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Achmea: The Beginning of the End for ISDS in and with Europe?

Laurens Ankersmit



Withdrawal of Consent to Investor-State Arbitration and Termination of Investment Treaties

Lise Johnson, Jesse Coleman and Brooke Güven



**An interview with Luis Guillermo Vélez
— Director-General of Colombia's
National Agency for the Legal Defense
of the State**





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International Institute for the Sustainable Development
International Environment House 2
9, Chemin de Ballexert, 5th Floor
1219, Chatelaine, Geneva, Switzerland

Tel +41 22 917-8748
Fax +41 22 917-8054
Email itn@iisd.org
Twitter

IISD Group Director – Economic Law & Policy
Nathalie Bernasconi

French Translator
Isabelle Guinebault

Editor-in-Chief
Martin Dietrich Brauch

Spanish Translator
María Candela Conforti

French Editor
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INSIGHT 1

Achmea: The Beginning of the End for ISDS *in and with* Europe?

Laurens Ankersmit



1. Introduction

In Case C-284/16 *Achmea*, the European Court of Justice (ECJ) found an arbitration clause in an international investment agreement (IIA) between two European Union (EU) member states incompatible with EU law.¹ This landmark ruling is likely to have profound consequences for investment arbitration clauses in current and future investment treaties and chapters concluded by EU member states or the Union itself. In this piece I discuss the judgement from an EU constitutional point of view and subsequently analyze the potential consequences.

The key to understanding the *Achmea* judgment is the Union's unique judicial structure and how it may be affected by ISDS. Under the EU Treaties, EU member state courts and the ECJ collaborate and enter into a dialogue in resolving disputes that somehow involve EU law. Through the preliminary reference mechanism under Article 267 of the Treaty on the Functioning of the European Union (TFEU), EU member state courts essentially ask the ECJ questions about how EU law operates and are then required to follow the answers given by the ECJ. The ECJ attaches great importance to this dialogue (it refers to the mechanism as the “keystone” of the Union's judicial system and

to EU member state courts as its “guardians”²) and will not permit—under any circumstances—that the power of EU member state courts to make preliminary references be affected.

The preliminary reference system is vital because it ensures that EU law operates effectively and uniformly throughout the Union and preserves the essential characteristics of the EU legal order. These essential characteristics are that EU law stems from an independent source of law—the EU Treaties—that operates completely independently from both international and domestic law (it is “autonomous”) and has “primacy” over those sources.³ For the ECJ, to ensure the full effectiveness of EU law, it is therefore crucial to preserve the power of EU member state courts to make preliminary references. Since ISDS tribunals essentially remove disputes from the jurisdiction of EU member state courts, and consequently from the Union's judicial system, the *Achmea* ruling came hardly as a surprise to EU law insiders.⁴

¹Case 284/16 Slovak Republic v. Achmea EU:C:2018:158. Retrieved from <http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0284&lang1=en&type=TEXT&ancre>.

² Opinion 2/13 Accession to the ECHR EU:C:2014:2454, para. 176. Retrieved from <http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN>;

Opinion 1/09 European and Community Patents Court [2011] ECR I-1137, para. 66. Retrieved from <http://curia.europa.eu/juris/celex.jsf?celex=62009CV0001&lang1=en&type=TEXT&ancre>.

³ Case 284/16 Slovak Republic v. Achmea, *supra* note 1, paras. 32–38.

⁴ See list of blog entries: Scheepel, H. (2018, March 23). From conflicts-rules to field preemption: Achmea and the relationship between EU law and international investment law and arbitration. *European Law Blog*. Retrieved from <http://europeanlawblog.eu/2018/03/23/from-conflicts-rules-to-field-preemption-achmea-and-the-relationship-between-eu-law-and-international-investment-law-and-arbitration>;

Niemelä, P. (2018, March 18). *Achmea* – A perspective from international (investment) law. *European Law Blog*. Retrieved from <http://europeanlawblog.eu/2018/03/15/achmea-a-perspective-from-international-investment-law/>;

Thym, V.D. (2018, March 9). The CJEU ruling in Achmea: Death sentence for autonomous investment protection tribunals. *EU Law Analysis*. Retrieved from <http://eulawanalysis.blogspot.be/2018/03/the-cjeu-ruling-in-achmea-death.html>;

Hindelang, S. (2018, March 9). The limited immediate effects of CJEU's Achmea Judgement. *Verfassungsblog*. Retrieved from <https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/>;

Szilágyi, S.G. (2018, March 7). The CJEU Strikes Again in Achmea. Is this the end of investor-State arbitration under intra-EU BITs? *International Economic Law and Policy Blog*.

Retrieved from <http://worldtradelaw.typepad.com/ielpblog/2018/03/guest-post-the-cjeu-strikes-again-in-achmea-is-this-the-end-of-investor-state-arbitration-under-intr.html>;

Requejo, M. (2018, March 8). A European law reading of Achmea. *Conflict of Laws.net*. Retrieved from <http://conflictflaws.net/2018/a-european-law-reading-of-achmea/>.



2. The *Achmea* case

The *Achmea* case essentially concerned a preliminary reference by the German Federal Court of Justice over whether EU law precluded the application of an arbitration clause in an IIA between EU member states. Slovakia had challenged before German courts the jurisdiction of an investment tribunal constituted under the Dutch–Slovak bilateral investment treaty (BIT). A Dutch investor (*Achmea*) had seized that investment tribunal over a partial reversal of the Slovak government’s decision in 2004 to privatize the health insurance market. In 2007 Slovakia had prohibited the distribution of profits generated by private health insurance activities. The investment tribunal considered this a breach of the BIT and awarded *Achmea* damages of EUR 22.1 million.

However, there was also an EU law dimension to the dispute between *Achmea* and Slovakia as undertakings established in the Union can rely on the EU internal market’s fundamental freedoms, including the free movement of capital and freedom of establishment. These rights are guaranteed by EU member state courts. Moreover, the European Commission, as “guardian of the EU Treaties,” is entitled to bring infringement proceedings against EU member states for infringing those freedoms. However, the Commission dropped those proceedings against Slovakia following a ruling by the Constitutional Court of Slovakia and subsequent legal amendment that once more allowed the distribution of profits. Accordingly, *Achmea* could have sought damages against Slovakia in Slovakian courts for its non-contractual liability for infringing EU law. Instead, it brought a claim before an investment tribunal under the BIT, probably expecting a more favourable outcome. This is not surprising, as the investment law regime tends to be less deferential to state interests than the EU judiciary.⁵

The ECJ’s judgment was as straightforward as it was constitutional, addressing three key features of the arbitration clause in the BIT that made it incompatible with the European Union’s judicial system and the autonomy of EU law.

After recalling the essential features of the autonomy of the EU legal order (paras. 32–38), the court ascertained that disputes an arbitration tribunal may be called to resolve “are liable to relate to the interpretation

or application of EU law” (para. 39). For the ECJ, the mere fact that a tribunal could “take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties” was sufficient to come to that conclusion (paras. 40–42).

Having established the important point that investment tribunals could potentially interpret EU law, the ECJ moved on to the question whether such tribunals are part of the Union’s judicial system. If this was the case, these tribunals would be subject to Article 267 TFEU and therefore the full effectiveness of EU law could be preserved, because, among other reasons, those tribunals could then make preliminary references. On this particular point, Advocate General Wathelet had made an argument that investment tribunals set up under IIAs between EU member states could be seen as a court or tribunal “common to two [EU] member states” similar to the Benelux court.⁶ In other words, the argument was that investment tribunals were not an internationally independent alternative to the domestic judiciary, but part of it. The ECJ, however, simply found that “the arbitral tribunal is not part of the judicial system of the Netherlands or Slovakia.” It noted that “it is precisely the exceptional nature of the tribunal’s jurisdiction compared with that of the courts of those two [EU] member states that is one of the principal reasons for the existence” of the arbitration clause in question (para. 45).

"*Achmea* could have sought damages against Slovakia in Slovakian courts for its non-contractual liability for infringing EU law. Instead, it brought a claim before an investment tribunal under the BIT, probably expecting a more favourable outcome."

Given that the investment tribunal could interpret or apply EU law, but was not part of the Union’s judicial system, the third and final consideration for the ECJ was whether awards issued by the tribunal were subject to review by an EU member state court.

⁵ See Niemelä, *supra* note 4.

⁶ Case C-284/16 *Achmea*, *supra* note 1, paras. 84–131.



For the ECJ this was necessary to ensure “that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling” (para. 50). In other words, for the ECJ it was key that the Union’s judicial system remained in full control over the potential interpretation and application of EU law.

Here, the court made two important findings. First, it noted the freedom for the investment tribunal to choose its seat and consequently the law applicable concerning the review of awards. Second, it noted that judicial review of awards is very limited under German law. According to the ECJ, while this may be acceptable in the context of commercial arbitration, investment arbitration is fundamentally different. Investment arbitration “derive[s] from a treaty by which [EU] member states agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which [EU law] requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law” (para. 55).

These three key features of investment arbitration (possibility of interpreting EU law, not being part of the EU judicial system and limited means of review of awards) led the ECJ to conclude that EU member states “established a mechanism for settling disputes between an investor and a [EU] member state which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law” (para. 56). The ECJ added that the arbitration clause “is such as to call into question not only the principle of mutual trust between [EU] member states but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation” (para. 58).

3. Commentary and analysis

The *Achmea* ruling calls for a number of comments on the ECJ’s approach toward investment tribunals and on the consequences of the ruling for investor–state dispute settlement (ISDS) in Europe.

First, the judgment not only confirms the ECJ’s strong attachment to preserving the powers of EU domestic courts, but also shows how the ECJ views investment tribunals. It does not view investment tribunals as part of the Union’s domestic judiciary, nor does it see them as

a complement to the domestic judiciary at international level. Rather, it sees investment tribunals as rivals and threats to the Union’s judicial system. This also makes ISDS different from state–state mechanisms under international law. For the ECJ, through arbitration clauses, EU member states remove disputes from the jurisdiction of their own courts and hence from the system of judicial remedies which EU law requires them to establish in fields covered by EU law.

"The ECJ does not view investment tribunals as part of the Union’s domestic judiciary, nor does it see them as a complement to the domestic judiciary at international level. Rather, it sees investment tribunals as rivals and threats to the Union’s judicial system."

The ECJ is not so much concerned with actual conflict between EU law and international investment law. It is concerned that a dispute that may *potentially* involve questions of EU law is removed from EU courts. For the ECJ, this is problematic, because EU member states are required under Article 19 TEU to ensure that their own courts are able to provide remedies in fields covered by EU law. This is a potentially far-reaching doctrine based on pre-empting any dispute that can be resolved by the Union’s judicial system from falling into the hands of investment tribunals, rather than avoiding actual direct conflict between EU law and investment law.⁷

How far-reaching are the consequences of the *Achmea* judgment for investment arbitration? Certainly, intra-EU BITs with arbitration clauses are affected (currently around 200 of these BITs exist). While the ECJ cannot invalidate the Dutch–Slovak BIT, EU law does require national courts to set aside and preclude the application of incompatible national and international law.⁸ This means practically that enforcement of

⁷ Schepel (2018), *supra* note 4.

⁸ Case 106/77 Simmenthal II EU:C:1978:49, para. 17. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61977CJ0106>; Case 121/85 Conegate Limited v. HM Customs & Excise, EU:C:1986:114, para 26. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61985CJ0121>.



awards stemming from such tribunals before courts of EU member states has become legally impossible. Moreover, such awards can be challenged before EU courts. This also holds true for awards by tribunals at the International Centre for Settlement of Investment Disputes (ICSID), as EU law trumps any incompatible international law obligations between EU member states.⁹ In addition, the Commission may recommence its infringement proceedings against EU member states for not terminating their intra-EU BITs.¹⁰ Under the EU Treaties, the Commission may bring an action against EU member states for breaching EU law before the EU courts. Ultimately, this may result in financial penalties for EU member states. Lastly, individual applicants, such as non-governmental organizations, may start challenging the validity of these intra-EU BITs before EU member state courts.

More complex is the question of the future of extra-EU BITs—those concluded between EU member states and non-member states. The thrust of the ECJ's reasoning makes it clear that arbitration clauses contained in such agreements are not immune from challenge.⁵ Indeed, tribunals under such treaties may very well potentially remove disputes involving questions of EU law and EU remedies from EU member state courts. As a result, EU member states may be required to terminate these agreements, and the enforceability of awards before EU member state courts is in doubt. Even so, we will have to wait for a definitive decision on the matter from the ECJ in the future. In any event, EU member states may still be able to perform their obligations under BITs concluded before EU membership under the conditions set out under Article 351 TFEU. This article allows EU member states to honour their international commitments to third states undertaken before becoming EU member states. However, the text of the article suggests that it only relates to obligations of EU member states toward third states, not individuals.¹¹ Moreover, it imposes obligations on EU member states to take all appropriate steps to eliminate incompatibilities, including denunciation of

international agreements.¹² Likewise, obligations under the ICSID Convention and enforcement of ICSID awards may result in similar legal questions.

Lastly, *Achmea* casts dark clouds over the future regarding IIAs containing some form of ISDS negotiated by the European Union itself. The Commission has taken some precautions in recently negotiated agreements such as the Comprehensive Economic and Trade Agreement (CETA) with Canada.¹³ Whether these precautions are sufficient will become clear when the ECJ delivers its Opinion 1/17 on CETA.¹⁴ Already in Opinion 2/15, the ECJ found that an ISDS mechanism similar to the one in CETA in the EU–Singapore free trade agreement (FTA) removed disputes from the jurisdiction of EU member states.¹⁵ And these disputes may very well, at least potentially, fall within areas covered by EU law.

Author

Laurens Ankersmit is a lawyer at ClientEarth, a non-profit environmental law organization based in London, Brussels and Warsaw.

⁹ Article 351 TFEU cannot be invoked in an intra-EU context. See Case C-301/08 *Bogiatzi v. Deutscher Luftpool and Others* [2009] ECR I-10185, paras. 16–20. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CC0301>.

¹⁰ It had already started such proceedings, but these were temporarily halted because of the then-pending *Achmea* ruling. See http://europa.eu/rapid/press-release_MEMO-16-3125_en.htm under 6.

¹¹ Case 812/79 *Attorney General v. Burgoa* [1980] ECR 2787. Retrieved from <http://curia.europa.eu/juris/celex.jsf?celex=61979CJ0812&lang1=en&type=TEXT&ancre=>

¹² See for instance Case C-249/06 *Commission v. Sweden* EU:C:2009:119, retrieved from <http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0249&lang1=en&type=TEXT&ancre=>.

¹³ CETA Article 8.31 contains several provisions that aim to ensure that investment tribunals under CETA will not interpret EU law. For a detailed assessment of these safeguards, see Ankersmit, L. (2016). The compatibility of investment arbitration in EU trade agreements with the EU judicial system. *Journal for European Environmental and Planning Law*, 13(1), 46–63.

¹⁴ This Opinion was requested by Belgium following the crisis over the signing of CETA in October 2016. For more background, see Ankersmit, L. (2016, December). Belgium requests an opinion on Investment Court System in CETA. *ehi Review*, 2, 54–58. Retrieved from https://www.researchgate.net/publication/321703966_Belgium_Requests_an_Opinion_on_Investment_Court_System_in_CETA.

¹⁵ Opinion 2/15 EU–Singapore FTA U:C:2017:376, para. 292. Retrieved from [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62015CV0002\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62015CV0002(01)).



INSIGHT 2

Withdrawal of Consent to Investor–State Arbitration and Termination of Investment Treaties

Lise Johnson, Jesse Coleman and Brooke Güven



1. ISDS and its present reality

It has become increasingly difficult to justify investor–state dispute settlement (ISDS). Even governments that had been among its strongest proponents—such as European Union (EU) member states and the United States—are now changing course. Governments and other stakeholders have raised a range of fundamental issues relating to ISDS, including:

- The lack of consistency and coherence in interpretation of the law
- Its asymmetrical nature, implications for incentives of litigators and adjudicators and consequent impacts on development of the law
- The lack of (mechanisms for ensuring the) independence and impartiality of adjudicators and arbitral institutions
- The limited ability of those interested and affected by the disputes to meaningfully participate in them
- The limited means to challenge awards for errors of fact or law, or for inconsistency with public policy
- The limited avenues for public oversight and control of settlement agreements.

Furthermore, ISDS, when coupled with the substantive standards that it protects, is increasingly questioned as an effective policy tool because there is no empirical evidence of any resulting benefits. An important paper recently published by the Organisation for

Economic Co-operation and Development (OECD) finds inconclusive evidence on whether international investment agreements (IIAs) lead to increased foreign direct investment (FDI), much less on whether any FDI that is influenced by IIAs is positive for host and home countries. Evidence is also inconclusive about whether IIAs contribute to the depoliticization of disputes or the improvement of domestic institutions.¹

There is also greater awareness among states and other stakeholders of the need to design tailored policies to encourage certain kinds of investment that will maximize their ability to achieve the Sustainable Development Goals (SDGs), which may also mean discouraging investment that harms the environment, social structures, individuals or the economy in the host country.

IIAs and ISDS are powerful instruments for investment protection, but do not treat foreign investment, much less FDI, with such nuance or purpose. They protect all covered investors and investments irrespective of the investors' motives, including whether such protection is relevant to an investment decision or the investments' contribution (or lack thereof) to the SDGs. Thus, in terms of governance tools, ISDS and old-generation IIAs are both inefficient, as they offer superfluous but costly benefits, and misguided, as they are capable of undermining policies for ensuring sustainable foreign investment. They are, in sum, ill-suited for modern realities.

2. Barriers to timely, meaningful reform

Growing awareness of and discontent with substantive IIA standards and ISDS has generated a call for a new direction in international investment policy making. Reform processes are now underway at national, bilateral and multilateral levels, and there are some promising

¹ Pohl, J. (2018). *Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence*. OECD Working Papers on International Investment, 2018/01. Paris: OECD Publishing, Paris. Retrieved from <http://dx.doi.org/10.1787/e5f85c3d-en>; Johnson et al. (2018). *Costs and benefits of investment treaties: Practical considerations for states*. Columbia Center on Sustainable Investment (CCSI); Bonnitcha, J. (2017). *Assessing the impacts of investment treaties: Overview of the evidence*. International Institute for Sustainable Development (IISD). Retrieved from <http://www.iisd.org/library/assessing-impacts-investment-treaties-overview-evidence>.



initiatives, including at the United Nations Commission on International Trade Law (UNCITRAL). However, it is unclear whether these efforts will effectively address the origins of this discontent and, even if they do, how long such efforts will take.

The UN Conference on Trade and Development (UNCTAD) has catalogued ways in which problems with old-generation IIAs can be addressed, including by means of treaty interpretation, amendment, replacement, consolidation and termination.² Each of those options has advantages and disadvantages in terms of ease and effectiveness.³ One major hurdle to reform is the nature and number of agreements. They number in the thousands, with individual states often being party to scores of bilateral agreements. Amending or interpreting treaties on a treaty-by-treaty basis is time consuming and often ineffective in reaching an agreement with treaty counterparties.

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One potential avenue for addressing these issues is to adopt a new pluri- or multilateral instrument to reform multiple treaties at once. Indeed, this was the idea behind the Mauritius Convention on Transparency in Treaty-based Investor–State Arbitration, drafted within UNCITRAL. Although the Mauritius Convention illustrates a promising strategy, it also reveals challenges. As of March 1, 2018, eight years after UNCITRAL kicked off transparency reform, the Convention had three parties.⁴ This timeline and take-up on the relatively

narrow issue of transparency indicates that broader and more comprehensive change to IIAs and ISDS may take years, if not decades, to realize.

Some states are approaching reform through the creation of bilateral courts or through the creation of a multilateral investment court (potentially through the UNCITRAL process). However, it is still unclear whether a multilateral instrument will be ultimately agreed upon at UNCITRAL or elsewhere and, if so, whether it will meaningfully address identified problems or could create unintended consequences through the further institutionalization of problematic substantive standards. Moreover, it may be decades before the court is established and able to receive claims.

While it is encouraging that some states are earnestly engaging in dialogues on reform, ongoing reform processes and any resulting policy measures remain substantively uncertain and may take a significant amount of time. In the interim, states will continue to assume the unjustified risks associated with the flawed ISDS system.

In light of these issues, we suggest that reform-minded governments explore two near-term actions for addressing well-recognized concerns with the status quo system of ISDS, alongside their longer-term work at UNCITRAL or elsewhere on new models and approaches. These two near-term pragmatic options are: (1) withdrawal of consent to ISDS and (2) termination of investment treaties.⁵ Below we consider the advantages and disadvantages of these options, focusing on their legal and practical feasibility.

3. Withdrawal of consent to investor–state arbitration

Withdrawal of consent to investor–state arbitration may be a controversial course of action, but it would help to address state concerns with existing treaties while enabling countries to focus on developing a new approach. It would curtail the problematic interpretations given by ISDS tribunals to outdated substantive standards contained in old-generation IIAs.

² See United Nations Conference on Trade and Development (UNCTAD). (2017, June). Phase 2 of IIA reform: Modernizing the existing stock of old-generation treaties. *IIA Issues Note, 2*. Retrieved from http://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf.

³ See the “rapporteurs report back” documents for the break-out sessions at UNCTAD’s High-level Annual IIA Conference: Phase 2 of IIA Reform (October 9–11, 2017), available at <http://investmentpolicyhub.unctad.org/Pages/2017-edition-of-unctad-s-high-level-annual-ii-a-conference-phase-2-of-ii-a-reform>.

⁴ See the UN Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-3&chapter=22&lang=en (as of March 1, 2018). The Mauritius Convention entered into force in October 2017.

⁵ Porterfield, M. C. (2014, August 14). Aron Broches and the withdrawal of unilateral consent in investor-state arbitration. *Investment Treaty News*. Retrieved from <https://www.iisd.org/itn/2014/08/11/aron-broches-and-the-withdrawal-of-unilateral-offers-of-consent-to-investor-state-arbitration/> (discussing legal basis for and implications of withdrawals of consent); Howse, R. (2017, March 9). A short cut to pulling out of investor-state arbitration under treaties: Just say no. *International Economic Law and Policy Blog*. Retrieved from <http://worldtradelaw.typepad.com/ielpblog/2017/03/a-short-cut-to-pulling-out-of-investor-state-arbitration-under-treaties-just-say-no.html>



At the same time, it would signal state commitment to an international framework, as states would remain bound by obligations under existing treaties. Those obligations, however, would be subject only to state–state dispute settlement and thus less likely to result in unintended, inconsistent and unpredictable interpretations of controversial provisions. This option would also allow states to make it clear that the decision to pursue this path is not against foreign investment or international law, but against ISDS, and simply taken to responsibly and promptly address a now well-recognized problem.

States can withdraw consent on a uni-, bi-, pluri- or multilateral basis. A jointly crafted instrument that states could then individually sign onto might help reduce negative messages and reactions. The effectiveness of this option is not certain, as investors are likely to challenge the legality of withdrawal of consent, and arbitrators could potentially find in their favour. Even so, withdrawal of consent may strike a useful balance between change and stability, continuing to provide treaty protections and dispute settlement, but tackling the issue of ISDS while reforms are ongoing.

4. Termination of investment treaties

A second option available to states is termination of their IIAs. While termination of investment treaties has arguably been controversial, termination of treaties more generally is not rare. One 2005 study, for instance, found⁶

1,546 instances of denunciation and withdrawal from 5,416 multilateral agreements registered with the UN between 1945 to 2004. [...] Based on these findings, the study concluded that “denunciations and withdrawals are a regularized component of modern treaty practice—acts that are infrequent but hardly the isolated or aberrant events that the conventional wisdom suggests.”

This option would seek to eliminate investment treaty obligations with respect to treaties that are viewed as outdated. For states that believe that the costs of their treaties outweigh their (undemonstrated) benefits, termination of existing IIAs arguably makes good policy sense. It would also give host states greater certainty regarding their potential exposure to claims or liability and could establish a clean slate on which host and home states could develop and implement policies that

take into account evidence on attracting and governing investments in a manner consistent with the SDGs.

A state can, as some have already done, unilaterally indicate its intent to terminate all or some of its treaties. States may also accomplish this objective through bi-, pluri- or multilateral agreements. A multilateral opt-in approach may lessen the pressure on terminating governments, allowing them to more clearly communicate that their actions are not directed against foreign investors but against ISDS and old-generation IIAs, and are taken in accordance with, and with continued respect for, international law.

"We suggest that reform-minded governments explore two near-term actions for addressing well-recognized concerns with the status quo system of ISDS, alongside their longer-term work at UNCITRAL or elsewhere on new models and approaches. These two near-term pragmatic options are: (1) withdrawal of consent to ISDS and (2) termination of investment treaties."

When termination becomes effective, states' investment treaty obligations to foreign investors cease to exist, though states retain obligations under customary international law and other legal instruments. Notably, the termination approach can be hampered in its effectiveness due to survival clauses. Unless amended and stricken from the treaty at or before termination, those provisions can result in the treaty remaining in force—and subjecting states to ISDS—for 10, 15 or 20 years or more after termination.

5. Common challenges to unilateral withdrawal of consent and termination

A challenge in both situations—withdrawal of consent and termination—relates to the reaction of treaty counterparties. A treaty counterparty could contend that such withdrawal of consent to ISDS would violate the withdrawing state's obligations under the treaty or could resist proposals for early termination of the treaty or the shortening or termination of the treaty's survival clause. However, as many states have publicly recognized fundamental and systemic problems with

⁶ Helfer, L. R. (2013). Terminating treaties. In Hollis, D. (Ed.) *The Oxford guide to treaties* (pp. 634–640). Oxford University Press (quoting L. R. Helfer. (2005). Exiting treaties. *Virginia Law Review*, 91(1579), 1602-05; internal footnotes deleted).



ISDS, it would seem disingenuous to persist in requiring a treaty counterparty to face claims through what is now widely seen as a flawed mechanism. As evidence of a state's good faith efforts toward reform, states could waive objections to their counterparties' withdrawals of consent, agree to their requests to terminate IIAs or agree to permit withdrawals of consent alongside unilateral terminations.

In order to facilitate withdrawal of consent or termination, an opt-in instrument could be drafted on which signatory states would indicate that they are taking one or both of these steps, while articulating the rationale driving these actions. In that instrument, a state could:⁷

- In the case of withdrawal of consent, specify the treaties with respect to which it seeks to do so.
- In the case of termination, specify the treaties it seeks to terminate according to their respective terms and the treaties it wishes to terminate with immediate effect.
- In both cases, indicate its intention not to challenge its counterparties' similar efforts to withdraw consent or terminate and, with respect to termination, its intent to waive any notice periods or other conditions.
- Set forth certain affirmations, including commitments to: (1) in the case of withdrawal of consent, continue to abide by substantive treaty commitments as intended by the treaty parties, and (2) in the case of termination, continue to provide foreign investors and investments treatment required by customary international law and other relevant legal instruments.

In this sense, a state could make it clear that withdrawal of consent or termination is not counter to cooperation or international law, but a step necessary to set that cooperation on a more modern, productive path.

Thus, although both withdrawal and termination could be done unilaterally, coordinated action would increase efficiency and clarify the legal and political meaning of such steps. To realize coordinated efforts, it would be important to identify a forum for the creation of a joint instrument onto which states could sign to accomplish one or both of these objectives. One option would be to hold working group sessions on this issue, which could take place alongside UNCITRAL, UNCTAD or other UN meetings.

6. Conclusion

ISDS reform is underway in various forums, as countries deal with a stock of thousands of outdated investment treaties and try to align their investment policies with sustainable development. However, even those processes that are underway may not produce meaningful change for decades. In the near term, therefore, it is crucial for states to explore options such as withdrawal of consent to ISDS and termination in order to responsibly manage the risks and address the problems generated by existing treaties.

"In order to facilitate withdrawal of consent or termination, an opt-in instrument could be drafted on which signatory states would indicate that they are taking one or both of these steps, while articulating the rationale driving these actions."

Such steps would reflect a conscientious effort to govern effectively and equitably, and to move toward an international economic regime where treaties and their dispute mechanisms achieve their desired ends, produce legitimate decisions and do not undermine international cooperation and sustainable development.

Authors

Lise Johnson is Head, Investment Law and Policy, at the Columbia Center on Sustainable Investment (CCSI). **Jesse Coleman** and **Brooke Güven** are Legal Researchers at CCSI. This paper is based on a longer discussion paper, available at <http://ccsi.columbia.edu/2018/04/24/clearing-the-path-withdrawal-of-consent-and-termination-as-next-steps-for-reforming-international-investment-law/>.

⁷ See Helfer, L. R. (2013), *supra* note 6.



INSIGHT 3

An interview with Luis Guillermo Vélez – Director-General of Colombia’s National Agency for the Legal Defense of the State



The International Institute for Sustainable Development (IISD), Kenya Investment Authority (KenInvest) and the South Centre held the 11th Annual Forum of Developing Country Investment Negotiators in Nairobi, Kenya, from February 7 to 9, 2018. The event gathered 141 participants, including delegates from 65 developing country governments and 11 regional and international organizations. Discussions focused on trends and challenges in the design of investment treaties and reform of investor–state dispute settlement (ISDS) from the perspective of sustainable development.

*During the event, IISD interviewed developing country delegates on their experiences on investment negotiations and disputes, their expectations for investment reform processes and their views on the value of the Forum. ITN publishes here the interview with **Luis Guillermo Vélez Cabrera**, Director-General of Colombia’s National Agency for the Legal Defense of the State (ANDŶE). Among other functions, ANDŶE coordinates Colombia’s defense in international investment disputes and supports the Colombian Ministry of Trade, Industry and Tourism (MinCIT) in investment treaty negotiations.*

IISD: Has your country faced any negative consequences as a result of investment treaties or agreements? Have you faced a dispute? Have you experienced regulatory chill?

Actually, and to a certain extent, all three. We are currently handling at least seven arbitrations derived principally from bilateral investment treaties (BITs),

some of them signed many years ago.

Colombia has been very respectful and welcoming of foreign investment. For Colombia, investment is very important. But it is also very important for the state to do its job, which is to regulate and to govern. When the government abides by the rule of law, it seems awfully unjust to have a dispute arise because the government is fulfilling its mandate. An investment regime that allows this to happen needs to be revised.

"When the government abides by the rule of law, it seems awfully unjust to have a dispute arise because the government is fulfilling its mandate. An investment regime that allows this to happen needs to be revised."

Colombia has never, in any way, acted contrary to its internal regulations, contravened international law or its international obligations or acted against an investor. Still, we have what we believe are unfair claims, that are going to be dealt with, but that in many ways should not be there.

IISD: What change would you like to see in how investment treaties and agreements are negotiated and in how disputes are resolved?

This problem should be approached from both angles—substantive and procedural.

More attention has to be paid to the wording of the substantive obligations of states in BITs. States should be very careful and aware of what exactly it is that they are obliging themselves to. Countries are not always aware of the details and implications of what they have signed. The Forum in Nairobi has been very useful in identifying ways to draft better BITs, if a country decides that is a route it wants to take.



The other problem is dispute resolution. Substance and procedure are of course linked and should be approached simultaneously, but they are different. ISDS is really the teeth that BITs have. And because of those teeth BITs bite and hurt. There is a lot to be done with respect to ISDS, which is currently in deep crisis. Multilateral work is being undertaken at the United Nations Commission on International Trade Law (UNCITRAL) to reform aspects of ISDS. There is also work being done at the International Centre for Settlement of Investment Disputes (ICSID). These ongoing reform efforts signal that there is no doubt that urgent reform is needed in several aspects.

"ISDS is really the teeth that BITs have. And because of those teeth BITs bite and hurt. There is a lot to be done with respect to ISDS, which is currently in deep crisis."

For example, the system lacks clear conflict-of-interest rules. The “double-hatting” issue—where attorneys from multinational law firms act as attorneys for plaintiffs, attorneys for defendants and also arbitrators—cannot be accepted as it is. Second, there is the issue of arbitrators adjudicating disputes not based either on the treaties or on international public law. There is evidence that arbitrators, who mainly come from commercial arbitration, are not always savvy on public international law. They often undertake their job without considering the particular realities of a state, its objectives and its mandate, approaching investment disputes as if they were typical commercial disputes between two companies, which is clearly not the case. Third, this is also the principal source of incongruence in the decisions made by the tribunals and the resulting lack of predictability in the system. Those are at least three aspects that need to be addressed in ISDS urgently.

IISD: How has the Annual Forum helped prepare you to deal with and avoid these negative consequences?

The Forum is very, very important. It is a place where negotiators can exchange experiences and ideas, learn from mistakes made by others, from successes that others have had. It clearly sets a path for future engagements with investors and also for reviewing some of the policies that some countries have had in the past that have led to unfortunate situations.

"This Forum allows for candid discussions among participants who come from similar backgrounds and have similar and shared interests."

Many other forums are attended by a great number of investors and capital-exporting countries, whose interests are not the same as the interests a developing country may have. This Forum allows for candid discussions among participants who come from similar backgrounds and have similar and shared interests.

IISD: How can IISD help you advance the desired reforms you mentioned?

Now that reform is demanded and is being seriously thought of, IISD can have a fundamental role as a source of ideas and information and also as a meeting point for many nations that experience the same situations and problems and that need some kind of guidance.



NEWS IN BRIEF

UNCITRAL Working Group III meets in New York to continue ISDS reform discussions

The 35th session of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) takes place April 23–27, 2018, in New York to continue discussions on possible reform of investor–state dispute settlement (ISDS). More information is available on the working group website. The working group will convene again in Vienna in late 2018.

Agreement to create the African Continental Free Trade Area (AfCFTA) signed in Rwanda

On March 21, 2018, 44 of the 55 African Union member states gathered in Kigali, Rwanda, signed the AfCFTA with a view to creating a single market in the continent. Once the agreement is ratified by all signatories, the trade bloc to be created would encompass 1.2 billion people and over USD 2 trillion in combined GDP.

Countries agreed to remove tariffs on 90 per cent of goods and to liberalize services. Free movement of people and a single currency could be future developments. Signing of the agreement concluded the first phase of negotiations; countries will focus on the AfCFTA investment provisions in phase 2.

Among the countries that did not sign the agreement, Nigeria and South Africa indicated the need for broader consultations with their domestic stakeholders.

Council of the European Union adopts negotiating directives: EU Commission to negotiate a convention establishing a multilateral investment court

On March 20, 2018, the Council of the European Union adopted negotiating directives authorizing the European Commission to negotiate a convention establishing a multilateral court for the settlement of investment disputes. On the basis of this mandate, the Commission intends to start negotiations in the framework of the United Nations Commission on International Trade Law (UNCITRAL).

The multilateral investment court (MIC) envisioned by the European Union would be a permanent international institution to adjudicate disputes under both existing and future investment treaties. It would include an appeals mechanism and provisions on procedural transparency as well as the impartiality and independence of adjudicators. The MIC would eventually replace the bilateral Investment Court Systems (ICS) included in EU agreements.



Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) signed

On March 8, 2018, the CPTPP was signed in Santiago, Chile. The free trade agreement involves 11 countries in the Pacific region: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. The legally verified text was released February 21, 2018, by New Zealand, the treaty's depositary. Mexico also published the [Spanish version](#).

At the signing ceremony, side letters were also signed to exclude compulsory ISDS between New Zealand and five countries: Australia, Brunei Darussalam, Malaysia, Peru and Vietnam.



In addition, Canada, Chile and New Zealand signed two joint declarations: one on [Fostering Progressive and Inclusive Trade](#), endorsing the countries' commitments to sustainable development and climate change goals, and another on [ISDS](#), reaffirming the parties' right to regulate and intent to promote transparency in dispute settlement proceedings.

U.S. President Donald Trump said on April 13, 2017, that he would reconsider joining the CPTPP if it were “substantially better” than the deal negotiated by his predecessor, Barack Obama. Trump had withdrawn the United States from the “horrible” TPP-12 in January 2017. He has recently asked his trade advisers to look into the possibility of joining the CPTPP.

Japan's trade minister, Taro Aso, said that he would welcome the possibility, but would have to verify the facts carefully. He added that Trump “is a person who could change temperamentally, so he may say something different the next day.” New Zealand trade minister David Parker was open to the possibility but highlighted that it was not yet clear “how real it is.”

RCEP to discuss investment in July; conclusion of agreement expected in 2018

On March 3, 2018, ministers from the 16 participating countries of the Regional Comprehensive Economic Partnership (RCEP) attended the [4th RCEP Intersessional Ministerial Meeting](#) in Singapore.

Noting the progress made since the 21st round of negotiations held February 2–9, 2018, in Yogyakarta, Indonesia, they reaffirmed their intent to [conclude the agreement in 2018](#).

Investment is among the issues to be discussed at the 5th RCEP Intersessional Ministerial Meeting, scheduled to take place in Tokyo, Japan, on July 1, 2018.



AWARDS AND DECISIONS

ICSID tribunal finds Latvia breached FET under Latvia–Lithuania BIT

UAB E Enerģija v. Republic of Latvia, ICSID Case No. ARB/12/33

Gladwin Issac

In a proceeding brought by UAB E Enerģija (UAB), a Lithuania-based energy company, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) held that Latvia’s conduct breached the fair and equitable (FET) standard under the Latvia–Lithuania bilateral investment treaty (BIT). In particular, the tribunal held that Latvia’s conduct toward the company appeared “to be founded on prejudice or preference rather than on reason or fact,” and was accordingly arbitrary within the meaning of the BIT (para. 887).

Background and claims

UAB entered into a 30-year lease agreement with AS Rēzeknes Siltumtīkli (the regulator), a company wholly owned by the Rēzekne Municipality (the municipality), to operate a district heating system for the City of Rēzeknes, Latvia. UAB established a separate entity, Latgales Enerģija (LE), to invest in this project.

In September 2007, the regulator sued LE in the Latgales Regional Court seeking payment of certain amounts and obtained attachment of its funds. Within a month, the municipality declared an energy crisis and appointed Rēzeknes Enerģija (RE) to provide thermal energy in the city. Following local elections, the newly elected politicians objected to the privatization of the service and terminated the lease in 2008, seizing all of the company’s assets and investments without compensation.

After four years of unsuccessful negotiations, UAB initiated arbitration claiming that Latvia breached its BIT obligations, particularly the FET and full protection and security standards under BIT Article 3(1).

Latvia’s preliminary objections to jurisdiction

Latvia presented several objections to the tribunal’s jurisdiction. First, it argued that UAB’s internal documents authorizing the request for arbitration failed to comply with the conditions precedent, namely, resorting to mediation prior to arbitration and obtaining the approval from the European Bank

for Reconstruction and Development (EBRD) as a shareholder. Second, it asserted that there was no dispute within the meaning of ICSID Convention Article 25. Latvia argued that the extensive delay in the submission of UAB’s request for arbitration, 42 months after the period authorized in the BIT, shows UAB’s bad faith and caused Latvia to understand that the claims would not be pursued beyond negotiations.

The tribunal dismissed these objections, stating that the contents of UAB’s internal documents were insufficient to prove that the approval from EBRD was a condition precedent to arbitration. Further, it found that Latvia’s treatment of UAB’s investment qualifies to be a “legal dispute arising out of an investment” under ICSID Convention Article 25(1).

Latvia’s application for termination or stay of proceedings

Relying on *Impregilo v. Argentina*, Latvia submitted that the arbitration should be suspended or terminated pending the final adjudication of the judicial proceedings in the Latvian courts. The tribunal rejected this application since the parties to the Latvian proceedings (regulator and LE) and the parties to the arbitration proceeding (UAB and Latvia) were not the same. Further, although the court proceeding related to an application for a stay under the lease agreement, it did not deal with the standards of protection under the BIT. The tribunal reasoned that an overlap between contract and treaty claims was not sufficient to warrant a stay or proceedings. Consequently, it found no cogent reason to order a stay of the arbitration proceedings or terminate them.

Breach of FET standard under BIT Article 3(1)

UAB argued that the municipality’s delay in adopting a heat supply development plan amounted to a breach of the FET standard. It asserted that the non-existence of such a plan caused the regulator to deny LE’s applications for a new tariff in 2006 and 2007. In addition, UAB submitted that the municipality’s conduct was in bad faith and that the energy crisis was used to force LE into relinquishing some or all of the heating system.

The tribunal rejected this argument, stating that, while the municipality’s duty to act during the energy crisis cannot be doubted, the question for consideration was



whether the energy crisis was declared in good faith and whether the municipality complied with BIT Article 3(1). In deciding this issue, the tribunal took note of the October 9, 2007 meeting of the Energy Committee, in which LE was summoned to provide heating within 24 hours, even though the municipality was aware that its bank account had been attached to the proceedings by the regulator. The tribunal emphasized that the municipality had, only a week before declaring the energy crisis, incorporated RE and endowed it with a capital of LVL 4 million (approximately USD 7 million) and appointed it as the “person in charge” of the provision of heating services in Rēzekne. Therefore, the tribunal found the municipality’s conduct in breach of BIT Article 3(1).

Revocation of licenses does not amount to expropriation

With regard to expropriation, UAB contended that the municipality acted in bad faith by conspiring with the regulator and RE to give rise to an energy crisis. UAB asserted that the regulator and the municipality sanctioned LE over a year by revoking UAB’s licenses, forcibly recovering its assets and finally terminating its long-term agreement. In the tribunal’s view, however, the regulator was entitled to revoke the licenses due to non-payment for the natural gas supplied to LE. It held that the regulator’s decision to revoke the license did not amount to a breach of BIT Article 4(1) on expropriation.

“Necessary permits” to be granted in accordance with domestic laws and regulations only

UAB invoked the most-favoured-nation (MFN) treatment clause contained in BIT Article 3(2) to argue that Latvia breached the obligations under Articles 2(2) and 3(1) of the Latvia–Romania BIT. Under these obligations, when the host state has admitted an investment in its territory in accordance with its laws, it shall “grant the necessary permits in connection with such investment” (para. 1104). UAB submitted that the municipality had failed to issue the required heat supply development plan and, consequently, the regulator failed to authorize LE to charge the revised heating tariffs.

The tribunal chose not to deal with the question of how procedural benefits could be imported through an MFN clause. Even so, it stated that it was doubtful whether the host state’s obligation to grant MFN treatment “subject to its laws and international agreements” could be relied upon to import standards contained in other treaties at all, since it may be limited to de facto treatment

under domestic law. Further, the tribunal was unsure of whether the concept of a “necessary permit” “in connection with the investment” would include the heat supply and development plan for the City of Rēzekne. Likewise, it was also uncertain of whether the regulator’s decisions approving a new tariff proposed by LE fell into the category of permits contemplated by the provisions relied on by UAB. In any case, the tribunal found that any necessary permits have to be granted by the host state only “provided that it is in accordance with its national law” (para. 1109).

Damages and costs

The tribunal awarded UAB a sum of EUR 1,585,000 plus pre- and post-award interest, compounded annually for losses suffered as a consequence of Latvia’s breaches of BIT Article 3(1). A majority ordered Latvia to pay 50 per cent of the costs incurred by UAB. Arbitrator Reinisch dissented that, considering that the claims were not frivolous and were only pursued in good faith, each party should have born its own costs.

Notes: The tribunal was composed of Paolo Michelle Patocchi (President appointed by the Chairman of the ICSID Administrative Council, Swiss national), Samuel Wordsworth (UAB’s appointee, British national) and August Reinisch (appointed by the Chairman of the ICSID Administrative Council, Austrian national). The award of December 22, 2017 is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9481.pdf> and August Reinisch’s dissenting opinion is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9482.pdf>.

Gladwin Issac is a final year undergraduate student of Law and Social Work at the Gujarat National Law University, India.

ICSID tribunal declines jurisdiction: Timor-Leste never consented to ICSID arbitration

Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste, ICSID Case No. ARB/15/2

Trishna Menon

A tribunal at the International Centre for Settlement of Investment Disputes (ICSID) denied its jurisdiction over a case initiated by Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC (Lighthouse) against the Democratic Republic of Timor-Leste. The final award was rendered on December 22, 2017.



Background and claims

The dispute originated in a Fuel Supply Agreement (FSA) comprising three interrelated agreements entered into in October and November 2010. The agreements refer to the Lighthouse Standard Terms and Conditions Applying to the Sale of Goods (Standard Terms) and the Lighthouse Energy – General Terms & Conditions of Supply (General Terms), the relevance and effect of which are disputed by the parties.

Timor-Leste’s jurisdictional objections were three: (1) it had not consented to ICSID arbitration, (2) there had been no “investment” for the purposes of the ICSID Convention or the Timor-Leste Foreign Investment Law (FIL) and (3) the claimants were not a “foreign investor” and did not hold a Special Investment Agreement (SIA) for the purpose of the FIL. Therefore, the tribunal focused on whether Timor-Leste had consented to the jurisdiction of ICSID to arbitrate the dispute through the FSA, the Standard Terms and the FIL.

Consent in the FSA

Lighthouse asserted that the Standard Terms were incorporated by reference into the three agreements forming the FSA. It also relied on the so-called December version of the General Terms, which provided that, if the parties could not settle a dispute amicably, they agreed to submit it to ICSID. Timor-Leste, however, relied on the so-called September and October versions of the General Terms, which state that domestic litigation would be the method of dispute settlement and do not mention ICSID.

The tribunal noted that the references to the Standard Terms were vague and did not express an intent to incorporate the document into the FSA. One of the references, for example, also mentioned information about Timor-Leste’s power generation needs, which were unlikely to have been intended to be incorporated as contractual terms. One of the three agreements mentioned a document that, in turn, referred to the Standard Terms, and the claimants argued that this “double incorporation” served to incorporate the Standard Terms into the FSA—but the tribunal disagreed. The tribunal was also not satisfied that the Standard Terms had even been supplied to Timor-Leste by the time of signing of the first agreement forming the FSA.

The tribunal also found, from an analysis of the General Terms, that there was no common intent to submit to ICSID jurisdiction. It found, instead, that the intent was to resolve disputes through domestic court litigation. The tribunal looked into the conduct of Lighthouse as of October 25, 2011, by which time Lighthouse had alleged

that the Standard Terms had been incorporated into the FSA. On that day, Lighthouse’s counsel had sent to Timor-Leste a document entitled “Consent to Arbitration under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States,” requesting that Timor-Leste execute it. Lighthouse’s counsel did not mention that an ICSID arbitration clause was already allegedly present in the parties’ contractual arrangements. Based on this, it was clear to the tribunal that Lighthouse still did not consider that Timor-Leste had consented to ICSID arbitration.

Consent to ICSID arbitration through the FIL

A “foreign investment” under the Timorese FIL is “an investment made by a ‘foreign investor’ which must be any direct investment made with financial resources, or subject to pecuniary assessment, originating from abroad at the risk and expense of a foreign investor” (para. 311). A “foreign investor” is defined as “any foreign individual or collective person or non-resident Timorese national, that holds a foreign investor’s certificate” (para. 312).

According to Timor-Leste, Lighthouse could not rely on the offer of ICSID arbitration contained in FIL Article 23 because Lighthouse does not hold a foreign investor’s certificate—as Lighthouse itself admitted—and accordingly does not qualify as a “foreign investor.” Also, according to Timor-Leste, the FSA does not constitute a “special investment agreement,” since FIL Article 18(2) requires that SIAs “be authorised by resolution of the Council of Ministers, clearly specifying the special conditions justifying the agreement, together with the special system applicable to the agreement” (para. 316).

The tribunal noted that Lighthouse could offer no evidence of a resolution from the Council of Ministers stating that the FSA was an SIA, and accordingly agreed with Timor-Leste.

Investment within the ambit of Article 25(1) of the ICSID Convention

Timor-Leste’s third jurisdictional objection was that the dispute did not arise directly out of an investment as required by ICSID Convention Article 25. It argued that the meaning of “investment” under the ICSID Convention is objective and excludes ordinary commercial transactions. According to Timor-Leste, the transaction in question was not an investment but rather an exchange of goods and services for payment. For reasons of procedural economy, the tribunal decided not to determine the answer to this question, since it was already established that Timor-Leste had not consented to ICSID arbitration and the outcome of this question



would make no difference to the tribunal's decision.

Decision and costs

The tribunal held that it lacked jurisdiction over the dispute, dismissing any other requests for relief and directing Lighthouse to bear all costs of the arbitration, ordering it to pay USD 273,434.26 to Timor-Leste and another USD 1,300,000 for Timor-Leste's legal fees and expenses.

Notes: The tribunal was composed of Gabrielle Kaufmann-Kohler (President, jointly appointed by the other arbitrators, Swiss national), Stephen Jagusch (claimants' appointee, New Zealand national) and Campbell McLachlan (respondent's appointee, New Zealand national). The award is available at <https://www.italaw.com/cases/6377>.

Trishna Menon is a final year undergraduate student of Law at the Gujarat National Law University, India.

ICSID tribunal dismisses expropriation case against Venezuela on jurisdictional grounds

Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/21

Bettina Müller

On November 13, 2017, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) declined to exercise jurisdiction over a USD 1.4 billion case initiated in 2012 by two U.S.-owned Venezuelan glass companies, Fábrica de Vidrios Los Andes, C.A. (Favianca) and Owens-Illinois de Venezuela, C.A. (OIdV), expropriated in 2010 by former Venezuelan president Hugo Chávez Frías.

Background and claims

Alleging environmental damage and years of exploitation of Venezuelan workers, on October 26, 2010, former Venezuelan President Hugo Chavez Frías expropriated the two largest businesses for production and distribution of glass containers in Venezuela, Favianca and OIdV, both owned by U.S.-based multinational Owens-Illinois. According to the presidential decree, expropriation was necessary to “strengthen the industrial capacity of the public sector in the manufacture of glass containers for the Venezuelan people” (para. 139). In 2011, Favianca and OIdV were merged into the state-owned company Venezolana del Vidrio, C.A. (Venvidrio).

In 2012, after the unsuccessful attempt to agree on

the amount Venezuela should pay in compensation for the two plants, two parallel cases were brought against the state. One was initiated in March by OI European Group B.V. (OIEG) (ICSID Case No. ARB/11/25) and a second one in July by Favianca and OIdV (ICSID Case No. ARB/12/21). In both cases, the claimants alleged unlawful expropriation and other investment treaty breaches. Given that the majority shareholder of both plants was the Dutch company OIEG, the claimants invoked the Venezuela–Netherlands bilateral investment treaty (BIT).

The first case was resolved in 2015 when the tribunal unanimously decided in favour of the investor and ordered Venezuela to pay USD 372.4 million plus interest, out of the USD 929.5 million OIEG had originally claimed. A [summary of the award](#) was published in ITN May 2015. The annulment proceeding Venezuela subsequently launched is still pending. In the second case, summarized here, the ICSID tribunal dismissed the claims of Favianca and OIdV on jurisdictional grounds.

Before proceeding to the details of the tribunal's decision, it is important to note that Venezuela formally denounced the ICSID Convention on January 24, 2012. According to ICSID Convention Article 71, denunciation takes effect six months after its official submission. Favianca and OIdV filed their claim on July 20, 2012, and argued that it still fell within ICSID jurisdiction, an interpretation Venezuela disputed. Venezuela had also unilaterally ended the BIT with the Netherlands in 2008, but the treaty's sunset clause provides for 15 more years of applicability to investments made prior to the date of denunciation.

ICSID jurisdiction depends on perfected consent

In view of Venezuela's decision to leave ICSID, the key debate in this case was whether or not the centre still had jurisdiction over the case. The tribunal deemed it relevant to interpret Article 9 of the BIT in question, which selects ICSID as the forum to settle investor–state disputes under the treaty, as well as ICSID Convention Article 71 and Article 72. Article 71 provides for the denunciation of the Convention, and Article 72 states that the denunciation “shall not affect the rights or obligations under this Convention of that State...arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.”

With respect to BIT Article 9, Favianca and OIdV reasoned that Venezuela's denunciation of the



Convention was irrelevant, since the country gave “unconditional” consent to the jurisdiction of ICSID in Article 9(1) and (4), which, due to the BIT’s sunset clause, would be applicable until 2023 to all investments made prior to the BIT’s termination date.

The arbitrators rejected this argument, holding that ICSID arbitration was only available if the conditions for access to ICSID arbitration in both the investment treaty and the ICSID Convention had been satisfied (para. 261). The tribunal concluded that “only where consent to arbitration to the jurisdiction of the Centre is perfected, such that it generates rights and obligations under the ICSID Convention, that those rights and obligations persist following the receipt of a notice of denunciation by a Contracting State pursuant to Article 71” (para. 282). It clarified that the denunciation of the ICSID Convention did not affect proceedings already in course or existing ICSID arbitration agreements.

On the other hand, the tribunal considered that, in analyzing Article 71 and 72 of the ICSID Convention, it had to reconcile two different objectives: “The first is to facilitate a Contracting State’s orderly exit from the ICSID Convention in case of a denunciation. The second is to protect the legitimate expectations of those who have relied upon that Contracting State’s consent to ICSID arbitration” (para. 289). In this case, it sided with Venezuela. Explaining its decision, the tribunal argued that ICSID Convention Article 72 could not be extended to potential agreements to arbitrate in addition to existing agreements. Otherwise, the denouncing state could potentially be the respondent in an unlimited and unforeseeable number of future ICSID arbitrations until its unilateral consent remained binding in investment treaties. This would also leave Article 71 without effect.

Thus, the tribunal concluded that it would only have had jurisdiction over the dispute if Venezuela had entered into an agreement with the investors to submit disputes to ICSID arbitration before the notice of denunciation. Since this was not the case, and Venezuela had withdrawn from the ICSID Convention before Favianca and OIdV submitted the case, perfected consent was not given and the tribunal consequently had no jurisdiction over the dispute.

Costs

The tribunal ordered each party to bear its own legal fees and expenses and determined that Favianca and OIdV pay all arbitration costs, which amounted to more than USD 915,000.

Annulment pending

On March 9, 2018, Favianca and OIdV initiated an annulment proceeding, challenging the tribunal’s decision on the grounds that it “exceeded its power... and misinterpreted and misapplied the BIT and the ICSID Convention” (para. 37 of the application for annulment). Also, according to the claimants, the *Favianca* award “will provide an incentive for rogue states to violate their obligations under treaties, safe in the knowledge that they can prevent investors from holding them accountable... simply by submitting a notice of denunciation of the ICSID Convention” (para. 88).

Notes: The tribunal consisted of Hi-Taek Shin (presiding arbitrator, appointed by the ICSID Administrative Council after considering the parties’ observations), L. Yves Fortier (claimants’ appointee, Canadian national) and Zachary Douglas (respondent’s appointee, Australian national). The award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9383.pdf>. The application for annulment is available at <https://pacer-documents.s3.amazonaws.com/36/180659/04516475124.pdf>.

Bettina Müller is a member of the Trade and Investment team of the Transnational Institute.

Solar energy claims brought by German investors against Czechia are dismissed

Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic, PCA Case No. 2014-03

Mintewab Abebe

In a dispute involving Czechia’s solar power sector, the majority of an arbitral tribunal administered by the Permanent Court of Arbitration (PCA) dismissed all claims brought under the Czechoslovakia–Germany bilateral investment treaty (BIT) in an award dated October 11, 2017.

Background and claims

The claims were brought by three members of the Wirtgen family (Wirtgen) and their company JSW Solar (zwei) GmbH & Co. KG (JSW Solar). In 2009 and 2010 the claimants invested in three solar photovoltaic plants in Czechia. In an effort to encourage the production of electricity from renewable sources of energy, Czechia issued a two-part Support Scheme providing incentives of a guaranteed feed-in tariff (FIT), originally for 15 and later for 20 years, and tax incentives, including long-



term income tax exemptions and shortened depreciation periods. According to Wirtgen and JSW Solar, they made investments relying on the explicit guarantees and incentives in the Support Scheme.

In 2009 and 2010, Czechia amended the Support Scheme, in view of a drastic drop in the cost of solar panels that led to windfall profits for solar power producers and a solar boom. According to Czechia, the profits exceeded the rate of return that was originally contemplated by the Support Scheme. The amendments consisted of a 26 per cent solar levy, the withdrawal of the tax exemption and the extension of the depreciation period.

Members of the Czech parliament petitioned for the repeal of the solar levy before the Czech Constitutional Court, which concluded that, despite these measures, a plant meeting technical parameters would achieve a simple payback of capital expenses. The claimants then initiated international arbitration, claiming that the relevant framework contained a stabilization commitment and that the amendments gave rise to breaches of their legitimate expectations, guaranteed under the fair and equitable treatment (FET) clause, the full security and protection (FSP) clause and the umbrella clause of the BIT.

Two jurisdictional objections against JSW Solar rejected by the tribunal

Czechia objected to the tribunal's jurisdiction, arguing that claimant JSW Solar is not an investor within the meaning of the BIT as it is not a "juridical person" and hence lacks legal personality under German law. The claimants, in turn, argued that "juridical person" must be interpreted autonomously, without recourse to domestic law.

The tribunal concluded that the term "juridical person" has an autonomous meaning because the contracting parties to the BIT did not refer to domestic law while defining it. Further, the tribunal found that an entity that can invest, enter into contracts, acquire property, sue and be sued in its own name qualifies as a juridical person even if it lacks legal personality under domestic law.

The European Commission (EC) raised the other prong of objection. It submitted an amicus curiae brief arguing that "the conclusion of the Treaty on Accession of the Czech Republic to the EU implied the termination of the BIT pursuant to Article 59 of the [Vienna Convention on the Law of Treaties]" (para. 241). The tribunal rejected this argument. It found that intra-EU BITs remained valid, mainly because

the Lisbon Treaty and the BIT do not have the same subject matter. For example, EU law does not include an investor-state dispute settlement (ISDS) mechanism or an FET guarantee. The tribunal reasoned that the EC also failed to show that the European Union's competence over foreign direct investment covers the same subject matter as the BIT (para. 265).

Majority holds that no specific commitments were made to claimants, hence no FET breach

Wirtgen and JSW Solar alleged that, by abrogating the tax incentives and introducing the solar levy, Czechia breached both components of BIT Article 2(1), which requires states to protect investors' legitimate expectations and not to deliberately cause them damage.

According to the claimants, the solar levy effectively reduced the FIT by the amount of the levy, in breach of their legitimate expectations. They also alleged that Czechia had committed to maintaining the tax incentives unchanged for the life of the plants. Czechia countered that no specific commitments were made and that the FIT remained intact in spite of the solar levy.

The majority held that FET obligations are breached when an investor's objectively reasonable expectations at the time the investment is made are breached. However, it noted that, absent a stabilization commitment, investors "can have no legitimate expectation that the host State's laws will not change" (para. 408). Ascertaining whether there was a legitimate expectation of stability by the investor requires consideration of the form, content and clarity of the alleged promise.

After evaluating the relevant context and circumstances, the majority found that there was no separate guarantee of an absolute FIT price level in the abstract, set independently of the guarantees of a payback of capital expenses and an annual return on investment. Rather, Czechia provided a level of revenue through an FIT system for solar energy producers that met specific technical and economic parameters. It also concluded that, even after the measures were taken, the claimants have continued to receive a level of revenue that ensured a payback of capital expenses and a return on investment over a period of 15 (later 20) years. As the guarantees given by Czechia continue to be complied with, the majority held that there can be no breach of legitimate expectations. It also reviewed other documents on which the claimants allegedly relied and concluded that, contrary to claimants' allegations, none guaranteed fixed revenues.

Concerning the reversal of the tax exemptions and



extension of the depreciation period, the majority concluded that Czechia neither offered guarantees that the exemption would apply throughout the lifetime of the plants nor promised that solar panels would be depreciated over a particular period. Furthermore, the majority found that Czechia did not offer guarantees that the incentives would not be amended.

The majority rejected the allegation that Czechia caused deliberate harm by attracting investors based on the guarantees and revoking them once the investments were made. It found no evidence that the Support Scheme was designed to promote “foreign” investment. In addition, it concluded that the measures were not improper or without justification, but were taken in pursuit of legitimate objectives of protecting the Czechs from unreasonably high electricity costs. The measures were also tailored to limit the effects only to investors that benefitted from the solar boom, the tribunal found.

No violation of full security and protection standard or umbrella clause

The majority held that Czechia did not in the first place provide the kind of guarantees alleged by the claimants, and hence had not violated its obligation to provide legal security. Similarly, the claimants’ umbrella clause claim failed since they could not prove that the Czechia had an obligation to ensure a fixed FIT or the maintenance of the tax incentives.

Decision and costs

Having dismissed all claims, the majority ordered each party to bear its own legal costs and an equal part of the arbitration costs.

Arbitrator Gary Born dissents

Gary Born, the claimants’ appointee, strongly disagreed with the majority’s decision. According to him, Czechia provided a plain and unequivocal statutory guarantee for a fixed FIT for the duration of the investment and the claimants invested relying on such guarantee. He maintained that the majority’s interpretation essentially rewrites the straightforward Czech laws, undermining the rule of law and Czechia’s ability to provide meaningful legislative guarantees.

Notes: The tribunal was composed of Gabrielle Kaufmann-Kohler (presiding arbitrator appointed by the parties upon the co-arbitrators’ proposal, Swiss national), Gary Born (claimant’s 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/italaw9498.pdf> and the dissent is available at <https://www.italaw.com/sites/default/files/case-documents/italaw9499.pdf>.

Mintewab Abebe is an Ethiopian lawyer and holds an LL.M. from New York University School of Law.

Venezuela held liable for unlawful expropriation of fertilizer plants

Koch Minerals Sarl and Koch Nitrogen International Sarl v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19

Claudia Arietti

A tribunal at the International Centre for Settlement of Investment Disputes (ICSID) held Venezuela liable for unlawful expropriation in a case relating to fertilizer plants, awarding over USD 324 million in damages plus interest.

Background and claims

In 1997, Swiss company Koch Minerals Sarl (KOMSA), Venezuelan state-owned company Petroquimica de Venezuela S.A. (Pequiven) and other two companies entered into a series of agreements for the development, construction and operation of two ammonia and two urea plants in Jose, Venezuela.

On April 8, 1998, a joint investor agreement was executed providing for the incorporation of a series of Venezuelan companies (FertiNitro) to implement the project. On that same day, a 20-year Offtake Agreement (the OA) was concluded. Under the OA, KOMSA and Pequiven agreed to purchase a guaranteed quantity of ammonia and urea produced by FertiNitro at a discounted set price for their own consumption or resale in local or export markets. KOMSA later assigned its rights and obligations under the OA to Koch Oil Marketing S.A., which in turn assigned it to Koch Nitrogen International Sarl (KNI). KOMSA and KNI are associated companies within the Koch group of companies.

From 2005 onward, Venezuela imposed on FertiNitro a series of new taxes and tax increases. In 2007, Venezuelan President Hugo Chavez issued a decree whereby manufacturers, suppliers and exporters of nitrogenous fertilizers were required to supply urea and ammonia on a priority basis to the national market, at a maximum price set by regulation.

On October 10, 2010, President Chavez announced the expropriation of FertiNitro on TV, and an



Expropriation Decree was published the next day. One day later, the Venezuelan Minister of Energy and Petroleum visited the plants and stated that Venezuela was already in control of the plants.

KOMSA and KNI initiated arbitration against Venezuela in June 2011 on the basis of the Venezuela–Switzerland bilateral investment treaty (BIT) and the ICSID Convention. They claimed that Venezuela violated BIT Articles 4 (Fair and Equitable Treatment [FET], National Treatment, Full Protection and Security [FPS], Discriminatory Treatment), 6 (Expropriation) and 11 (Umbrella Clause).

On February 28, 2012, by express reference to the Expropriation Decree, Venezuela no longer permitted the sale of urea and ammonia to KNI, and FertiNitro unilaterally terminated the OA.

Tribunal affirms jurisdiction over KNI's claims

Venezuela challenged the tribunal's jurisdiction over KNI's claims relating to the OA, arguing that KNI's interest in the OA did not constitute an investment under the BIT and the ICSID Convention. Accordingly, in this determination, the tribunal proceeded with a dual test, under both instruments.

The tribunal found that the BIT defines investment as including every kind of asset and that shares or participation in a company and contractual performance are described as assets under the BIT.

When analyzing the definition of investment under the ICSID Convention, the tribunal referred to the *CSOB v. Slovakia* case to hold that an investment should not be sliced up into pieces to state that one part, standing alone, does not qualify as an investment. Furthermore, the tribunal stated that the OA should not be considered as a separate transaction, unrelated to the project; rather, it should be considered as an integral and essential part of overall investment. Thus, the tribunal concluded that the entire transaction was part of a single integrated investment within the meaning of ICSID Convention Article 25(1).

Based on the above, the tribunal concluded that KNI's interest in the OA constituted an investment under both the BIT and the ICSID Convention.

Venezuela unlawfully expropriated KOMSA and KNI's investments

KOMSA and KNI argued that the Expropriation Decree and the Minister's declarations constituted an unlawful indirect expropriation. In turn, Venezuela alleged that

the Expropriation Decree ordered the mandatory acquisition of FertiNitro's assets pursuant to Venezuela's local laws and in compliance with BIT Article 6 (Expropriation) and that the termination of the OA was a commercial decision, which could not be qualified as an expropriation under the BIT.

To analyze the expropriation claim, the tribunal referred to the four-prong test established in Article 6 of the BIT. According to the test, expropriation is prohibited unless the following are satisfied: (i) the measure must be taken in the public interest, (ii) on a non-discriminatory basis, (iii) under due process of law and (iv) provided that provisions be made for effective and adequate compensation.

In the tribunal's view, KOMSA and KNI failed to prove that (i) the measures were not taken in the public interest, and (ii) that they were discriminatory. The tribunal disagreed with the claimants that Venezuela was required to give them advance notice of the Expropriation Decree and found that (iii) the expropriation was carried out in accordance with due process of law.

As to (iv) compensation, the tribunal noted that KOMSA did not receive any compensation from Venezuela, even more than seven years after the Expropriation Decree. Accordingly, the tribunal held that Venezuela unlawfully expropriated KOMSA's interest in FertiNitro on October 11, 2010. It considered that the expropriation was *indirect* because no formal transfer of ownership of FertiNitro's assets under local law occurred until July 2011, but that it had the effect of a direct expropriation on October 11, 2010.

The tribunal carried out a separate analysis of KNI's interest as a successor of KOMSA in the OA. The majority of the tribunal considered that KOMSA's investment and the OA formed a unified package, that KOMSA's investment would have not taken place without the OA and that KNI's investment could not be sliced off and isolated. Accordingly, the majority decided that Venezuela also unlawfully and indirectly expropriated KNI's interest in the OA on October 11, 2010, in violation of BIT Article 6.

Other claims dismissed

KOMSA also presented claims for losses derived from new and increased taxes, non-payment or late payment of tax credits, effects of the measures adopted in 2007 concerning priority supply to national markets and interference with FertiNitro's business. However, the tribunal dismissed all non-expropriation claims because



there was not enough evidence that KOMSA, as a minority shareholder of FertiNitro (25 per cent), suffered a loss sufficiently quantifiable in money from any of the allegations above, and that any of the losses suffered by FertiNitro were passed through to KOMSA.

Compensation and interest

The tribunal ordered Venezuela to pay KOMSA damages of USD 140.25 million. By majority, it also ordered it to pay USD 184.8 million to KNI. Both amounts were calculated as at October 10, 2010. In addition, the tribunal ordered Venezuela to pay pre-award interest (from October 11, 2010 to the date of the issue of the award) and post-award interest (from the date of issue of the award until payment), in both cases calculated at USD 6-month LIBOR plus 2 per cent, compounded with 6-month rests.

Dissenting opinion

Arbitrator Zachary Douglas dissented on the tribunal's finding that Venezuela expropriated KNI's interest in the OA. In his view, the Expropriation Decree could only produce effects in the Venezuelan legal system and could not deprive KNI of its intangible property rights under New York law, the governing law of the OA. He stated that KNI's rights under the OA remained valid and binding even after the Expropriation Decree and that KNI could enforce them by invoking the arbitration clause of the OA.

Notes: The tribunal was composed of V.V. Veeder (president, appointed by the parties, British national), Marc Lalonde (claimants' appointee, Canadian national) and Zachary Douglas (respondent's appointee, Australian national, replacing Florentino Feliciano, Philippine national). The award of October 19, 2017 is available in English at <https://www.italaw.com/sites/default/files/case-documents/italaw9397.pdf>.

Claudia Arietti is a Paraguayan attorney and holds an LL.M from New York University School of Law.



RESOURCES AND EVENTS

RESOURCES

Legalization, Diplomacy, and Development: Do investment treaties de-politicize investment disputes?

By Geoffrey Gertz, Srividya Jandhyala, and Lauge N. Skovgaard Poulsen, Published by Elsevier in *World Development*, volume 107, July 2018, pp. 238–252

Architects of the investment treaty regime, as well as many current proponents, have suggested that the treaties also allow developing countries to de-politicize investor–state disputes, shielding commercial disputes from broader political and diplomatic considerations with developed states. The paper subjects this widely accepted and promoted argument to empirical investigation, using a dataset of U.S. diplomatic actions in 219 investment disputes across 73 countries and case studies of U.S. State Department diplomatic cables. The authors find no evidence for the de-politicization hypothesis. Their findings provide a critical corrective to the understanding of the investment treaty regime and its effects on developing countries. Available at <https://www.sciencedirect.com/science/article/pii/S0305750X18300688>

Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration

By Christina L. Beharry (Ed.), Published by Brill | Nijhoff, April 2018

Given the financial stakes in investment arbitration, compensation is a key concern for both foreign investors and states. The increasingly large sums awarded and the growing complexity of claims call for a renewed analysis of legal and valuation concepts related to damages. This book explores issues dominating a new generation of investment awards and the interconnectedness of damages with other areas of international investment law. Practitioners, experts and academics provide a deeper understanding of legal and valuation principles that are often the source of intense debate in international investment cases. Available at <https://brill.com/view/title/35978>

Fair and Equitable Treatment: Its interaction with the minimum standard and its customary status

By Patrick Dumberry, Published by Brill | Nijhoff, March 2018

The fair and equitable treatment (FET) standard has become one of the most controversial provisions found in bilateral investment treaties (BITs). This book examines the interaction between the minimum standard of treatment (MST) and the FET standard and the question of why states started referring to the former in their BITs. It also addresses the question of whether FET should be considered as an autonomous standard under BITs. Rebutting the controversial proposition that the FET standard should now be considered as a rule of customary international law, the author shows that states' practice of including FET clauses in their BITs is not uniform and consistent enough and that states also lack the necessary *opinio juris*. Available at <https://brill.com/abstract/title/37944>

Judicial Acts and Investment Treaty Arbitration

By Berk Demirkol, Published by Cambridge University Press, February 2018

Judicial acts of states are becoming increasingly subjected to international investment claims. This book focuses on distinctive particularities of these claims. The author addresses questions in relation to the substance, jurisdiction, admissibility and remedies in cases where state responsibility arises from a wrongful judicial act. Available at <http://www.cambridge.org/academic/subjects/law/international-trade-law/judicial-acts-and-investment-treaty-arbitration>

Civil Society in Investment Treaty Arbitration: Status and prospects

By Farouk El-Hosseny, Published by Brill | Nijhoff, January 2018

This book provides an overview of the evolution of civil society's participation as *amicus curiae* before investment tribunals, an evolution that fits within a



broader movement towards transparency in investment treaty arbitration. By looking at the procedural roles available to civil society before other jurisdictions, the author questions whether the amicus role could be expanded. El-Hosseny ultimately shows that the issue of civil society's participation in investment treaty arbitration transcends the procedural realm: it is equally about arbitral tribunals' openness vis-à-vis public interest, environmental protection and human rights issues. Available at <https://brill.com/abstract/title/35089>

Societal Benefits and Costs of International Investment Agreements: A critical review of aspects and available empirical evidence

By Joachim Pohl, Published by the Organisation for Economic Co-operation and Development (OECD), January 2018

This paper reviews alleged societal benefits and costs of international investment agreements (IIAs). It sets out the wide range of issues that diverse actors have proposed in the context of assessing the societal benefits and costs of IIAs. The paper analyzes and organizes the available material generated by these sources to identify and classify the many different issues, summarizes available empirical evidence and findings in these sources on the individual aspects, and assesses strengths and weaknesses of the approaches. It focuses in particular on the investor protection component of IIAs. The inventory finds that, for many claims about the positive or negative impacts of IIAs, little robust evidence has been generated to date. Available at https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en

Arbitrating the Conduct of International Investors

By Jose Daniel Amado, Jackson Shaw Kern and Martin Doe Rodriguez, Published by Cambridge University Press, January 2018

Investment arbitration, emerging from modest beginnings and maturing into an established presence in international law, has drifted from the reciprocal vision of its founders. This book serves as a comprehensive guide for those who wish to reform international investment law from within, seeking a return to the mutuality of access that is in arbitration's

essence. A detailed toolset is provided for enhancing the access of host states and their nationals to formal resolution mechanisms in foreign investment disputes. It concludes by offering model texts to achieve greater reciprocity and access to justice in the settlement of disputes arising from international investments. Available at <http://www.cambridge.org/academic/subjects/law/arbitration-dispute-resolution-and-mediation/arbitrating-conduct-international-investors>

Investment Laws of ASEAN Countries: A comparative review

By Jonathan Bonnitcha, Published by International Institute for Sustainable Development (IISD), January 2018

This report compares the investment laws of the 10 Association of Southeast Asian Nations (ASEAN) member states, focusing on basic questions relating to the function of investment laws in each country. While not every ASEAN country has an investment law, some ASEAN countries have multiple investment laws, each with a different function. These laws form only a small part of the legal and regulatory regime governing investment. It is impossible to evaluate a country's investment law without considering how it fits into the wider legal and regulatory framework governing investment. Available at <https://www.iisd.org/library/investment-laws-asean-countries-comparative-review>

Contracts for Sustainable Infrastructure: Ensuring the economic, social and environmental co-benefits of infrastructure investment projects

By Martin Dietrich Brauch, Published by International Institute for Sustainable Development (IISD), December 2017

To achieve the sustainable development goals (SDGs) and the objectives of the Paris Agreement on Climate Change, the infrastructure to be upgraded and built must be sustainable—it must be specifically designed to mitigate economic, social and environmental risks, and to generate economic, social and environmental co-benefits. Public–private partnerships (PPPs) are among the modes that government may adopt to structure infrastructure projects. Bridging IISD's experience in public procurement and infrastructure finance and investment, this report defines sustainable infrastructure, outlines its expected characteristics



and co-benefits, and presents why governments must and how they can integrate sustainability into infrastructure contracts. Available at <https://www.iisd.org/library/contracts-sustainable-infrastructure-ensuring-economic-social-and-environmental-co-benefits>

ISDS in numbers: Impacts of investment arbitration against Latin America and the Caribbean

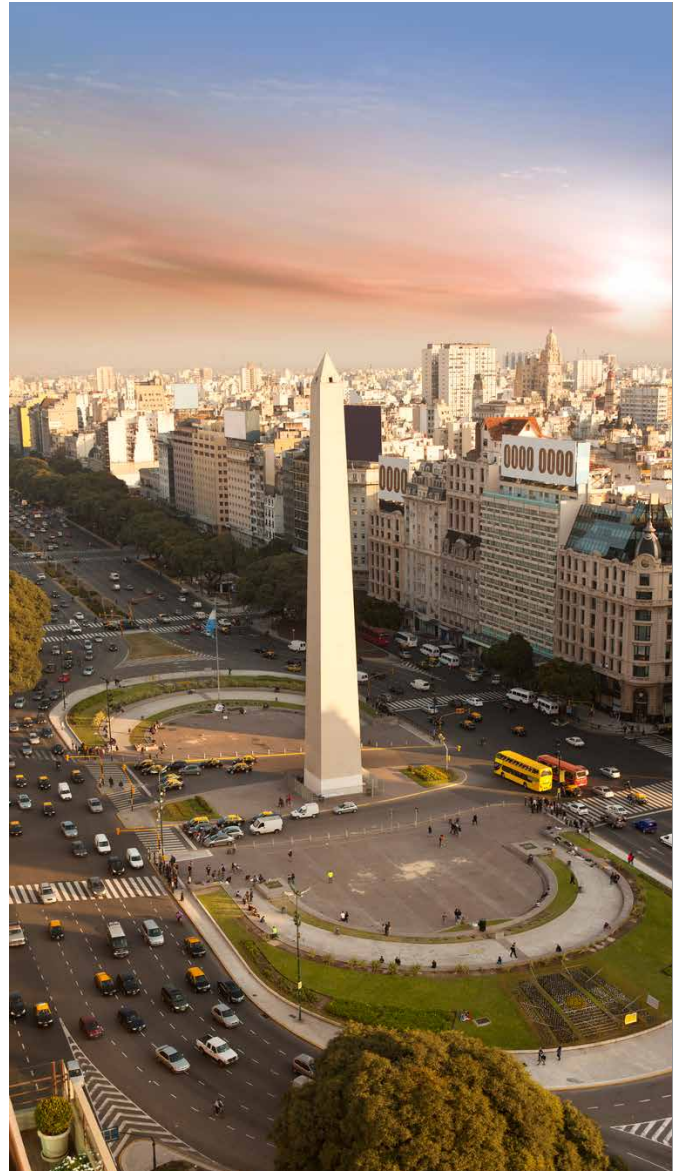
By Cecilia Olivet, Bettina Müller and Luciana Ghiotto, Published by Transnational Institute (TNI), December 2017

Latin American and Caribbean (LAC) countries are among the most affected by the investment arbitration system worldwide, representing 28.6 per cent of all known investor–state disputes around the world. In particular, Argentina, Venezuela, Mexico, Ecuador, Bolivia and Peru account for 77.3 per cent of the total number of claims against LAC countries. Investors have won in 70 per cent of the cases brought against LAC countries. As a result, LAC states have already had to pay foreign companies US\$ 20.6 billion, which could cover Bolivia’s budget for health and education for four whole years. Available at <https://www.tni.org/en/publication/isds-in-numbers>

International Investment Treaties and Arbitration Across Asia

By Julien Chaisse and Luke Nottage (Eds.), Published by Brill | Nijhoff, December 2017

The book examines whether and how the Asian region has or may become a significant rule maker in international investment law and dispute resolution. The editors introduce foreign direct investment (FDI) trends and regulations, investment treaties and arbitration across Asia. The authors present country studies for the 10 member states of the Association of Southeast Asian Nations (ASEAN) as well as an overview of ASEAN treaties. Two early chapters present econometric studies of treaty impacts on FDI flows, while two concluding chapters offer other normative and forward-looking perspectives. Available at <https://brill.com/view/title/36129>





EVENTS 2018

May 2

FORUM: INVESTOR STATE DISPUTE SETTLEMENT (ISDS) AND THE DEVELOPMENT OF INVESTOR STATE (IS) MEDIATION, organized by the International Centre for Settlement of Investment Disputes (ICSID) and others, at ADGM Authorities Building, Abu Dhabi, United Arab Emirates, <https://icsid.worldbank.org/en/Documents/ISDS%20and%20the%20Development%20of%20IS%20Mediation%20-%20Invitation%20and%20Programme%20-%20202%20May%202018.pdf>

May 3–4

1ST ITA–ALARB JOINT CONFERENCE ON INTERNATIONAL ARBITRATION: ARBITRATING DISPUTES IN NATURAL RESOURCES, organized by Institute for Transnational Arbitration (ITA) and Latin American Arbitration Association (ALARB), at Ritz-Carlton Hotel, in Santiago, Chile, <https://icsid.worldbank.org/en/Documents/1st%20ITA-ALARB%20Joint%20Conference%20Brochure%20english.pdf>

May 7–10

INVESTOR–STATE MEDIATOR TRAINING, organized by International Centre for Settlement of Investment Disputes (ICSID), at World Bank Conference Centre, in Paris, France, <https://icsid.worldbank.org/en/Pages/Events.aspx?CID=172>

May 11

THIRTIETH ITF PUBLIC CONFERENCE: ENFORCEMENT IN INTERNATIONAL INVESTMENT LAW, organized by Investment Treaty Forum (ITF), at British Academy, in London, United Kingdom, <https://www.biicl.org/event/1299>

CONFERENCE: KEY ISSUES IN INTERNATIONAL ARBITRATION: ADVOCACY, DAMAGE CALCULATION, SETTLEMENT AND CYBERSECURITY, organized by International Centre for Settlement of Investment Disputes (ICSID), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Energy Charter Secretariat (ECS) and Permanent Court of Arbitration (PCA), at World Bank Conference Centre, in Paris, France, <https://icsid.worldbank.org/en/Documents/ECTConferenceProgramMay2018.pdf>

May 10–11

2018 INVESTMENT ARBITRATION & TRANS-PACIFIC TRANSACTIONS CONFERENCE, organized by the American Bar Association (ABA) Section of International Law, at Maxwell Chambers, in Singapore, <https://shop.americanbar.org/PersonifyImages/ProductFiles/296454598/Preliminary%20Brochure%20Singapore.pdf>

CONFERENCE: INTERNATIONAL INVESTMENT LAW AND NON-COMMUNICABLE DISEASES PREVENTION, organized by Law & NCD Unit, School of Law and Social Justice, University of Liverpool, at University of Liverpool London Campus, in London, United Kingdom, <https://www.liverpool.ac.uk/law-and-social-justice/events/international-investment-law-and-ncd-prevention>

May 26

9TH INVESTMENT ARBITRATION FORUM: VALUATION OF DAMAGES IN CHANGING ECONOMIC AND POLITICAL CIRCUMSTANCES: LESSONS LEARNT IN LATIN AMERICA – RELEVANT FOR INVESTMENT ARBITRATION IN EUROPE?, organized by International Chamber of Commerce (ICC) Austria, at Vienna University, in Vienna, Austria, [https://www.icc-austria.org/fxdata/iccws/download/seminar/Ninth-Investment-Arbitration-Forum-invitation-brochure--\(1\).pdf](https://www.icc-austria.org/fxdata/iccws/download/seminar/Ninth-Investment-Arbitration-Forum-invitation-brochure--(1).pdf)

June 1

CONFERENCE: THE FUTURE OF INVESTMENT ARBITRATION IN EUROPE, organized by Association for International Arbitration (AIA), at Conference Hall of Press Club Brussels Europe, in Brussels, Belgium, <http://arbitration-adr.org/documents/?i=470>

June 4–15

EXECUTIVE TRAINING ON EXTRACTIVE INDUSTRIES AND SUSTAINABLE DEVELOPMENT, organized by Columbia Center on Sustainable Investment (CCSI), at Columbia University, in New York, United States, <http://ccsi.columbia.edu/2018/06/04/executive-training-program-on-extractive-industries-and-sustainable-development-3>

June 19–29

EXECUTIVE TRAINING ON SUSTAINABLE INVESTMENTS IN AGRICULTURE, organized by Columbia Center on Sustainable Investment (CCSI), at Columbia University, in New York, United States, <http://ccsi.columbia.edu/2018/06/19/executive-training-program-on-sustainable-investments-in-agriculture-3>



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