



## TTIP and Climate Change: Low Economic Benefits, Real Climate Risks

Matthew C. Porterfield and Kevin P. Gallagher



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## feature 1

**TTIP and Climate Change: Low Economic Benefits, Real Climate Risks**

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Climate change governance should inform global governance more broadly—including international trade and investment policy. One of the most important trade and investment agreements is the Trans-Atlantic Trade and Investment Partnership (TTIP)—currently under negotiation between the European Union and United States—given the role the agreement will likely play in establishing rules for the global economy in the 21<sup>st</sup> century.

The current model that the TTIP is based on will increase carbon dioxide emissions and jeopardize the ability of Europe and the United States to put in place effective policies for mitigating climate change. Trade and investment treaties should be used to help achieve the broader climate change objectives of Europe and the United States, not hinder them.

This short brief outlines how the TTIP can increase emissions and restrict the ability of nations to adequately mitigate and adapt to climate change and offers a set of recommendations that would make EU–U.S. trade policy more consistent with our climate change goals.

### 1. TTIP will Increase Carbon Emissions

Given that the United States and Europe already enjoy a strong trade and investment relationship, the economic benefits of the treaty are projected to be relatively small. The most cited studies in the European debates are by Ecorys, the Centre for Economic Policy Research (CEPR) and Tufts University. The first two studies find that the treaty will boost GDP among the parties by less than one percent for the United States and Europe, though the Tufts study finds that the impacts on GDP will be slightly negative in the European Union.<sup>1</sup>

Despite the small projected economic gains of the treaty, the Ecorys study projects that it will increase emissions by 11 million metric tons. The increase in emissions is just 0.07 percent from the baseline, smaller than the 0.47 percent increase in GDP projected by Ecorys. When multiplied by estimates of the social cost of carbon, carbon emissions would cost the European Union US\$1.4 billion annually.<sup>2</sup>

This finding is consistent with the broader literature—

according to a comprehensive assessment of the literature conducted by the World Trade Organization and the United Nations, most trade and investment agreements tend to increase carbon emissions.<sup>3</sup> It should be noted that the Ecorys study is only a partial one because it does not look at the environmental impacts of many “non-tariff barriers” such as certain domestic subsidies. There has also been inadequate consideration of the potential impact of TTIP provisions that could limit the ability of governments to design and implement effective climate change policy. As we will see, it is the deregulatory aspect of the TTIP that poses the highest risk to climate change policy.

### 2. Regulatory Risks of the TTIP

The TTIP could jeopardize the ability of the European Union and the United States to put in place the proper regulations to meet climate targets. The legal effects of the TTIP could take a variety of forms, including broad restrictions on regulatory authority under investor-state dispute settlement (ISDS) provisions, limits on carbon intensity standards, modifications of the U.S. fossil fuel export regime, and restrictions on renewable energy programs.

#### *a. Broad restraints on climate regulations under investment rules*

The TTIP’s investment chapter will likely provide investors with certain broad rights, including “fair and equitable treatment” and compensation for regulations deemed to constitute acts of “indirect expropriation.” These rights would be enforceable by private corporations, including fossil fuel companies, through a controversial process known as ISDS that could be used to challenge a wide range of government measures affecting climate change.<sup>4</sup> Similar rules under other treaties have been used to challenge environment-related measures, including a claim under the Energy Charter Treaty based on Germany’s regulation of a coal-fired power plant<sup>5</sup> and a pending challenge under NAFTA to Quebec’s moratorium on hydraulic fracturing or “fracking.”<sup>6</sup>

#### *b. Limits on carbon-intensity standards*

Regulations that limit the carbon intensity of transportation fuels could also be targeted under the TTIP. United States Trade Representative Michael Froman has reportedly used the TTIP negotiations to pressure the European Union to weaken the carbon intensity standards of the European Union’s Fuel Quality Directive (FQD) in order to facilitate the export of high carbon intensity oil.<sup>7</sup> Although the European Commission subsequently modified the FQD proposal to accommodate the dirtier oil,<sup>8</sup> the TTIP negotiations could be used to impose restrictions on future efforts to implement carbon intensity standards for fuel.<sup>9</sup>

#### *c. Modification of the fossil fuel export regime*

One of the European Union’s principal objectives in the TTIP negotiations is to secure “a legally binding commitment . . . guaranteeing the free export of crude oil and gas resources [from the United States] by transforming any mandatory and non-automatic export licensing procedure into a process by which licenses for exports to the European Union are granted automatically and expeditiously.”<sup>10</sup> Creating an

“automatic” and “expeditious” process for U.S. crude oil and gas exports could result in more greenhouse gas emissions than projected in quantitative analyses by promoting the production and consumption of these fuels.

Although natural gas is widely viewed as a lower-carbon alternative to other fossil fuels such as oil and coal, expanded exports of liquefied natural gas (LNG) could actually result in increased greenhouse gas emissions for several reasons. Liquefying, transporting and re-gasifying natural gas is energy-intensive, causing exported LNG to be approximately 15 percent more carbon-intensive than natural gas that is used domestically. In addition, increased LNG exports will raise the price of natural gas in the United States, potentially resulting in the use of more coal to produce electricity. Expanded LNG exports will also encourage increased fracking for the production of natural gas, which could cause increased accidental releases of natural gas, known as “fugitive methane emissions.”<sup>11</sup> Given that methane is a much more powerful greenhouse gas than CO<sub>2</sub>, “any climate benefits from increased natural gas use internationally could be dwarfed by accelerated warming caused by fugitive methane emissions.”<sup>11</sup>

#### d. Restrictions on renewable energy programs

The TTIP could also conflict with efforts to address climate change by imposing new restrictions on policies designed to promote renewable energy. Trade rules are already being used to challenge alternative energy programs. Since 2010 about a dozen disputes have been brought over renewable energy programs.<sup>12</sup> The European Union has indicated that it intends to use the TTIP negotiations to seek new restrictions targeting renewable energy programs that contain local content requirements.<sup>13</sup> Proponents of local content provisions argue that they are essential for developing the political support that will be necessary to maintain and expand renewable energy programs.

### 3. Putting Climate Change First

At the Paris Summit and in the newly crafted Sustainable Development Goals (SDGs) at the United Nations, the world’s nations have pledged to “take urgent action to combat climate change and its impacts.”<sup>14</sup> The TTIP must not undermine this goal.

Both the European Union and the United States have made strides in prioritizing climate change in other areas of global economic governance, but not in international trade and investment policy. The European Investment Bank and the European Bank for Reconstruction and Development—the European Union’s multilateral development banks (MDBs)—significantly restrict the financing of fossil fuel intensive economic activity. The United States also has executive orders that restrict the ability of the United States to support the financing of coal projects through MDBs of which it is a member, and mandates that all projects be climate resilient. Such an approach is urgently needed in the TTIP.

The negative economic and regulatory impacts of the TTIP on climate policy noted above are not inevitable. A bold approach could be put forth where the TTIP excludes climate mitigation measures from ISDS, protects renewable

energy programs and carbon-intensity standards, and discourages the production and consumption of fossil fuels.

As first steps in striking a new economic relationship that enhances our climate change goals, the United States and the European Union should commit to three principles:

- (1) the potential economic and regulatory impacts of the TTIP on climate policy should be carefully studied,
- (2) the provisions of the TTIP should be fully compatible with and supportive of climate policy objectives, and
- (3) the TTIP should at a minimum, not result in a net increase in greenhouse gas emissions—i.e. the TTIP must be “carbon neutral or better.”

As the SDGs articulate, “climate change is a global challenge that does not respect national borders. Emissions anywhere affect people everywhere. It is an issue that requires solutions that need to be coordinated at the international level.”<sup>13</sup> Trade and investment policy should not be an exception.

#### Authors

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#### Notes

- 1 See Ecorys. (2009). *Non tariff measures in EU-US trade and investment – An economic analysis*, ECORYS Nederland BV; and CEPR. (2013). *Reducing transatlantic barriers to trade and investment*. London: Centre for Economic Policy Research. For a discussion of the limits of CGE modeling, see Ackerman, F., & Gallagher, K. (2004). Computable abstraction: General equilibrium models of trade and environment. In F. Ackerman and A. Nadal (eds.), *The flawed foundations of general equilibrium: Critical essays on economic theory* (168–80). New York: Routledge; and Ackerman, F., & Gallagher, K. P. (2008). The shrinking gains from global trade liberalization in computable general equilibrium models. *International Journal of Political Economy*, 37(1), 50–77.
- 2 European Commission. (2013). *Impact assessment on the future of EU-US trade relations*. EC Staff Working Document (“EC Impact Assessment”), p. 49. Retrieved from [http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150759.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150759.pdf). On the social cost of carbon (SCC), 11 million tons is multiplied by the average estimate in this comprehensive review of estimates J. C. J. M. van den Bergh, & W. J. W. Botzen. (2014). A lower bound to the social cost of CO<sub>2</sub> emissions. *Nature Climate Change*, 4, 253–258.
- 3 World Trade Organization & United Nations Environment Programme. (2009). *Trade and climate change*, p. xii. Retrieved from [https://www.wto.org/english/res\\_e/booksp\\_e/trade\\_climate\\_change\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf)
- 4 See Van Harten, G. (2015). *An ISDS carve-out to support action on climate change*, Osgoode Hall Legal Studies Research Paper No. 38/2015. Retrieved from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2663504](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2663504); Wilinsky, M. (2014, August 7). *Potential liability for climate related measures under the Trans-Pacific Partnership*. Retrieved from [http://web.law.columbia.edu/sites/default/files/microsites/climate-change/wilinskytranspacificpartnership8-7-14\\_-\\_revised.pdf](http://web.law.columbia.edu/sites/default/files/microsites/climate-change/wilinskytranspacificpartnership8-7-14_-_revised.pdf)
- 5 Bernasconi-Osterwalder, N., & Hoffmann, R. T. (2012, June). *The German nuclear phase-out put to the test in international investment arbitration? Background to the new dispute Vattenfall v. Germany (II)*, p. 4. Retrieved from [http://www.iisd.org/pdf/2012/german\\_nuclear\\_phase\\_out.pdf](http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf)
- 6 Lone Pine Resources Inc. v. Canada (UNCITRAL), Notice of Arbitration, paras. 48–52 (Sept. 6, 2013). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf>
- 7 From Inside U.S. Trade (2013, September 19). Froman pledges to preserve Jones Act, criticizes EU Clean Fuel Directive: Froman raised concerns about trade impacts of the FQD “with senior European Commission officials repeatedly, including in the context of the . . . TTIP negotiations.”
- 8 From Inside U.S. Trade (2014, October 14). EU backpedals on vehicle fuels policy in face of U.S., Canadian pressure.
- 9 From Inside U.S. Trade (2014, October 14). EU backpedals on vehicle fuels policy in face of U.S., Canadian pressure: “[O]utgoing EU Climate Action Commissioner Connie Hedegaard . . . signaled that the EU was leaving the door open to directly targeting tar sands . . . for penalties in the future.”
- 10 Council of the European Union. (2014, May 27). *Note for the attention of the Trade Policy Committee—Non-paper on a chapter on energy and raw materials in TTIP*. Retrieved from <http://www.scribd.com/doc/233022558/EU-Energy-Non-paper>
- 11 World Resources Institute. (2013, May 20). *What exporting U.S. natural gas means for the climate*. Retrieved from <http://www.wri.org/blog/2013/05/what-exporting-us-natural-gas-means-climate>
- 12 Cimino, C., & Hufbauer, G. (2014, April). *Trade remedies—Targeting the renewable energy sector*, p. 19. Retrieved from [http://unctad.org/meetings/en/SessionalDocuments/ditc\\_ted\\_03042014Petersen\\_Institute.pdf](http://unctad.org/meetings/en/SessionalDocuments/ditc_ted_03042014Petersen_Institute.pdf)
- 13 European Commission. (2013). *EU-US Trade and Investment Partnership, Raw Materials and Energy: Initial EU Position Paper*, p. 3. Retrieved from [http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151624.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151624.pdf)
- 14 United Nations. (n.d.). Goal 13: Take urgent action to combat climate change and its impacts. *United Nations Sustainable Development Goals*. Retrieved from <http://www.un.org/sustainabledevelopment/climate-change-2>

## feature 2

## Is ISDS in EU Trade Agreements Legal under EU Law?

Laurens Ankersmit



The unique judicial architecture and ambitious political aims of the European Union indicate that it is more than an international organization governed by international law. One of its special features is that its judicial system is open to individuals. Another is that it grants extensive and exclusive powers to EU courts to decide on challenges to EU acts and on challenges by individuals based on EU law.<sup>1</sup> This system was deemed necessary for the proper functioning of the EU internal market, whose ultimate goal is to ensure that EU undertakings can operate under the same conditions throughout the European Union. As a result, the European Union has a legal order that is autonomous of both the domestic Member States' and of the international legal orders.<sup>2</sup>

Both these features make it problematic to introduce an alternative dispute settlement mechanism allowing individuals to challenge EU acts and decisions based thereon. Under EU law, every international agreement concluded by the European Union needs to be compatible with the EU Treaties.<sup>3</sup> This means that an international agreement to which the European Union is a party must comply with the rules in the Treaty on the Functioning of the European Union (TFEU) setting up the European Union's judicial system and the internal market, including the rules on state aid.

The legality of investor–state dispute settlement (ISDS), including in the form of an Investment Court System (ICS), in EU trade agreements under EU law is a contentious issue among academics and legal experts, especially after the European Court of Justice (ECJ) rendered its Opinion 2/13 on the accession of the European Union to the European Convention of Human Rights (ECHR).<sup>4</sup> In that Opinion, the ECJ held that the European Union could not accede to the ECHR, because the powers of the European Court of Human Rights (ECtHR) would undermine the powers of the ECJ, contrary to the EU Treaties.<sup>5</sup> ISDS (including ICS) faces four specific legal problems:

1. ISDS may affect the autonomy of the EU legal order and, in particular, the ECJ's powers to interpret EU law.
2. ISDS affects the exclusive jurisdiction of the EU courts to hear claims for damages.
3. Under no circumstance can ISDS arbitrators or judges determine who the respondent is or decide on the division of competences between the European Union and the Member States.
4. ISDS may negatively affect the completion of the internal market.

This article details these legal objections and closes with

a discussion of the potential for legal challenge of ISDS, including ICS, under EU law.

### 1. The autonomy of the EU legal order

In the context of European human rights law, the ECJ rejected the EU accession to the ECHR, because it would allow the European Court of Human Rights in Strasbourg to interpret EU law without the involvement of the ECJ.<sup>6</sup> This involvement was necessary for the ECJ to ensure that the Strasbourg court would have the correct understanding of EU law.

As a fundamental purpose of ISDS (including ICS) is to enable investors to challenge EU acts and decisions based on these acts, an ISDS arbitral tribunal or an ICS court would have to interpret and give meaning to EU law. Similarly to the context of human rights law, ISDS (including ICS) tends to encroach on the powers of the EU courts to rule on questions of EU law.

The European Commission is well aware of this issue in the context of Member State bilateral investment treaties (BITs). In its *amicus curiae* submission in *Achmea v. Slovakia*, the Commission argued that the arbitration tribunal should decline jurisdiction because “an investor–State arbitral mechanism [...] conflict[s] with EU law on the exclusive competence of the EU court for claims which involve EU law, even for claims where EU law would only partially be affected.”<sup>7</sup>

Similarly, the Commission's legal service wrote in *EURAM v. Slovakia*:

The arbitral tribunal is not a court or tribunal of an EU Member State but a parallel dispute settlement mechanism entirely outside the institutional and judicial framework of the European Union. Such mechanism deprives courts of the Member States of their powers in relation to the interpretation and application of EU rules imposing obligations on EU Member States.<sup>8</sup>

Indeed, one of the objections the German Association of Judges (Deutscher Richterbund) has against the new ICS proposal of the European Commission is that it would alter the judicial architecture of the European Union and affect the powers of the national judges under EU law.<sup>9</sup>

### 2. Article 340 TFEU: Suing the European Union

Another problem related to the EU courts powers is that under EU law the EU courts have exclusive jurisdiction to hear and determine actions seeking compensation for damage brought under the second paragraph of Article 340 TFEU, which covers non-contractual liability of the European Union.<sup>10</sup> In other words, if you want to sue the European Union for damages, you need to go to the ECJ.

ISDS (including ICS) introduces an alternative to such suits for foreign investors, undermining the exclusive nature of the EU courts' powers in claims for damages. Under EU law a claim for damages is an autonomous remedy, but the ECJ limits its use.<sup>11</sup> In particular, actions for damages are inadmissible if they are used improperly as a disguised action for annulment or action for failure to act. An example would be to use an action for damages to nullify the effects of a measure that has become definitive, such as a fine. It is also very difficult, if not impossible, to claim damages for lawful acts.<sup>12</sup> Moreover, the Court is very wary of the potential of a “regulatory chill” if it were to accept damages claims too easily. The Court has held that the “exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests.”<sup>13</sup> Bringing a claim

under ISDS, therefore, has clear advantages for investors over bringing claims before the EU courts, putting a perverse competitive pressure on those EU courts. ISDS tribunals may be less wary of the risk of regulatory risk and, therefore, may be more inclined than the EU courts to decide cases that could potentially chill regulation.

### 3. Determining the respondent

A third legal problem is how the determination of the respondent in a case is made. Under EU trade agreements, an arbitration case may be brought against either the European Union or the Member States. The determination of the respondent, however, encroaches on the determination of competence between the European Union and the Member States. For the ECJ, not only are these two issues treated similarly, they are also fundamentally an internal EU issue that can never be decided by a judicial body operating outside the EU institutional context. In Opinion 2/13 the Court held that:

The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent [that is, the European Union] and respondent [that is, the Member State] respects those rules. To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction.<sup>14</sup>

Both the EU–Singapore Free Trade Agreement and the Canada–EU Comprehensive Economic and Trade Agreement (CETA) violate this requirement by making it possible for arbitrators to determine the respondent in a particular case.<sup>15</sup>

### 4. The proper functioning of the EU internal market

The conflict with EU internal market rules is more diverse and complex, and goes beyond the scope of this article.<sup>16</sup> However, at a fundamental level ISDS (including ICS) is problematic from the perspective of EU internal market law because they provide for a discriminatory remedy that can undermine the proper functioning of those rules. For example, decisions under EU competition law may be challenged and lose their effectiveness. A foreign investor could challenge a decision of the Commission to fine the investor for abuse of dominance under ISDS, in particular where the Commission does not prove actual detrimental effects to the market. These fines can be as high as 30 per cent of the annual sales of an undertaking. While EU courts generally do not require the Commission to take an “economic approach” in its enforcement, greater scrutiny by ISDS arbitrators may impede the effectiveness of the Commission's enforcement powers.

Another clear example is the recent *Micula* case, which concerned a dispute over the requirement to pay back unlawful state aid.<sup>17</sup> Moreover, foreign-owned undertakings established under the laws of a particular Member State would have recourse to ISDS, whereas undertakings from other Member States in a similar situation would not, potentially breaching the rules on free movement of services, establishment, and capital.<sup>18</sup> The unique aspect of the EU internal market rules is that they have constitutional status, which makes them superior to rules contained in EU trade agreements.<sup>19</sup>

### Legal challenge of ISDS under EU law

There are two main ways in which ISDS (including ICS) can

be challenged before the ECJ. The first option is to request the Opinion of the ECJ on the compatibility of an “envisaged” agreement with the EU Treaties on the basis of article 218 (11) TFEU. This procedure is only open to Member States, the Commission, the Council and the European Parliament, and is designed to prevent legal complications if the European Union concluded an agreement that is not compatible with the EU Treaties. This option is available while the Council has not yet taken a decision to conclude an agreement. Where the opinion of the ECJ is adverse, the envisaged agreement may not enter into force unless it is amended or the Treaties are revised. In light of the large number of free trade agreements the Commission is currently negotiating, this option is currently available for a number of these agreements.

Another option is to challenge before the ECJ the Council decision concluding an international agreement containing ISDS or ICS. However, only one EU agreement containing ISDS is currently in force: the Energy Charter Treaty. Moreover, it is very difficult from a procedural perspective to challenge such a decision under EU law due to the rules on standing in the European Union and its Member States. Potentially, therefore, the question of legality of ISDS or ICS in particular may never arise before the ECJ. If it does, it may have significant consequences for the future of investment law in Europe.

### Author

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### Notes

<sup>1</sup> These courts are both the courts of the Member States and the courts of the Court of Justice of the European Union. Individuals can seek a EU remedy at the Court of Justice of the European Union directly (through direct actions) or at the courts of the Member States which can make a preliminary reference to the Court of Justice on the basis of Article 267 of the Treaty on the Functioning of the European Union (TFEU). See Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] TFEU O.J. C326/01 art. 267. Retrieved from <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:12012E/TXT>

<sup>2</sup> Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.

<sup>3</sup> TFEU art. 218 (11).

<sup>4</sup> See footnote 5 in Ankersmit, L. & Hill, K. (2012, October 22). *Legality of investor-state dispute settlement (ISDS) under EU law*. Retrieved from <http://www.clientearth.org/health-environment/health-environment-publications/legality-of-investor-state-dispute-settlement-under-eu-law-3020>

<sup>5</sup> Opinion 2/13 *Accession to the ECHR* [2014], paras. 246–247. Retrieved from <http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN>

<sup>6</sup> *Ibid.*, paras. 246–247.

<sup>7</sup> As quoted by the arbitration tribunal in *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (award on jurisdiction 7 December 2012), para. 193

<sup>8</sup> European Commission, *Amicus Curiae* submission in *European American Investment Bank AG (EURAM) v. Slovak Republic* (13 October 2011) SJ.i.dir (2011) 1154556.

<sup>9</sup> Deutscher Richterbund. (2016, February). *Stellungnahme Nr. 04/16: Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015*. Retrieved from <http://www.dr.b.de/cms/index.php?id=952> (in German only)

<sup>10</sup> Case C-377/09 *Hanssens\_Ensch v. European Community*, para. 17.

<sup>11</sup> Lenaerts, K., Maselis, I., & Gutman, K. (2015). *EU procedural law*. Oxford: Oxford University Press, p. 490.

<sup>12</sup> Joined cases C-120/06 P and C-121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and others v Council and Commission* [2008] ECR I-6513, paras. 164–169.

<sup>13</sup> *Ibid.*, para. 174.

<sup>14</sup> Opinion 2/13 *Accession to the ECHR* [2014], para. 234.

<sup>15</sup> See art. 19 (3) EUSFTA, art. X20 CETA. Commission has addressed this problem in its TTIP proposal.

<sup>16</sup> For more detail, see Ankersmit, L. & Hill, K. (2012, October 22). *Legality of investor-state dispute settlement (ISDS) under EU law*. Retrieved from <http://www.clientearth.org/health-environment/health-environment-publications/legality-of-investor-state-dispute-settlement-under-eu-law-3020>

<sup>17</sup> Case T-646/14 *Micula and Others v Commission* (pending), see also *Micula v Romania* (ICSID arbitration award) (Case SA.38517) and Commission Decision C/393/2014 [2014] OJ C 393/27.

<sup>18</sup> The right of establishment (article 49 TFEU), the right to receive and provide cross-border services (article 56 TFEU) and the provision on free movement of capital (article 63 TFEU) guarantee non-discriminatory treatment. These provisions apply to the EU institutions as well as to Member States.

<sup>19</sup> The cornerstones of EU internal market law are the so-called four freedoms: the free movement of goods, persons, services and capital. These can be found in articles 34, 45, 49, 56, and 63 TFEU. The EU competition rules, enshrined in articles 101–109 TFEU are also part of EU internal market law.

## feature 3

# State Strategies for the Defence of Domestic Interests in Investor–State Arbitration

Julia Calvert



Several countries are now well experienced in investor–state dispute settlement (ISDS) and have had some success in defending domestic interests from investor claims based on international investment agreements (IIAs). This article discusses legal defence strategies employed by Argentina and Ecuador in disputes with investors active in utility and oil sectors respectively. While the nuances of these disputes cannot be covered adequately here, my intention is to distil lessons from prior experiences that could benefit countries—particularly in the developing world—as they devise their future legal defence strategies.

## 1. Argentina<sup>1</sup>

Argentina is the most frequent respondent state to ISDS cases,<sup>2</sup> most of which stemmed from the emergency measures adopted in the wake of the country's 2001 economic crisis. These measures froze unregulated utility tariffs and devalued the Argentine peso, which had been pegged to the U.S. dollar. As a result, contracts signed with foreign investors significantly devalued while investors' debt remained high. At least 44 known treaty-based claims were brought against Argentina in response, all but 4 of which under the International Centre for Settlement of Investment Disputes (ICSID). Utility operators alone brought 29 cases; the water and sanitation services sector initiated 9; electricity and gas distributors, 20.

A handful of cases were brought against Argentina in the years preceding the crisis, which revealed to state officials the extent to which the country was ill prepared to address investor claims. Few state lawyers had extensive knowledge of ISDS proceedings. A legal team was established under the State Attorney General to deal exclusively with the cases while the national and provincial governments created commissions to renegotiate contracts with affected foreign investors. Most foreign investors brought claims as a means to gain leverage in the negotiations. Upon Néstor Kirchner's election in 2003, emphasis was placed on giving incentives to foreign investors to drop ISDS claims using the promise of new contracts. Most new contracts allowed foreign investors to increase tariffs charged to wealthy and industrial sectors in exchange for a commitment to keeping tariffs artificially low for poorer consumers and withdrawing ISDS claims. This compromise allowed state officials to secure access

to basic services for poorer households—a vital policy goal given the unrest amongst poorer sectors of society—while enabling investors to maintain their investment's viability. This strategy was most effective with investors wanting to continue their operations in Argentina while minority shareholders and investors that exited the market were more inclined to maintain their arbitral claims.

Where renegotiations failed, Argentina defended its regulatory choices case by case. Central to its legal strategy was the state of necessity defence provided for under some bilateral investment treaties (BITs) and customary international law. This defence exempts actions taken by states in response to extraordinary circumstances from the substantive protection of the treaties. State lawyers argued that foreign investors must bear a part of the adjustment burden as domestic investors and citizens had done. Such measures, they argued, were also necessary to ensure citizens' access to basic services, particularly clean water, which is a human rights obligation. As observed by Peterson,<sup>3</sup> arbitrators responded inconsistently. The *CMS v. Argentina* tribunal ruled that the crisis did not meet the requirements of a state of necessity and awarded CMS US\$133.2 million. In *LG&E v. Argentina*, however, the tribunal found that Argentina had no obligation to foreign investors during that period.<sup>4</sup>

Argentina also sought annulments on all awards rendered against it and insisted that such awards be reviewed by its domestic courts at the investor's expense. This latter facet of Argentina's strategy has been particularly controversial, drawing protest from foreign investors and their home countries. In 2012, the United States suspended Argentina's preferential trade status and blocked its access to World Bank loans in retaliation to Argentina's refusal to pay awards after investors failed to submit them to Argentine courts. Argentina has since agreed to pay the outstanding awards in the form of government bonds at a discounted rate. Argentina's in-house legal team has enhanced its effectiveness over time according to its corporate opponents. Indeed, the team successfully overturned awards rendered in three of five cases in which arbitrators unanimously rejected Argentina's necessity defence, including a US\$106 million award rendered in favour of Enron in 2007.<sup>3</sup> Argentina's strategy helped reduce the cost of awards and better time award payment while building the state's technical capacity to address future investor claims.

## 2. Ecuador<sup>5</sup>

Ecuador has faced 22 known ISDS cases, many of which were brought by foreign-owned oil firms after attempts to restructure the country's oil sector. An extensive privatization process undertaken in the 1990s resulted in profits flowing to private oil companies while poverty rates persisted. In 2001, Ecuador announced that oil companies would no longer receive reimbursements on value added tax (VAT), resulting in treaty claims by Occidental, Repsol and Encana. This was followed in 2006 by amendments to Ecuador's Hydrocarbons Law, which placed a 50 percent tax on oil exports when prices exceeded a benchmark

level. As oil prices rose, the government faced pressure to exact greater benefits from oil exploitation. Once Rafael Correa came to power, the Hydrocarbons Law was amended again (in 2007) to increase the windfall tax to 99 percent. Correa's objective was to use the threat of the windfall tax to incentivize companies to agree to a new contract model that extended government control over production. This resulted in claims by Burlington, Perenco, and Murphy Exploration. Additional claims were brought in 2006 by Chevron in response to a class action suit lodged by residents of the Amazon rainforest and again by Occidental after the termination of its concession contract.

Ecuador was also ill equipped to address its early ISDS cases. Much of the country's legal defence was contracted out to prestigious law firms in the United States and United Kingdom, which operated under the close eye of Ecuador's executive branch. Though many cases are pending, contradictions in available rulings reveal the importance of provisional wording in IIAs. For instance, in the VAT disputes, Occidental was awarded US\$75 million after arbitrators found Ecuador failed to provide a transparent and predictable framework for planning. The *Encana* tribunal, however, ruled that foreign investors had neither the right nor legitimate expectation that the tax regime would not change over the life of its contract.<sup>6</sup> This contradiction is due to arbitrators' interpretations of subtle variations in BIT exemptions related to matters of taxation. Ecuador was also held liable for expropriation in Occidental's second claim and ordered to pay the company US\$1.77 billion.

These cases are heavily politicized in Ecuador, and civil society groups actively monitor the proceedings. Accordingly, Ecuador has taken a strict stance on transparency, regularly publishing information about the costs and progress of cases on government websites. The government has also used media outlets to chastise companies that bring arbitral claims. This has helped strengthen support for the country's withdrawal from its IIA obligations. In 2008, Correa notified ICSID that it would not consent to arbitration over matters involving its oil sector, but arbitrators dismissed the notification.<sup>7</sup> Ecuador then insisted that oil companies surrender their right to ICSID jurisdiction in new contracts signed. The same year, Ecuador enacted a new constitution with an article forbidding the government from ceding sovereign jurisdiction to international arbitration entities outside Latin America. This clause provided a basis for the termination of Ecuador's existing IIAs with smaller Latin American, Caribbean, and European economies and its withdrawal from the ICSID Convention. Both initiatives received popular support in the National Assembly. The termination of Ecuador's remaining IIAs has been put on hold pending a final report by a Citizen's Audit Commission established to develop recommendations on the remaining agreements.

The termination of IIAs is not automatic as most agreements continue to have effect for 10 or 20 years after cancellation. Ecuador's withdrawal from IIAs and ICSID is best understood as a symbolic protest against the systemic injustices of the existing ISA regime and as an attempt to create greater space for the future

advancement of the government's development agenda.

## Discussion

While both examples demonstrate the risks of signing on to IIAs, they also demonstrate that investors are not always successful in leveraging the rights IIAs provide them. Indeed, the strategies governments adopt inside and outside of legal venues play an important role in mitigating the costs of investment disputes. Government breaches of perceived IIA obligations do not automatically deter investors from staying or investing in the market. Foreign investors with interests in maintaining or expanding their investments in the host market appear to be more susceptible to the use, by host governments, of domestic pressures aimed at thwarting ISDS claims, whereas minority shareholders or those exiting the market are better addressed within the confines of the legal system. Governments' defence strategies must therefore be attuned to the long-term interests of the claimants they face.

The contestation of investment rules in both countries has been informed by suspicion of systemic bias in current ISDS proceedings. Both countries are working to establish an alternative dispute resolution body under the auspices of the Union of South American Nations (UNASUR) that is expected to include stronger transparency requirements and an appellate mechanism, and to encourage local and regional dispute settlement. However, whether Argentina will continue with this initiative under its newly elected government is questionable, given Macri's commitment to creating a favourable investment climate. Ecuador has also strengthened collaborative efforts with Latin American and Caribbean partners, notably by establishing the Southern Observatory on Transnational Corporations, which is meant to facilitate information sharing on defence strategies while providing training to government officials. Both Ecuador and Argentina's experiences demonstrate the importance of institutional capacity, and the Observatory is a positive first step. However, there is a need to further strengthen South-South cooperation on matters related to investment disputes both within and outside of the Latin American region.

## Author

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## Notes

- 1 This section is informed by interviews with former members of the State's Attorney General Office, corporate legal representatives and government officials conducted in Buenos Aires from January to May 2014.
- 2 United Nations Conference on Trade and Development (UNCTAD). (2015, February). Recent trends in IIAs and ISDS, *IIA Issues Note, 1*. United Nations: Geneva, p. 5. Retrieved from [http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf)
- 3 Peterson, L. E. (2012, January 29). Latest split amongst ICSID arbitrators over Argentina's necessity defence reflects wide chasm," *Investment Arbitration Reporter*.
- 4 See *CMS Gas Transmission Company v. Republic of Argentina*, Award, ICSID, Case No. ARB/01/8 (September 8, 2005) and *LG&E Energy Corp. v. Republic of Argentina*, Award, ICSID, Case No. ARB/02/1 (July 25, 2007).
- 5 This section is informed by interviews with members of the State's Attorney General Office, corporate legal representatives and government officials conducted in Quito in October 2014.
- 6 See *Occidental Exploration and Production Company v. Republic of Ecuador*, Award, London Court of International Arbitration (LCIA), Case No. UN3467 (July 1, 2004); *Encana Corporation v. Republic of Ecuador*, Award, LCIA, Case No. UN3481 (February 3, 2006), pp. 49–50.
- 7 See *Murphy Exploration v. Republic of Ecuador*, Decision on Jurisdiction, ICSID, Case No. ARB/08/4 (December 15, 2008), p. 86.

## news in brief

### Trans-Pacific Partnership agreement signed in Auckland; UN independent expert calls on states to safeguard regulatory space

On February 4, 2016, trade ministers from twelve Pacific Rim nations met in Auckland, New Zealand, to sign the **Trans-Pacific Partnership** (TPP) agreement.

On the eve of the meeting, UN Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, called on governments to issue an interpretative declaration on TPP, reaffirming their commitments to human rights obligations and to the Sustainable Development Goals.

In his **statement** of February 2, 2016, Zayas indicated that the TPP “is fundamentally flawed and should not be signed or ratified unless provision is made to guarantee the regulatory space of States.” He recalled that the agreement resulted from “secret negotiations without multi-stakeholder democratic consultation,” and would be signed despite “enormous opposition by civil society worldwide.” The expert said that the agreement’s compatibility with international law should be challenged before the International Court of Justice.

In a report published in August 2015, **Zayas had recommended** abolishing the existing investor–state dispute settlement (ISDS) system.

### Ecuador’s audit on investment treaties: CAITISA reports leaked

Three reports by **CAITISA**, Ecuador’s citizen audit commission on bilateral investment treaties (BITs), were leaked by online newspaper **Diagonal** on January 24, 2016. CAITISA, formed by experts in foreign investment and international law, was created in 2013 by President Rafael Correa to examine the legitimacy and legality of Ecuador’s BITs and the impact of their application. The commission concluded its work in December 2015.

In the report on **Final Recommendations**, CAITISA recommends that Ecuador denounce its BITs and negotiate new instruments, whether specific contracts with foreign investors or investment treaties. These new instruments should not include any of the old-style exception protection clauses except for clauses on direct expropriation. In addition, they should include state rights and investor obligations.

In its observations on international investment arbitration, CAITISA recommends excluding the clause on investor–state dispute settlement (ISDS) from existing and future BITs, and prioritizing adjudication by domestic courts. It also advances proposals for a transition period, which include: prohibiting compound interest in damages awards, providing for exhaustion of local remedies, enhancing transparency in proceedings, limiting arbitrator fees, issuing interpretive statements, creating an appellate mechanism, and establishing a permanent international or regional investment court, with permanent judges.

### Standing tribunal included in European Union–Vietnam FTA

On December 2, 2015, the European Union and Vietnam

signed a free trade agreement (FTA), closing three years of negotiations. The text, made public on February 1, 2016, includes the more traditional trade issues, including SPS and TBT, and trade facilitation, but also extends to other issues such as government procurement, competition policy, intellectual property, cooperation and capacity building, state-owned enterprises, and transparency. Like other recent EU treaties, it also contains a chapter on sustainable development covering both labour and environmental issues.

The **investment chapter** adopts the European Union’s emerging approach to investment protection. It also includes a new type of investor-state dispute settlement mechanism, consisting of a standing nine-member tribunal to hear cases at first instance and a permanent six-member appeal tribunal.

### Germany’s judges and public prosecutors reject proposed investment court system in TTIP

In a statement issued in early February 2016, the German Association of Judges (known by its German acronym, DRB) firmly rejected the **proposal published by the European Commission** on September 16, 2015 to establish an Investment Court System (ICS) under the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States.

The DRB saw no need for the proposed ICS, as existing judicial systems in EU member states guarantee access to justice and grant effective protection to foreign investors. It argued that, even if that were not the case, the issue should be addressed by national parliaments. For the DRB, creating special courts is not the proper way to guarantee legal certainty.

The statement also questioned whether the European Union has the legislative competence to create an investment court. It pointed out that the proposed court would limit legislative powers and alter the existing court system, both in the European Union and in member states.

Finally, the statement criticized the proposed procedure and criteria for appointing ICS judges, which would not meet the international requirements for technical and financial independence. According to the DRB, the pool of judges would tend to be limited to persons already involved in international investment arbitration, and ICS would emerge as a permanent arbitration facility rather than as an international court.

The DRB, founded in 1909, is Germany’s largest professional organization of judges and public prosecutors. The official **text of DRB Opinion No. 04/16** is available in German only.

### Commission attempts to reopen CETA negotiations with Canada to revisit ISDS

EU officials are said to have requested the new Canadian federal government to revisit the ISDS clause in the Comprehensive Economic and Trade Agreement (CETA), according to **reports by CBC News** on January 21, 2016. CETA negotiations were announced as concluded in August 2014. The **CETA** provides for a more traditional-style ISDS mechanism, which is not in

line with the European Union’s new approach on a more permanent investor–state mechanism. As it currently stands, the text is seen as unlikely to be approved by the European Parliament.

### UNASUR Arbitration Centre one step closer to being established

On January 19, 2016, experts from the Union of South American Nations (UNASUR) met in Montevideo, Uruguay, to finalize **agreements regarding the proposed regional centre** for the settlement of investment disputes. UNASUR is a regional intergovernmental organization of the 12 South American nations: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

The text establishing the dispute settlement centre, not yet public, was negotiated by foreign ministers, general attorneys, and finance ministers in the region, in consultation with central banks. Once approved by the 12 states, the proposed centre could emerge as a regional alternative to the International Centre for Settlement of Investment Disputes (ICSID).

### TransCanada initiates NAFTA arbitration against the United States over rejection of Keystone XL pipeline\*

On January 6, 2016, TransCanada initiated arbitration against the United States for “unreasonably delaying approval” of the proposed Keystone XL pipeline and ultimately denying, in November 2015, the company’s application for the required Presidential Permit. Alleging the United States breached its non-discrimination, expropriation, and fair and equitable treatment commitments under the North American Free Trade Agreement (NAFTA), the Canadian company **seeks damages** of over US\$15 billion.

The Keystone XL pipeline, which would carry crude oil from the Canadian province of Alberta to U.S. ports in the Gulf of Mexico, became a contentious political issue in the United States. Environmentalists pointed to the carbon-intensity of extracting oil from the Alberta tar sands, and argued that the pipeline would run counter to the country’s efforts to reduce fossil fuel reliance. Meanwhile, Republican lawmakers and several U.S. states supported the project.

In its Notice of Intent, TransCanada highlighted that the application review lasted significantly longer than the average for such a pipeline. The **Obama Administration admitted** the review lasted longer because the pipeline became politicized. In a **statement after rejecting the application** on November 6, 2015, President Obama explained: “America is now a global leader when it comes to taking serious action to fight climate change. And frankly, approving this project would have undercut that global leadership.”

On the same day it initiated arbitration, TransCanada also filed suit against U.S. federal authorities in a U.S. court, **claiming** Obama’s rejection of the application exceeded the president’s constitutional powers and lacked authorization by Congress. This U.S. court case is in addition and parallel to the NAFTA case, which is expected to take several years to resolve. The United

States has never lost a challenge under NAFTA’s investment chapter to date.

### Philip Morris fails in PCA arbitration against Australia over plain packaging laws

On December 17, 2015, a tribunal at the Permanent Court of Arbitration (PCA) issued its jurisdictional award in the case of tobacco giant Philip Morris against Australia over the country’s tobacco plain packaging legislation. According to the **PCA website**, the award will be made available to the public once any confidential information has been redacted. Philip Morris admitted in a **news release** that the tribunal dismissed jurisdiction over the case. Accordingly, the tribunal did not rule on the merits.

Australian Senator Peter Whish-Wilson **welcomed the result** as a victory, commending plain packaging as an effective public policy tool. However, he cautioned that Australia is not free from similar challenges by foreign corporations under ISDS mechanisms contained in its trade and investment agreements with China, Korea, and the United States. “ISDS is the Damocles Sword hanging over Australia’s sovereignty and our right to legislate in the public interest,” he said. The Senator also indicated that the successful defence against Philip Morris reportedly cost Australian taxpayers US\$35 million.

### European Commission gives in to pressures for increased transparency of TTIP texts

All 751 Members of the European Parliament (MEP) will have comprehensive access to all confidential documents relating to TTIP negotiations. The **Parliament announced the agreement** with the European Commission on December 2, 2015, after 11 months of negotiations. Under the **operational arrangements**, MEPs will be able to read the restricted “consolidated texts”—which reflect EU and U.S. compromises—in a secure reading room at the European Parliament, as well as take handwritten notes.

On December 4, EU Trade Commissioner Cecilia Malmström **announced** that reading rooms would be established in the capitals of all 28 EU Member States to allow national members of Parliament (MPs) to analyze the consolidated texts. The announcement was made as the Commissioner spoke to the President of the German Bundestag, Norbert Lammert, addressing the requests he had made in 2015 for access to the documents by German MPs.

A week before the two announcements, **The Guardian** had obtained documents allegedly revealing that the Commission had given U.S. oil company ExxonMobil access to confidential EU strategies in TTIP negotiations. The Commission **denied** the allegations.

\*The editorial team acknowledges, with many thanks, the contribution of Jacob Greenberg, Geneva International Fellow from University of Michigan Law and an intern with IISD’s Investment for Sustainable Development Program.

# awards and decisions

**ICSID tribunal dismisses final claim for compensation in relation to Hungary's 2008 termination of power purchase agreement**  
*Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/1*  
**Matthew Levine**

A Belgian energy company—Electrabel S.A. (Electrabel)—has failed in its final claim under the Energy Charter Treaty (ECT). An International Centre for Settlement of Investment Disputes (ICSID) tribunal has found no breach of the ECT's fair and equitable (FET) treatment standard by Hungary.

In 2012 the ICSID tribunal had issued a decision dismissing three minor claims and postponing the fourth, major claim for a second phase of proceedings. The 2015 award (Award) orders Electrabel to cover the fees of the arbitration.

## *Background*

In 1995 Dunamenti (operator of Hungary's largest power plant, then wholly-owned by Hungary) and MVM (Hungary's sole wholesale electricity buyer, 99.9 percent owned by Hungary) entered into a Power Purchase Agreement (PPA). Subsequent to the PPA, a group of foreign investors, including Electrabel, invested substantial funds in Dunamenti as shareholders.

Hungary acceded to the European Union in 2004. Between December 2005 and June 2008, the European Commission conducted a formal investigation into unlawful state aid provided by Hungary under, among other instruments, the PPA. In June 2008, the European Commission issued a final decision in relation to the investigation (EC Final Decision). In December 2008 Hungary terminated the PPA.

In June 2007 Electrabel commenced the present arbitration in anticipation of the PPA's termination. In March 2009, on the initiative and agreement of the parties, the tribunal ordered a first phase of proceedings addressing only issues of jurisdiction and liability. This procedural order also contemplated a second phase of proceedings to address quantum issues. Of note, the European Commission intervened in the first phase of proceedings to argue that Electrabel's claims did not fall within the jurisdiction of an international arbitral tribunal, as they were understood to be exclusively covered by European law.

At the end of November 2012, the tribunal issued its Decision on Jurisdiction, Applicable Law and Liability (2012 Decision). The tribunal found its own jurisdiction in relation to all of Electrabel's claims under the ECT. With regards to liability, the tribunal dismissed three

minor claims brought by Electrabel and dismissed all grounds for liability under the claimant's fourth and final claim—the PPA Termination Claim—with one exception, namely, that Hungary had failed to provide FET in calculating costs incurred by Electrabel for the purpose of granting compensation.

In early 2015, arbitration proceedings initiated by E.D.F. International in relation to a similar investment in Hungary resulted in an arbitration award. Electrabel and Hungary made short written submissions regarding the *E.D.F.* award.

## *The 2012 Decision: PPA Termination Claim*

In the first stage of proceedings, the tribunal considered the PPA Termination Claim in relation to both ECT Article 13(1) (expropriation provision) and ECT Article 10(1) (FET provision). The tribunal found that there had been neither direct nor indirect expropriation of Electrabel's investment.

In relation to Hungary's alleged failure to provide FET, the tribunal briskly dismissed Electrabel's claim in relation to events prior to the EC Final Decision. It found, rather, that Electrabel's claim turned primarily on results of the European Commission investigation. "In the Tribunal's view, that [EC] Final Decision required Hungary under EU law to terminate Dunamenti's PPA, as explained below. The Tribunal also draws a distinction between the [EC] Final Decision in regard to recoverable State aid and Hungary's own scheme for calculating Stranded Costs (with Net Stranded Costs)" (para. 6.70).

In the Decision, the tribunal therefore concluded that Hungary could only be liable in the present arbitration under ECT Article 10(1) for its application of EU law in determining Electrabel's stranded costs for the purpose of compensation. While the methodology prescribed under EU law resulted in a range of values, Electrabel was disappointed to have been compensated the minimum amount under that methodology.

## *The 2015 Award: Fair & Equitable Treatment (FET) in calculating Net Stranded Costs*

In the Award the tribunal considered Hungary's implementation of the European Commission's methodology for calculating Net Stranded Costs to determine whether it violated ECT Article 10(1).

The tribunal explained that both Stranded Costs and Net Stranded Costs are terms of art in EU law. In considering whether Hungary's calculation of Electrabel's Net Stranded Costs ran afoul of Hungary's obligations under ECT Article 10(1), the tribunal noted that it had already rejected, in the 2012 Decision, any allegation of discriminatory measures, and that

Electrabel made no allegations regarding either lack of transparency or due process.

Therefore, as put concisely by the tribunal, the principal issues arose in regard only to arbitrariness and frustrated legitimate expectations. In general it was Electrabel that bore the burden of proving its case under the ECT's FET standard.

#### *Absence of arbitrariness*

In terms of Electrabel's claim of arbitrariness, the tribunal applied an objective test in the circumstances prevailing at the relevant time. The tribunal found itself in agreement with previous tribunals, such as *Saluka*, *AES*, and *Micula*, in that a measure will not be arbitrary if it is reasonably related to a rational policy. And, following the *AES* tribunal especially, this required two elements: the existence of a rational policy and the state acting reasonably in relation to that policy.

The tribunal considered the following arguments by Electrabel, among others: first, Hungary's decision as to the level of compensation was driven by a desire to minimize the associated burden on the national budget; and second, Hungary had decided against compensation even before the extent of losses resulting from the PPA's termination could have been known.

The tribunal noted that Hungary's scheme was not devised by the Hungarian Parliament for Dunamenti alone, but for an entire industrial sector. It also noted that these had been turbulent economic times, with Hungary's economy facing severe financial and fiscal constraints. Relevant negotiations were difficult and protracted. The tribunal observed that it would be all too easy, many years later with hindsight, to second-guess a state's decision and its effect on a single entity such as Dunamenti, when the state was required at the time to consider much wider interests in awkward circumstances, balancing different and competing factors. Further, even as regards only Dunamenti, Hungary sought to balance several appropriate considerations.

Ultimately, the tribunal found that Electrabel had not proven that "Hungary's conduct was arbitrary or that there was no legitimate purpose for Hungary's conduct or that Hungary's conduct bore no reasonable relationship to that purpose or was, in another word, disproportionate" (para. 168).

#### *Lack of legitimate expectations*

As regards legitimate expectations under the ECT's FET standard, the tribunal found no evidence that Hungary represented to Electrabel, at the times of its investments in Dunamenti, that it would ever act differently from the way that it eventually did

act towards Dunamenti or Electrabel. And, in the absence of such a representation, the tribunal found that Electrabel's case on legitimate expectations could not succeed.

“The host state is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance. An FET standard may legitimately involve a balancing or weighing exercise.”

The tribunal concluded that Electrabel's case appeared to rest upon purported representations concerning pricing arrangements. However, the statements in question did not amount to a representation (or assurance) that Dunamenti would be entitled to a reasonable profit or that Electrabel would be entitled to a reasonable return on its investment. Furthermore, in the tribunal's view, any such entitlement would have been inconsistent with the terms of the PPA: although in this case the place for such an entitlement would have been in the PPA from 1995 onwards, it was evident that, under the PPA, Dunamenti bore the risk of a change in the applicable law.

Furthermore, the tribunal noted that "the application of the ECT's FET standard allows for a balancing exercise by the host State in appropriate circumstances. The host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance. As was decided by the tribunals in *Saluka v Czech Republic* and *Arif v Moldova*, an FET standard may legitimately involve a balancing or weighing exercise by the host State." (para. 165).

#### *Tribunal notes E.D.F. award*

The tribunal noted that it may be perceived as being at variance with the *E.D.F.* tribunal. Although the tribunal had considered the parties' submissions on the *E.D.F.* award, it found it inappropriate to further dissect the *E.D.F.* award in search of evidence and arguments.

The tribunal could not be "influenced therefore by the result of a different arbitration, where an investor's claim appears to have been formulated differently and decided on different arguments and evidence" (para. 225). The tribunal went on to note that the *E.D.F.* award had also declined to compensate the investor for the maximum amount of Net Stranded Costs.

## Costs

The tribunal found that the parties should be responsible for their own legal costs and expenses. Electrabel, however, was required to cover the fees and expenses of the arbitrators as well as ICSID's administration fees.

*Notes:* The tribunal is composed of V. V. Veeder, (President, British national), Gabrielle Kaufmann-Kohler (claimant's appointee, Swiss national), and Brigitte Stern (respondent's appointee, French national). The Award was dispatched to the parties on November 25, 2015 is available at <http://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf>.

## Tribunal dismisses all claims by U.S. mining investor against Oman

*Adel A. Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33*

**Stefanie Schacherer**

A tribunal at the International Centre for Settlement of Investment Disputes (ICSID) dismissed all claims against Oman, in an award dated November 3, 2015. The claimant was Adel A. Hamadi Al Tamimi, a U.S. investor with controlling majority shareholdings in two mining companies operating in the Persian Gulf region. In 2006, he had concluded lease agreements with an Omani state-owned mining company for the quarrying of limestone in the municipality of Mahda in Oman.

The investor's claims for expropriation, breach of minimum standard of treatment and breach of national treatment arose out of Oman's alleged harassment and interference in the operation of his mining companies, which culminated in the termination of the relevant lease agreements by the state-owned company as well as the confiscation of the mining facilities by the Royal Oman Police. The dispute fell under the Oman–United States Free Trade Agreement (FTA), which entered into force in January 2009. The claimant sought compensation of around US\$560 million.

## Background

Al Tamimi made his investment in 2006 through two lease agreements for the quarrying of limestone signed between each of his companies, Emrock and SFOH, and the Omani state-owned enterprise Oman Mining Company LLC (OMCO). Only Emrock was duly registered in Oman. Subsequently, the Omani Ministries of Finance and Environment issued to Al Tamimi the initial permits. Both ministries reminded him to respect the limits of the quarrying area and to limit his activity to the exploitation of limestone products. Al Tamimi thus started to operate in the Jebel Wasa mountain range in September 2007.

Quickly however the relationship between Al Tamimi, OMCO and the ministries deteriorated. The Ministry of Environment issued a number of complaints, warnings and fines against Emrock, SFOH and OMCO, notably because of the Al Tamimi's alleged takings of material from the Jebel Wasa area, operation of machinery without the necessary permits, failure to obtain permits for housing, and uprooting of trees. The claimant did not take into account any of these complaints.

The situation culminated in OMCO's decision to terminate the agreement with Emrock, and to declare the agreement with SFOH to be null because of the initial failure to register the company in Oman. A July 2008 letter notified Al Tamimi of these decisions, and a second letter followed in February 2009 confirming the termination of the lease. As the claimant did still not stop to operate, the ministries and OMCO issued further warnings, and ultimately the Royal Oman Police arrested Al Tamimi at the request of the Ministry of Environment for the alleged unauthorized operation.

*Jurisdiction* *ratione temporis*: only Emrock–OMCO agreement was covered by the FTA

The tribunal engaged in a long discussion as to its jurisdiction *ratione temporis* given that the Oman–United States FTA entered into force only on January 1, 2009, whereas the two lease agreements had already been concluded in 2006. The FTA does not apply to investments made before its entry into force. The question therefore was whether the lease agreements still were valid after January 1, 2009.

In relation to the Emrock–OMCO agreement, the tribunal analyzed the two letters of termination of the lease. It did not consider the first termination notice by OMCO in July 2008 to be effective. Indeed, the tribunal found that even after July 2008 OMCO continued to communicate with Emrock and the Omani government about the lease. Furthermore, the tribunal considered that the subsequent termination notice of February 2009 superseded the earlier notice. As such, the tribunal considered that the Emrock–OMCO lease was still in force until February 2009 and thus fell under the Oman–United States FTA.

With respect to the SFOH–OMCO agreement, however, the tribunal declined its jurisdiction. It held that OMCO's declaration was effective as of July 2008, and OMCO was entitled to treat the lease agreement as null and void because of SFOH's failure to register and obtain business licenses in Oman.

## Expropriation claim dismissed

Al Tamimi listed a series of actions taken by Oman that led to the complete loss of his investment, thus alleging a type of creeping indirect expropriation.

The central element of the expropriation claim was the termination of the two lease agreements, which initially gave the investor the right to operate in Jebel Wasa. However, this right finally ceased to exist in February 2009, as the tribunal already decided in its jurisdictional analysis. Al Tamimi argued that the termination of the lease agreements was unlawful.

The tribunal did not engage in a discussion about the unlawfulness of the termination, since this question would fall under private contract law rather than public international law. In other words, the claimant's investment was lost not as the result of sovereign expropriation, but as the result of a contractual dispute with a party that was acting in a private commercial capacity. Furthermore, the tribunal held that any action after the termination of the lease agreement could not have interfered with Al Tamimi's rights, because any property rights ceased to exist with the termination of the lease. Thus, the tribunal dismissed the expropriation claim.

*Minimum standard of treatment: content and alleged breach*

The Oman–United States FTA specifically refers to customary international law for the content of the minimum standard of treatment. Therefore, the tribunal briefly analyzed previous cases that discussed the content of the standard, mainly in the NAFTA context (such as *SD Meyers v. Canada* and *International Thunderbird v. Mexico*). The tribunal reiterated that the minimum standard of treatment under customary international law imposes a relatively high threshold for breach. In the tribunal's view, in order to establish a breach of the minimum standard of treatment under the Oman–United States FTA, “the Claimant must show that Oman has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law” (para. 390). The tribunal underlined that this would not be the case for every minor misapplication of a state's laws or regulations. That is particularly so, in a context

“Not every minor misapplication of a state's laws will breach the minimum standard of treatment, particularly where the impugned conduct concerns the good-faith application or enforcement of environmental protection laws.”

such as the Oman–United States FTA, “where the impugned conduct concerns the good-faith application or enforcement of a State's laws or regulations relating to the protection of its environment” (para. 390).

Al Tamimi also argued that Oman violated the requirement of proportionality through the termination of the lease agreements as well as through the measure taken by the police. The tribunal rejected this argument and held that the minimum standard of treatment under customary international law does not include a standalone requirement of proportionality of any state conduct that would in fact entail a general obligation of proportionality.

Given the high threshold for breach of the standard, the tribunal dismissed all of Al Tamimi's allegations concerning unfair conduct and lack of transparency by the Omani ministries. It underlined that, even if there might have been some inconsistency in the way the ministries handled the permits, this would not amount to “manifest arbitrariness” or a “complete lack of transparency and candor” (para. 384).

Furthermore, the tribunal rejected Al Tamimi's argument as regards the measures taken in order to force him to cease the operation in Jebel Wasa, notably his arrest. According to the tribunal, the actions taken were in full compliance with national law and a consequence of his unlawful presence at the quarry after the termination of the lease agreement. It therefore dismissed the claim for violation of the minimum standard of treatment.

*No breach of national treatment after termination of the lease agreement*

Al Tamini's last claim was for an alleged breach by Oman of the national treatment standard enshrined in the Oman–United States FTA. The tribunal reiterated that any action taken by Oman after the termination of the lease agreement could not constitute a breach of his rights under this treaty, since his investment ceased to exist upon termination of the agreement. The tribunal noted that in any event his claim for breach of national treatment would fail due to the lack of reliable evidence. Al Tamini based his evidence merely on a discussion about other quarries in the area that he had with the operator of a neighboring quarry.

*All claims dismissed; Al Tamimi ordered to reimburse 75 per cent of Oman's costs*

In view of the above considerations, the tribunal rejected all Al Tamimi's claims, and ordered him to bear his own costs and to reimburse 75 per cent of the sum of Oman's arbitration costs, legal fees and other expenses.

*Notes:* The tribunal is composed of David A. R. Williams (President appointed by the parties, New Zealand

national), Charles N. Brower (claimant's appointee, U.S. national), and Christopher Thomas (respondent's appointee, Canadian national). The award of November 3, 2015 is available at <http://www.italaw.com/sites/default/files/case-documents/italaw4450.pdf>.

### ICSID tribunal declines jurisdiction in case against Macedonia and orders investor to reimburse 80% of Macedonia's legal fees and expenses

*Guardian Fiduciary Trust Ltd, f/k/a Capital Conservator Savings & Loan Ltd v. Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/12/31*

**Inaê Siqueira de Oliveira**

In an award dated September 22, 2015, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) declined jurisdiction to hear the case initiated by Guardian Fiduciary Trust Ltd (Guardian) against Macedonia based on the Netherlands–Macedonia bilateral investment treaty (BIT). The tribunal concluded that Guardian failed to present evidence that it qualified as a national of the Netherlands under BIT article 1(b)(iii).

#### *Factual background and claims*

Guardian is a trustee company and financial services provider, constituted under the laws of the New Zealand, which has operated in Macedonia since 2007. In August 2009, following investigations into money laundering initiated in the United States, Macedonian authorities arrested one of Guardian's directors and issued a press release disclosing the name of the company and of the director arrested.

According to Guardian, Macedonia knew or should have known that the money-laundering allegations were false and that Macedonia's measures—particularly the statements made to the press—forced Guardian to change its name and the location of its operations, resulting in “substantial damages to its business” (para. 4). Guardian asked for compensation for alleged losses of more than US\$600 million, later reducing its claim to approximately US\$20 million.

At Macedonia's request, the tribunal agreed to bifurcate the proceedings, suspending the analysis of the merits to rule, as a preliminary question, on one of Macedonia's objections to jurisdiction—namely, whether Guardian satisfied the nationality requirement under the BIT.

#### *Summary of claims*

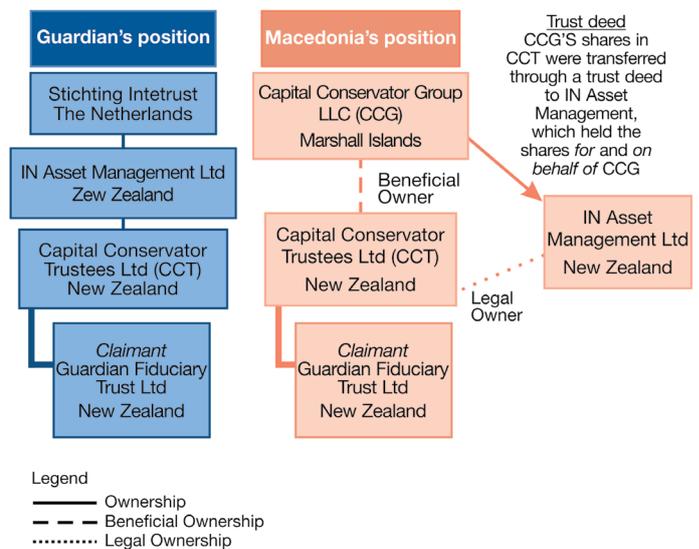
In its jurisdictional objection, Macedonia argued that Guardian did not qualify as a national of the Netherlands under BIT article 1(b)(iii), as it was indirectly controlled by Capital Conservator Group LLC (CCG), constituted under the laws of the Marshall Islands.

Guardian, in turn, maintained that it qualified as a national of the Netherlands under the BIT, as it was indirectly controlled by Stichting Intetrust, a Dutch

foundation. The fact that it was owned by Capital Conservator Trustees Ltd (CCT), which was in turn owned by IN Asset Management, both New Zealand companies, was irrelevant to the case, given that a legal person constituted under the laws of the Netherlands lied at the end of the chain of ownership.

In sum, the parties' views of Guardian's corporate structure can be illustrated as follows:

#### *Guardian's corporate structure*



#### *Opposing interpretations of the term “controlled” in BIT article (1)(b)(iii)*

In its relevant part, BIT article 1(b)(iii) reads that “[t]he term ‘national’ comprises [...] legal persons not constituted under the law of the Contracting State, but *controlled*, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii)” (emphasis added). The parties presented opposing interpretations of the meaning of the term “controlled.”

Macedonia asserted that the term “controlled” required not only evidence of ownership, but also evidence of exercise of active control over Guardian's activities. From Macedonia's standpoint, the mere legal ownership of shares, for instance, would not suffice to establish control in the absence of evidence of exercise of control.

Guardian, on the other hand, argued that “controlled” refers to the legal capacity of control rather than to the fact of control. Ownership, in Guardian's view, is sufficient to establish control.

On the interpretation of article 1(b)(iii), the tribunal initially recognized that “ownership generally implies the legal right or the capacity to exercise control” (para. 131). However, it pointed out that the issue of control was particularly complicated in the present

case because of a trust deed between IN Asset Management and CCG, a Marshall Islands company.

#### *Tribunal looks at Guardian's corporate structure*

Macedonia objected to Guardian's qualification as a national of the Netherlands based mainly on a trust deed of October 1, 2008. According to this trust deed, IN Asset Management, the third element of Guardian's chain of ownership, held the shares in CCT (which directly owned Guardian) as a trustee for and on behalf of CCG, a Marshall Islands company. In view of this deed, Macedonia asserted that IN Asset Management legally owned CCT as a nominee trustee acting only in a professional capacity, and that CCG retained the beneficial ownership.

Guardian did not deny that CCG was the beneficial owner of CCT. It denied, however, that the deed was relevant to the tribunal's assessment of jurisdiction. In Guardian's view, CCG's role in this corporate structure was passive, and IN Asset Management, as the legal owner of CCT, controlled the shares and held all voting rights. As IN Asset Management was, in turn, controlled by Stichting Intetrust, Guardian asserted that it qualified as a national of the Netherlands.

The tribunal, in its analysis, noted that the terms of the deed made no reference to the direction and control of CCT's business activities or to the exercise of voting rights. According to the tribunal, this implied that the deed had left open the possibility that control of CCT *could have been* exercised by IN Asset Management or, indirectly, by Stichting Intetrust. As a result, the tribunal concluded that the issue of control was ultimately a matter of evidence of whether Guardian was effectively controlled by Stichting Intetrust.

#### *Guardian fails to present conclusive evidence that it was controlled by Stichting Intetrust*

Guardian presented only one evidence that it was controlled by Stichting Intetrust—a sworn statement of Nicolaas Francken, one of Stichting Intetrust's owners, saying that the ultimate controlling shareholder of CCT was Stichting Intetrust. In the tribunal's view, such statement did not provide any further detail on how shareholder control, including voting rights, was in fact exercised.

The absence of evidence led the tribunal to conclude that Guardian failed to qualify as a national of the Netherlands within the meaning of BIT article 1(b)(iii). Consequently, the tribunal dismissed the case for lack of personal jurisdiction.

#### *Reimbursement of Macedonia's costs*

The decision acknowledged that the practice of ICSID tribunals in awarding costs "is not entirely consistent"

(para. 149), which it considered as a result of the considerable degree of discretion that the tribunals enjoy under ICSID Convention article 61(2). When using the so-called degree of discretion, the decision referred that the "costs follow the event" approach was appropriate in view of the circumstances of the present case, although without elaborating on what these circumstances were.

The tribunal ordered Guardian to reimburse 80 percent of the Macedonia's legal fees and expenses. This decision resulted in a reimbursement of US\$1,072,708 and £32,800. The tribunal also ordered the parties to share arbitration costs.

*Notes:* The ICSID tribunal was composed of Veijo Heiskanen (President appointed by the Secretary-General of ICSID, Finnish national), Andreas Bucher (Claimant's appointee, Swiss national), and Brigitte Stern (Respondent's appointee, French national). The award is available at <http://www.italaw.com/sites/default/files/case-documents/italaw4447.pdf>.

#### **Quiborax awarded US\$50 million against Bolivia, one-third of initial claim**

*Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2)*

#### **Martin Dietrich Brauch**

On September 16, 2015, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) ordered Bolivia to pay approximately US\$50 million in compensation for the expropriation of a mining investment. The claimants were Chilean company Quiborax S.A. (Quiborax) and Bolivian-incorporated Non-Metallic Minerals S.A. (NMM), majority owned and established by Quiborax as its investment vehicle to extract ulexite in Bolivia.

#### *Background and claims*

The Gran Salar de Uyuni, a salt flat in the Bolivian region of Potosí, has been a reserve since 1965. Bolivian Law No. 1854 of 1998 (*Ley Valda*) reduced the size of the reserve, and several mining concessions were requested and granted in the former reserve area. Between 2001 and 2003, Quiborax acquired 11 mining concessions, which were transferred to NMM.

Local communities did not favour the mining concessions in the area. This led Potosí representatives to present bills to reverse *Ley Valda* and transfer the concessions to the state. Accordingly, Law No. 2564 was promulgated in December 2003, abrogating *Ley Valda*. The law also authorized the executive to audit the concessions granted while *Ley Valda* was in force, and to annul the mining rights of concessionaires that were liable to sanctions, reverting the concessions and non-metallic resources to the state.

Based on tax and customs irregularities found in the audits, Bolivia revoked all of NMM's mining concessions by Decree 27,589 of June 23, 2004 (Revocation Decree). In compliance with the decree, NMM handed over the operation of the concessions to the Potosí administration within 30 days of their revocation. The legality of the Revocation Decree was later questioned, as the mining code provided for the annulment of mining concessions, but not for their revocation. Attempting to remedy the situation, Bolivia abrogated the Revocation Decree itself in December 2005, at the same time annulling the concessions.

One month after the Revocation Decree, Quiborax and NMM requested consultations under the Bolivia–Chile BIT, and ultimately filed arbitration on October 4, 2005; proceedings commenced in December 2007. Among other claims, they argued that the Revocation Decree directly expropriated NMM's investment (the concessions) and indirectly expropriated Quiborax's investment (its shares in NMM), and that the expropriation was unlawful. They asked for compensation of US\$146,848,827, plus compound interest, and US\$4 million for moral damages.

*Tribunal finds that illegal conduct during the operation of an investment does not bar an investor from relying on guarantees under a BIT*

Bolivia objected that the investments could not benefit from BIT protection as they were neither made nor operated in accordance with Bolivian law. The tribunal reasoned that “ongoing illegality” in the operation of the investment could not affect the availability of BIT protections. As to the allegation of an “original illegality,” the tribunal recalled its jurisdictional decision that the investments were made in accordance with Bolivian law. While Bolivia offered new evidence that the investments were fraudulently acquired, the tribunal found it to be inconclusive.

Bolivia had also argued that the concessions were irregular and void from the outset, and therefore the investors did not have any rights subject to protection. But the tribunal did not support this argument. It found evidence that “the annulment [...] was an *ex post* attempt to improve Bolivia's defense in this arbitration, not a *bona fide* exercise of Bolivia's police powers” (para. 139). Furthermore, looking at Bolivian law, the tribunal held that the alleged irregularities were non-existent or did not serve as grounds for annulment.

*Tribunal finds expropriation unlawful despite legitimate public interest at stake*

The tribunal was not convinced that the tax and customs irregularities mentioned as grounds for the Revocation Decree really occurred. Even if they did, the tribunal did not find the revocation was justified

under Bolivian law. In view of evidence that the claimants were not notified of the audits and did not have access to information about them, the tribunal held that the revocation failed to comply with due process under international law and Bolivian law.

Endorsing the direct expropriation standard enunciated in *Burlington v. Ecuador*, on which the claimants relied, the tribunal held that the Revocation Decree had resulted in a permanent deprivation of the claimants' investment, without justification as a legitimate exercise of the Bolivia's police powers. Therefore, it upheld the claim that the Revocation Decree directly expropriated NMM's investment in the concessions.

The tribunal also addressed the claimants' claim that the Revocation Decree indirectly expropriated Quiborax's shares in NMM. According to the tribunal, since the concessions appeared to be NMM's only business, without them the shares in the company were “virtually worthless” (para. 239), resulting in an indirect expropriation of Quiborax's investment in NMM.

“ Even though accepting that Bolivia ‘may have had a legitimate interest,’ the tribunal held that the expropriation was unlawful, as it was not carried out in accordance with the law. ”

Based mostly on media reports about the public perception that the claimants' mining activities consisted in the looting of national wealth by Chilean investors, the tribunal considered that there was compelling evidence of a discriminatory intent in targeting NMM because of the Chilean nationality of Quiborax. Further, the tribunal had already decided that the expropriation was not carried out in accordance with the law, and it was undisputed that the claimants were not compensated. Accordingly, the tribunal held that the expropriation was unlawful under the BIT.

Even though the tribunal deferred to “Bolivia's sovereign right to determine what is in the national and public interest” and accepted that “Bolivia may have had a legitimate interest in protecting the Gran Salar de Uyuni Fiscal Reserve” (para. 245), it found that this was irrelevant as the tribunal had already determined on other grounds that the expropriation was unlawful.

### *Both revocation and subsequent annulment breached FET standard*

Without much analysis and leaving open the question of whether the BIT's fair and equitable treatment (FET) standard corresponded to the minimum standard under international law, the tribunal considered that even under a more demanding standard the revocation of the concessions breached international law, as it was discriminatory and unjustified under domestic law. Again recalling that the annulment appeared to have been a strategy to legalize the revocation when the Revocation Decree was questioned, the tribunal held that the annulment also breached FET.

### *Tribunal dismisses claims for declaratory judgment and moral damages*

The claimants alleged that Bolivia engaged in post-expropriation acts of harassment—mainly by initiating criminal cases against shareholders of the claimants—and that this breached the FET standard and the non-impairment clause under the BIT. However, the tribunal did not find sufficient evidence of such conduct. The tribunal also dismissed the claimants' allegations that Bolivia, through its procedural conduct in the arbitration, breached several provisions of the ICSID Convention and its duty of good faith. Accordingly, the tribunal dismissed the claimants' request for a declaratory judgment.

Furthermore, the tribunal understood that the US\$4 million in moral damages sought by the claimants were intended to repair non-material damage resulting from the alleged post-expropriation acts of harassment. As the tribunal had already dismissed such alleged breaches, it held that there was no basis for a moral damages claim.

### *Full reparation valued under DCF method; calculation based on the date of the award*

In accordance with customary international law—as articulated in the *Chorzów* case and the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts—the tribunal held that the claimants were entitled to full reparation. In the circumstances of the case, it did not see any relevant mitigating factors.

The parties agreed that the reparation should reflect the fair market value of the investment. However, for the valuation, the claimants favoured the discounted cash flow (DCF) method, while Bolivia favoured considering the net amounts invested. The tribunal sided with the claimant, noting that the DCF method is widely accepted, is mentioned in the World Bank Guidelines on the Treatment of

Foreign Direct Investment, and has been endorsed by many investment tribunals. It decided to focus on assessing the fair market value of the mining concessions, NMM's primary asset, and found that the record of operations and prospective profitability of NMM's mining activity justified applying the DCF method.

The claimants maintained that compensation should be calculated based on the award date, while Bolivia argued that it should be calculated based on the expropriation date. After carefully analyzing the parties' submissions and the reasoning in *Chorzów*, a majority of the tribunal decided to quantify the losses on the date of the award, considering that the expropriation was unlawful for various reasons, not only because it lacked compensation. In support of its decision, the majority cited to other investment tribunals, adjudicatory bodies and scholars following the same approach. Brigitte Stern, arbitrator appointed by Bolivia, wrote a partially dissenting opinion, outlining legal and economic reasons why, in her view, the valuation should in all cases be calculated based on the expropriation date.

### *Damages award and costs*

Based on a series of parameters and on the cash flows that the ulexite reserves would have generated if the concessions had not been expropriated, the tribunal awarded damages amounting to US\$48,619,578. It also awarded interest, compounded annually, at the rate of one-year LIBOR plus two per cent. Bolivia was ordered to cover half of the claimants' arbitration costs, and each party was ordered to cover its own legal fees and expenses.

*Notes:* The ICSID tribunal was composed of Gabrielle Kaufmann-Kohler (President appointed by the Chairman of the Administrative Council, Swiss national), Marc Lalonde (claimant's appointee, Canadian national), and Brigitte Stern (respondent's appointee, French national). The award is available at <http://www.italaw.com/sites/default/files/case-documents/italaw4389.pdf>. Brigitte Stern's partial dissent is available at <http://www.italaw.com/sites/default/files/case-documents/italaw4388.pdf>.

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# resources and events

## Resources

### **The Mining Policy Framework: Assessing the implementation readiness of member states of the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) – Synthesis Report**

By Alec Crawford, Published by IISD, October 2015

IISD, with support from the Canadian Department of Foreign Affairs, Trade and Development (DFATD), worked with three member states of IGF—the Dominican Republic, Madagascar, and Uganda—to help them operationalize practices consistent with IGF’s Mining Policy Framework (MPF). This was a two-part process. First, assessments measured the readiness of the three member states to implement the six pillars of the MPF through existing government laws, policies and measures. The assessments were then used to help governments target their efforts in implementing the MPF, to inform capacity-building efforts, and to allow for monitoring of progress over time. The second part of the project focused specifically on the capacity-building element. This report synthesizes some of the key findings from the assessments and the capacity-building workshops. Available at <http://www.iisd.org/library/mining-policy-framework-assessing-implementation-readiness-member-states-intergovernmental>

### **Investment Dispute Settlement Navigator (ISDS Navigator)**

By United Nations Conference on Trade and Development (UNCTAD), December 2015

UNCTAD has launched its fully revamped ISDS Navigator. The online database contains information on 696 publicly known international arbitration cases initiated by investors against states pursuant to international investment agreements (IIAs). It includes advanced search options, as well as readily available statistical data on the main aspects of ISDS cases. Each case entry contains information on: legal basis (applicable treaty); countries involved; short summary of the dispute; economic sector and subsector; amounts claimed and awarded; breaches of IIA provisions alleged and found; arbitrators serving on the tribunal; status/outcome of the arbitral proceedings; decisions issued by tribunals (with links to texts); links to external sources with information about the case; among other items. The data has been updated as of January 1, 2016. Available at <http://investmentpolicyhub.unctad.org/isds>

### **Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified**

By Steffen Hindelang and Markus Krajewski (editors), Published by Oxford University Press, January 2016

While the prevailing mindset in international investment law has always been the protection of the economic interests of individual investors, new developments have brought about a paradigm shift. There is now more than ever before an interest in a more inclusive, transparent, and public regime. The book analyses how the investment treaty regime has changed and how it ought to be changing to reconcile private property interests and the state’s duty to regulate in the public interest. The individual chapters address the contents of investment agreements, the system of dispute settlement, the interrelation of investment agreements with other areas of public international law, constitutional questions, and new regional perspectives from South Africa and Latin America. Available at <https://global.oup.com/academic/product/shifting-paradigms-in-international-investment-law-9780198738428>

### **Investment Law within International Law: Integrationist Perspectives**

By Freya Baetens (editor), Published by Cambridge University Press, January 2016

The book examines the links between investment law and other sub-fields of international law, including the law on armed conflict, human rights, sustainable development, trade, development and EU law. In particular, it scrutinizes how concepts, principles and rules developed in the context of such sub-fields of public international law could inform the content of investment law. Solutions aimed at resolving problems in other settings may provide instructive examples for addressing current problems in the field of investment law, and vice versa. The underlying question is whether key sub-fields of public international law, notably international investment law, are open to cross-fertilisation, or, whether they are evolving further into self-contained regimes. Available at <http://www.cambridge.org/academic/subjects/law/arbitration-dispute-resolution-and-mediation/investment-law-within-international-law-integrationist-perspectives>

### **Analogies in International Investment Law and Arbitration**

By Valentina Vadi, Published by Cambridge University Press, December 2015

Many recent arbitral awards have determined the boundary between two conflicting values: the legitimate sphere for state regulation in the

pursuit of public goods, and the protection of foreign private property from state interference. Can comparative reasoning help adjudicators in interpreting and applying broad and open-ended investment treaty provisions? Can the use of analogies contribute to the current debate over the legitimacy of investor–state arbitration? How should comparisons be made, and what are their limits? This book scrutinizes the impact a comparative approach can have on investment law, including on increasing its perceived legitimacy. Available at <http://www.cambridge.org/academic/subjects/law/public-international-law/analogies-international-investment-law-and-arbitration>

## Events 2016

### March 3–4

**19<sup>TH</sup> ANNUAL IBA INTERNATIONAL ARBITRATION DAY 2016**, International Bar Association (IBA) Arbitration Committee, Pudong Shangri-La Hotel, Shanghai, China, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a6012508-0839-4c51-9cb1-eeec86df04762>

### March 7

**INTERNATIONAL CONFERENCE ON INTRA-EU BITS AND INTRA-EU DISPUTES**, Law School of the University of Vienna, Vienna, Austria, <http://intra-eu-bits.univie.ac.at>

### March 7–9

**1<sup>ST</sup> ANNUAL CONFERENCE ON ENERGY ARBITRATION AND DISPUTE RESOLUTION IN THE MIDDLE EAST AND AFRICA**, Centre for International Arbitration and Dispute Resolution of the London Centre of International Law Practice (LCILP) & Centre for International Energy and National Resources Law and Security, London, United Kingdom, <http://lcilpconference.org>

### March 10–11

**KLRCA INTERNATIONAL INVESTMENT ARBITRATION CONFERENCE**, Kuala Lumpur Regional Centre for Arbitration (KLRCA), Kuala Lumpur, Malaysia, <https://webapps.worldbank.org/apps/ICSIDWEB/Documents/KLRCA-flyer.pdf>

### March 11

**INVESTMENT ARBITRATION UNDER THE SCC RULES**, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Goethe University, Frankfurt am Main, Germany, <http://www.sccinstitute.com/about-the-scc/event-calendar/frankfurt-scc-conference-in-connection-to-the-frankfurt-investment-moot>

### March 14–15

**INTERDISCIPLINARY CONFERENCE ON THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP)**, Centre for European Research at the University of Gothenburg (CERGU), Gothenburg, Sweden, [http://cergu.gu.se/english/Events/Calendar/Event\\_Detail/?eventId=3127005768](http://cergu.gu.se/english/Events/Calendar/Event_Detail/?eventId=3127005768)

### March 14–18

**17<sup>TH</sup> ANNUAL WORLD BANK LAND AND POVERTY CONFERENCE 2016: “SCALING UP RESPONSIBLE LAND GOVERNANCE,”** World Bank, Washington, DC, United States, <http://www.worldbank.org/en/events/2015/07/20/land-and-poverty-conference-2016-scaling-up-responsible-land-governance>

### March 15

**JOINT UNCITRAL-LAC CONFERENCE**, United Nations Conference on International Trade Law (UNCITRAL) & Ljubljana Arbitration Centre (LAC), Slovenian Chamber of Commerce and Industry, Ljubljana, Slovenia, <http://globalarbitrationreview.com/events/1869/joint-uncitral-lac-conference>

### March 16

**UNCTAD EXPERT MEETING: “TAKING STOCK OF IIA REFORM,”** part of Multi-year Expert Meeting on Investment, Innovation and Entrepreneurship for Productive Capacity-building and Sustainable Development, United Nations Conference on Trade and Development (UNCTAD), Room XXVI, Palais des Nations, Geneva, Switzerland, <http://unctad.org/en/Pages/Meetings/Expert-Meetings.aspx> (RSVP to [WIF\\_IIA\\_Conference@unctad.org](mailto:WIF_IIA_Conference@unctad.org) with “In person attendance” or “Webinar attendance” in the subject line)

### March 30 – April 2

**110<sup>TH</sup> ASIL ANNUAL MEETING: “CHARTING NEW FRONTIERS IN INTERNATIONAL LAW,”** American Society of International Law (ASIL), Hyatt Regency Capitol Hill, Washington, DC, United States, <https://www.asil.org/annualmeeting>

### March 31

**INTRODUCTION TO ICSID ARBITRAL PRACTICE**, Ministry of Financial Services, Commonwealth of The Bahamas, The British Colonial Hilton, Nassau, The Bahamas, [https://webapps.worldbank.org/apps/ICSIDWEB/Documents/ICSID Introduction Bahamas Program.pdf](https://webapps.worldbank.org/apps/ICSIDWEB/Documents/ICSID%20Introduction%20Bahamas%20Program.pdf)

### April 22–23

**BUCERIUS LAW JOURNAL CONFERENCE ON INTERNATIONAL INVESTMENT LAW & ARBITRATION**, Bucerius Law School, Hamburg, Germany, <http://law-journal.de/en/conference>



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