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A Critical Review of the Debate on Investment Facilitation

Luciana Ghiotto



Reforming Investment Treaties: Does treaty design matter?

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International Investment Law and Sustainable Development: Key cases from the 2010s

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LIST OF ACRONYMS

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



INSIGHT 1

A Critical Review of the Debate on Investment Facilitation

Luciana Ghiotto



The debate on investment facilitation (IF) is relatively new, though it has intensified since Brazil, Argentina, Russia and China, among others, started to promote it at a multilateral level.¹ These countries submitted their proposals in 2017 to include IF in the 11th WTO Ministerial Conference, but ultimately other countries such as the United States, South Africa, India and the countries of the Bolivarian Alliance for the Peoples of our America (ALBA, in its Spanish acronym) (Bolivia, Cuba and Venezuela) blocked its inclusion. For its part, China also promoted IF in the organization process of the G20 summit in Hamburg (2017), but it was also blocked on that occasion.²

IF is a vague and broad term. It encompasses regulatory actions, institutional roles and administrative procedures with the aim of facilitating the entry, operation and exit of investors. There is neither a common definition nor a list of rules to facilitate

investments. So far, IF is seen as a group of principles, including “transparency,” “consistency” and “predictability,” aimed at changing some national regulations in order to ease investment flows. In this article, I argue that these concepts constitute a mechanism that operates at the core of domestic regulatory processes, implying not only a set of clauses on the treatment to be accorded to foreign investors, like those contained in traditional investment treaties, but also processes for the design of rules and laws that directly affect investors.

This is why, even though the inclusion of IF has not advanced in some forums,³ it is an issue that has come to stay. IF involves a central idea broadly promoted during the last years, showing a trend toward simplifying administrative procedures, and especially regulatory processes for foreign investors and economic operators, in order to reduce the regulatory burden. In other words, this proposal is focused on the reduction of transaction costs for foreign investors through a transformation of domestic administrative processes. This was also the focus of the debate within the WTO on trade facilitation, which implies, among other things, the facilitation, modernization and harmonization of export and import procedures, for example, by means of measures for effective cooperation among customs authorities.

Besides the administrative simplification for investors, all the proposals submitted at global forums (as well as those promoted by the OECD⁴) include mechanisms that are an essential part of regulatory cooperation, such as transparency. In this debate, foreign investment stakeholders, whether private sector entities or other states, would have the opportunity to participate in the design process of new foreign investment regulations. This poses a high risk of undermining social,

¹ The proposals submitted to the General Council of the WTO are: Russia: JOB/GC/120 (2017, March 31); Mexico, Indonesia, Korea, Turkey, and Australia (MIKTA): JOB/GC/121 (2017, April 6); Friends of Investment Facilitation for Development (FIFD): JOB/GC/122 (2017, April 26); China: JOB/GC/123 (2017, April 26); Argentina and Brazil: JOB/GC/124 (2017, April 26); Brazil: JOB/GC/169 (2018, February 1). See Zhang, J. (2018). *Investment Facilitation: Making sense of concepts, discussions and processes*. Geneva: IISD. Retrieved from <https://www.iisd.org/library/investment-facilitation-making-sense-concepts-discussions-and-processes>

² See Ghiotto, L. (2017) *La negociación sobre reglas de facilitación multilateral de las inversiones*. Working Paper, Transnational Institute. Retrieved from <https://www.tni.org/es/publicacion/la-negociacion-sobre-reglas-para-la-facilitacion-multilateral-de-las-inversiones>

³ Third World Network. (2018, July 30). WTO investment facilitation & technical assistance activities deferred, *TWN Info Service on WTO and Trade Issues* (July 18/24). Retrieved from <https://www.twn.my/title2/wto.info/2018/ti180724.htm>

⁴ OECD. (2015). *OECD guiding principles for regulatory quality and performance*. Retrieved from <http://www.oecd.org/fr/reformereg/34976533.pdf>



environmental and human rights standards if there is pressure exerted by the private sector⁵ in its search for reducing transaction costs and expanding its scope of action within national territories.

Regulatory cooperation: The heart of the debate on IF

While IF does not specify a system of investment protection, it establishes a series of changes that states must introduce to administrative procedures as well as to regulations on foreign investments. In IF, we find a new form of regulatory cooperation, which shows a trend toward *standardization* and *reconciliation* of regulatory systems and processes. Hence, the focus is not on the rules themselves, but on administrative procedures to enforce those rules. It is about minimizing future regulatory barriers by means of joint procedures.⁶

Transparency implies that states must disclose foreign investment laws, regulations, judicial decisions and administrative rules. Also, a registry of laws and regulations affecting investments must be established.

Regulatory cooperation has already been included in new mega-regional treaties, such as the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP) and the Transatlantic Trade and Investment Partnership (TTIP), as well as the FTA between the European Union and Canada (CETA). It is also present in the process of convergence between the Pacific Alliance and the Southern Common Market (Mercosur, such as the Argentina–Chile FTA, under the title Technical Barriers to Trade.⁷ Regulatory cooperation has also been promoted by the Juncker Commission in the European Union since

2013 under the title Better Regulation. This issue is directly related to what the OECD considers as “good regulatory practices,” pursuing the following principles: transparency, consultation, impact assessments and maximization of benefits.

Investment facilitation is a vague and broad term. There is neither a common definition nor a list of rules to facilitate investments.

Many of these principles also appear in the IF proposals submitted to the WTO in 2017, which underline that regulatory cooperation is the most powerful tool for debate. It involves a series of common principles for investors to have a “stable, predictable and effective”⁸ framework, according to the proposal presented by Brazil and Argentina. Meanwhile, China and Russia support the idea that these mechanisms can “promote the establishment of clear and consistent criteria and procedures for the process of selection, evaluation and approval of investments.”⁹

Transparency implies that states must disclose foreign investment laws, regulations, judicial decisions and administrative rules. Also, a registry of laws and regulations affecting investments must be established. The aim is to facilitate investment operations by simplifying administrative procedures and the access to permits through the implementation of a single window for administrative procedures, as well as access to all information necessary for an investment through an online system. Even the setting of a series of common principles to process investment applications and permits was proposed.

Stakeholders stepped in with the introduction of the idea that they should have an opportunity to comment on new laws, regulations and policies proposed by a state, as well as on future changes of pre-existing regulations. The private sector would have a decisive role in a country’s legislation, directly participating in the creation of regulatory frameworks. For example, under the TTIP, this mechanism is included as the notice-and-comment system, which implies that stakeholders can make their own proposals and they must be invited to present their comments on

⁵ European Environmental Citizens Organization for Standardisation. (2016). *Mutual recognition of standards in TTIP: Another threat to citizens' welfare and the environment*. Retrieved from <http://ecostandard.org/wp-content/uploads/ECOS-2016-POS-002-TTIP.pdf>

⁶ Meuwese, A. (2015). Constitutional aspects of regulatory coherence in TTIP: An EU perspective. *Law and Contemporary Problems*, 78. Retrieved from <https://scholarship.law.duke.edu/lcp/vol78/iss4/7>

⁷ Ghiotto, L. & López, P. (2018). El tratado de libre comercio Argentina-Chile: El camino a un retorno encubierto del ALCA. *ALAI Net*. Retrieved from <https://www.alainet.org/es/articulo/194817>

⁸ Proposal at the WTO by Argentina and Brazil: JOB/GC/124, ut supra.

⁹ Proposals made by China and Russia: Russia: JOB/GC/120; China: JOB/GC/123, ut supra.



regulations through contact points. The comments of these sectors have to be “taken into account.”¹⁰

In conclusion, this is not only about facilitating investments with simplified administrative mechanisms, but other states and investors themselves can have a voice in the regulatory mechanism of each state. Yet, in the case of IF, none of the abovementioned proposals explain how this process would be implemented; this is why there is a dangerous definition gap in an issue as relevant as foreign investment regulation.

Conclusions

The IF debate has come to stay. Even if it will not see any progress in the short term, it is a matter that deserves to be the focus of analysis by experts in the investment protection regime. As such, IF includes a topic that involves new FTAs as well as international forum debates, namely, regulatory cooperation. This discussion is currently developing in forums such as the WTO and G20,¹¹ as well as in the OECD and UNCTAD, and at a regional level in the European Union and the Pacific Alliance. As we stated previously, it is also present in most new generation FTAs as well as in the Argentina–Chile FTA.

Investment facilitation at the multilateral level would lead to a movement toward harmonization of procedures for the adoption of domestic regulations in different states. This would have an impact on the adoption of countries’ domestic standards.

Particularly at the WTO, the introduction of IF would mean a “multilateralization” of the investment debate, which would bring substantial changes to member states’ regulatory processes. Until now, the WTO has

succeeded in removing trade barriers at the border level. But if IF is accepted as a multilateral agreement, this would imply the establishment of rules that reduce the administrative burden for foreign investors “behind the borders,” leading to a movement toward harmonization of procedures for the adoption of domestic regulations in all member states. This would have an impact on the adoption of countries’ domestic standards.

In this sense, the most affected nations would be those that have the highest threshold. For example, countries with stricter regulations about the acceptance of an investment in areas considered strategic or with regulations that set performance requirements for foreign investors will be obligated to adjust their domestic laws to those of countries with more relaxed regulations. The effect of this would be a generalized “downward spiral,” as the pressure exerted by the private sector would lead to undermining regulations in the investment sector at a global level.

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¹⁰ Haar, K. (2015). *Cooperating to deregulate*. International Trade, CEO. Retrieved from <https://corporateeurope.org/international-trade/2015/11/cooperating-deregulate>

¹¹ Apart from the proposals submitted to the WTO, this topic has also been presented in other forums. See, for example: UNCTAD. (2016). Global action menu for investment facilitation. Retrieved from http://investmentpolicyhub.unctad.org/Upload/Action%20Menu%2023-05-2017_7pm_print.pdf; G20. (2016) *Guiding principles for global investment policymaking*. Retrieved from <http://www.oecd.org/investment/g20-agrees-principles-for-global-investment-policymaking.htm>; Pacific Alliance (2012). *Ruta crítica en materia de cooperación regulatoria*. Retrieved from <https://alianzapacifico.net/cloudcomputing/iadb-org/serverhosted/alianzapacifico/multimedia/archivos/Anexo-3-Ruta-cr%C3%ADtica.pdf>



INSIGHT 2

Reforming Investment Treaties: Does treaty design matter?

Tarald Laudal Berge and Wolfgang Alschner



In the 1990s, world politics was being transformed by a wave of legalization—the move to legal governance systems in spheres previously governed by politics.¹ International investment policy was no different. More than 200 BITs with access to ISDS were signed in each of 1994, 1995 and 1996.

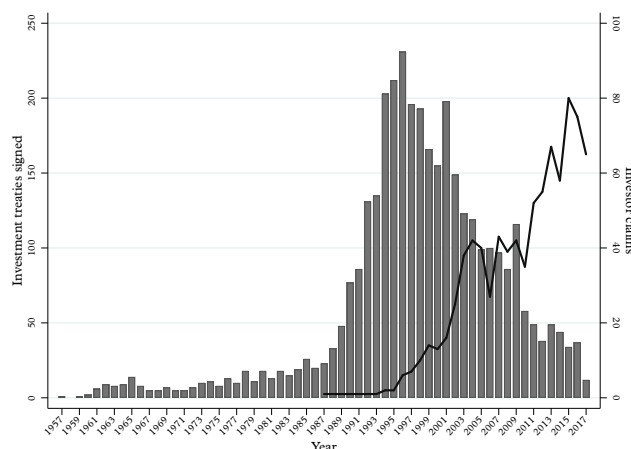
Over the last decade, however, investment arbitration has experienced a backlash. There is now a debate around investment treaty design. International organizations such as UNCTAD² are advocating reform packages. Moreover, a wide array of state actors—from India to Canada to the European Commission—are openly reflecting on their investment treaty policies.

This reorientation has manifested itself empirically. We have seen states adding new obligations to their treaties, including in relation to investor conduct. We have seen clarifications of existing disciplines and procedures for solving treaty-related disputes. Moreover, we are witnessing more conscientiousness around the importance of policy space under investment treaties.

Part of the trigger for this change is the wave of arbitration claims that succeeded the 1990s' boom in

investment treaty signing (Figure 1). However, little is known about whether there is a link between treaty design and the risk of attracting claims for arbitration—or to what extent new treaty clauses such as general public policy exception clauses matter in litigation.³

Figure 1



Dispute by design?⁴

While the public debate around international investment law has focused on ISDS mechanisms,⁵ a perception has spread among stakeholders that earlier investment treaties were drafted too broadly and vaguely. As part of its reform package, UNCTAD recommends that states consider omitting or reformulating provisions in their future investment treaties to increase clarity and predictability.⁶

Some states, such as Canada and the United States, took early measures to this effect. After being on the

¹ Goldstein, J. et al. (2000). Introduction: Legalization and world politics. *International Organization*, 54(3), 238–399.

² UNCTAD. (2012). *World investment report 2015: Reforming international investment governance*. Retrieved from http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf; UNCTAD. (2015). *Investment policy framework for sustainable development*. Retrieved from http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf

³ This insight is based on two working papers: Berge, T.L. (2018). *Dispute by design? Legalisation, backlash and the drafting of investment agreements*. Presented at the 2018 Midwestern Political Science Association's Annual Conference. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3201306; and Alschner, W. & Hui, K. (2018). *Missing in action: General public policy exceptions in investment treaties*. Presented at the 2018 Society of International Economic Law Conference, Washington D.C. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237053

⁴ This part is based on Berge (2018), *supra* note 3.

⁵ Waibel, M. Kaushal, A., Chuung, K.-H., & Balchin, C. (2010). *The backlash against international investment arbitration: Perceptions and reality*. Alphen aan den Rijn: Kluwer Law International; and Behn, D. & Langford, M. (2018). Managing backlash: The evolving investment treaty arbitrator? *The European Journal of International Law*, 29(2), 551–580. doi: 10.1093/ejil/chy030.

⁶ UNCTAD (2015), *supra* note 2, pp. 132–133.



respondent side of multiple investor claims under NAFTA, they included more explicit and explanatory language in their 2004 model investment treaties.⁷ Other states, such as India, Indonesia and the Netherlands, have publicly stated that many of the investment treaties they signed in the past are too vague and insensitive to the balance between investor rights and obligations.⁸

Upon close reading, there are five common and interconnected concerns across different treaty reform narratives. States, international organizations and other stakeholders are concerned that older investment treaties:

1. Include an extensive amount of substantive obligations.
2. Deliver too little policy flexibility.
3. Provide for wide-ranging definitions of investment and investor.
4. Adopt language perceived as lacking in precision.
5. Contain ISDS clauses affording high levels of discretion or legal delegation to arbitrators.

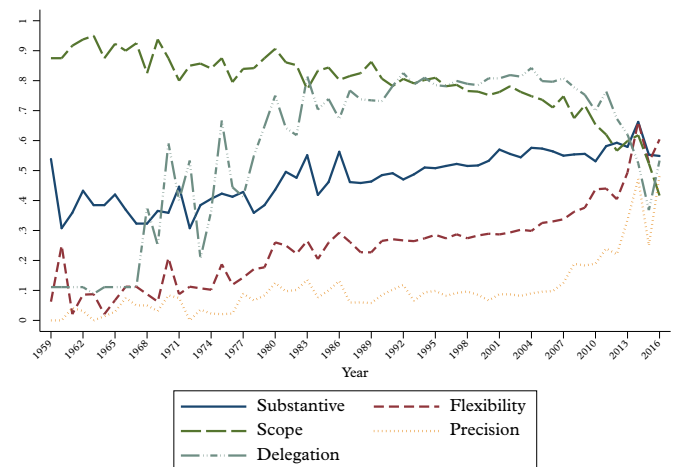
The general assumptions are that more substantive obligations, less flexibility, wider scope definitions, less precision and more legal delegation may increase the risk of investment arbitration claims. UNCTAD's detailed mapping of the legal content of over 2,500 BITs can be used to assess these assumptions empirically.⁹ One of the authors has created five indices measuring how treaties score on these five dimensions.¹⁰

Each index varies from 0 to 1, where higher values indicate more obligation, more extensive use of flexibility mechanisms, broader scope of investment coverage, more precision and more legal delegation in terms of dispute settlement. Figure 2 shows how treaty practice along these five dimensions has evolved over time, by averaging index scores across all treaties signed in any given year between 1959 and 2017.

Generally, we see evidence of significant changes in treaty practice over time. Levels of substantive obligations have crept upwards. There has been a marked increase in the use of flexibility mechanisms

such as general public policy exceptions. The scope of investment covered by investment treaties has been significantly reduced over time. The use of precision elements such as external standards against which substantive obligations should be interpreted has increased markedly in the last few years. Lastly, legal delegation in investment treaties rose to a peak in the mid 1990s but has been in decline since.

Figure 2



When using these treaty scores to look econometrically at whether treaty content actually influences the risk of claims, we find that, at the most general level, differences in treaty design are indeed associated with different risks of investment arbitration claims. However, not all of the assumptions by states and international organizations seem to hold true.

Based on our statistical analysis, the only two dimensions that are strongly and systematically associated with a substantially increased risk of investment arbitration claims are the presence of extensive substantive obligations and wide-ranging definitions of investment and investor. The use of precision or limitations on arbitrators' interpretative discretion does not seem to lower the risk of claims. Crucially, the risk imposed by substantive obligations and wide scope definitions in treaties does *not* appear to be offset by more flexibility or higher levels of precision.

One explanation for this finding may be that some treaty design changes matter more than others in investment arbitration. It is thus worth asking how responsive litigants and investment arbitrators are to specific treaty design innovations and to check whether differences in treaty content actually translate into differences in arbitral interpretation.

⁹ UNCTAD. (n.d.). Investment Policy Hub. Retrieved from <http://investmentpolicyhub.unctad.org/IIA>

¹⁰ See Berge (2018), *supra* note 3, pp. 13–15 for a more detailed description how these indices are constructed.



Changing treaties, changing outcomes?¹¹

Of all the changes in recent treaties, the inclusion of general public policy exceptions is among the most radical. If a measure falls under them, a state is exempted from liability altogether. They are thus the ultimate flexibility mechanism or escape clause.¹²

General public policy exceptions, although new to investment treaties, are on the rise. At least 100 treaties alone contain such a clause, of which two thirds are inspired by Article XX in GATT and one third follows the model of prohibition and restriction clauses first included in Article 11 of the 1985 Singapore–China BIT. Yet, in spite of their popularity in treaty making, general public policy exceptions do not make much noise when it comes to dispute settlement.

Respondent states fail to raise these clauses, and tribunals do not consider them on their own initiative. Moreover, even when these exceptions are applied, tribunals typically accord them little weight. In short, general public policy exceptions are largely missing in action.

To investigate how these clauses perform in practice, we have analyzed recent awards rendered under agreements containing general public policy exceptions. To our surprise, we found that respondent states fail to raise these clauses, and tribunals do not consider them on their own initiative. Moreover, even when these exceptions are applied, tribunals typically accord them little weight. In short, general public policy exceptions are largely missing in action. *Copper Mesa v. Ecuador*¹³ and *Bear Creek v. Peru*¹⁴ are good examples.

In *Copper Mesa*, the first investment arbitration to deal with such a clause, the tribunal found that the arbitrariness and lack of due process in Ecuador's withdrawal of a mining license not only violated the expropriation and FET clauses of the 1996 Canada–Ecuador BIT, but also rendered Article XVII (the treaty's general exception clause) inapplicable, because it only exempted measures “not applied in an arbitrary or unjustifiable manner” from liability.¹⁵

The *Bear Creek* tribunal reached a similar conclusion, but additionally concluded that the general public policy exception in the 2009 Canada–Peru FTA applied as *lex specialis* to the exclusion of customary international law defenses.¹⁶

In both cases, the tribunals, without providing much reasoning, adopted an interpretation that drastically limits the effect these clauses have in practice. If general exceptions are inapplicable on the same grounds that gave rise to a violation of the primary obligations in the first place, they will rarely save respondent states from liability. Similarly, if they operate as replacements rather than complements to the flexibility already offered under customary international law, such as the police powers doctrine, they will provide little additional policy space or may even detract from it.¹⁷

In other cases, respondents failed to even raise applicable general public policy exceptions. In a wave of cases involving the expropriation of gold mining companies in Venezuela, the respondent claimed to have revoked the mining concessions of several Canadian companies on environmental grounds, but without pointing to the general public policy exception in the Article II(10)(b) Annex of the 1996 Canada–Venezuela BIT in support of its argument, and lost each of its disputes.¹⁸

In another case, Costa Rica sought to justify the revocation of a mining license based on environmental

¹¹ This part is based on Alschner & Hui (2018), *supra* note 3.

¹² On a legal appraisal of these clauses, see Sabanogullari, L. (2015, May 21). The merits and limitations of general exception clauses in contemporary investment treaty practice. *Investment Treaty News*, 6(2), 3–5. Retrieved from <https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice>

¹³ *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, March 15, 2016. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf>

¹⁴ *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/2, Award, November 30, 2017. Retrieved from <https://www.italaw.com/cases/documents/6322>

¹⁵ *Copper Mesa v Ecuador*, *supra* note 13, paras. 6.58–6.67.

¹⁶ *Bear Creek v. Peru*, *supra* note 14, paras. 4.73–74.

¹⁷ On this point, see Legum, B. & Petculescu, I. (2013). GATT Article XX and international investment law. In Roberto Echandi & Pierre Sauve (Eds.), *Prospects in international investment law and policy: World Trade Forum*, (340–362). Cambridge: Cambridge University Press; and Levesque, C. (2013). The inclusion of GATT Article XX exceptions in IIAs: A potentially risky policy. In Roberto Echandi & Pierre Sauve (Eds.), *Prospects in international investment law and policy: World Trade Forum*, (363–370). Cambridge: Cambridge University Press.

¹⁸ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1); *Crystallix International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2); *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5).



protection concerns. But rather than invoking a general exception from the 1998 Canada–Costa Rica BIT that could absolve it of liability, it raised the treaty’s right-to-regulate clause, which mirrored NAFTA Article 1114 in permitting environmental measures “otherwise consistent” with the treaty.¹⁹

In short, both respondent states and tribunals are to blame for the fact that we see general public policy exception largely missing in action. They should look to *CC/Devas v. India* as a good example of an effective defense by the respondent and a thoughtful assessment of a general public policy exception by the tribunal, albeit in a case dealing with an exception’s national security aspect.²⁰ With many more disputes under second-generation treaties with general exceptions in the pipeline, future respondents and tribunals will have ample opportunities to engage with general public policy exceptions and the many yet-unresolved interpretive issues they raise.

Conclusions

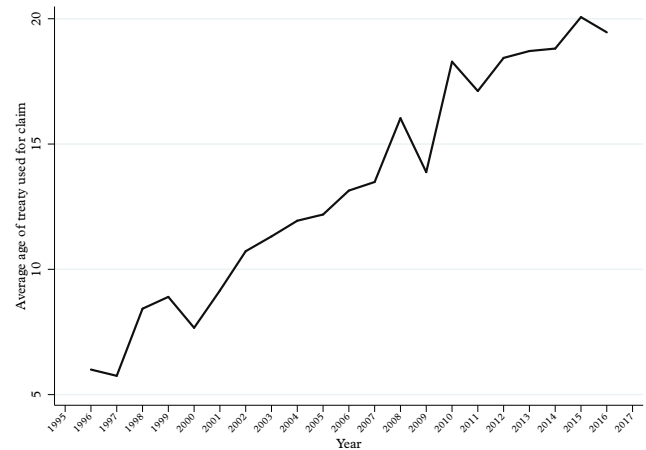
What general conclusions might we draw from these findings? First, if we are mainly concerned with the risk of investment arbitration claims, clarifying the language of substantive clauses, adding new flexibilities or reining in arbitrator discretion is not necessarily a panacea. What seems to matter is the actual presence of substantive obligations and how many investors these obligations cover. Going forward, states should thus focus more on *what* protections they give to *whom* in investment treaties than *how* those protections are written.

Investors increasingly rely on old treaties when making claims. Continuing to update old investment treaties remains important.

Second, these findings might reflect that few second-generation treaties have been put through the test of arbitral interpretation yet. In fact, investors increasingly rely on old treaties when making claims. In the mid-1990s, the average age of treaties used as legal basis for

claims was six years. Today, the average age is close to 20 years (Figure 3). To this end, continuing to update old investment treaties remains important.

Figure 3



Third, changing the design of investment agreements matters little unless states, in their role of respondents, make use of the novel provisions and tribunals to actively engage with the new treaty architecture in their reasoning. General public policy exception’s missing impact in practice is a case in point. Treaty design reform thus does not end at the signature table but is a process that continues into a treaty’s application and litigation.

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¹⁹ *Infinito Gold Ltd. v. Republic of Costa Rica* (ICSID Case No. ARB/14/5).

²⁰ *CC/Devas v. The Republic of India* (PCA Case No. 2013-09), Award on Jurisdiction and Merits, July 25, 2016. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/italaw9750.pdf>



INSIGHT 3

New Egyptian Investment Law: Eyes on sustainability and facilitation

Moataz M. Hussein



At a time when the world is witnessing critical changes at the national and international levels in a new generation of investment treaties, laws, policies and regulations, Egypt contributed to this process through revamping its national and international legal frameworks regulating investment.

At the core of this contribution is the new Egyptian Investment Law No. 72 of 2017.¹ Replacing a 20-year-old law on investment guarantees and incentives, the new law signals an overt shift in investment policy from targeting quantity to quality of FDI, in line with the adoption of Egypt's Sustainable Development Strategy (Egypt's Vision 2030) in 2015.²

The new law promotes domestic and foreign investments that contribute to sustainable development and abide by responsible business conduct standards. It also provides for incentives and investment facilitation measures in a framework of balance between rights and obligations of investors and states.

Sustainable development: One of the main goals of investment in Egypt

This trend is made clear in the definition of “investment,” which entails “using money for the set-up, expansion, development, funding, holding, or

management of an Investment Enterprise in a manner that contributes to the comprehensive and sustainable development of the state” (Art. 1). The same sustainable development dimension is reflected in the law as one of the main goals of investment in Egypt (Art. 2).

Principles governing investment in Egypt

The new law also identifies eight principles that should govern investment and apply to both the state and investors. These principles include (Arts. 3–8):

1. Equality of investment opportunities and non-discrimination
2. Supporting emerging companies, entrepreneurship and micro, small and medium enterprises (MSMEs)
3. Consideration of the social dimension, public health and environment protection
4. Freedom of competition, prevention of monopoly and consumer protection
5. Compliance with principles of governance, transparency, prudent management and non-conflict of interests
6. Maintaining stability of investment policies
7. Expedition and facilitation of investors' transactions
8. Preserving national security and public interest

Guarantees and safeguards

The new law maintains fundamental safeguards provided for investors, including: general standards of treatment, entry and sojourn of foreign investors, protection against nationalization, unlawful expropriation or confiscation, warning before revocation or suspension of licenses, transfer of funds, right to appoint foreign labour force and enforcement of state contracts (Arts. 3–8).

Investment incentives

In addition, the law provides a bundle of general, special and additional financial and procedural incentives for investment. The special incentives, for example, support development-oriented enterprises on a geographic and

¹ Egyptian Investment Law No. 72 of 2017, published in the Official Gazette on May 31, 2017, Article (1). Retrieved from <http://www.gafi.gov.eg/English/StartaBusiness/Laws-and-Regulations/PublishingImages/Pages/BusinessLaws/Investment%20Law%20english%20ban.pdf>

² <http://www.cabinet.gov.eg/English/GovernmentStrategy/Pages/Egypt%E2%80%99sVision2030.aspx>



sectoral basis. Investors may deduct from their taxable net profits 50 per cent of investment costs in Sector A and 30 per cent of investment costs in Sector B. Sector A includes the geographic locations that most urgently need development, while sector B covers all other areas in Egypt (Art. 11). Sector B targets enterprises operating in the sectors directly related to Egypt's development plan, including labour-intensive sectors, export-oriented sectors, MSMEs, renewable energy, mega projects and a list of other sectors.

Investment facilitation

In terms of investment facilitation, a fundamental development was introduced regarding the Single Window: a one-stop shop was established at the General Authority for Investment (GAFI) in 2004. The new law created the Investor Service Centre to facilitate company incorporation and the issuance of approvals, permits and licenses for the set-up or management of investment enterprises and to provide aftercare services, among others, in conformity with Egyptian laws (Art. 21). On the same track, the law mandates the automation and unification of procedures related to incorporation and post-incorporation services, including Electronic Incorporation (Art. 48). Moreover, it provides that an Investor's Manual covering the conditions, procedures and dates prescribed for the allocation of the real estate properties and the issuance of the approvals, permits and licenses related to investment must be made available on the website and publications of the competent authorities (Art. 19).

Corporate social responsibility

Supporting CSR, the law provides tax incentives for investors who dedicate a percentage of their annual profits to the creation of social development systems outside of their projects, including in areas such as environmental protection, healthcare, social care, cultural care, technical education, and research and development (Art. 15). To fight corruption, the law denies protection, safeguards, privileges and exemptions to enterprises established on the basis of deceit, fraud or corruption (Art. 3).

Dispute settlement

The law provides for multitiered mechanisms for the settlement of investment disputes, including domestic litigation, amicable settlement and alternative dispute resolution (ADR), and administrative review by three specialized committees:

1. The Grievances Committee inside GAFI examines complaints filed against the resolutions issued in accordance with the provisions of the new law by GAFI or the authorities concerned with the issuance of the approvals, permits and licenses.
2. The Ministerial Committee for Settlement of Investment Disputes looks into applications, complaints or disputes between investors or in which one of the state's bodies, authorities or companies is involved.
3. The Ministerial Committee for Settlement of Investment Contracts' Disputes settles disputes arising from investment contracts to which the state or one of its bodies, authorities or companies is a party.

In addition, subject to the agreement between the state and the investor, the law allows for settlement through domestic or international ad hoc or institutional arbitration. Finally, the law establishes an independent centre—the Egyptian Arbitration and Mediation Centre—for the settlement of disputes between investors or with governmental entities (Arts. 82–91).

Relationship between the new law and treaty reform

The important step of issuing a new investment code expresses the intention of the Egyptian government to adopt a new generation of investment regulations at the domestic level to complement and conform to its efforts to revamp its IIAs network, especially BITs.

Egypt's efforts to reform the international legal framework governing foreign investors in Egypt have been in place since the creation of an Egyptian BIT Model in 2007 and its subsequent updates. The BIT model serves as a roadmap for investment negotiations aimed at achieving consistency in the substantive content and language of Egyptian BITs, attracting FDI that fosters sustainable development, maintaining balance between the rights and obligations of investors, reducing the number of treaty-based disputes, and developing an effective and flexible mechanism for the settlement of investment disputes.

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INSIGHT 4

Toward an International Convention on Business and Human Rights

Carlos Lopez



The zero draft of one of the most important international human rights treaties of recent years—an instrument addressing business and human rights—was released in July 2018 by Ecuador’s Ambassador acting as chair of the process.¹ Largely focused on the key issue of access to justice and remedy for those who allege harm by a business enterprise, the draft is already having an impact on the tone and character of the debates, so far focused primarily on political and procedural considerations. This article carries out a preliminary critical analysis of the salient elements of the draft treaty.

In 2014, the UN Human Rights Council in Geneva adopted by majority resolution 26/9 creating an Intergovernmental Working Group to elaborate a “legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (a treaty on business and human rights).² The working group has held three sessions,³

¹ UN Office of the High Commissioner of Human Rights [OHCHR]. (2018, July 16). *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*. Retrieved from <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTTransCorp/Session3/DraftLBI.pdf>

² Human Rights Council. (2014, July 14). *Resolution 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (A/HRC/RES/26/9)*. Retrieved from http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9

³ Zhang, J., & Abebe, M. (2017, December). The journey of a binding treaty on human rights: Three years out and where is it heading? *Investment Treaty News*, 8(4), 3–4. Retrieved from <https://www.iisd.org/itm/2017/12/21/the-journey-of-a-binding-treaty-on-human-rights-three-years-out-and-where-is-it-heading-joe-zhang-and-mintewab-abebe>; Zhang, J. (2015, November). Negotiations kick off on a binding treaty on business and human rights, *Investment Treaty News*, 6(4), 10–11. Retrieved from <https://www.iisd.org/itm/en/2015/11/26/negotiations-kick-off-on-a-binding-treaty-on-business-and-human-rights>

with its next session scheduled for October 16–19, 2018.

The zero draft makes reasonable choices in its overall structure and main focus on state obligations. The chosen model is a treaty focused on access to remedy and justice by victims of corporate abuse and legal accountability of transnational corporations. Other options included a framework treaty and a treaty that would focus on creating or recognizing direct human rights obligations for businesses under international law. In the zero draft, business human rights obligations are only recognized as such in the preamble, which provides that all business enterprises “shall respect all human rights.”

The focus on remedies and accountability for business enterprises’ abuses is commendable, and the treaty’s structure, including the headings, tackles head-on the most pressing issues, including legal liability of corporations, victims’ rights, jurisdiction and mutual legal assistance, among others. All of these make the draft treaty a politically viable alternative. However, the way it deals with those issues is uneven, imprecise and at times obscure. In any case, having a full draft in front of our eyes undoubtedly helps in the debates and the eventual improvement of the draft.

The role of the state

Regrettably, the draft treaty pays scant attention to the business role of the state and the need for accountability and remedy in that context. Very often, states enter into joint ventures with private investors or otherwise facilitate and support business operations in mining, oil and gas and other sectors or provide security to the operational sites. Many of the abuses reported usually involve private business and state complicity. Further, some provisions seem to go in the opposite direction. For instance, Article 13 on consistency with international law astonishingly presents broadly worded clauses that leave existing state obligations untouched.

Scope

The zero draft addresses only the conduct of transnational corporations and other business enterprises that have “transnational activities.” Actions



or omissions by businesses acting only within domestic jurisdictions are omitted. The zero draft treaty defines “business activities of transnational character” as those “for-profit activities” that “take place or involve actions, persons or impact in two or more national jurisdictions” (Art. 4(2)). The limitation in scope is in detriment of a broader scope including all business operations, as advocated by some states and non-governmental organizations.

This limited scope has been a matter of contention since the start of the process.⁴ The scope has impacts on the reach and consistency of several treaty provisions whose focus is the definition of grounds of legal liability (mainly civil and criminal) for businesses and access to remedy and reparation. Its disruptive effects can be seen more prominently in the definition of corporate criminal offences that state parties are required to enact domestically. Under the current scope and definitions, only criminal conduct (no matter its seriousness) that occurs in more than one jurisdiction may be punishable, which may lead to the absurd outcome that egregious criminal conduct (for instance crimes against humanity) may not be punishable if committed by businesses acting only within one jurisdiction.

To mitigate this distortion, the draft could have inserted a clause inspired by Article 34.2 of the UN Convention on Transnational Organized Crime.⁵ An adapted provision could read:

The offences established in accordance with Article 10.8 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature of the business activity, except to the extent that the nature of the crime would require the transnational element.

This proposed clause could also be broadened to cover human rights due diligence (Art. 9).

Despite these deficiencies, the draft treaty will reassure those concerned that the operations of transnational corporations may not be properly addressed if they were to be embedded within broad and vague norms that would address “all business enterprises.”

⁴ International Commission of Jurists. (2015, May 30). *Submission on scope of future treaty on business and human rights*. Retrieved from <https://www.icj.org/submission-on-scope-of-future-treaty-on-business-and-human-rights>

⁵ UN Office of Drugs and Crime. (2004). *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*. Retrieved from <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCbook-e.pdf>

Prevention

The draft treaty takes a sweeping approach to the issue of preventive measures to be required by states from business enterprises (Art. 9). These measures are framed as a sort of (human rights) due diligence that significantly departs from what is generally known as such.

As formulated in the UN Guiding Principles on Business and Human Rights,⁶ human rights due diligence is a four-step process whereby business enterprises should identify, prevent, mitigate and account for how they address their adverse human rights impacts. The zero draft adds “meaningful consultation” with affected groups, the requirement of financial security to cover potential compensation claims and the incorporation of some measures into businesses’ transnational contracts. Failure to comply with such due diligence measures would entail legal liability. A provision for “effective national procedures” to “enforce compliance”—something that is always weak everywhere—is positive. However, both businesses and governments will find it hard to comply or monitor compliance respectively unless these obligations of due diligence are further clarified and defined.

Under the draft treaty, preventive measures are framed as a sort of (human rights) due diligence that significantly departs from what is generally known as such.

Given that preventive measures are usually regarded as a priority and that large sectors of organized civil society are advocating for mandatory human rights due diligence for businesses, this section of the draft treaty is likely to remain included in a final draft, though in a revised form.

Legal liability and access to remedy

The core of the draft treaty is perhaps its provisions on legal liability for transnational corporations and the rights of victims to remedy and reparation. Although it is not strictly needed, draft Article 8 starts with a restatement of the rights of victims to access to justice and remedies. It is not clear how various forms of reparation will work

⁶ UN OHCHR. (2011). *Guiding principles on business and human rights: Implementing the United Nations “Protect, Respect and Remedy” framework*. Retrieved from https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf



when applied to companies. In addition, references to “environmental remediation” and “ecological restoration” also need clarification if they are different from other generally accepted forms of reparation.

Among the rights of victims spelled out in the draft convention, the sweeping provision that “in no case shall victims be required to reimburse any legal expenses of the other party to the claim” (Art. 8(5) (d)) stands out as potentially controversial since it may be seen as an incentive to frivolous litigation, though that problem could be addressed through a screening system. The draft treaty also provides for the establishment of a Fund for Victims (Art. 8(7)).

The core of the draft treaty is perhaps its provisions on legal liability for transnational corporations and the rights of victims to remedy and reparation.

Article 10 focuses on civil and criminal liability. It requires the enactment of civil, criminal or administrative legal liability for abuses committed in the context of transnational business activity, and provides that liability applies to both legal and natural persons.

Key issues in this discussion are the parent–subsidiary company and lead–supplier company relationships and the corresponding legal responsibilities in the event that harm is caused or contributed to in the context of business operations. Draft Article 10(6) attempts to tackle this complex and contested issue by mandating certain parameters whereby a “person with business activities of transnational character” (presumably a business corporation) will be liable for harm caused in the context of those operations:

6. All persons with business activities of a transnational character shall be liable for harm caused by violations of human rights arising in the context of their business activities, including throughout their operations:
 - a. to the extent it exercises control over the operations, or
 - b. to the extent it exhibits a sufficiently close relation with its subsidiary or entity in its supply chain and where there is strong and direct connection between its conduct and the wrong suffered by the victim, or

c. to the extent risk[s] have been foreseen or should have been foreseen of human rights violations within its chain of economic activity.

The various grounds under which the liability of parent companies may be established in relation to wrongs by their subsidiaries are remarkable for their flexible definition and their alternative application. This suggests an effort to cover all possible ways in which a company may be involved in the harm caused by others. However, there is a need for careful analysis to ascertain the extent to which these clauses will be effective in clarifying the link between parent and subsidiary or, on the contrary, will provide an incentive for parent companies’ hands-off strategies to avoid “strong” or clear connections with other companies.

The provision is likely to be the subject of heated debates during negotiations, as many corporations and states remain keenly attached to the doctrine of separation of legal entities (the corporate veil). Heightened attention will come not only from legal experts but also from groups and communities from around the world who often complain that subsidiaries of large companies in the extractive sector cause damage to their livelihoods, environments and health, among others.

The various grounds under which the liability of parent companies may be established in relation to wrongs by their subsidiaries are remarkable for their flexible definition and their alternative application.

The provisions on criminal legal liability (Art. 10(8)–(12)) are similarly formulated in loose fashion. It should be said for starters that a special provision on corporate criminal liability should be welcomed as a step forward and maintained until the end, but the language needs to be more precise. The draft treaty not only calls for criminal liability for all human rights violations amounting to criminal offences under international law and “domestic law” (potentially leaving room for divergent and potentially arbitrary approaches) but also limits its application to offences committed by “persons with business activities of a transnational character.” This narrow scope will likely lead to further debate and discussion.



International institutional arrangements

The draft treaty would create a committee of experts to monitor and promote the implementation of the treaty and a conference of state Parties (Art. 14), but regrettably confines their functions to the traditional functions performed by existing similar bodies. The limitations in terms of effectiveness of the current international system of monitoring and supervision based on expert committees are well known. This system is already insufficient in examining state compliance with classic human rights treaties and may be even less effective in relation to practices and policies of business enterprises. Rather than replicating the existing system, the new treaty on business and human rights could establish innovative practices and mechanisms to strengthen the functions and enhance the effectiveness of the international system of treaty monitoring and supervision.

The drafting of the treaty needs considerable work to measure up to the high expectations and needs expressed by the international community and especially those in need of justice and reparation.

By early August, Ecuador's Ambassador released also a draft optional protocol containing provisions for a National Implementation Mechanism and a complaints function for the expert committee created under Article 14 of the main treaty. Although receiving complaints is a welcome function for the Committee, the applicable procedure and final outcomes are far from clear and effective. These aspects deserve a separate analysis.

Conclusion

All things considered, it may be said that the draft treaty is a step forward and a viable option. Many doubted the process would advance to the stage of having a full draft for negotiations. The process is in its fourth year and moving forward despite the many challenges. But the drafting of the treaty needs considerable work to measure up to the high expectations and needs expressed by the international community and especially those in need of justice and reparation.

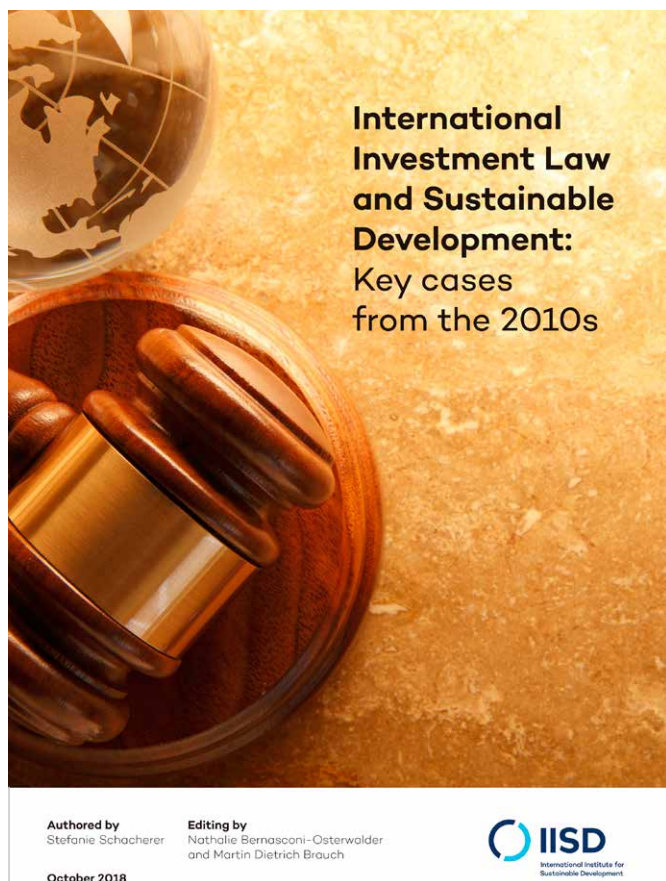
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FEATURED E-BOOK

International Investment Law and Sustainable Development: Key cases from the 2010s



2010s. Looking at these cases through a sustainability lens, Stefanie Schacherer illustrates the complex relationship between international investment law and sustainable development.

The 10 cases were selected based on their relevance for a range of issues relating to sustainable development, including environmental protection, socio-environmental impact assessment, renewable energy, taxation, corruption and human rights. The cases also highlight fundamental legal issues and current debates in international investment law, such as the notion of legitimate expectations and the related balancing of public versus private rights, the amount of compensation awarded for actions taken by states that affect the bottom line of investors, and the increasing trend to push for responsible investment by holding foreign investors accountable for their actions in the host state.

Along with the publication of this e-book, IISD is publishing the 27 summaries of both volumes on the ITN website at <https://www.iisd.org/itn/es/isds-investment-arbitration-sustainable-development>

In 2011, IISD published *International Investment Law and Sustainable Development: Key cases from 2000–2010*. The e-book features 17 summaries and analyses of decisions rendered by arbitral tribunals in treaty-based investor–state arbitration cases having sustainable development implications.¹

IISD is now releasing *International Investment Law and Sustainable Development: Key cases from the 2010s*.² The new e-book, a companion volume to the 2011 publication, carries out the same exercise, now focusing on 10 investment arbitration cases decided in the

Through the compilation of analyzed cases, IISD aims at contributing to a broader debate on the reform of international investment law and policy, with the aim of ensuring that foreign investment contributes to sustainable development.

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¹ Bernasconi-Osterwalder, N. & Johnson, L. (Eds.). (2011, July). *International investment law and sustainable development: Key cases from 2000–2010*. Geneva: IISD. Retrieved from <https://www.iisd.org/library/international-investment-law-and-sustainable-development-key-cases-2000-2010>

² Bernasconi-Osterwalder, N. & Brauch, M. D. (Eds.). (2018, October). *International investment law and sustainable development: Key cases from the 2010s*. Geneva: IISD. Retrieved from <https://www.iisd.org/library/international-investment-law-and-sustainable-development-key-cases-2010s>



NEWS IN BRIEF

NAFTA 2.0 finalized, announced as USMCA: Mexico, United States agree to limit ISDS clause; Canada to pull out of ISDS after a three-year window

On September 30, 2018, U.S. Trade Representative (USTR) Robert Lighthizer and Canadian Foreign Affairs Minister Chrystia Freeland [announced](#) that the two countries had reached an agreement, alongside Mexico, on a modernized trade deal. NAFTA will be replaced once the new agreement, dubbed [United States–Mexico–Canada Agreement \(USMCA\)](#), enters into force.

Canada, Mexico and the United States embarked on [NAFTA renegotiations](#) in August 2017. After a July 2018 round, Canada took to the sidelines to let its partners work out [bilateral differences](#), or possibly because it was [frozen out by them](#). After [Mexico and the United States reached a bilateral agreement](#) on August 27, 2018, Canada rejoined negotiations with the United States.

While the investor protections in USMCA [Chapter 14](#) are similar to those contained in the [CPTPP](#), the ISDS clause is more limited. Investors may only bring claims with respect to the clauses on post-establishment national treatment or MFN, or direct expropriation. Before initiating arbitration, foreign investors must exhaust local remedies in the host state or pursue such remedies for at least 30 months.

Annex 14-D, containing the ISDS clause, is titled “Mexico–United States Investment Disputes,” signalling that the mechanism does not apply to Canadian claimants or Canada as a respondent state.

Investments made between NAFTA’s entry into force (January 1, 1994) and its termination and in existence when USMCA enters into force are defined as “legacy investments.” Under Annex 14-C, investors from all three USMCA parties may raise NAFTA-based claims with respect to legacy investments within three years of NAFTA’s termination. The three-year window does not affect currently pending proceedings or any legacy claims initiated.

Canada–Mexico ISDS disputes would still be possible under the [CPTPP](#) once it enters into force. However,

after the USMCA’s three-year window for legacy claims, there would no longer be a treaty basis for ISDS between Canada and the United States.

Under Annex 14-E, Mexico–United States ISDS claims are also possible for investors in certain sectors who have a contract with their host government. These sectors include oil and gas, power generation, telecommunications, transportation and infrastructure. In these cases, investors may bring claims based on most investor protections in the USMCA without pursuing local remedies first.

In addition to investment, the agreement contains 33 other chapters, with disciplines on trade in goods and services, agriculture, rules of origin, government procurement, financial services, telecommunications, intellectual property, competition policy, labour and environment, among others.

According to [Mexican Economy Secretary Ildefonso Guajardo Villareal](#), the USMCA may be signed by the Canadian, Mexican and U.S. leaders at the G20 summit in Buenos Aires in late November. All three parties must then ratify the agreement for it to enter into force and replace NAFTA.

UNCITRAL Working Group III to continue debate on possible multilateral reform of ISDS

UNCITRAL Working Group III is scheduled to continue discussions on [possible reform of ISDS](#) at its 36th session, to be held October 29–November 2, 2018 in Vienna. At the session, UNCITRAL member states will begin to identify and discuss areas where, in their view, multilateral reform of ISDS may be desirable. More information as well as several official documents to be considered during the session are available on the [working group website](#).



Canadian government launches consultation on Canada's foreign investment promotion and protection agreements (FIPA), open until October 28, 2018

Canadian Minister of International Trade Diversification Jim Carr [announced](#) on August 14, 2018 the launch of a public consultation on Canada's BITs, known as foreign investment promotion and protection agreements (FIPAs). The consultation provides an opportunity for Canadians to express their views on rules and institutions that support the international trade and investment regime.

In the consultation, the Canadian government asks six general questions. The first four focus on how FIPAs can best promote the interests of Canadian small and medium-sized enterprises (SMEs), advance gender equality and women's economic empowerment, reflect the interests of Indigenous-owned businesses and peoples, and advance and strengthen the notion of responsible business conduct. A fifth question asks how ISDS mechanisms can be made more transparent and fairer. A sixth and final question invites respondents' views on the advantages and disadvantages of FIPAs and on whether there are other mechanisms that could robustly protect Canadian investor interests abroad.

The Canadian government encourages all Canadians to participate in the consultation. The [online consultation platform](#) is open until October 28, 2018.

UN Working Group on Business and Human Rights hosts 4th session October 15–19, 2018

The fourth session of the Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights will take place October 15–19, 2018 in Room XX of the Palais des Nations in Geneva.

During the session, the working group will discuss the zero draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, as well as a zero draft optional protocol. More information, including the zero drafts, is available

at the website of the UN Human Rights Council.

In an open letter dated October 1, 2018, over 150 scholars and experts in the fields of public international law, human rights law, business and human rights, and international economic law “strongly urge all states to engage constructively and in good faith with the process of negotiating an international legally binding instrument.” The letter will remain [open for signature](#) until the end of the 4th session of the working group on October 19, 2018.

Over 300 U.S. state legislators strongly support USTR's efforts to remove ISDS from NAFTA

In a September 12, 2018 letter, 312 legislators—including Democrats as well as Republicans—from all 50 U.S. states wrote that they “strongly support” U.S. Trade Representative (USTR) Robert Lighthizer's efforts to [remove ISDS from NAFTA](#). In contrast, a May 2018 letter [in support of ISDS in NAFTA](#) gathered the signatures of 12 state legislators only.

ISDS finds strong support among Republicans in the U.S. Congress. A group of 103 Republican senators and representatives signed a [letter on March 20, 2018](#) calling on Lighthizer to maintain ISDS in NAFTA. In the letter, the lawmakers cautioned that excluding ISDS altogether or maintaining it in an [opt-in system](#) in a renegotiated NAFTA would “jeopardize Republican support” to the deal.

Published texts reveal minor edits to the ISDS clause in the United States–South Korea FTA

The United States and South Korea have renegotiated investment provisions in their FTA (KORUS FTA). [According to texts published on September 3, 2018](#) by the Korean government, the revised agreement includes minor edits to the ISDS mechanism, adding clauses to prevent the abuse of investment arbitration by multinational companies and to safeguard states' right to regulate.



Reduced scope of application of ISDS in RCEP; negotiating partners still aim at end-2018

After an RCEP negotiation round held in Singapore in late August 2018, most negotiating partners are reported to have agreed to reduce the scope of application of the ISDS clause.

A senior official said that ISDS would not be applied on an MFN basis; accordingly, different RCEP members could agree to different dispute settlement regimes. It was also reported that India secured a commitment that disputes concerning performance requirement prohibitions would be excluded from the scope of ISDS. The 16-nation agreement is expected to be concluded by the end of 2018.

Australian Labor Party drops opposition to CPTPP, vows to remove ISDS bilaterally

On September 10, 2018, the Australian Labor Party (Labor) dropped its long-standing opposition to the 11-nation CPTPP, clearing the way for the agreement to pass the Senate. The Australian Greens and the Centre Alliance strongly criticized the move, accusing Labor of selling out. Union representatives—including the Australian Council of Trade Unions, the Australian Manufacturing Workers Union and the Electrical Trades Union—also felt betrayed by the party.

In a statement to the House of Representatives, Labor trade spokesman Jason Clare stressed that the party “doesn’t support the inclusion of ISDS clauses in trade agreements,” but highlighted that the CPTPP extended ISDS to Canada only. Australia already has bilateral agreements with ISDS with the other CPTPP partners. If Labor wins the next election, Clare committed to negotiating with Canada to remove the application of the ISDS between the two countries, as was done by New Zealand.

Clare’s statement also expresses Labor’s understanding that “the way Australia negotiates trade agreements needs to change.” He also stated that a Labor government, if elected, will “seek to remove ISDS provisions from existing free trade agreements and legislate so that a future Australian government cannot sign an agreement with such provisions.”



AWARDS AND DECISIONS

ICSID tribunal finds Croatia in breach of expropriation obligations under Austria–Croatia BIT

Georg Gavrilović and Gavrilović D.O.O. v. Republic of Croatia, ICSID Case. No. ARB/12/39

Kirrin Hough

In an award dated July 26, 2018, an ICSID tribunal considered claims brought against Croatia by Georg Gavrilović, an Austrian national, and Gavrilović d.o.o., a company established under Croatian law. The tribunal upheld the direct expropriation claim under the Austria–Croatia BIT, awarding the claimants roughly EUR 3 million in compensation, but denied the remaining claims.

Background and claims

When the communist republic of Yugoslavia was created after World War II, the meat business owned by the family of Georg Gavrilović came under social ownership. Between the collapse of Yugoslavia in 1989 and the Croatian war of independence in 1991, the business transitioned to a privately-owned company, comprising a holding company and nine limited liability companies.

Five of the nine companies were placed into bankruptcy. The bankruptcy court authorized the sale of the five bankrupt companies via public tender, and Mr. Gavrilović submitted the only bid in November 1991. The liquidator and Mr. Gavrilović entered into a purchase agreement that provided for the purchase of the five companies along with their assets, but did not specify what exactly the assets were.

According to the claimants, the purchase agreement confirmed Mr. Gavrilović's rights as owner of the five companies (collectively, Gavrilović d.o.o., the other claimant in the arbitration). Croatia, however, contended that Mr. Gavrilović had taken part in a fraudulent scheme to place the companies into bankruptcy and secure his ownership.

Defending the legitimacy of the purchase, the claimants argued that Croatia had undermined, failed to protect and promote, and ultimately expropriated Mr. Gavrilović's investment.

Tribunal has jurisdiction over dispute; claims found admissible

Croatia argued that the tribunal did not have jurisdiction over the claims, because Croatia had not consented to the arbitration in light of Mr. Gavrilović's "orchestration" of the bankruptcy in violation of Croatian law. The tribunal, however, found that in fact the bankruptcy court—an organ of the state—had orchestrated the bankruptcy as part of a quid pro quo for Mr. Gavrilović's assistance in smuggling currency out of the country in support of the Croatian war for independence.

Croatia also argued that the investment was made unlawfully, rendering the claims inadmissible. However, the tribunal found that Croatia had failed to prove the alleged illegalities. Additionally, the tribunal found that, although the purchase agreement gave the Regional Commercial Court in Zagreb jurisdiction over disputes arising from such agreement, the umbrella clause in the BIT made the claims admissible.

Croatia in breach of direct expropriation obligations

The claimants alleged that Croatia had directly and unlawfully expropriated the real property of Gavrilović d.o.o. by registering the state as its owner, in breach of BIT Article 4(1). The plots of land were registered by the state under Article 362(3) of the Ownership Act, which gave Croatia ownership rights to all property under social ownership in Croatia, where the ownership of such property had not been determined; anyone asserting otherwise had the burden of proof. The tribunal found this provision of the Ownership Act to be expropriatory insofar as Croatia's assertion of ownership could not be reversed without further action by the claimants, for example, through domestic courts.

The claimants further argued that Croatia had indirectly expropriated Gavrilović d.o.o.'s property by preventing Gavrilović d.o.o. from registering ownership of that property. The tribunal, however, found that the claimants had never attempted to register the property and thus could not effectively allege that they had been prevented from registering it. The tribunal also rejected the claimants' argument that Croatia had expropriated Mr. Gavrilović's contractual rights under the purchase agreement since there were no relevant contractual rights capable of expropriation.



Tribunal rejects FET claims

The remainder of the tribunal's analysis addresses the remaining plots of land for which the claimants had not yet shown a violation of the BIT. In its analysis, the tribunal, citing *Tecmed v. Mexico* and *El Paso v. Argentina*, found that a breach of a legitimate and reasonable expectation by an investor may result in a violation of the FET standard. The tribunal further found that there can be no legitimate expectation with respect to property to which the claimants have no property or contractual rights.

Next, the tribunal considered whether the claimants had a legitimate expectation that Gavrilović d.o.o. would be able to register ownership over the properties. Croatia argued that neither the purchase agreement (which failed to specify which assets were to be sold with the companies) nor any other documents or statements provided the claimants with a legitimate expectation regarding the title or ability to register the claimed properties.

The tribunal ultimately found that, since the claimants had not established that Croatia had made any representations or warranties that the claimants were to purchase a registerable right to all of the claimed property, Mr. Gavrilović could not have legitimately or reasonably believed that he would be able to register ownership over all of it. The tribunal did find, however, that Mr. Gavrilović had a reasonable and legitimate expectation that he had registerable title to the property to which he could establish ownership.

The claimants argued that an annulment action by the state seeking to annul the purchase agreement, a criminal investigation into Mr. Gavrilović's actions and the consequent public campaign launched against him would have made it likely that they could not sell or mortgage real estate in the absence of additional documentation from Croatia, in breach of the claimants' legitimate expectations. They also argued that they were prevented from registering and improving the properties and that Croatia had sold the claimants' property based upon reliance on the pending annulment action. The tribunal, however, found that the damages alleged were too hypothetical and that there was no causal link between the investigation and the claimants' inability to register ownership or obtain financing.

The tribunal considered additional FET claims, but ultimately found no breach. It also indicated that the claimants had not argued or shown that Croatia had

violated domestic law, domestic procedure or domestic notions of due process as part of their FET claims.

Tribunal denies umbrella clause and national treatment claims

The claimants contended that, under the umbrella clause of the BIT, Croatia was bound by the terms of the purchase agreement and had breached such clause by failing to honour its terms. The tribunal, however, found that the purchase agreement was concluded between Mr. Gavrilović and the five companies represented in bankruptcy by the liquidator; Croatia was not a party to the purchase agreement and was thus not responsible to the claimants for any obligations thereunder (para. 1159).

Additionally, under the national treatment clause of BIT Article 3(1), the claimants alleged that they were treated less favourably than a Croatian national, Davor Imprić, who had purchased and registered a plot of land from the bankruptcy estate of one of the nine Gavrilović companies. The tribunal ultimately dismissed the claim. It considered that the claimants and Mr. Imprić were not in like circumstances, because Mr. Imprić had purchased and sought ownership of just one plot of land from the nine companies, while the claimants sought ownership over many plots of land; the terms of the respective purchase agreements differed; the claimants had not established registrable title to all claimed properties; and the claimants failed to establish ownership rights over the plots. For these reasons, the tribunal dismissed the claim of national treatment violation.

Damages

Having found that Croatia directly expropriated the taken plots, in breach of BIT Article 4(1), the tribunal awarded Gavrilović d.o.o. HRK 9,699,463.73 and EUR 1,658,960.49 in damages plus compounded interest. Croatia was also ordered to pay 30 per cent of the claimants' legal and other costs and 30 per cent of arbitration costs, plus interest on the two amounts.

Notes: The tribunal was composed of Michael Pryles (president appointed by the parties, Australian national), Stanimir Alexandrov (claimants' appointee, Bulgarian national) and J. Christopher Thomas (respondent's appointee, Canadian national). The award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9887.pdf>

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Spain found to have breached the Energy Charter Treaty in award by ICSID tribunal

Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. The Kingdom of Spain, ICSID Case No. ARB/13/31

Trishna Menon

In a final award dated June 15, 2018, an ICSID tribunal found Spain in breach of the FET standard under ECT Article 10(1), in a case initiated by Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. (jointly, Antin), companies constituted in Luxembourg and the Netherlands, respectively.

Background and claims

One of Spain's policies to stimulate investment in the renewable energy sector was Royal Decree 661 of 2007 (RD661/2007), under which renewable energy generators would benefit from a premium set by the Spanish government above the wholesale market price. The basis of remuneration for generators was a feed-in tariff (FIT) for the lifetime of the installation.

Antin's investments on the basis of RD661/2007 consisted of the acquisition of shareholding in two operational concentrated solar power (CSP) plants (the Andasol Companies) located in Granada, southern Spain, in 2011. Antin claimed that the regulatory regime changed considerably since it made its investment—particularly in light of the new regime, created by Law 15/2012 of December 28, 2012, which effectively excluded the Andasol Companies from the application of RD661/2007, particularly the right to receive a FIT, and created a tax on the value of electrical energy produced (TVPEE).

The claimants argued that these changes had significant harmful effects on the Andasol Companies, and thus on their investments. According to the expert report submitted by the claimants, the premium payments expected under RD661/2007 considerably exceeded the special payments provided under the new regime. Additionally, according to the claimants, their freedom of cash flows and equity cash flows was also considerably reduced.

Antin initiated arbitration seeking a declaration that Spain breached the FET standard under ECT Article 10(1) and full restitution to the claimants by re-establishing the situation that existed prior to Spain's alleged ECT breaches, together with compensation for all losses suffered before restitution as a result of Spain's alleged treaty breaches.

Tribunal accepts jurisdiction over the disputes

Spain objected to the tribunal's personal jurisdiction (*ratione personae*) on the grounds that, since the claimants were nationals of EU member states and the respondent is an EU member state, the claimants are not investors "of another Contracting Party" under ECT Article 26(1). Spain considered that the context of the ECT must result in the exclusion of intra-EU investor–state disputes based on the ECT. The tribunal, however, noted that this objection had already been presented by Spain as respondent in the *Charanne*, *Isolux* and *Eiser* cases and was rejected in all of them.

Spain also argued that the tribunal lacked subject matter jurisdiction (*ratione materiae*) since the claimants did not own or control, directly or indirectly, the assets identified by them as their investment, and therefore did not have protected investments under ECT Article 1(6). The tribunal considered that the terms of ECT Article 1(6) meant that the investment must be either owned or controlled by the investor, directly or indirectly, but that nowhere in the ECT text or context was there a requirement that only the real and ultimate owner or beneficiary may submit claims to arbitration, as Spain had argued. Accordingly, the tribunal rejected this objection as well.

The third objection was that the tribunal lacked subject matter jurisdiction (*ratione materiae*) to hear any claims related to the tax on the value of electricity production, introduced by Law 15/2012 (TVPEE), given that Spain did not consent to arbitrate disputes regarding alleged violations of ECT Article 10(1) arising from tax measures, by way of the exclusion contained in ECT Article 21. The tribunal found that the TVPEE was designed with a general public purpose, not with the aim of destroying Antin's investments. Accordingly, it upheld Spain's jurisdictional objection to decide on the TVPEE.

Fair and equitable treatment under ECT Article 10(1)

Antin argued that it invested in Spain in reliance of the regime under RD661/2007, a measure designed to attract foreign investment. Specifically, the claimants argued that they legitimately expected that, because their plants complied with all the registration requirements, they would be subject to the FIT regime for their entire operational life, since they were based on an offer by Spain under a royal decree.

In particular, Antin alleged that Spain frustrated this legitimate expectation, among others, withdrawing the FIT for electricity production using natural gas,



introducing the TVPEE as a disguised and unjustified cut of the FIT, eliminating the economic regime under RD661/2007 in its entirety and introducing a substantially less favourable regime without FIT.

The tribunal concluded that the FET obligation under ECT Article 10(1) comprises an obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long-term investments. However, it agreed with Spain that this did not mean that an investor could have a legitimate expectation that the legal framework could not evolve or that a state party to the ECT is precluded from exercising its regulatory powers to adapt the regime to the changing circumstances in the public interest. Rather, according to the tribunal, it means that an investor's legitimate expectations may be defeated if the host state eliminates the essential features of the regulatory framework relied upon by the investor in making a long-term investment.

In conclusion, the tribunal held that the tariff deficit faced by Spain did not justify the elimination of the key features of the RD661/2007 regime and its replacement by a wholly new regime, not based on any identifiable criteria. This, according to the tribunal, amounted to a violation of the investor's legitimate expectations and the FET standard.

Decision and costs

The tribunal decided that Spain breached the FET standard under ECT Article 10(1). Spain advocated the asset-based method and opposed the discounted cash flow (DCF) method proposed by Antin, which, according to Spain, was speculative. The tribunal disagreed, considering that the alleged unpredictability of the DCF method was fundamentally tied to the unpredictability of the Spanish legal regime, and decided to apply the DCF method. Spain was ordered to pay Antin EUR 112 million as compensation for the FET breach, along with pre- and post-award interest of 2.07 per cent, compounded monthly.

Notes: The tribunal was composed of Eduardo Zuleta Jaramillo (President, appointed by the Chairman of the ICSID Administrative Council, Colombian national), Francisco Orrego Vicuña (claimants' appointee, Chilean national) and J. Christopher Thomas (respondent's appointee, Canadian national). The award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9875.pdf>.

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Cypriot investor awarded EUR 18 million for expropriation and violation of national treatment and FET

Olin Holdings Limited v. State of Libya, ICC Case No. 20355/MCP

Pietro Benedetti Teixeira Webber

In an arbitration initiated by Cypriot company Olin Holdings Limited (Olin), an ICC tribunal found that Libya breached its obligations to accord to the investor FET and to treat Olin's investments no less favourably than it treated Libyan nationals' investments. In addition, the tribunal held that Libya had unlawfully expropriated Olin's investments. The award was rendered on May 25, 2018.

Background and claims

In the 1990s, Libya initiated reforms to foster foreign investments. In this context, Olin decided to invest in a dairy and juice factory in Tripoli. By the end of 2006, when Olin's factory was built and ready to operate, it received an eviction order (the Expropriation Order) informing that the factory had been dispossessed and requesting it to vacate the property within three days.

The Libyan army, soon after the issuance of the Expropriation Order and pursuant to it, destroyed several buildings around the factory. Although two Libyan competitors of the same business sector were formally exempted from the order, the Libyan government refused to exempt Olin from it. Olin started court proceedings in Libya, and the order was voided in 2010. However, in February 2011 a period of revolution started, and the Libyan court decided to reopen the proceedings. In 2014 it ruled that Olin had failed to prove the harm it suffered. Olin ceased all operations in the factory in October 2015.

Olin initiated ICC arbitration in July 2014, requesting the tribunal to declare that Libya breached Article 7 of the Cyprus–Libya BIT (the BIT), related to expropriation; the national treatment clause (BIT Article 3); and the FET and full protection and security (FPS) standards (BIT Article 2(2)). Olin requested compensation for its past and future losses.

Libya disregarded the standards for lawful expropriation

First, the arbitrators analyzed BIT Article 7(1) and Article 23 of the Libyan Investment Law, which provided the standards for lawful expropriation: (i) public interest; (ii) in accordance with due process of law; (iii) non-discriminatory basis; and (iv) prompt,



adequate and effective compensation. The tribunal concluded that the Expropriation Order did not comply with these requirements.

Initially, the tribunal assessed who was affected by the Expropriation Order. Although the land where Olin's factory was located belonged to a Libyan national, "the Expropriation Order necessarily entailed an expropriation of all the buildings on the land in question" (para. 156). Referring to *Sd Myers v. Canada*, the tribunal considered that the state measures had an effect equivalent to expropriation.

Regarding the public interest requirement, the arbitrators ruled that the disputing parties "failed to produce sufficiently compelling evidence allowing it to make a conclusive finding" (para. 169). Even so, it considered the Expropriation Order unlawful because due process was disregarded. As it was an administrative resolution, the tribunal held that it did not comply with the requirement of being a law or court decision. Furthermore, the tribunal found the order to be discriminatory and held that Libya failed to provide prompt or effective compensation.

Libya breached its national treatment obligation

Olin alleged that Libya accorded treatment less favourable than that accorded to Libyan investors, thus breaching BIT Article 3. The tribunal, considering the standards provided by *Total v. Argentina*, established that "a discriminatory treatment can be demonstrated if the investor proves that the State has been treating differently persons who are similarly situated" (para. 202). In order to pass this threshold, the tribunal analyzed whether: (i) Olin and the domestic investors were similarly situated; (ii) Libya treated Olin less favourably than those domestic investors; and (iii) the alleged discrimination was justified.

First, the arbitrators considered Olin and the domestic investors to be similarly situated, as the companies operated in the same business sector and were closely located in the same industrial zone. Second, Libya expressly exempted domestic investors from demolitions and allowed them to remain on site permanently, while Olin faced 4.5 years of uncertainty until Libyan courts cancelled the Expropriation Order. Third, they held that Libya failed to prove that the difference in treatment was justified. Accordingly, the tribunal upheld Olin's national treatment claim.

Libya did not accord FET to Olin and violated the impairment clause

The tribunal considered that the FET obligation entailed

"respect for the investor's ability to operate its investment with a minimum level of certainty as to its fate and as to the ability to implement basic business decisions in an unfettered manner" (para. 311). It ruled that the issuance of the Expropriation Order frustrated Olin's legitimate expectations, as Libya prevented Olin from operating its plant under normal business conditions.

According to the tribunal, Libya breached its FET obligation due to the lack of transparency in the expropriation of the land in which Olin's plant was located, as well as by taking a series of measures related to the importation of a new production line and the repatriation of Olin's profits. However, the tribunal held that Olin did not satisfy the burden and "relatively high threshold" (para. 353) of proving a denial of justice.

In addition, the arbitrators considered that the impairment clause embodied in BIT Article 2(2) would be breached if Libya "impaired the management, maintenance, use, enjoyment, and expansion of the Claimant's investment" (para. 374) through unreasonable or discriminatory measures. Thus, the tribunal ruled that Libya's actions negatively impacted Olin's investment, violating the impairment clause.

Libya did not breach full protection and security

Regarding BIT Article 2(2), the arbitral tribunal also found that Libya had an obligation to "ensure a climate of protection and security" (para. 362). The tribunal referred to *Saluka v. Czech Republic* and ruled there was neither use of force nor physical integrity harassment. Therefore, although Olin's factory had to slow down its pace, the arbitrators affirmed that there was no evidence to conclude that Libya breached the FPS standard.

Claimant is awarded EUR 18 million in compensation for past losses

The tribunal decided that Olin was entitled to full compensation for the losses it suffered. Considering that Olin did not satisfy its burden of proof regarding the amount of its future losses, the arbitrators ruled that it should receive compensation solely for past losses. The damages were evaluated through the discounted cash flow (DCF) method.

Decision and costs

The tribunal concluded that Libya breached BIT Articles 2(2), 3 and 7 and ordered the state to pay Olin EUR 18,225,000 as compensation for its past losses, plus simple interest of 5 per cent per year. Regarding legal costs and expenses, the tribunal decided that Libya should reimburse 75 per cent of Olin's costs, amounting



to EUR 1,069,687. Additionally, Libya was ordered to pay USD 773,000 in arbitration costs.

Notes: The arbitral tribunal was composed of Nayla Comair-Obeid (president appointed by the ICC International Court of Arbitration, Lebanese and French national), Roland Ziadé (claimant's appointee, Lebanese, French and Ecuadorian national) and Ibrahim Fadlallah (respondent's appointee, Lebanese and French national). The final award of May 25, 2018 is available at https://www.italaw.com/sites/default/files/case-documents/italaw9766_0.pdf

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The Czech Republic fends off another claim in relation to their renewable energy scheme

Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01

Joseph Paguio

In an award dated May 2, 2018, a tribunal constituted under the PCA dismissed the claims by German renewable energy investors for breaches of full protection and security (FPS) and FET under the ECT and the 1992 Germany–Czechoslovakia BIT.

Background and claims

Entering into effect August 1, 2005, Czechia's Act 180/2005 (Act on Promotion) was intended to promote the use of renewable energy systems and to increase the share of electricity produced from renewable energy sources. Pursuant to Section 6 of the act, Czechia provided investors with a maintained minimum rate of feed-in tariffs (FIT) for renewable energy sources for 15 years from the date of commissioning of such sources. The Czech Energy Regulatory Office (ERO) later amended this to 20 years.

Subsequent to this legislation, the ERO conducted presentations both overseas and within the Czech Republic guaranteeing the statutorily prescribed minimum prices for 15 (later 20) years.

In the ensuing years, the popularity of the program coupled with decreasing costs of photovoltaic (PV) production led Czech officials to fear an increase

of electricity prices for households and industrial consumers. In response to this, on December 14, 2010, Czechia introduced Act 402/2010, which effectively applied a solar levy of 26 per cent on FITs and 28 per cent on green bonuses. On January 1, 2011, Act 330/2010 abolished all incentives related to PV plants with installed output exceeding 30 kWp commissioned after March 1, 2011.

On May 8, 2013, Antaris Solar GmbH and Michael Göde, together with eight other claimants, initiated arbitration against Czechia. They submitted that Czechia had breached its obligations under both the ECT and the BIT by reneging on its economic incentive arrangements originally intended to attract investors in PV power generation.

Tribunal rejects jurisdictional objection based on ECT taxation carve-out

Czechia contended that the tribunal did not have jurisdiction over the claimants' ECT claims as the solar levy and subsequent amendments to the Act on Promotion were taxation measures under Czech law and, as such, excluded by way of the taxation carve-out contained in ECT Article 21.

In response, the claimants invoked VCLT Article 31(1) in requiring the tribunal to read the amendments to the Act on Promotion in good faith and in the context of the ECT. In line with this reasoning, they asserted that the solar levy more fittingly characterized a deduction of the FIT than a tax, with its object and purpose being the offsetting of payments made from the state budget to the FIT.

In rejecting Czechia's assertion, the tribunal found it pertinent that the Czech Supreme Administrative Court, the Czech Constitutional Court and the Czech Ministry of Finance concluded that the solar levy was in essence a reduction of the FITs. The tribunal held that the ECT's Article 21 carve-out can only be invoked for tax measures whose principle objective is to raise state revenue, and not to reduce payable FITs.

Czechia did not act arbitrarily or without reason and did not frustrate legitimate expectations

Acknowledging the object and purpose of the ECT, Czechia contended that the treaty is not meant to grant a legal framework with immutability from future changes. Czechia argued that the continuance of FITs for the lifetime of the projects, the existence of a reasonable rate of return and the public purpose measures for which the amendments were made precluded Czechia's measures



from being branded as unreasonable or disproportionate.

In response, the claimants asserted that the Act on Promotion contained an intrinsic promise of regulatory stability and that their subsequent investments were made on the premise of stability and of minimum FITs to be paid over 15 (later 20) years. In applying the three-part test elaborated in *Micula v. Romania*, the frustration of the claimants' legitimate expectations occurred because (i) there was a specific promise of stability, (ii) the promise was essential to the claimants' investment and (iii) such reliance was reasonable.

Reflecting recent ECT tribunals calling for a balanced approach, the tribunal held that the ECT does not provide a free-standing obligation to accord a stable and predictable legal framework. The tribunal also did not accept the *Charanne v. Spain* proposition that no legitimate expectations can arise in the absence of a specific commitment. The tribunal found it sufficient for an express or implied promise to give rise to a legitimate expectation.

The tribunal did not doubt that the main objective of the Act on Promotion was to establish a secure, stable and predictable regime. The ERO's plainly stated promise of guaranteed minimum FITs, along with statements from government officials, reinforced this recurring theme.

However, the tribunal criticized the claimants for being an "opportunistic investor" (para. 431) that should have known that changes to the existing regime were imminent. The tribunal reiterated statements from the Czech Prime Minister, the Minister of Industry and Trade and the Minister of Environment along with press reports stressing the impending change in regulatory incentives and the political controversy surrounding Czechia's renewable energy scheme. Thus, according to the tribunal, the lack of due diligence precluded the claimants' complaint of impairment by arbitrary and unreasonable conduct.

Importantly, once again, when ascertaining the existence of legitimate expectations, the tribunal held that it "[did] not accept that...there is a free-standing obligation to provide a stable and predictable investment framework" (para. 365). Nor did they accept Czechia's assertion requiring a specific stabilization arrangement for legitimate expectations to arise (para. 365). Yet, due to the public purpose of the measures in combating rising consumer costs and windfall investor profits, along with the claimants' own lack of due diligence, the majority dismissed the FET and impairment claims.

Costs

While Czechia prevailed on the merits, the tribunal decided that the claimants were to bear three-quarters of the arbitration costs, as they succeeded on the issue of the tax carve-out.

Arbitrator Gary Born's dissenting opinion

Closely following his dissenting opinion in *Wirtgen v. Czechia*, Born did not view due diligence as a condition to treaty-based protection under international law. According to Born, where due diligence comes into play is if it would have contradicted from the outset the claimants' initial understanding of the investment. In line with this, Born viewed the language of Section 6 of the Act on Promotion to be clear in its granting of a long-term guarantee of a specific minimum FIT that further due diligence would not have led the claimants to believe otherwise.

In addition, Born criticized the majority for failing to give effect to legitimate expectations arising out of the general regulatory framework. He repeatedly stressed the importance of the binding nature of legislation. According to Born, legislation is a both pragmatic and appropriate medium for the regulation of conduct in an economic system; to deny "states the power to make binding commitments to private parties, including investors, by way of legislative (or regulatory) guarantees" would amount to an affront to the rule of law (dissenting opinion, para. 37).

Similar to *Micula*, the singular matter of importance to Born was "whether the statements and actions of the state provide a sufficiently clear commitment regarding future treatment to give rise to legal rights or legitimate expectations on the part of an investor" (dissenting opinion, para. 35). Due to the existence of a regulatory framework explicitly providing for economic stability, the dissenting opinion answered this in the affirmative.

Notes: The tribunal was composed of Lawrence Antony Collins (president appointed by the co-arbitrators, British national), Gary Born (claimants' appointee, U.S. national) and Peter Tomka (respondent's appointee, Slovak national). The award is available in English at <https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf> and the dissenting opinion of Gary Born is available in English at <https://www.italaw.com/sites/default/files/case-documents/italaw9810.pdf>

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ICSID tribunal awards compensation for the seizure of power generation vessels, dismisses Pakistan's counterclaim

Karkey Karadenize Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1

Amr Arafa Hasaan

On August 22, 2017, an ICSID tribunal issued an award in the case filed by Turkish company Karkey Karadenize Elektrik Uretim A.S. (Karkey) against Pakistan under the Pakistan–Turkey BIT. At the provisional measures stage, the tribunal had ordered Pakistan to comply with its international obligations. Ultimately, the tribunal awarded Karkey **approximately USD 800 million** (including interest), while dismissing the counterclaim brought by Pakistan against Karkey.

Background

Following a power generation crisis in Pakistan, in December 2008 Karkey secured a contract with Lakhra Generation Company (Lakhra), an enterprise owned and controlled by Pakistan, to perform a rental power generation project. The contract was amended in April 2009.

Due to allegations of non-compliance of the contract with Pakistani public procurement rules, in September 2009 the Chief Justice of the Supreme Court of Pakistan registered a case on irregularities in the awarding of the contract. On March 30, 2012, Karkey served a notice of termination of the contract due to Lakhra's failure to make the payments it was obligated to under the contract. On the same date, the Supreme Court of Pakistan rendered a decision that the contract had been awarded in breach of the procurement rules and was thus void *ab initio*, ordering the competent authorities to investigate corruption in the awarding of the contract. Shortly thereafter, Karkey's bank account in Pakistan was frozen, and on April 3, 2012, Karkey was notified that its vessels were prohibited from leaving their moored position until further notice.

Karkey served a notice of dispute according to the Pakistan–Turkey BIT on May 12, 2012, and on January 13, 2013, it lodged its request for arbitration. It argued that Pakistan had breached the BIT by expropriating its investment and violating its right to the free transfer of its investment. In addition, it sought to bring several additional claims under the MFN, FET and umbrella clauses. Karkey asked for damages exceeding USD 1.4 billion, plus interest (para. 234).

Red flags are insufficient to prove corruption in securing investment

Pakistan objected to the tribunal's jurisdiction, alleging that Karkey had secured the contract due to corruption. In particular, it argued that Karkey retained Zulqarnain, its local representative, to act as an illegal lobbyist to induce public officials to grant the contract to Karkey (para. 506). Karkey rejected Pakistan's claims and substantiated that Zulqarnain's services were plausible and necessary for starting up its business in Pakistan. The tribunal found that Pakistan could not demonstrate Zulqarnain's involvement "in anything that could qualify as corruption" (para. 517).

Moreover, Pakistan raised 17 questions or "red flags," which, if not rebutted by Karkey, would indicate that the investment had been made through corruption. However, the tribunal found that these questions did not shift the burden of proof to Karkey. It concluded that it was "unable to find in the elements included in Pakistan's questions 'red flags' suggestive of corruption... still less any positive proof of corruption" (para. 521).

Lakhra acts are attributable to Pakistan

Karkey submitted that Pakistan induced Lakhra to conclude the contract and its amendment and to fail to make its payment under the contract. Pakistan, in turn, claimed that Lakhra is an independent body from the Pakistani government.

The tribunal found that Pakistan designated Lakhra to be the buyer of electricity services from Karkey. Further, according to the tribunal, Pakistan determined Lakhra's commitments under the contract. Accordingly, it found that Pakistan instructed and directed Lakhra, and thus Lakhra's acts are attributable to Pakistan under international law.

Karkey did not obtain its investment via fraud

According to Pakistan, Karkey confirmed that it would perform its commitments under the contract within 180 days from the award of the contract but failed to perform. Thus, Pakistan argued that this was a misrepresentation by Karkey to secure the contract. The tribunal noted that Pakistan did not perform its obligations under the contract and that this would have affected Karkey's ability to execute the contract on schedule. Likewise, due to logistical considerations, the tribunal reasoned that it would be impractical to consider Karkey's estimation of the time of performance as accurate. Hence, the tribunal concluded that Karkey's affirmation was a mistake rather than a misrepresentation.



Pakistan is estopped from claiming that Karkey secured its investment via misprocurement

Pakistan contended that the contract was procured in breach of Pakistani procurement laws and rules. However, Karkey rejected this allegation and submitted that the tribunal shall dismiss this claim based on the principle of estoppel. The tribunal agreed with Karkey, highlighting that the bidding process, the contract and its amendments were all performed under the supervision of Pakistani authorities. The tribunal indicated that “Pakistan’s own witness, Mr. Khan, admitted at the Hearing that Pakistan is defending the Contract before the highest court of Pakistan, while at the same time attacking it in this arbitration” (para. 626).

Pakistan expropriated Karkey’s investment via the Supreme Court’s judgment

Karkey argued that Pakistan expropriated its investment via the Pakistani judicial, administrative and executive branches. However, Pakistan rebutted that Karkey failed to show substantial evidence of the deprivation of its investment and that its purported contractual rights may not be subject to expropriation, having been rendered as void *ab initio* by the Pakistani Supreme Court.

According to the tribunal, the reasoning of the Supreme Court’s judgment relied heavily on the flawed understanding of a parliamentarian, Mr. Salah Hayat, that Pakistan had enough generation power, though this was contrary to a statement by the Pakistani Electric Power Company (PEPCO). Moreover, the judgment assumed an identical liability on all sponsors of rental power projects regardless of the substantial differences between each project. The tribunal found the judgment of the Supreme Court to be arbitrary, given that, in the tribunal’s view, the judgment failed to define “with some particularity the evidential and legal basis” of the liability it imposed (para. 554). Furthermore, it concluded that the judgment deprived Karkey of its enjoyment of its rights under the contract (para. 648).

The tribunal also concluded that Pakistan breached its free transfer obligations under the BIT, but dismissed all other claims based on the MFN, FET and umbrella clauses, “as the damages resulting from these alleged breaches and from the expropriation/free transfer violation would be the same” (para. 657). It ordered Pakistan to pay Karkey, under several heads of damage, a total of over USD 490 million, plus interest. In addition, it ordered Pakistan to pay USD 10 million toward Karkey’s legal costs and expenses and over USD 300,000 as reimbursement for Karkey’s share of the arbitration costs.

Tribunal without jurisdiction to hear Pakistan’s counterclaim

Pakistan intended to bring a counterclaim against Karkey to seek from the tribunal a declaration acknowledging that the contract was void *ab initio* or, in the alternative, to advance claims for damages arising out of Karkey’s alleged misrepresentations and breaches of contract. According to Pakistan, Karkey had already consented to counterclaims when it filed its claims with ICSID; once the tribunal asserted jurisdiction over Karkey’s claims, it would automatically exert jurisdiction over Pakistan’s counterclaims (para. 1007).

The tribunal noted that the BIT did not provide for the possibility of counterclaims and that “most ICSID tribunals have not found the theory of *ipso facto* consent to be sufficient to conclude that an investor’s consent to ICSID counterclaims is automatic” (para. 1015). Accordingly, the tribunal decided that it had no jurisdiction over Pakistan’s counterclaim.

Notes: The tribunal was composed of Yves Derains (president appointed by the Chairman of the ICSID Administrative Council, French national), David A. O. Edward (claimant’s appointee, British national) and Horacio A. Grigera Naón (respondent’s appointee, Argentinian national). The award is available in English at <https://www.italaw.com/sites/default/files/case-documents/italaw9767.pdf>

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PCA tribunal holds India liable for unlawful expropriation and FET breach under India–Mauritius BIPA

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited., and Telcom Devas Mauritius Limited v. The Republic of India, PCA Case No. 2013-09

Gladwin Issac

In a proceeding brought by three Mauritius-based shareholding companies of Devas Multimedia Private Limited (Devas)—an enterprise based in Bangalore, India—a tribunal seated at the PCA rendered an award on liability holding India liable for expropriating the investments made pursuant to a contract concluded



between Devas and Antrix Corporation Ltd. (Antrix), the commercial arm of the Indian space agency. In particular, the tribunal found that the annulment of the contract by Antrix constituted expropriation and breach of FET under the India–Mauritius Bilateral Investment Promotion and Protection Agreement (BIPA).

Background and claims

In January 2005, Antrix and Devas entered into a contract concerning the licence of a frequency of satellite spectrum (S-band) to provide high-speed Internet services. In February 2011, Antrix terminated the contract based on a decision by India’s Cabinet Committee on Security (CCS) citing essential security interests.

Devas’s three Mauritian shareholders initiated arbitration against India under the UNCITRAL Rules and the India–Mauritius BIPA, claiming that the termination of the contract amounted to an expropriation of the claimants’ investments in India and constituted a denial of FET.

The termination of the contract also led Devas to initiate international commercial arbitration against Antrix. In September 2015, an ICC tribunal ordered Antrix to pay USD 562.5 million to Devas for damages caused by the wrongful termination of the contract, plus interest.

Definition of “investment” under the India–Mauritius BIPA

India raised a jurisdictional objection relying on the admission clause contained in the BIPA, which protects “assets invested and admitted in accordance with the laws and regulations of the host State,” but not “pre-investment activities” (Article 1(1)(a)). It argued that Devas’s failure to apply for the concerned licences and government approvals characterized all activities conducted by Devas as “pre-investment activities” and therefore not as investments within the meaning of the BIPA.

In the absence of any evidence, the tribunal could not accept India’s contention. In its view, the claimants’ shares, debentures and any other form of participation in Devas and their indirect partial ownership of Devas’ business assets do fall within the BIPA definition of “investment.” Consequently, it concluded that the claimants made investments covered by the BIPA.

India raises “essential security interests” defence

In its key defence, India argued that BIPA Article 11(3) entitles it to take measures to protect its essential security interests without incurring responsibility under the BIPA.

In particular, it stated that the provision is self-judging and that the tribunal may not “sit as a supranational regulatory or policy-making body to review the policy decisions of the Cabinet Committee on Security” as national authorities “are uniquely positioned to determine what constitutes a State’s essential security interests in any particular circumstance and what measures should be adopted to safeguard those interests” (para. 214).

However, the tribunal rejected this argument. It held that, in the absence of any explicit language under Article 11(3) to grant to the state full discretion to determine what it considers necessary to protect its security interests, the clause is not self-judging. It clarified that, while India did not have to demonstrate necessity—in the sense that the measure adopted was the only one it could resort to in the circumstances—it still had to establish that the measure related to its “essential” security interests.

Next, the tribunal was faced with the difficult question of whether there was a genuine need for Indian military and security agencies to reserve S-band capacity or whether it was a pretext to concoct a force majeure event that would enable Antrix to terminate the contract on advantageous terms. By a majority, the tribunal ruled out that a portion of the measures were indeed part of “essential security interests” and would fall within the purview of Article 11(3).

However, it maintained that measures that were not reserved for military or paramilitary purposes would be subject to BIPA Article 6 on expropriation. On the basis of the evidence submitted, the majority concluded that a reasonable allocation of spectrum for the protection of India’s essential security interests would not exceed 60 per cent of the S-band spectrum allocated to the claimants. It held that the remaining 40 per cent could be allocated for other public interest purposes and were subject to the expropriation conditions under BIPA Article 6.

India’s measures lead to unlawful expropriation

The claimants argued that the coordinated measures adopted by various Indian agencies leading to the annulment of the contract resulted in the unlawful expropriation of their investments, in violation of BIPA Articles 6 and 7. According to them, their assets and rights, their indirect ownership of the contract and of the Devas system and business, and their pre-emptive contractual right to an S-band allocation were capable of being, and in fact were, directly and indirectly expropriated by India.



The tribunal concluded that the measures adopted by India, insofar as they did not relate to its essential security interests (40 per cent), amounted to unlawful expropriation and breach of due process under BIPA Article 6. Consequently, it held that the claimants are entitled to compensation for up to 40 per cent of the value of their investments in India.

India's annulment of contract constitutes FET breach

The claimants contended that India breached FET. While India argued that the FET standard embodied in BIPA Article 4(1) does not go beyond the minimum standard required by customary international law, the claimants stated that a broad FET standard applies to the present case.

Relying on *El Paso v. Argentina*, the tribunal noted that investors' legitimate expectations are central to FET under any investment treaty and that the claimants could not have had legitimate expectations that India would never invoke the "essential security interests" exception under BIPA Article 11(3). Further, it added that, since India did not inform the claimants about the CCS decision to annul the contract, it breached the good faith principle under international law and the FET standard under the BIPA.

Other claims dismissed

The tribunal dismissed the claims concerning the alleged unreasonableness and the discriminatory nature of the measures, as there was no evidence to suggest that the measures adopted by India were targeted at foreign investors or investments.

Award and costs

The tribunal, by a majority, rendered an award on liability, finding that the termination of the contract amounted to an expropriation of the claimants' investments in India and constituted a denial of FET. Therefore, it ruled that India compensate the claimants for the part of the investment (40 per cent) that is not protected by India's essential security interests.

David R. High's dissent

Arbitrator David R. Haigh did not concur with the views of the majority over the "essential security" defence submitted by India. According to him, India's only settled objective was to see that the contract would be annulled or terminated with as little cost as possible, and no determination on a reasonable allocation of spectrum to national security or other public purposes could have been made. Therefore, in Haigh's opinion, the taking of

the S-band spectrum was simply an expropriation for a public purpose, falling under BIPA Article 6.

Notes: The tribunal was composed of Marc Lalonde (president appointed by his co-arbitrators, Canadian national), David R. Haigh (claimants' appointee, Canadian national) and Anil Dev Singh (respondent's appointee, Indian national). The award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9750.pdf> and David R. Haigh's dissenting opinion is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9751.pdf>.

Gladwin Issac is a graduate of the Gujarat National Law University, India, and a contributor to IISD's Investment for Sustainable Development Program.



RESOURCES AND EVENTS

RESOURCES

Transparency in International Investment Arbitration: A guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration

By Dimitrij Euler, Markus Gehring and Maxi Scherer (Eds.), published by Cambridge University Press, August 2018

This book explains the underlying debate and provides an in-depth commentary on the UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration, paragraph by paragraph. The contributors provide in-depth guidance on how to apply the rules and analyze the issue of transparency in investment law more broadly. The chapters encompass all treaty-based investor–state disputes, examining the perspectives of disputing parties, third parties, non-disputing state parties and arbitral tribunals. Available at <https://www.cambridge.org/academic/subjects/law/arbitration-dispute-resolution-and-mediation/transparency-international-investment-arbitration-guide-uncitral-rules-transparency-treaty-based-investor-state-arbitration>

International Investment Law and Globalization: Foreign investment, responsibilities and intergovernmental organizations

By Jean-Michel Marcoux, published by Routledge, August 2018

Have the processes of elaboration and implementation of foreign investors' responsibilities by intergovernmental organizations reached the realm of legality? Using an analytical framework and a methodology that combines international law with international relations, this book provides a twofold answer to this question. First, it demonstrates that the normative integration of foreign investors' responsibilities in international investment law is fragmented and consistent with the interests of the most powerful actors. Second, while using the interactional theory of international law to assess the normative character of several international instruments

elaborated and implemented by intergovernmental organizations, it highlights the sense of obligation that each instrument generates. The analysis demonstrates that such a codification process is marked by relations of power and has resulted in several social norms, with relatively few legal norms. Available at <https://www.routledge.com/International-Investment-Law-and-Globalization-Foreign-Investment-Responsibilities/Marcoux/p/book/9781138596221>

A Guide to State Succession in International Investment Law

By Patrick Dumberry, published by Edward Elgar, July 2018

This book provides a comprehensive analysis of state succession issues arising in the context of international investment law. It examines the legal consequences in the field of investor–state arbitration arising from the disappearance or the creation of a state, or from a transfer of territory between states. In particular, it analyzes whether a successor state is bound by the investment treaties (bilateral and multilateral) and the state contracts signed by the predecessor state before the event of succession. Available at <https://www.e-elgar.com/shop/a-guide-to-state-succession-in-international-investment-law>

Reassertion of Control over the Investment Treaty Regime

Andreas Kulick (Ed.), published by Cambridge University Press, June 2018

States are pursuing many avenues to curb the international investment regime, perceived as having run out of control. This book examines the many issues of procedure, substantive law and policy arising from this trend—from procedural aspects such as frivolous claims mechanisms, to the establishment of an appeals mechanism or state–state arbitration, to substantive issues such as joint interpretations, treaty termination or detailed definitions of standards of protection. It identifies and discusses the main means by which states do or may reassert their control over the interpretation



and application of investment treaties. Each chapter tackles one of these avenues and evaluates its potential to serve as an instrument in states' reassertion of control. Available at <https://www.cambridge.org/academic/subjects/law/international-trade-law/reassertion-control-over-investment-treaty-regime>

Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration

By Valentina Vadi, Published by Edward Elgar, April 2018

The book examines the merits and pitfalls of arbitral tribunals' use of the concepts of proportionality and reasonableness to review the compatibility of a state's regulatory actions with its obligations under international investment law. Investment law scholars have given greater attention to the concept of proportionality than to reasonableness; this book combats this trajectory by examining both concepts in such a way that it does not advocate one over the other, but instead enables the reader to make informed choices. The author also explores the intensity of review as one of the main tools to calibrate the different interests underlying investor-state arbitrations. Available at <https://www.e-elgar.com/shop/proportionality-reasonableness-and-standards-of-review-in-international-investment-law-and-arbitration>

EVENTS 2018

October 11–November 15

FALL 2018 INTERNATIONAL INVESTMENT LAW AND POLICY SPEAKER SERIES, Columbia Center on Sustainable Investment (CCSI), at Columbia Law School, New York, United States, <http://ccsi.columbia.edu/2018/10/11/fall-2018-international-investment-law-and-policy-speaker-series>

October 15–19

ANNUAL GENERAL MEETING 2018, Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), at the Palais des Nations, Geneva, Switzerland, <http://igfmining.org>

October 22–26

WORLD INVESTMENT FORUM 2018, UNCTAD, at the Palais des Nations, Geneva, Switzerland, <http://worldinvestmentforum.unctad.org>

October 24

INVESTMENT FOR SUSTAINABLE DEVELOPMENT: INCORPORATING INVESTOR OBLIGATIONS IN TRADE AND INVESTMENT AGREEMENTS, World Investment Forum 2018 side event hosted by IISD, International Commission of Jurists (ICJ), & Friedrich Ebert Stiftung (FES), at the Palais des Nations, Geneva, Switzerland, <https://iisd.org/event/investment-sustainable-development-incorporating-investor-obligations-trade-and-investment>

October 25

THE FUTURE OF INVESTMENT-RELATED DISPUTE SETTLEMENT: OPTIONS AND MODELS, World Investment Forum 2018 side event hosted by IISD, International Commission of Jurists (ICJ), & Friedrich Ebert Stiftung (FES), at the Palais des Nations, Geneva, Switzerland, <https://iisd.org/event/future-investment-related-dispute-settlement-options-and-models>

October 23–25

8th INVESTMENT TREATY ARBITRATION CONFERENCE, Ministry of Finance of the Czech Republic & KPMG Czech Republic, at Lichtenstein Palace, Prague, Czechia, <https://home.kpmg.com/cz/en/home/insights/2018/10/8th-investment-treaty-arbitration-conference.html>



October 26

31st ITF PUBLIC CONFERENCE: HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, Investment Treaty Forum (ITF), at The British Academy, London, United Kingdom, <https://www.biicl.org/event/1331/thirty-first-itf-public-conference-human-rights-in-international-investment-law>

October 26–27

THE FUTURE OF ARBITRATION IN EUROPE, Stockholm Centre for Commercial Law & Institute of European and Comparative Law, Oxford, at Sankta Clara, Klara Strand, Stockholm, Sweden, <https://sccinstitute.com/about-the-scc/event-calendar/stockholm-the-future-of-arbitration-in-europe>

October 29–November 2

36th SESSION OF UNCITRAL WORKING GROUP III, “Investor–State Dispute Settlement Reform,” United Nations Commission on International Trade Law (UNCITRAL), Vienna, Austria, http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html

October 31

STAKEHOLDER SESSION ON UNCITRAL ISDS REFORM PROCESS, IISD, Columbia Center on Sustainable Investment (CCSI) & International Institute for Environment and Development (IIED), at Diplomatische Akademie Wien, Vienna, Austria, <http://bit.ly/2Rkoynj>

November 6–7

NEW FRONTIERS OF ALTERNATIVE DISPUTE RESOLUTION (ADR): FROM COMMERCIAL AND INVESTMENT MATTERS TO REGULATORY VIOLATIONS, International Bar Association (IBA) Mediation Committee, IBA North America Forum, McGill University, Montreal University & International Chamber of Commerce (ICC), at McGill Faculty Club and Conference Centre, Montreal, Canada, <https://www.ibanet.org/Conferences/conf904.aspx>

EVENTS 2019

February 27–March 1

12th ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS, IISD, South Centre and Government of Colombia, in Cartagena, Colombia, <https://www.iisd.org/event/12th-annual-forum-developing-country-investment-negotiators>



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