of ventures.<sup>8</sup>
- allows for all agreements to be reviewed by parliament as part of its constitutional executive function.<sup>9</sup>
- requires that investors in the mining sector be active participants in the growth of the Tanzanian economy. Specifically, mineral rights holders are now required to reinvest a portion of their profits to augment Tanzania's economic performance and should demonstrate this effort in annual returns.

### 2. *A ban on the export of raw materials and the prohibition of beneficiation outside of Tanzania*

Among the provisions of the Permanent Sovereignty Act that have received the most attention in the context of the mining sector are the prohibitions on the export of raw natural resources, as well as the beneficiation of raw materials outside of the country.<sup>10</sup> Investors are now required to commit to establishing beneficiation facilities within the country.

Notably, the Permanent Sovereignty Act defines natural resources and wealth as:

all materials or substances occurring in nature such as soil, subsoil, gaseous and water resources, and flora, fauna, genetic resources, aquatic resources, micro-organisms, air space, rivers, lakes and maritime space, including the Tanzania's territorial sea and the continental shelf, living and non-living resources in the Exclusive Economic Zone which can be extracted, exploited or acquired and used for economic gain whether processed or not.<sup>11</sup>

This provision could be relevant to multiple industries including agriculture, mining, fisheries, oil and gas, forestry, electricity, etc. It seems geared to the development of infrastructure that presently does not exist in Tanzania. Its impact will depend on the regulations detailing how it should be applied.

### 3. *A move away from international dispute resolution*

Investor-state dispute settlement (ISDS) through international

arbitration has historically been a part of Tanzania's dispute resolution mechanisms. The national Promotion of Investment Act 131 of 2009 provides for international arbitration at ICSID or under the Arbitration Rules of the United Nations Conference on Trade Law (UNCITRAL).<sup>12</sup> Tanzania is a party to the ICSID Convention and to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. Additionally, all BITs signed by Tanzania provide for some form of ISDS.

In a significant departure from current practice, under the Permanent Sovereignty Act natural wealth and resources can no longer be subject to foreign courts and proceedings. Disputes on their extraction, exploitation or acquisition and use must be adjudicated by tribunals or organs in Tanzania and in accordance with Tanzanian law. Foreign investors may still attempt to circumvent the mandatory use of domestic courts by bringing claims to international arbitration based on the country's BITs with ISDS provisions. To ensure the effectiveness of the new provision mandating disputes to be adjudicated by Tanzanian courts, Tanzania could consider reviewing older national laws and its BITs for coherence with the Permanent Sovereignty Act.

#### 4. The renegotiation of "unconscionable terms" in all natural resource agreements and prohibition of stabilization provisions in the mining sector

To ensure permanent sovereignty, the Review and Renegotiation of Unconscionable Terms Act requires the Tanzanian parliament to review and renegotiate all agreements that contain unconscionable terms.<sup>13</sup> The act defines "unconscionable terms" in the context of natural wealth and resources as terms that are contrary to "good conscience" and terms that potentially or actually do jeopardize the people of Tanzania if implemented.

Among the provisions that may be seen to be unconscionable in this context are those that restrict the state's right to exercise full permanent sovereignty, restrict the state from exercising authority over foreign investments, are inequitable and onerous on the state, restrict periodic review, secure differential treatment designed to create separate legal regimes for some investors, deprive the people of Tanzania of economic benefit, subject the state to the jurisdiction of foreign laws and forums, and finally, undermine environmental protection measures. To ensure fairness, the power to determine whether terms fall within this list lies with the parliament. This process is aimed at remedying contracts that predate the Act and that prejudiced the interests of the Tanzanian people.

Further, the Miscellaneous Amendments Act, which amends the Mining Act, limits the scope of the use of stabilization provisions (that result in the general freezing of laws or the contracting away of sovereignty) in the extractive industry and prohibits stabilization provisions that are guaranteed to last the lifetime of a mine.<sup>14</sup> Under the new law, these stabilization provisions, if negotiated, must be specific, time-bound, based on an economic equilibrium equation and make room for occasional renegotiation. In addition, specific stabilization provisions related to government tax expenditure (or in other words, the value of tax incentives guaranteed to a mining company) should provide for the quantification of tax expenditure and how the company will compensate the government. The provisions therefore result in the government receiving back all tax incentives that are subject to stabilization provisions, and such incentives may be recovered by such methods as converting their value into equity in the mining company.

#### 5. Government shareholding in all mining companies

Finally, the new amendments to the Mining Act require the Tanzanian government to hold a minimum of 16 per cent non-dilutable free carried interest shares in the share capital of any company holding ordinary or special mining licences. Additionally, the Tanzanian government may also acquire a maximum of 50 per cent non-dilutable shares in the capital of the mining company, equal to the tax incentives that the company benefits from.<sup>15</sup>

#### Conclusion

In Africa, many have seen BITs as being one-sided in favour of investors and a tool to hinder host state power to enact sound regulation of social and environmental policies. Like other African countries, Tanzania is rethinking the regulation of foreign investment and how it can better ensure that investment benefits citizens.

The broader benefit of local populations through the promotion of sustainable investment is the political and legal goal of many countries, including Tanzania. The transition to more sustainable development-oriented policies will take some time, and will require the development and consideration of a range of factors— including, for instance, the assessment of manufacturing capabilities in a country like Tanzania.

Tanzania is undoubtedly in the middle of a complex and politically sensitive reform process, one that reignites the age-old questions over natural resources. In the era of BITs, what will be their impact on Tanzania's regulatory reform aspirations, and how can the government best ensure that its BIT network does not hinder these much-needed reforms? From an African perspective, it is time to rethink our BIT regimes, particularly in the context of their impact on states' regulatory space.

#### Author

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The views expressed in this article are the author's and do not necessarily reflect the views of the World Bank Group.

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- 6 Section 6(1) of the Permanent Sovereignty Act.
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- 9 Section 4 of the Review and Re-negotiation of Unconscionable Terms Act.
- 10 Section 9(1) of the Permanent Sovereignty Act.
- 11 Section 3 of the Permanent Sovereignty Act.
- 12 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1996>
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- 15 Section 10(1) and (2) of the Mining Act, as amended.

# UNCTAD's 2017 High-level IIA Conference: Moving Forward on Addressing Older-Generation International Investment Agreements

James Zhan and Moritz Obst



## Introduction

From October 9 to 11, 2017, more than 300 experts, including high-level negotiators of international investment agreements (IIAs) and representatives from intergovernmental organizations, civil society, academia and the private sector convened in Geneva for UNCTAD's [Annual High-level IIA Conference](#).<sup>1</sup> Based on policy toolkits developed by the United Nations Conference on Trade and Development (UNCTAD)—[Roadmap for IIA Reform](#)<sup>2</sup> and [10 Policy Options for Phase 2](#)<sup>3</sup>—the experts took stock of the sustainable development-oriented reform of the IIA regime (Phase 1 of IIA reform) and discussed policy options for modernizing the existing stock of older-generation IIAs (Phase 2).

Through plenary and break-out sessions, the meeting provided a forum for inclusive, constructive and knowledge-generating deliberations on Phase 2. By sharing experiences, identifying best practices, discussing new ideas and analyzing pros and cons of policy options, the meeting charted the way forward for Phase 2 and reaffirmed UNCTAD's role as *the* intergovernmental convener for an inclusive debate on international investment policy-making for sustainable development. This report summarizes the key issues discussed at the event.

## Taking stock of IIA reform and moving forward

During the high-level plenary opening and closing sessions, participants expressed their commitment to IIA reform. There was broad consensus that sustainable development-oriented IIA reform has entered the mainstream of international investment policy-making. Many delegates shared their countries' experiences in reviewing their IIA networks, reforming model treaties and negotiating new-generation IIAs, often based on UNCTAD's publications [Roadmap for IIA Reform](#) and [Investment Policy Framework for Sustainable Development](#).<sup>4</sup> Most countries acknowledged that the time had come to focus on how to modernize the existing stock of older-generation treaties (Phase 2).

Generally, participants recognized that the IIA regime has become too complex to be fixed by a single institution or group of countries, and that multilateral collaboration would be key. A common message was

that UNCTAD should continue providing a forum for collective and inclusive engagement and, in line with its mandate, act as the focal point within the United Nations on issues related to international investment and sustainable development. Several speakers emphasized the importance of involving all affected stakeholders in designing new approaches to IIAs. Several experts also appreciated the capacity-building, technical assistance and policy research provided by UNCTAD.

## The break-out sessions

The break-out sessions were designed to engage experts in meaningful, creative and solution-oriented discussions on UNCTAD's 10 policy options. Experts exchanged views on pros and cons, lessons learned and practical challenges of reform options. During the plenary on the final day, designated rapporteurs reported on the discussions and outcomes of each of the following sessions.

### 1. *Harnessing Investment for the SDGs: The IIA Dimension*

Experts discussed how IIAs could be harnessed for mobilizing investment to help achieve the Sustainable Development Goals (SDGs). This discussion raised questions such as how to “translate” sustainable development objectives into actionable treaty language. Experts also exchanged views on the (empirically inconclusive) question of whether IIAs played a role in attracting and retaining foreign direct investment (FDI).

The session focused on the role of public-private partnerships (PPPs) in promoting and financing sustainable development-friendly investment. In this respect, experts underlined the potential benefits of PPPs, particularly for SDG-related infrastructure development, but expressed the need to balance the rights and obligations of investors, safeguard states' right to regulate, take into account social and environmental standards, and establish an adequate oversight structure for PPPs. Experts discussed best practices in this regard and called upon UNCTAD to conduct further research and offer policy advice on how to channel foreign investment into infrastructure and public services sectors, and ultimately maximize the sustainable development contribution of such investment.

### 2. *Clarifying and Modifying Treaty Content*

Experts also shared their countries' experiences with joint interpretations and amendments in their efforts to modernize older-generation treaties.

Many participants identified the policy goals of safeguarding the right to regulate and promoting sustainable development as a key concerns in their IIA reform efforts. Regarding substantive treaty provisions, several experts identified the definitions of “investor” and “investment,”<sup>5</sup> fair and equitable treatment (FET) and most-favoured-nation (MFN) treatment as priorities for Phase 2. The importance of stakeholder consultations, inter-ministerial coordination and transparent communication was emphasized.

Compared to amendment, several delegates referred to the advantages of joint interpretations as the preferred method to address the substantive content of older-generation treaties as they are easier to issue. However, a few experts also underlined the limited scope of joint

interpretations, explaining that they could clarify but not attach an entirely new meaning to a provision. In discussing the cons of these reform options, it was further noted that identifying common ground on the objectives of an envisaged joint interpretation or amendment is not always straightforward.

### 3. Consolidating the IIA Network

Among the options for modernizing the stock of older-generation treaties and reducing fragmentation of the IIA regime are replacing outdated treaties, consolidating the IIA network and managing relationships between coexisting treaties. Sharing their country and regional experiences, several experts considered that replacing multiple old agreements with one new (multilateral) IIA was most effective in reducing overall complexity and fragmentation.

Particular attention was paid to the special situation of IIA-related developments in the European Union and as part of regional integration on the African continent. Discussions on the latter were further deepened in a side event entitled “The Pan African Investment Code and the Investment Chapter of the Continental Free-Trade Agreement (CFTA): Opportunities for Rationalizing Investment Regulation in Africa,” hosted by the United Nations Economic Commission for Africa (UNECA). Discussions assessed how continental initiatives such as the Pan African Investment Code (PAIC) and the proposed CFTA investment chapter may contribute to consolidating the regulatory investment environment in Africa.

Discussions in the break-out session also acknowledged challenges posed by consolidation, including the identification of willing partners, the mobilization of financial and human resources in relevant government departments, and the large amount of time needed to

reach consolidation.

A few experts stated that managing relationships between coexisting treaties was the most difficult policy option. Here, it was suggested that the Vienna Convention on the Law of Treaties could provide guidance on which agreement shall prevail, if the coexisting treaties have not addressed this issue.

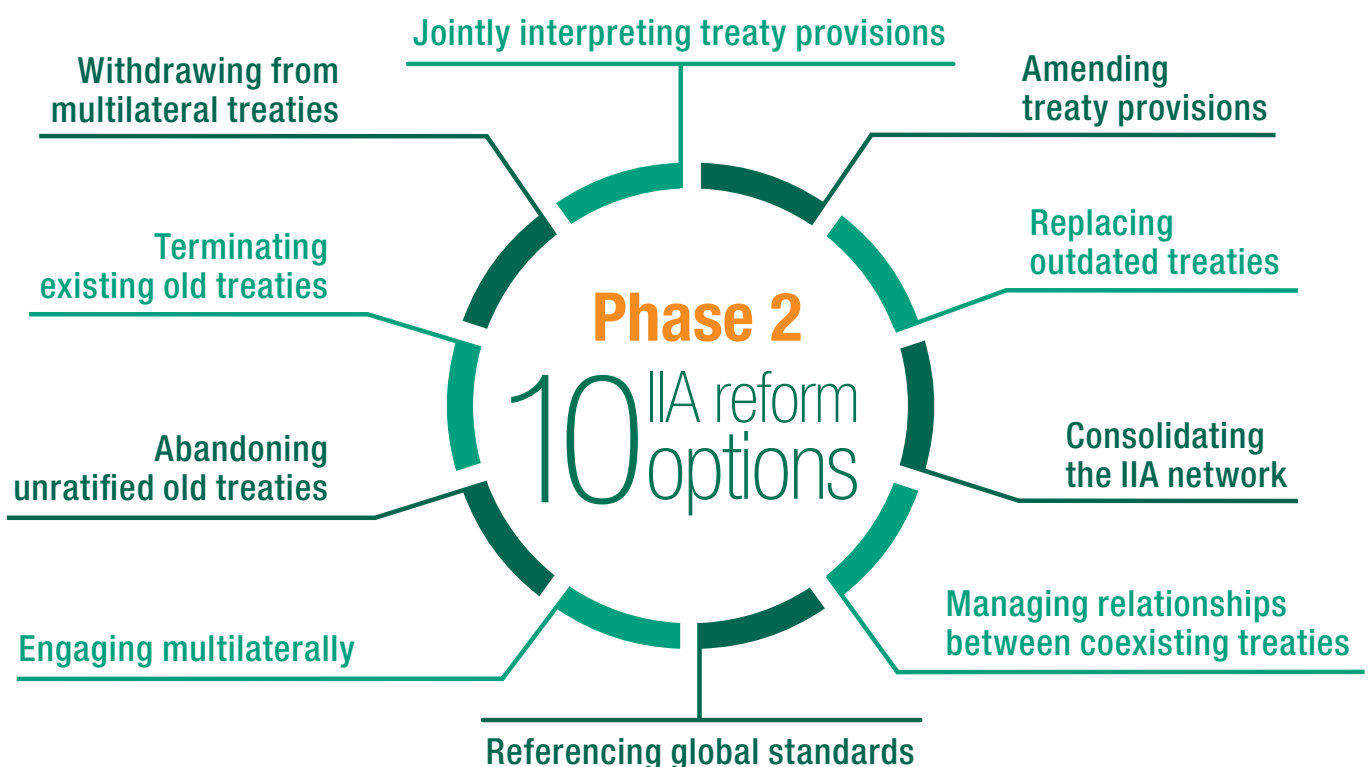
### 4. The Implications of Disengaging

Experts addressed the possibility of disengagement from the IIA regime through abandoning unratified older treaties, terminating existing old treaties and withdrawing from multilateral treaties. Some delegates maintained that their countries had taken steps to terminate their old treaties without observing a reduction in FDI inflows. Some emphasized that, in tandem with terminating, they were reengaging in investment policy-making through the development of a new model for future IIA negotiations or through domestic legislation. Diverging from this view, others held that IIAs played an important role in attracting and retaining FDI. Several experts mentioned that unilateral terminations could have negative implications for countries’ business climates and repercussions on countries’ bilateral relations. Bilateral or multilateral options such as renegotiation and treaty replacement were considered preferable over unilateral actions.

Generally, noting the challenges arising from individual countries’ efforts to disengage, experts greatly appreciated the possibility of multilateral sharing of experiences and views on this issue.

### 5. Toward a Global Reform Effort: Designing Principles

In ongoing IIA reform efforts, principles can serve as an important reference for negotiating new IIAs and modernizing existing ones. Many country delegates





noted that they had been involved in regional or multilateral initiatives for designing investment policy principles. Some delegates considered that an inclusive multilateral effort for developing investment policy principles was desirable to avoid overlaps and inconsistencies, while others expressed that different groups of countries should be encouraged to formulate distinctive sets of principles.

A number of delegates stressed the need for an inclusive approach to investment principles that takes into account the needs and specific circumstances of developing countries. A few experts also alluded to the advantages of investment policy principles as the basis for a gradual transition to a new IIA regime and the potential of such principles to create linkages to other areas of law and policy-making, such as sustainable development, human rights, health and the environment.

### 6. *Toward a Global Reform Effort: Improving Investment Dispute Settlement*

While the need to reform the dispute settlement regime was widely acknowledged, as an essential part of comprehensive and coordinated reform of today's existing multilayered and multi-faceted IIA regime, there were divergent views on the extent and depth of reform efforts. Several speakers emphasized the need to buttress alternative dispute resolution and dispute prevention alongside or as an alternative to investor–state dispute settlement (ISDS), and to strengthen capacities of domestic courts to adjudicate investor claims and enforce investor obligations. Others mentioned that a review of substantive provisions was equally necessary to ensure balanced and consistent decisions in ISDS cases.

Regarding proposals for a multilateral investment court, many delegates expressed support for such an endeavour and their interest in exploring the establishment of an appeal mechanism. Similar views were also debated in a side event hosted by the European Commission. Under the heading “Multilateral Reform of ISDS: Possible paths forward,” the presentation focused on the background and need for multilateral reform of ISDS, objectives of such reform, possible features and next steps. At the same time, experts considered challenges to creating a multilateral court, including its institutional setup, financing, arrangements for expansion and enforcement of awards. In addition, concerns regarding state sovereignty and politicization of disputes were raised.

Discussions also considered the option to refrain from including ISDS provisions in investment treaties, a policy option put in practice by some recent IIAs. In this regard, the importance of effective dispute prevention and avoidance, together with well-functioning domestic judicial systems (and related efforts to strengthen and build capacities of domestic courts) were considered important.

### 7. *Toward a Global Reform Effort: Referencing Global Standards*

Multilaterally recognized standards and instruments can help foster coherence and improve the interaction between IIAs and other areas of international law and policy-making. Several delegates identified references to global standards as an emerging trend in new models and treaties. Experts considered that referencing global

standards could introduce broader policy objectives into IIAs, add clarity to the right to regulate, and foster the overall balance and coherence of the IIA regime.

Regarding ISDS, it was noted that explicit references to public interest issues (for example, public health and the environment) could make arbitral tribunals more likely to consider them. One expert noted that the meaning of global standards was not always sufficiently clear to refine other IIA provisions. In this context, a number of experts suggested that domestic law was the principal place to address investor obligations and that domestic institutions needed to be willing and able to implement them.

### Conclusion: Kickstarting the next phase of IIA reform

As many participants noted, moving to a more sustainable development-oriented IIA regime constitutes a great challenge, involving many complex issues, to which countries respond with a diverse range of approaches. Sustainable development should be the overarching goal of reform of the IIA regime, and multilateral collaboration on all levels is indispensable. Among other things, there is a need to focus reform on the interaction, coherence and consistency between the national and international dimensions of investment policy-making (that is, between national investment policies and IIAs), as well as between IIAs and other public policies. Both challenges could be taken up in Phase 3 of IIA reform. Multistakeholder platforms and processes such as UNCTAD's High-level IIA Conferences, its Expert Meetings and the World Investment Forum are highly useful for carrying reform further. We invite you to continue multistakeholder discussions at the next UNCTAD World Investment Forum, to be held in Geneva from October 22 to 26, 2018.

Information and documents related to this Expert Meeting—including the background note, the chair's summary, presentations and rapporteurs' reports—are available at <http://investmentpolicyhub.unctad.org/Pages/2017-edition-of-unctad-s-high-level-annual-iaa-conference-phase-2-of-iaa-reform>.

### Authors

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### Notes

<sup>1</sup> The Multi-year Expert Meeting on Investment, Innovation and Entrepreneurship for Productive Capacity-building and Sustainable Development, fifth session can be found at <http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=1438>. The conference outcome and documents are available at <http://investmentpolicyhub.unctad.org/Pages/2017-edition-of-unctad-s-high-level-annual-iaa-conference-phase-2-of-iaa-reform>.

<sup>2</sup> United Nations Conference on Trade and Development (UNCTAD). (2015). *World investment report 2015: Reforming international investment governance*. Chapter IV. Geneva: United Nations. Retrieved from [http://unctad.org/en/PublicationChapters/wir2015ch4\\_en.pdf](http://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf); UNCTAD. (2016). *World investment report 2016: Investor nationality: Policy challenges*. Chapter III. Geneva: United Nations. Retrieved from [http://unctad.org/en/PublicationChapters/wir2016ch3\\_en.pdf](http://unctad.org/en/PublicationChapters/wir2016ch3_en.pdf).

<sup>3</sup> UNCTAD. (2017). *World investment report 2017: Investment and the digital economy*. Chapter III. Geneva: United Nations. Retrieved from [http://unctad.org/en/PublicationChapters/wir2017ch3\\_en.pdf](http://unctad.org/en/PublicationChapters/wir2017ch3_en.pdf). See also the background note prepared by the UNCTAD Secretariat: [http://unctad.org/meetings/en/SessionalDocuments/ciimem4d14\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ciimem4d14_en.pdf).

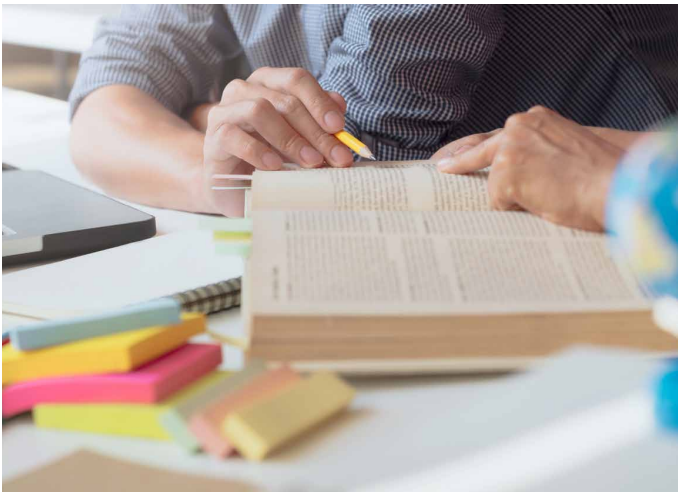
<sup>4</sup> UNCTAD. (2015). *Investment policy framework for sustainable development*. Geneva: United Nations. Retrieved from [http://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf).

<sup>5</sup> UNCTAD, 2016, *supra* note 2.

## insight 4

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

David Gaukrodger



Book review of Jonathan Bonnitcha, Lauge Poulsen and Michael Waibel's *The Political Economy of the Investment Treaty Regime*.<sup>1</sup>

As the authors rightly remark in the introduction to this important book, “there has been very little engagement with investment treaties in scholarship from politics, economics and business” (p. 1). The well-organized and accessible policy analysis provided here by the authors is both a major contribution to filling that gap and a call to others to address outstanding and unresolved questions.

The authors' development of a coherent overall structure for policy analysis of investment treaties in this concise book will appeal to many readers and should become an important component of university courses and academic study of investment treaties. In a field often dominated by practitioner-academics and commentary on arbitral interpretations, the three authors—professors at universities in Australia and the United Kingdom—belong to a new generation of scholars that does not participate in investment arbitration.

The clear and lively writing, balanced presentation and dispassionate tone will also be of particular interest for governments, including the more than 50 of them that participate in an investment roundtable hosted by the Organisation for Economic Co-operation and Development (OECD). Those governments have been considering a review and evaluation of existing research on the benefits and costs of investment treaties, including input from the authors and other experts in the field. This stocktaking of existing studies, which will be made available on the OECD website, reaches many conclusions similar to those of the authors in terms of the often-unresolved questions about benefits and costs, and need for additional study in many areas. More broadly, the authors echo governmental interest in reconnecting investment treaty law and policy with academic and government specialists in relevant fields.

The authors provide a brief synthesis of current debates and refer to some recent developments, but the book is more useful in providing access to broad context, and as such will remain relevant even as policies evolve. Three chapters provide valuable economic analysis which synthesizes and expands earlier work by the authors

and others.<sup>2</sup> A recurring theme is that, while investment treaties have a core function for some situations, as currently applied they often appear poorly tailored to address identifiable economic concerns—this is traced to the fact that much treaty policy and interpretation lacks a foundation in economic analysis. A chapter addressing the economics of foreign investment concludes that the benefits of foreign investment are often associated with particular types of investment, which the authors contrast with the generally unselective treaty coverage of practically all investment, limited only by a nationality criterion.

### The microeconomics of investment treaties

In analyzing the microeconomics of investment treaties and the decision making of key actors, the book provides a nuanced discussion of the scope of the hold-up risk—the risk that the government will seek to appropriate value after a foreign investor has sunk costs—and whether investment treaties are well designed to address it. In addition to suggesting that hold-up risk may be over-estimated in some contexts, the authors consider that certain interpretations of key treaty provisions such as fair and equitable treatment (FET) or umbrella clauses are not well designed to address hold-up risks because they are not focused on government appropriation of value. The book's balanced treatment of the thorny question of the impact of investment treaties on the quantum and quality of government regulation—an issue at the core of today's intense debate over the impact of treaties on the right to regulate—considers risks of over-regulation and under-regulation (regulatory chill), as well as risks of over-investment and under-investment. The over-investment risk has rarely been discussed, but as the authors suggest, there may be excessive investment in activities with high but currently unaddressed negative externalities—such as carbon dioxide-producing sectors—if over-protected investors do not internalize the risk of future regulation to address the externalities. The authors see protection from discrimination as a valuable role for investment treaties, but question the degree of discrimination against foreign investors in practice and note that some interpretations of now-central provisions such as FET are largely unconnected to concerns about discrimination.

### The politics of investment treaties in developing and developed countries

Two important chapters are devoted to the politics of treaties in developed and developing countries respectively. They examine the reasons for the extraordinary historical development of a broad network of over 3,000 investment treaties in a short period. Noting the limited academic attention to the issue of political support for treaties in developed countries, particularly in Europe, the authors address various possible explanations including the promotion of business interests, the desire to depoliticize investment disputes, an interest in building customary international law, or the use of investment treaties for diplomatic and symbolic reasons. The authors' largely historical treatment of views about the relationship between investment treaties and customary international law could be complemented by reference to government statements since 2002 that investment treaties have not

created customary international law.<sup>3</sup> Overall, the authors suggest that external influences from investors have played a limited role, emphasizing other political drivers including bureaucratic incentives.

A second chapter on politics summarizes and builds on the ground-breaking research in Lauge Poulsen's 2015 book on developing countries' reasons for concluding investment treaties.<sup>4</sup> Treaty policy is seen as having been driven by efforts to increase investment as well as on occasion by the sometimes-controversial use of treaties to lock in domestic law reforms. Although it is observed that practically all governments have been surprised by evolutions of arbitral interpretations, the authors see deeper capacity issues in some developing countries, noting for example historical evidence of a lack of awareness that treaties contained binding obligations.

### Legal analysis of substantive and dispute settlement provisions

Two chapters provide succinct legal analysis of substantive and dispute settlement provisions in treaties respectively. In its desire to be brief here, the book suffers to some degree from a focus only on arbitral decisions and recent European reforms. It largely treats FET provisions as a single category, and overlooks earlier government reforms and views in the context of the North American Free Trade Agreement (NAFTA), their possible impact in generating different outcomes under different treaty types, and their influence on other governments in many recent treaties and submissions.<sup>5</sup> The focus on arbitral decisions and lack of attention to this intensive (if quiet and often overlooked) and influential government action is related to the questionable assertion in the conclusion of the book that "hardly any country has begun to revisit whether foreign investors should in fact have substantive guarantees that go beyond guarantees of non-discrimination" (p. 260). In fact, there is considerable evidence of government action on this front. This includes the now widely used clarifications of indirect expropriation provisions as well as extensive briefing and treaty drafting to achieve narrower interpretations of FET by, for example, excluding any role for legitimate expectations as an element of that provision.<sup>6</sup>

The authors appear to describe the joint interpretive instrument signed in conjunction with the conclusion of the Canada–European Union Comprehensive Economic and Trade Agreement (CETA)—which states that "CETA will not result in foreign investors being treated more favourably than domestic investors"—as merely a general "conten[tion]" about treaties not providing preferential treatment (p. 13). As a contemporaneous part of the treaty context agreed to by all treaty parties after intensive political debate and negotiations, the joint interpretive instrument is of a different nature from other government statements on this issue cited by the authors. The joint intent to limit treatment to that received by domestic investors may be of great importance given what the authors recognize as potential scope for interpretation of some of the FET elements in CETA.

Admittedly, even joint government action has not always been reflected in arbitral decisions, but it may play the role of an advance indicator for systemic changes in

some cases. And as the authors elsewhere note, some major economies have developed treaties without FET provisions or have terminated treaties with provisions sometimes interpreted as broadly applicable to non-discriminatory measures.

The authors' characterization of government action as timid is more accurate for the limited government action to ensure that the many existing older treaties are interpreted consistently with these policy goals or to restrain investor treaty shopping into older treaties to maximize investor rights in investor–state dispute settlement (ISDS), as reflected in continued use of older treaties for the vast majority of claims.<sup>7</sup> As public tolerance for treaty shopping affecting government budgets shrinks in other fields of economic law—reflected notably in OECD work on tax treaties—governments may be prompted to address the issues across the investment treaty field as well.<sup>8</sup>

### Conclusion

These relatively minor issues—which may also raise questions for governments about whether they need to publicize better the detail of their policies—do not detract from the authors' admirable and well-organized examination of many underlying principles that should be considered by policy-makers, academics and participants in investment treaty policy. The book rightly emphasizes the need to ensure that treaties address identifiable and articulated policy goals, that possible drift in treaty interpretation does not take treaties off course and that treaty policy is actively managed by governments using a wide range of inputs. It merits careful study and should attract interest from a broad range of experts, policy-makers and students as governments increasingly engage in intensive review of their treaty policies.

### Author

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### Notes

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

2 For an example of important earlier work by the authors in this area, see Jonathan Bonnitca's 2014 law and economics monograph. Bonnitca, J. (2014). *Substantive protection under investment treaties: A legal and economic analysis*. Cambridge: Cambridge University Press.

3 See, e.g., *Crompton (Chemtura) Corp. v. Government of Canada*, Canada Counter-Memorial, Oct. 20, 2008, p. 272. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/italaw8258.pdf> ("All three NAFTA States have expressly rejected the notion that BITs create customary international law") (bold in original and citations omitted).

4 Poulsen, L. N. S. (2015). *Bounded rationality and economic diplomacy: The politics of investment treaties in developing countries*. Cambridge University Press.

5 Government materials in this area are gathered and summarized in Gaukrodger, D. (2017). *Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law* (OECD Working Papers on International Investment, 2017/03). Retrieved from <http://dx.doi.org/10.1787/0a62034b-en>.

6 See id., pp. 42–47.

7 See UNCTAD. (2017). *World investment report 2017: Investment and the digital economy*. Chapter III Geneva: United Nations. Retrieved from [http://unctad.org/en/PublicationChapters/wir2017ch3\\_en.pdf](http://unctad.org/en/PublicationChapters/wir2017ch3_en.pdf), p. 128 ("At the end of 2016, virtually all of the known treaty-based ISDS cases had been filed pursuant to treaties concluded before 2010, which typically feature broad and vague formulations and include few exceptions or safeguards.")

8 For an overview, see, e.g., OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (a multilateral treaty allowing jurisdictions to transpose results from the OECD/G20 BEPS Project, including minimum standards to implement in tax treaties to prevent treaty abuse and "treaty shopping," into their existing networks of bilateral tax treaties in a quick and efficient manner), retrieved from <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beeps.htm>; see also OECD, Eliminating Treaty Shopping, (video 5 Oct. 2015), retrieved from <https://www.youtube.com/watch?v=3W4orxYM18k&feature=youtu.be&list=PLWJUF-surg4vyyAX9kkY4UvXj85cYCNm>. Limits on potential treaty shopping have been included in a number of recent investment treaties but it remains an issue including for many older treaties.

## news in brief

### EU–Japan EPA negotiations finalized without investment; EU–Mexico updated FTA nears completion

On December 8, 2017, European Commission President Jean-Claude Juncker and Japanese Prime Minister Shinzo Abe **announced** the finalization of the negotiations of the Economic Partnership Agreement (EPA) between the European Union and Japan.

According to the European Commission **statement**, the path is now clear for signature, ratification and implementation of the agreement. The statement highlights that “the EPA reinforces the EU and Japan’s actions on sustainable development and climate change.”

**As reported in ITN**, the partners had reached an agreement in principle on the EPA in July 2017, but could not agree on certain aspects of the investment chapter, including dispute settlement. Parties **left investment out of the EPA** to be able to finalize it and would later conclude a separate agreement on investment.

The EU–Mexico agreement is also reported to be nearing completion—including an investment chapter. The negotiating partners held the sixth round of negotiations in Mexico City, November 25–December 1, 2017. Negotiations on an updated trade deal have been ongoing since May 2016.

According to an **EU press release**, progress was made in issues including the Investment Court System (ICS) and sustainable development, and the European Commission remains committed to the goal of concluding the deal before the end of 2017.

Negotiators met in Brussels from December 11 to “**outline a possible conclusion of negotiations**,” and EU Trade Commissioner Cecilia Malmström and Mexican Economy Minister Ildefonso Guajardo are scheduled to meet in the week of December 18.

### UNCITRAL Working Group III holds first meeting on possible reform of ISDS

During the week of November 27–December 1, 2017, Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) held its first meeting on possible reform of investor–state dispute settlement (ISDS). The 34th session of the working group was attended by over 300 participants representing governments, intergovernmental organizations and civil society.

At the meeting, the working group—which **received a mandate** to work on this topic in July 2017—agreed to consider the three stages of the mandate in sequence: to identify concerns regarding ISDS, to consider whether reform was desirable and, if deemed desirable, to develop solutions to be recommended to the UNCITRAL Commission. It also agreed “to undertake a thorough analysis of all relevant issues, with the objective of identifying the core concerns that might justify reform.”

The working group already began discussions on procedural aspects of ISDS, including duration and cost of proceedings, allocation of costs, security

for costs, third-party funding, transparency, early dismissal mechanisms and counterclaims by states. It also exchanged views on the overall consistency and coherence of the ISDS regime and its outcomes.

More information is available in the **UNCITRAL press release** and on the **working group website**. **Audio recordings** of the proceedings of the 34th session are also available. The 35th session of UNCITRAL Working Group III is scheduled for April 23–27, 2018, in New York, United States.

### EU continues efforts toward establishing multilateral investment court, despite sharp criticism

Beyond advancing its Investment Court System (ICS) proposal in bilateral negotiations, the European Union continues its efforts toward establishing a **multilateral investment court** (MIC). On September 13, 2017, the Commission released a **recommendation** that, if adopted by the Council, would give the European Commission the required mandate to negotiate a convention to create an MIC.

The German Association of Judges (known by its German acronym, DRB)—which had already **rejected the EU ICS proposal** in February 2016—asked the German government to deny such a mandate. In its Opinion 21/17 of November 2017 (available in the **German original** and in an unofficial **English translation**), the association presented sharp criticism of the EU MIC proposal. Several civil society organizations have also voiced **serious concerns regarding the proposal**.

### NAFTA 2.0: Canada, Mexico and U.S. negotiation rounds move into the first quarter of 2018

The three parties to the North American Free Trade Agreement (NAFTA) held the third, fourth and fifth rounds of renegotiation (**Ottawa, September 23–27; Arlington, October 11–17**; and **Mexico City, November 17–21**). The next round of NAFTA renegotiations is scheduled for January 23–28, 2018 in Montreal. **Negotiations are expected to continue** through the end of March 2018, before the July 2018 presidential election in Mexico.

On November 17, 2017, the U.S. Trade Representative (USTR) released an **updated version** of the NAFTA negotiating objectives, which were **originally published in July**. The update expands significantly on the U.S. negotiating objectives with respect to investment.

The updated document clarifies that the objective to “reduce or eliminate barriers to U.S. investment in all sectors” includes rules such as national treatment and most-favoured-nation treatment, a minimum standard of treatment under customary international law, and prohibitions on expropriation, transfer restrictions and performance requirements.

Regarding investor–state dispute settlement (ISDS), the revised goals aim at ensuring arbitrator impartiality and independence, swift review and dismissal of frivolous claims, and correctness and coherence of the interpretation of investment rules.

The USTR also aims at ensuring open hearings, prompt publication of key documents and a mechanism to allow *amicus curiae* submissions.

The United States **reportedly continues** to propose an **opt-in system** for ISDS that would allow each NAFTA country to decide whether or not to participate. On this point, Mexican Economy Minister Ildefonso Guajardo **stated**: “We can explore the opt-in, as long as we can define our own opt-in,” and added that, otherwise, Mexico is “not interested.”

In turn, **Canada is reported** to be pushing for the replacement of the Chapter 11 ISDS provision with an Investment Court System (ICS), mirroring the one included in the Canada–European Union Comprehensive Economic and Trade Agreement (CETA). The proposed ICS would be composed of a first instance tribunal and an appeal tribunal.

### **RCEP partners miss third deadline and push negotiations through November 2018**

Participating countries of the Regional Comprehensive Economic Partnership (RCEP) held the 20th round of negotiations in Incheon, Korea, from October 17 to 28, 2017. Leaders also held the first ever RCEP summit in Manila, Philippines on November 14, 2017 after two days of preparatory meetings.

The **Joint Leaders’ Statement** issued at the end of the summit indicates that RCEP will include “agreed provisions which maintain the right of Participating Countries to address legitimate public policy purposes.” The current outline of the agreement, attached to the statement, also indicates that “the Investment Chapter would create an enabling investment environment in the region covering the four pillars of investments— protection, liberalization, promotion, and facilitation.”

Leaders agreed to intensify negotiations throughout 2018. They **set a new target** to sign the agreement during the ASEAN summit in Singapore in November 2018. Negotiations were officially launched in 2012, and **negotiating deadlines were missed three times**, in 2015, 2016 and 2017.

The 16 RCEP partners comprise the 10 member states of the Association of Southeast Asian Nations (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam) in addition to Australia, China, India, Japan, Korea and New Zealand. Together, the countries cover roughly a third of the global economy and half of the world’s population.

### **TPP-11 ministers agree on core elements of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)**

On November 11, 2017, in Da Nang, Vietnam, ministers of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam “**agreed** on the core elements of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).”

In their **statement**, the ministers expressed their understanding that “the CPTPP maintains the high

standards, overall balance, and integrity of the TPP while ensuring the commercial and other interests of all participants and preserving our inherent right to regulate, including the flexibility of the Parties to set legislative and regulatory priorities.”

The CPTPP incorporates provisions of the **TPP-12**, concluded before the **U.S. withdrawal**, with the exception of certain suspended provisions and items that still depended on further negotiations. In the investment chapter, the suspended provisions are those regarding “investment agreement” and “investment authorization,” which are covered by investor–state dispute settlement (ISDS).

In a **press release** issued on October 31, 2017, New Zealand Prime Minister Jacinda Ardern had expressed her government’s concern regarding the ISDS clause of the TPP and resolve to amend it. “In addition, Cabinet has today instructed trade negotiation officials to oppose ISDS in any future free trade agreements,” the press release stated.

After the Da Nang November 11 meeting, **Ardern hailed the narrowing of ISDS** in three areas: “One, ISDS no longer applies to investor screening. The second, anyone who takes up a contract with a Government is no longer able to sue through ISDS, but must go through domestic procedures instead. The third relates to financial services.”

While acknowledging that the agreement is not perfect, Ardern stated that “it is a damn sight better than what we had when we started,” and that the review of the TPP in three years would be another chance for New Zealand to challenge the ISDS provisions. She finally confirmed: “We’re putting a line in the sand—we will not sign up to future agreements that include those clauses.”

Canadian Prime Minister Justin Trudeau and Japanese Prime Minister Shinzo Abe had a meeting on November 10 that ended in disagreement. A subsequent meeting with other TPP leaders was unexpectedly cancelled as Trudeau decided not to attend it.

Criticized by some for allegedly “sabotaging” a final agreement, Trudeau explained that there still was “important work to be done” regarding gender, rules of origin, culture and the automotive sector. “We weren’t ready to close it,” **Trudeau said**. In advance of the Da Nang meeting, he had stated that **Canada would “not be rushed** into a deal that is not in the best interest of Canada and Canadians.”

### **Belgium requests CJEU for an opinion on the compatibility of ICS in CETA with EU law**

On September 6, 2017, Belgium **submitted** to the Court of Justice of the European Union (CJEU) a request for an opinion on the compatibility of the ICS with the European Treaties. **Specifically**, Belgium is requesting an opinion on the compatibility of the ICS with (1) the exclusive competence of the CJEU to provide the definitive interpretation of EU law, (2) the general principle of equality and the “practical effect” requirement of EU law, (3) the right of access to the courts and (4) the right to an independent and impartial judiciary.

## awards and decisions

### Canadian mining company awarded sunk costs only in compensation for Peruvian expropriation

*Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21*

**Matthew Levine**

An arbitral tribunal constituted under the investment chapter of the Canada–Peru Free Trade Agreement (FTA) has issued its award.

The tribunal accepted that the claimant mining company must be compensated for expropriation by the host state. However, the tribunal awarded sunk costs only, and a dissenting arbitrator found that damages should have been reduced in light of the investor’s contribution to the unrest that led the state to expropriate the investment in the first place.

#### *Background and claims*

The claimant, Bear Creek Mining Corporation (Bear Creek), is a Canadian company headquartered in Vancouver. In 2004, Bear Creek found indications of significant silver ore deposits in the Santa Ana mine, located in the Puno department of Peru.

Under Article 71 of the Peruvian Constitution, because the mine is within 50 kilometres of the Peru–Bolivia border, specific authorization from the Peruvian executive was required for any foreign investor to operate. In order to preserve its claim to Santa Ana, Bear Creek first had a Peruvian employee register the relevant mining rights. Subsequently, Bear Creek applied for and received the authorization needed to acquire those rights in its own name. Ultimately, the rights were transferred to Bear Creek in December 2007.

Between 2007 and 2011, Bear Creek raised external finance for the development of Santa Ana. According to the company, it had proposed a sustainable design for the mine site as demonstrated by the governmental approval of its impact assessment report in 2011. The company also submitted that public meetings with local residents had been well-attended and resulted in mostly favourable inputs.

However, from 2011 onwards, Santa Ana encountered significant social opposition, resulting in protests that sometimes turned violent. Concern spread within some of the nearby communities that mining activities were contaminating local land and the nearby Lake Titicaca. When a new president was elected in June 2011, Peru issued a decree revoking Bear Creek’s authorization (Supreme Decree 032).

In August 2014, Bear Creek filed a Request for Arbitration with the International Centre for Settlement of Investment Disputes (ICSID). Pursuant to FTA Article 832, Canada filed a non-disputing party submission. The tribunal also received three applications to file written submission as *amicus curiae*, but accepted only two.

#### *Tribunal rejects objections to jurisdiction*

Peru submitted that, as the Peruvian national who

originally acquired the mining rights was an employee of Bear Creek, the company had become the *de facto* owner of the rights prior to satisfying the constitutional condition precedent. It argued that, although option agreements are commonly used in the mining industry, the usage in this case lacked good faith. For Peru, the implication was that Bear Creek had failed to properly apply for approval for its interest in Santa Ana, and, as a result, any approval that had been granted was invalid. The tribunal, however, was unanimous in rejecting this, noting that FTA Article 847 provides an express and wide definition of “investment” that must be applied in the present case.

In a separate objection, Peru submitted that, as a general rule, investment tribunals lack jurisdiction over investments made in violation of domestic law. The tribunal found, however, that any such determination should be made based on the applicable treaty. Finding that the FTA provided no evidence of a legality requirement, it rejected Peru’s objection.

#### *Post-election reversal of authorization constitutes illegal indirect expropriation*

Bear Creek claimed that Supreme Decree 032 constituted an indirect expropriation of its investment in Santa Ana. The tribunal noted the detailed guidance as to the nature of an indirect expropriation provided in Article 812.1, its footnotes and a related annex. It thereby distilled three factors: economic impact; interference with distinct, reasonable expectations; and the character of the measure at issue. While the tribunal was immediately satisfied that the first two factors were met in the current case, the third factor required detailed examination of Supreme Decree 032 and the circumstances in which it was decided.

According to Peru, the revocation was within its broad remit to exercise police powers—and thus not an indirect expropriation—given reasonable fears that the border crossing with Bolivia would be disrupted by violent protests. In this regard, Peru argued that Bear Creek had actually focused its community relations efforts on a narrow segment of local society and that this was the reason why opposition to the mine grew from strikes and protests to instability, food shortages and poor sanitation.

Bear Creek contended that the protestors were not local and were rather organized by then presidential candidate Ollanta Humala, who was pursuing an anti-foreign investment campaign. According to Bear Creek, it was given no hearing or advance notice of the decree, and the reasons offered were merely politically motivated pretexts for expelling foreign investment.

The tribunal found that “even though the concept of ‘social license’ is not clearly defined in international law” (para. 406), actions to gain social license beyond those Bear Creek undertook would have been possible and feasible. However, ultimately, “the relevant question for the Tribunal is whether Respondent [could] claim

that such further outreach was legally required and its absence caused or contributed to the social unrest, so as to justify Supreme Decree 032” (para. 408).

In seeking to answer this question, the tribunal agreed with the principle in *Abengoa v. Mexico* that, in order for international responsibility of a state to be excluded based on an investor’s omission or fault, it is necessary to prove not only said omission or fault, but also to establish a causal link to the harm suffered. On the evidence, all outreach activities by Bear Creek had been known to Peruvian authorities and were in fact conducted with Peru’s approval, support and endorsement. Given this continuous approval and support, Peru could not, in hindsight, claim that the investor’s conduct was insufficient such that it caused or contributed to the social unrest.

The tribunal proceeded to hold that Supreme Decree 032 constituted an illegal expropriation.

#### *Investor’s other claims reserved in favour of judicial economy*

The investor had also invoked the FTA’s guarantees of fair and equitable treatment (FET) and most-favoured-nation (MFN) treatment. As the parties had not presented arguments related to the legal consequences of an FET or MFN finding, and that such a finding would not change or add to those that follow from the finding of unlawful indirect expropriation, the tribunal declined to make any findings on these additional claims.

#### *Damages limited to sunk costs*

In considering the damages owing to Bear Creek, all three members of the tribunal agreed that it was not possible to calculate damages by relying on the expected profitability of the mine under the discounted cash flow (DCF) method. Expected profit was not relevant in the case of a non-producing, early-stage mine, such as Santa Ana. The task was therefore to assess the value of what Bear Creek had actually invested prior to being expropriated.

It was uncontested that Bear Creek had spent USD 21,827,687 on the project, but Peru argued successfully that this amount included monies spent prior to Bear Creek’s authorization to mine at Santa Ana. The tribunal determined that the USD 3,590,095 spent prior to authorization could not be considered part of the investment, and therefore awarded USD 18,237,592.

#### *One arbitrator dissents on the amount of compensation*

For the dissenting arbitrator, Philippe Sands, the assessment of damages should be reduced because it was “clear that the protests and unrests were caused in part by the Santa Ana Project” (dissent, para. 1).

The International Labour Organization’s Indigenous and Tribal Peoples Convention (ILO Convention 169) was of “particular relevance” (dissent, para. 7). While the majority relied on the position that ILO Convention 169 “imposes direct obligations only on States” (para. 664)

such that private companies cannot fail to comply, for the dissenting arbitrator “the fact that the Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them” (dissent, para. 10).

As in *Urbaser v. Argentina*, the dissenter found that ILO Convention 169, in particular its Article 15 on consultation requirements, could not be overlooked. He concluded that “it is for the investor to obtain the ‘social license’, and in this case it was unable to do so largely because of its own failures” (dissent, para. 37). On this basis, he proposed that the amount of damages should have been cut in half to account for the investor’s contribution to the events leading to Supreme Decree 032.

*Notes:* The tribunal was composed of Karl-Heinz Böckstiegel, (President appointed by the parties, German national), Michael Pryles, (claimant’s appointee, Australian national), Philippe Sands (respondent’s appointee, British national). The award of November 30, 2017 along with the dissenting opinion of arbitrator Philippe Sands are available at <https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf>.

### **Kazakhstan held liable for expropriation of Hourani family’s investment on second round of ICSID arbitration**

*Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13*  
**Mintewab Abebe**

A majority tribunal at the International Centre for Settlement of Investment Disputes (ICSID) awarded Caratube International Oil Company LLP (Caratube) USD 39.2 million plus interest for the unlawful expropriation of its oil contract rights by Kazakhstan.

#### *Background and claims*

The claimants were Caratube and its majority shareholder, Mr. Devincci Salah Hourani, a U.S. national. The dispute arose from an oil exploration and production contract concluded between the Kazakh Ministry of Energy and Mineral Resources and Consolidated Contractors (CCC) in 2002. After a few months, CCC assigned the contract to Caratube. The contract provided for an exploration phase of five years (with possibility of two extensions) and a subsequent production phase. The exploration phase was extended once, in 2007.

Following a recommendation by the prosecutor’s office, the ministry sent notices of breach of contract to Caratube and later terminated the contract unilaterally in January 2008. Kazakhstan alleged that the terminations were due to Caratube’s failure to carry out essential exploration works, amounting to material breaches. The claimants alleged that the termination and subsequent harassments were politically motivated due to the fallout between the president of

Kazakhstan and Mr. Rakhat Aliyev, an associate of the Hourani family.

The dispute gave rise to several proceedings. The *Caratube I* ICSID case under the Kazakhstan–United States bilateral investment treaty (BIT) was dismissed for lack of jurisdiction and ultimately upheld in annulment proceedings. The present claims—for expropriation, fair and equitable treatment (FET), full security and protection, among others—relied on the contract, which includes an arbitration clause, and on Kazakhstan’s Foreign Investment Law (FIL), which contains substantive protections.

#### *Tribunal rejects Kazakhstan’s jurisdictional objections*

First, Kazakhstan argued that Caratube abused process by splitting and bringing repetitive claims, which should have been brought under *Caratube I*. The tribunal held that the initiation of multiple proceedings by itself is not abusive. While the claimants could have raised the present claims previously, the failure was not motivated by bad faith. It accepted that the claimants had a legitimate strategic interest not to bring unnecessary claims under *Caratube I* and held that they failed to meet the high evidentiary threshold of abuse of process.

Second, Kazakhstan contended that the claims were purely contractual, thus governed by the Kazakh statute of limitations. Accordingly, it argued that the claims expired in 2013, and that *Caratube I* did not interrupt the period given that jurisdiction was denied. The claimants maintained that their claims were not subject to domestic law limitations given their international nature. The tribunal found that Caratube acted diligently in initiating the first proceeding and later the annulment proceedings. It held that it is incompatible with international prescription principles to punish a diligent party who acted reasonably on grounds that were not manifestly unfounded.

Third, Kazakhstan argued that issue preclusion (collateral estoppel) and claim preclusion (*res judicata*) barred the claims.

Kazakhstan contended that the issues presented had been decided by the *Caratube I* tribunal. The claimants countered that *Caratube I* rejected jurisdiction exclusively on the basis of the BIT. The tribunal reasoned that, for collateral estoppel to operate, the issues must be identical and fundamental to the dispositive part of the earlier award. It found that *Caratube I* had not finally decided on all jurisdictional issues and that those it decided were not identical to issues in this arbitration. According to the tribunal, the decision on jurisdiction in *Caratube I* depended on the consent-granting instrument—namely, the BIT—which was not the same in the present claims.

Similarly, it rejected the *res judicata* objection, which requires identity of subject matter (the relief sought) and cause of action (the legal grounds) between the proceedings. The tribunal recalled that the fundamental

basis invoked in *Caratube I* was the BIT, in contrast to the contract and the FIL in the present case. Thus, it concluded that there was no identity of claims.

#### *Caratube is an investor as defined under Article 25(2)(b) of the ICSID Convention*

The ICSID Convention requires that the parties agree to submit their disputes to arbitration. Further, Article 25(2)(b) concerning juridical persons requires the host state to treat foreign-controlled local subsidiaries as nationals of another contracting state. Kazakhstan argued that Caratube does not meet these threshold requirements.

Concerning the requirement to treat the investor as a national of another contracting state, the tribunal found that, under the contract, the parties agreed that the “Contractor” would be treated as a foreign national for the purposes of the ICSID Convention. Kazakhstan argued that this provision applied to CCC, Caratube’s predecessor, but did not extend to Caratube, as it is a Kazakh company and a mere assignee of the contract. The tribunal rejected this argument, finding no reason to treat Caratube any differently, particularly given that Kazakhstan approved the assignment of the contract.

As to the foreign control requirement, the dispute was whether that meant effective control or formal (legal) control. Kazakhstan argued that Mr. Hourani did not exercise effective control over Caratube and hence there was no foreign control. The tribunal held that the ICSID Convention does not require actual control and that Kazakhstan did not rebut the presumption that Caratube, being majority-owned by a foreign national, was under foreign control.

Concerning the consent requirement, the tribunal held that Kazakhstan consented when concluding the contract with CCC and later agreeing to the assignment. The tribunal rejected the argument that consent was for claims arising out the contract, but not out of the FIL. It agreed with the claimants that the substantive protections of the FIL are incorporated under the contract.

#### *Caratube had made investments*

The contract states that all of the transactions contemplated under it “shall be deemed to constitute an investment within the jurisdiction of ICISD” (para. 630). Kazakhstan, however, argued that investment has an objective meaning that could not be extended by agreement. The tribunal rejected this argument and held that an agreement regarding the existence of an investment precludes the parties from later challenging ICSID’s jurisdiction based on the alleged absence of an investment. It found no sufficient evidence of unlawful use of U.S. nationality to access the tribunal.

#### *The tribunal does not have jurisdiction over Mr. Hourani’s claims*

The tribunal found that it does not have jurisdiction over Mr. Hourani’s claims, given that the only potentially



available consent-granting instrument—the FIL—was repealed in 2003, over a year before he acquired his shares in Caratube.

*Kazakhstan unlawfully expropriated the existing contractual rights of Caratube*

Caratube argued that the contract was unlawfully terminated due to political motivations while Kazakhstan maintained that termination was due to material breach. The tribunal defined expropriation as (i) unreasonable substantial deprivation of existing rights, (ii) of a certain duration and (iii) caused by a sovereign act of the host state (para. 825). It followed the legal standard of the FIL, which mirrors expropriation standards in customary international law.

The majority held that Caratube had not made any commercial discovery of new oil deposits and thus had no vested right to proceed to the production phase. However, it held that Caratube still had rights under the exploration phase as well as a possibility of fulfilling the requirements to move to the production phase. According to the tribunal, Caratube had the right to perform until the end of the first extension period and the possibility to request a second extension. Further, it held that Kazakhstan failed to establish that any breaches by Caratube were material breaches, and that it failed to give adequate notice of breach.

Noting that the investment was worthless without the contract, and that the deprivation was of a permanent nature with no public interest in view and no payment of compensation, the majority held that Kazakhstan unlawfully expropriated Caratube's investment.

The tribunal also decided that the intervention by the prosecutor's office by sending "recommendations" to the ministry evidenced the sovereign nature of the acts. It found no authority or prior experiences of such intervention by the prosecutor's office. Though the majority found no proof of the alleged politically motivated harassment, it held that the striking coincidence between the termination and the Hourani family's fallout with the state evidenced that the real motivation lay in the family and political context.

Finding that Kazakhstan expropriated the investment, the tribunal found it unnecessary to decide upon claims of other breaches.

*Tribunal rejects all damage claims except sunk investments costs plus interest*

The tribunal rejected the claimants' request for lost profit and opportunity, holding that both claims were uncertain and speculative. It also rejected the moral damage claims due to the alleged harassments that lead to humiliations and loss of reputation as claimants failed to meet the burden of proof.

The majority awarded sunk investment costs of USD 39.2 million plus interest from the January 2008 termination onwards at the LIBOR rate plus 2 per cent,

compounded semi-annually. Each party was left to bear its own legal fees, with arbitration costs split equally.

*Dissenting opinion*

Kazakhstan's nominee, Jacques Salès, dissented on the tribunal findings of expropriation. The dissenter held that the seismic study submitted by the claimants could not establish oil reserves with any certainty. Further, he stated that the prosecutor's conduct was authorized as he was doing his job in upholding enforcement of the law. He also reasoned that sufficient notice was given.

*Notes:* The tribunal was composed of Laurent Lévy (president, appointed by the parties, Brazilian and Swiss national), Laurent Aynès (claimants' nominee, French national) and Dr. Jacques Salès (respondent's nominee, French national). The award of September 27, 2017 is available in English at <https://www.italaw.com/sites/default/files/case-documents/italaw9324.pdf>.

**ICSID tribunal affirms jurisdiction over dispute between Chinese construction firm and Yemen**  
*Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30*  
**Matthew Levine**

An arbitral tribunal constituted under the China–Yemen bilateral investment treaty (BIT) has issued its decision on jurisdiction, accepting that the claimant state-owned enterprise (SOE) could pursue arbitration at the International Centre for Settlement of Investment Disputes (ICSID).

*Background and claims*

The claimant, Beijing Urban Construction Group Co. Ltd. (BUCG), is a wholly state-owned enterprise established under Chinese laws.

Yemen, together with international donors, has been engaged in improving facilities at the Sana'a International Airport for several decades. In 2006 BUCG entered into a contract with the Yemen Civil Aviation and Meteorology Authority (CAMA) to build a new terminal for the airport in the Yemeni capital.

BUCG alleges that, in July 2009, Yemen employed its military forces and security apparatus to assault and detain BUCG's employees and forcibly deny BUCG access to the construction site. Subsequently, again according to BUCG, Yemen used this incident as an excuse for CAMA to terminate BUCG's contract.

In its 2014 request for arbitration and subsequent submissions before the tribunal, BUCG claims that it was expropriated in violation of Article 4 of the BIT.

*Parties disagree over an SOE qualifies as investor*

The ICSID Convention provides a forum for the settlement of investment disputes brought by foreign investors against host states but excludes state-to-state disputes. The Convention, however, does not specifically address the standing of SOEs, such as BUCG.

Yemen submitted that Article 25(1) of the ICSID Convention providing for “a national of another Contracting State” excluded BUCG for two primary reasons: BUCG was under the direction and control of the Chinese government in carrying out its activities, and BUCG was empowered to exercise elements of governmental authority in China.

Yemen further argued that, under Chinese law, SOEs act effectively under the direction and control of the Chinese government and the Chinese Communist Party (CCP), and that this meant that the Chinese government was the ultimate decision maker for BUCG’s operational, management and strategic decisions. In support of its position, Yemen invoked certain features of Chinese law applicable to SOEs generally and BUCG specifically.

BUCG contended that the question of whether or not it qualified under Article 25(1) must be considered in the specific context of the investment that had given rise to the dispute. It argued that its investment in Yemen was made while acting as a commercial enterprise, after participating in a competitive tender, and did not involve the exercise of governmental or public powers. According to BUCG, structural links to the Chinese government and public functions inside China were irrelevant to its standing as an investor at ICSID.

#### *Tribunal affirms jurisdiction over Chinese SOE*

The tribunal agreed with BUCG that the relevant legal question was whether BUCG “functions as an agent of the State in the fact-specific context” (para. 39). For the tribunal, the evidence in the current case did not establish that, “in building an airport terminal in Yemen, BUCG was acting as an agent of the Chinese State in any relevant sense of the word ‘agent’” (para. 39).

In this regard, the tribunal found it particularly noteworthy that “BUCG participated in the airport project as a general contractor following an open tender in competition with other contractors. Its bid was selected on its commercial merits. Its contract was terminated, Yemen contends, not for any reason associated with the PRC’s decisions or policies but because of BUCG’s failure to perform its commercial services on the airport site to a commercially acceptable standard” (para. 40).

The tribunal further found that “the assertion that ‘the Chinese State is the ultimate decision maker’ for BUCG is too remote from the facts of the Sana’a International Airport project to be relevant” (para. 43).

#### *Tribunal accepts jurisdiction over expropriation claims regarding both liability and compensation*

**Similar to other treaties negotiated by China prior to 1998**, the BIT in its Article 10 contemplates ICSID arbitration for “any dispute relating to the amount of compensation for expropriation.”

Yemen argued that the tribunal’s jurisdiction was limited to disputes concerning the calculation of “the amount of compensation” where there is admitted liability by the host state. In contrast, BUCG advocated for a broad interpretation to include assessment of both liability and compensation. BUCG argued that without determining the issue of liability there could be no consideration of quantum.

The tribunal accepted BUCG’s position and found that Article 10 allows an investor to bring expropriation claims relating to issues of both liability and quantum. In this regard, the tribunal found that the ordinary meaning of the words “amount of compensation” was not conclusively in favour of either party’s position. As the ordinary meaning of the BIT was not conclusive, the tribunal’s interpretation moved to consider the context, object and purpose of the BIT.

#### *Yemen’s objection that claims are purely contractual is dismissed*

As a final matter, the tribunal considered Yemen’s objection that BUCG’s claim was purely contractual and thus subject to the exclusive jurisdiction of its contract with CAMA. Consequently, Yemen argued that the tribunal lacked jurisdiction.

BUCG responded that its claims arose under the BIT and were not merely contractual. According to the claimant, the tribunal should apply a *prima facie* test to the facts presented in the claimant’s memorial and that these facts demonstrated that its claims were capable of constituting BIT breaches.

The tribunal found that it indeed had no jurisdiction to resolve claims and counterclaims alleged by the parties on the basis of contractual obligations. It was limited to considering the relief to which the claimant may or may not be entitled under the BIT. The tribunal then found that it had jurisdiction to hear BUCG’s claims to the extent that they arose under the BIT, which was to be considered in the course of the merits phase of arbitration.

*Notes:* The tribunal was composed of Ian Binnie (President appointed by the parties, Canadian national), John Townsend (claimant’s appointee, U.S. national) and Zachary Douglas (respondent’s appointee, Australian national). The Decision on Jurisdiction of May 31, 2017 is available at <http://www.italaw.com/sites/default/files/case-documents/italaw8968.pdf>.

#### **Claims brought by a company controlled by an Egyptian billionaire against Algeria are held inadmissible**

*Orascom TMT Investments S.à r.l. v. People’s Democratic Republic of Algeria, ICSID Case No. ARB/12/35*

On May 31, 2017 a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) held that the claims by Orascom TMT Investments S.à r.l. (Orascom) against Algeria are inadmissible and declined to exercise jurisdiction.

## Background

In 2001 the Egyptian company Orascom Telecom Holdings (OTH) was awarded a public tender to develop a mobile telecom network for Algeria. It started its operation through its Algerian subsidiary, OTA. Orascom acquired OTH and Wind, an Italian telecoms company, in the same transaction in 2005.

Orascom alleged that, starting from 2008, due to a political vendetta against its controlling shareholder—the Egyptian businessman Naguib Sawiris—Algeria took several measures against OTA, including massive tax reassessments, dividend payment restrictions, freezing of bank accounts and a customs blockade. According to Orascom, these harassments forced it to sell OTA in 2011.

In 2010 OTH notified a dispute under the Egypt–Algeria bilateral investment treaty (BIT), and in 2012 it initiated arbitration at a Permanent Court of Arbitration (PCA) tribunal under the rules of the United Nations Commission on International Trade Law (UNCITRAL). In less than a week, another subsidiary, Weather Investments, gave notice under the Italy–Algeria BIT. Later in 2012, Orascom initiated ICISD arbitration under the BIT between the Belgo-Luxembourg Economic Union (BLEU) and Algeria (the BIT). OTH and Algeria reached a settlement agreement and the PCA recorded the settlement in a consent award in 2015.

### *Tribunal affirms that Orascom’s siège social was in Luxembourg*

The BIT definition of investor requires a company to be constituted under the laws of one of the contracting states and have its *siège social* there. The disputed issue was what “*siège social*” meant. Algeria argued that Orascom’s nationality must be determined by reference to Luxembourg’s domestic law, which points to the “real seat”—the company’s place of effective management. Therefore, for Algeria, the real seat is Egypt, where Naguib Sawiris is based. In turn, Orascom submitted that the term embodies an autonomous notion of nationality and means statutory or registered office—Luxembourg.

The tribunal decided that the grammatical and syntactic structure of the BIT and the context in which the term was employed show that “*siège social*” is a treaty-specific requirement. This is in line with the recent *Tenaris and Talta v. Venezuela* award. However, it departed from the reasoning of the *Tenaris* tribunal as well as the *Capital Financial Holdings Luxembourg v. Cameroon* tribunal, both dealing with BITs concluded by Luxembourg. The *Tenaris* tribunal found the term to mean “effective seat,” and the *Capital Financial Holdings* tribunal, “actual headquarters.” The *Orascom* tribunal analyzed the BIT texts in Arabic, Dutch and French, and concluded that all of them establish that it means “registered office.”

Algeria invoked the principle of *effet utile* and argued

that interpreting *siège social* as registered office would render the term superfluous. In the tribunal’s opinion, however, corporate nationality is defined by reference to the place of incorporation, which leads to a single test with two elements: constitution in accordance with local law and registered office. Applying the test, the tribunal found that Orascom’s *siège social* was in Luxembourg and that it therefore qualified as an investor under the BIT. The tribunal found that its decision would have been the same even if nationality were to be established by reference to Luxembourg law, as argued by Algeria.

### *Indirect shareholding constitutes an investment*

Algeria objected to the tribunal’s jurisdiction, arguing that Orascom made no investment within the meaning of the BIT and the ICSID Convention. According to the respondent, Orascom’s mere holding of indirect shares in OTA does not qualify as an investment in the economy and on the territory of the country. It argued that the investment was indirect and remote.

The tribunal established that the term “investment” has the same definitional elements in both the ICSID Convention and the BIT: a contribution or allocation of resources, duration and risk. It found that Orascom made transactions exceeding EUR 1.5 billion in acquiring indirect interest in OTA, and concluded that such indirect shareholding constitutes an investment under the BIT and the ICSID Convention. Furthermore, it held that the ICSID Convention and the BIT protect both minority and indirect shareholdings and do not require active involvement.

In conclusion, the tribunal also rejected Algeria’s argument that the main purpose of the Orascom’s investment in OTA was to acquire the Italian telecom company, Wind, and not to invest in Algeria. The tribunal held that Orascom’s motivations were irrelevant when assessing the existence of the investment, and that what mattered was the existence of a contribution of resources, which Orascom fulfilled.

### *Settlement agreement ended the dispute, and Orascom had no independent loss*

Algeria argued that the claims were inadmissible due to the settlement reached between OTH and Algeria, which ended the dispute under the UNCITRAL arbitration. Orascom contended that both that arbitration and the settlement agreement were irrelevant to the tribunal’s jurisdiction.

The tribunal concluded that the existence of several BITs should not be a leeway for multiple claimants in a vertical ownership chain to bring multiple claims for the same injury. It established that the group of companies to which Orascom belongs was organized under a vertical chain controlled by the same shareholder, and that the measures complained of and damages claimed were identical to those in the UNCITRAL arbitration. It also considered that the agreement put an end to the dispute arising from the alleged measures by Algeria.

Accordingly, it held that, to the extent OTH would have been restored through the UNCITRAL arbitration, all the companies in the chain—including Orascom—were made whole, unless Orascom could prove that it suffered an independent loss. The tribunal found that the settlement agreement in the UNCITRAL case stands in lieu of any forthcoming award under that arbitration, whether the settlement was beneficial or not.

Orascom contended that part of the damages it claimed was independent of OTH's loss. The tribunal analyzed the different heads of damages requested by Orascom, and found that these damages concern the same economic harm OTH claimed in the UNCITRAL arbitration. Furthermore, it found that for damages such as consequential damages, an investor as experienced as Sawiris must have factored in these losses in the sale of its investment. It also dismissed the claim for moral damages given that Orascom is a mere holding company with no reputation to protect.

Finally, the tribunal emphasized that disputes would never be settled amicably if different entities in a vertical chain could bring claims over a dispute already settled by one of the entities. According to the tribunal, this would defeat the purpose of investment treaty provisions encouraging the amicable settlement of disputes.

#### *Right to arbitrate was sold with the investment*

The tribunal agreed with Algeria that, by failing to carve out its right to arbitrate from the scope of the sale of its investments, Orascom waived its right to bring arbitration: the price paid by the buyer included the right to sue for losses.

#### *Pursuit of multiple claims by several entities constituted abuse of rights*

For the tribunal, the pursuit of multiple claims against the host state based on the same harm by several entities in Orascom's vertical chain of companies constituted an abuse of right. According to the tribunal, this contradicts the purpose of investment treaties, which is "to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development." It also risks multiple recoveries, conflicting decisions and wasted resources on proceedings (para. 543).

The tribunal also noted that jurisprudence has evolved over the past 15 years since the widely criticized decisions of *CME* and *Lauder* against the Czech Republic. Both proceedings concerned claims related to the same facts and harm, and resulted in contradictory awards.

#### *Costs and annulment proceedings*

Orascom was ordered to pay the entire cost of proceedings and half of Algeria's legal fees and other expenses. At Orascom's request, an annulment committee was constituted on October 26, 2017.

*Notes:* The tribunal was composed of Gabrielle Kaufmann-Kohler (President appointed by the parties upon the co-arbitrators' proposal, Swiss national), Albert Jan van den Berg (claimant's appointee, Dutch national) and Brigitte Stern (Algeria's appointee, French national). The award is available in English at <https://www.italaw.com/sites/default/files/case-documents/italaw8973.pdf> and in French at <https://www.italaw.com/sites/default/files/case-documents/italaw8977.pdf>.

### **UNCITRAL tribunal dismisses allegations of Hungarian investor's bribery and refuses to set aside contract with Croatia**

*The Republic of Croatia v. MOL Hungarian Oil and Gas Plc, PCA Case No 2014-15*

#### **Trishna S. Menon**

A tribunal under the auspices of the Permanent Court of Arbitration (PCA), constituted under the Rules of Arbitration of the United Nations Commission on Trade Law (UNCITRAL), dismissed Croatia's request to set aside certain agreements with MOL Hungarian Oil and Gas Plc (MOL), which Croatia argued had been obtained through bribery. The award was rendered on December 23, 2016.

#### *Background and claims*

The dispute arose from the privatization of INA Industrija Nafta d.d. (INA), a Croatian state-owned energy company. In 2003, upon Croatia's initiative, MOL, the most significant oil and gas company in Hungary, entered into INA's capital through a Shareholders Agreement (SHA). Around 2009, amendments to the SHA were being negotiated and entered into force on January 30, 2009.

The allegations of bribery pertain to this period. Croatia initiated the UNCITRAL arbitration in January 2014, alleging that its former prime minister, Dr. Sanader, had agreed to accept a bribe of EUR 10 million from MOL's managing director, Mr. Zsolt Hernadi. According to Croatia, the bribe was intended to ease the passage of amendments to the SHA that were detrimental to Croatia but beneficial to MOL. As none of this money was ever received into any account in the name of Dr. Sanader, Croatia had to rely on inferences and the testimony of a witness whose account was strongly denied by MOL and Dr. Sanader. On the ground of bribery, Croatia sought to set aside the amendments concluded with MOL as null and void. In addition, it relied on alleged breaches of Croatian corporate law as a ground to set aside the amendments.

The tribunal was to decide whether the bribe was offered and accepted as alleged, by applying Croatian law. If it found that the bribe took place, it was to decide whether the amendments should be set aside and, if so satisfied, assess Croatia's damages.

#### *Corruption at the heart of ongoing ICSID case initiated by MOL against Croatia under the ECT*

In respect of the same facts, on November 26, 2013 the

investor had initiated a [parallel ICSID arbitration](#) under the Energy Charter Treaty (ECT), *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia* (ICSID Case No. ARB/13/32), which is still pending. MOL's claims of indirect expropriation and violation of the umbrella clause under that arbitration arose out of the alleged failure by Croatia to improve the gas trading business of the company in which MOL had invested, as well as alleged delays and irregularities in granting licences and the criminal prosecution of MOL's chief executive. According to MOL, Croatia's actions breached Article 10(1) of the ECT, particularly, Croatia's failure to fulfil certain obligations and undertakings with regard to MOL's investments. The obligations in question were reflected in the amendments to the SHA and other agreements concluded in 2009.

The issue of corruption, which saw detailed discussion in the UNCITRAL award, lies at the heart of the ICSID arbitration as well. Croatia claimed that as the 2009 agreements were concluded through bribery, MOL never made a valid investment, so the tribunal lacked jurisdiction to hear the case. MOL objected, stating that no convictions to this effect had been achieved, and further alleged that the criminal investigation breached the ECT. The ICSID tribunal denied that MOL's claims were "manifestly without legal merit" and thus [dismissed Croatia's preliminary objections under ICSID Arbitration Rule 41\(5\) on December 2, 2014](#). Even so, the tribunal ruled that Croatia was allowed to raise these arguments in the subsequent stages of the arbitration.

#### *Standard of proof: "Reasonable certainty"*

Croatia submitted that the UNCITRAL tribunal was not required to apply a high standard of certainty, especially in a case where the factual matrix was very complex. MOL, however, considered that under Croatian law, the tribunal was required to apply a high standard of certainty or probability, because of the seriousness of the allegations made in this case. MOL also argued that it was common practice in international arbitration to employ a high standard of proof for allegations of corruption.

The tribunal considered that the ideal standard ought to focus on something between the balance of probabilities and absolute certainty, while at the same time, recognizing that the latter is unobtainable. The tribunal chose, ultimately, to adopt the standard of "reasonable certainty," which Croatia itself put forward.

#### *Shifting the burden of proof to MOL*

Croatia also asserted that the tribunal ought to shift the burden of proof to MOL in accordance with [Metal-Tech Ltd. v. Uzbekistan](#). The tribunal disagreed and noted that the circumstances of the Metal-Tech case were markedly different from this case. The briber in Metal-Tech was actually the claimant, and the tribunal's "reasonable certainty" was based on the testimony from the claimant's CEO himself who admitted having paid USD 4 million to consultants at the time of the investment. Here, by contrast, Croatia's allegations rested upon the testimony

of Mr. Jezic, who was the alleged intermediary between MOL and Dr. Sanader. The tribunal had given Metal-Tech the opportunity to provide evidence of the services supposedly rendered in exchange for these monies, but none was produced. In the absence of an alternative explanation of the claimant's own payment, the tribunal was persuaded of its unlawfulness. The tribunal found that the Metal-Tech case was a contextually specific instance of shifting the burden of proof.

Furthermore, the tribunal found no support for Croatia's assertion that, under Croatian law, the tribunal could shift the burden of proof to MOL. The tribunal held that the burden of establishing this at all times remained with Croatia.

The tribunal ultimately came to the "confident conclusion" that Croatia had failed to establish that MOL did in fact bribe Dr. Sanader. Consequently, Croatia's case that the amendments be rendered null and void due to the alleged bribery failed.

#### *Violation of Croatian corporate law*

As an alternative argument, Croatia contended that if the tribunal were to reject the bribery allegations, it should even so declare them null and void as a matter of Croatian corporate law.

According to Croatia, the structure created by the amendments strengthened MOL's influence as a majority shareholder at three different levels, giving rise to a corporate governance structure that would breach Croatian corporate law. However, the tribunal was of the opinion that Croatia's contention that it entered into a poor agreement with MOL would not suffice to conclude that the FASHA breached Croatian law. The tribunal noted that this issue was beyond its jurisdiction, which was limited to the FASHA and its attached schedules.

#### *Decision and costs*

The tribunal dismissed both of Croatia's claims in relation to bribery and breach of domestic corporate law. The award ordered Croatia to bear the tribunal's and administrative fees, as well as most of MOL's legal and expert fees and other expenses.

*Notes:* The tribunal was composed of Neil Kaplan (presiding arbitrator, jointly appointed, British national), Jakša Barbić (claimants' appointee, Croatian national) and Jan Paulsson (respondent's appointee, Swedish national).

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# resources and events

## Resources

### **Adjudicator Compensation Systems and Investor–State Dispute Settlement**

*By David Gaukrodger, Published by Organisation for Economic Co-operation and Development (OECD) Working Papers on International Investment, November 2017*

Compensation for adjudicators is generally considered a core issue for judicial independence and for attracting good judges in the institutional design for courts. This paper examines compensation systems for adjudicators and dispute settlement administrators in investor–state dispute settlement (ISDS). Comparing approaches in domestic courts in advanced economies, it provides historical context and examines remuneration reform for judges, from private fees to salaries, in the 18th and early 19th centuries. It also addresses the impacts of compensation systems on adjudicators; contemporary approaches to the compensation of judges in advanced economies; and the co-existence in advanced economies of national courts with salaried judges since the early 19th century with generally strong support for commercial arbitration based on ad hoc fee-based remuneration. It compares commercial arbitration and investment arbitration, focusing on the different effects and perceptions of largely similar compensation systems. Available at <http://dx.doi.org/10.1787/c2890bd5-en>

### **Large-Scale Land Investments in Least Developed Countries: Legal conflicts between investment and human rights protection**

*By Montilla Fernández and Luis Tomás, Published by Springer, November 2017*

This book analyzes large-scale land investments for agricultural purposes in Africa's least developed countries from a law and economics perspective. Focusing on the effects of foreign land investments on host countries' local populations and the apparent failure of international law to create incentives to offset them, it examines the legal and economic mechanisms to hold investors accountable in cases where their investment leads to human rights violations. It shows that, where judicial mechanisms fail to deliver justice, international law offers alternatives to safeguard against arbitrary and abusive state and investor conduct, and also to effectuate human rights and, thus, tackle opportunistic behaviour. Available at <http://www.springer.com/gp/book/9783319652795>

### **Towards an Indicative List of FDI Sustainability Characteristics**

*By Karl P. Sauvant and Howard Mann, Published by E15 Initiative, October 2017*

To meet the Sustainable Development Goals and climate change commitments, foreign direct investment (FDI) flows would have to increase significantly. However, the issue is not only more FDI, but the right kind of FDI—what is referred to as “sustainable FDI,” that is, investment that has certain sustainability characteristics. The paper seeks to make an important contribution to the international investment debate by highlighting particular desirable characteristics of FDI, outlining how these can be promoted and encouraged, and providing guidance so that national and international efforts in investment law and policy contribute fully to the achievement of these goals. Available at <http://e15initiative.org/publications/towards-an-indicative-list-of-fdi-sustainability-characteristics>

### **Integrating Sustainable Development in International Investment Law: Normative incompatibility, system integration and governance implications**

*By Manjiao Chi, Published by Routledge, October 2017*

The current international investment law regime is insufficiently

compatible with sustainable development. To better address sustainable development concerns associated with transnational investment activities, international investment agreements (IIAs) should be made more compatible with sustainable development. This book presents an important systematic study of the issue, using conceptual, normative and governance perspectives to explore the challenges and possible solutions for making international investment law more compatible with sustainable development. Chi suggests that reform of the IIA regime should feature redesigning the provisions of the agreements, improving the structure of IIAs, strengthening the function of soft law, engaging non-state actors and enhancing the dispute settlement mechanism. Available at <https://www.routledge.com/Integrating-Sustainable-Development-in-International-Investment-Law-Normative/Chi/p/book/9781138187887>

### **Reconceptualizing International Investment Law from the Global South**

*By Fabio Morosini and Michelle Ratton Sanchez Badin (Eds.), Published by Cambridge University Press, October 2017*

This book shows how the current reform in investment regulation is part of a broader attempt to transform the international economic order. Countries in the North and South are rethinking how economic order can advance their national interests and preferred economic orientation. While some countries in the North seek alternative institutional spaces in order to promote neoliberal policies more effectively, some countries in the South are increasingly skeptical of this version of economic order and are experimenting with alternative versions of legal ordering that do not always align with those promoted by the North. While there are differences in how some North and South countries approach proposed financial regimes, the commonalities could function as the founding pillars of an alternative economic order. The book proposes comprehensive appraisal of international economic law practices being designed in selected developing countries. Available at <http://www.cambridge.org/br/academic/subjects/law/international-trade-law/reconceptualizing-international-investment-law-global-south>

### **Asia's Changing International Investment Regime: Sustainability, regionalization, and arbitration**

*By Julien Chaisse, Tomoko Ishikawa and Sufian Jusoh (Eds.), Published by Springer, October 2017*

This book focuses on the Asia–Pacific region, delineating the evolving dynamics of foreign investment in the region. It examines the relationship between efforts to increase FDI and efforts to improve governance and inclusive growth and development. It emphasizes the need to strike a balance between these domestic and international legal frameworks to promote both foreign investment and the laws and policies necessary to regulate investments and investor conduct. The book addresses four overarching themes: the trends (how Asia-Pacific's agreements compare with recent global trends in the evolving rules on foreign investment), what China is doing, current investment arbitration practice in Asia and the importance of regionalizing investment law in the Asia–Pacific region. In addition, it identifies and discusses the research and policy gaps that should be filled in order to promote more sustainable and responsible investment. Available at <http://www.springer.com/gp/book/9789811058813>

### **The Rise of Agricultural Growth Poles in Africa: Investment in Agriculture Policy Brief #6**

*By Francine Picard, Mohamed Coulibaly, Carin Smaller, Published by IISD, September 2017*

A number of African governments see the emerging agricultural growth poles and corridors as a way to attract private investment to promote agricultural transformation. They are also seen as a way to counter the negative

impacts and publicity that resulted from leasing large tracts of farmland to investors, commonly referred to as “land grabs.” Many attempts to attract responsible and sustainable investment to African agriculture have failed. Ensuring that the new wave of agropoles and growth corridors is effective requires robust policies, laws and practices to ensure that a possible new trend of investment helps Africa achieve the sustainable development goals the continent has set. This paper identifies challenges and opportunities of current agricultural growth poles; outlines the role of laws, policies and institutions; and describes three key stages for the development of a responsible agricultural growth pole. Available at <http://www.iisd.org/library/rise-agricultural-growth-poles-africa-investment-agriculture-policy-brief-6>

### **International Natural Resources Law, Investment and Sustainability**

*Shawkat Alam, Jahid Hossain Bhuiyan and Jona Razzaque (Eds.), Published by Routledge, September 2017*

This work examines the relationship between the institutions that govern foreign investment, sustainable development, and the rules and regulations that administer natural resources. Experts explore how investment and natural resources come together to achieve sustainable development in developing countries, with examples from water, oil and gas, renewable energy, mineral, agriculture and carbon trading. Several themes consider the linkages between natural resources, investment and sustainability. Specifically, transparency, good governance and citizen empowerment are vital conditions that encourage positive social, economic and environmental outcomes for developing countries. The book also provides new insights on international law concepts such as sovereign rights and state responsibility principles. It explores how countries prioritize their policy objectives to achieve their notion of sustainable natural resource use, which is strongly influenced by power imbalances that inform North–South cooperation, as well as South–South cooperation, in international investment. Available at <https://www.routledge.com/International-Natural-Resources-Law-Investment-and-Sustainability/Alam-Bhuiyan-Razzaque/p/book/9781138848702>

### **International Investment Law and Policy in Africa: Exploring a human rights based approach to investment regulation and dispute settlement**

*By Fola Adeleke, Published by Routledge, September 2017*

This book provides a comprehensive analysis of the international investment law regime and current treaty practices in Africa from global, regional and domestic perspectives. Through a public interest regulation approach, it highlights the role of investment regulation in sustainable development and human rights. In doing so, it identifies seven factors that should be considered by arbitrators in resolving investment disputes that affect the public interest. It also considers how investment treaties can hold corporations accountable while protecting the rights of investors. Furthermore, the book explores the objectives and deficiencies of ISDS and its intersection with the rule of law. It identifies alternatives for ISDS and their impacts on attracting investment, depoliticizing investment disputes, promoting the rule of law and offering remedies to investors. It also identifies impacts on human rights, sustainable development and domestic public interest regulation. Finally, the book discusses trends in dispute settlement and investment rulemaking in Africa. Available at <https://www.routledge.com/International-Investment-Law-and-Policy-in-Africa-Exploring-a-Human-Rights/Adeleke/p/book/9781138240629>

### **Investor–State Arbitration and Human Rights**

*By Filip Balcerzak, Published by Brill | Nijhoff, August 2017*

This book examines the interrelations between human rights and international investment law and discusses whether and how human rights arguments may be presented in the course of arbitral proceedings based on investment treaties. The work identifies three model situations, derived from existing arbitral jurisprudence, which provide the backdrop and methodological tools underpinning the book’s legal analysis. The work considers the perspectives of both host states and investors and analyzes all stages of arbitral proceedings—jurisdiction, admissibility, merits, compensation and costs—to determine the potential impact of human rights on the outcome of proceedings. Available at <http://www.brill.com/products/book/investor-state-arbitration-and-human-rights>

## **Events 2018**

### **January 18–19**

**5th ITA-IEL-ICC JOINT CONFERENCE ON INTERNATIONAL ENERGY ARBITRATION**, Institute for Transnational Arbitration (ITA), Institute for Energy Law (IEL) of the Center for American and International Law & the International Court of Arbitration of the International Chamber of Commerce (ICC), in Houston, TX, United States, <http://www.cailaw.org/Institute-for-Transnational-Arbitration/Events/2018/ita-iel-icc-conference.html>

### **February 7–9**

**11th ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS**, Kenya Investment Authority (KenInvest), IISD & South Centre, Nairobi, Kenya, <http://www.iisd.org/event/11th-annual-forum-developing-country-investment-negotiators>

### **March 9–10**

**FRANKFURT INVESTMENT LAW WORKSHOP 2018: INTERNATIONAL INVESTMENT LAW AND CONSTITUTIONAL LAW**, Merton Centre for European Integration and International Economic Order, Goethe University, University of Glasgow & Amsterdam Center for International Law, at Campus Westend, Goethe University, Frankfurt am Main, Germany, [https://www.uni-frankfurt.de/69435674/FILW-2018-IIL-and-Constitutional-Law-Program-final-\\_9\\_.pdf](https://www.uni-frankfurt.de/69435674/FILW-2018-IIL-and-Constitutional-Law-Program-final-_9_.pdf)

### **March 12**

**INTERNATIONAL CONFERENCE: COSTS IN INVESTMENT ARBITRATION: ISSUES AND PITFALLS**, McDermott Will & Emery, Arbitration Institute of the SCC & Goethe University Frankfurt am Main, at Goethe University, Frankfurt, Germany, <http://www.sccinstitute.com/media/228441/frankfurt-seminar-12-march.pdf>

### **April 23–27**

**35th SESSION OF WORKING GROUP III OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL): POSSIBLE REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)**, New York, United States, [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)



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