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The Best of Two Worlds? The Brazil–India Investment Cooperation and Facilitation Treaty

Martin Dietrich Brauch



UNCITRAL Working Group III Debate: Enforceability of awards by an appellate mechanism or an investment court under the ICSID and New York Conventions

N. Jansen Calamita



Diversity of Adjudicators in a Reformed ISDS Regime: Is the WTO a good model for developing countries to follow?

Jane Kelsey



Fighting Bribery and Corruption in Africa: From AU and OECD conventions to a general principle of international investment law

Guy Marcel Nono





Contents

INSIGHT 1 The Best of Two Worlds? The Brazil–India Investment Cooperation and Facilitation Treaty.....	4
INSIGHT 2 UNCITRAL Working Group III Debate: Enforceability of awards by an appellate mechanism or an investment court under the ICSID and New York Conventions.....	9
INSIGHT 3 Diversity of Adjudicators in a Reformed ISDS Regime: Is the WTO a good model for developing countries to follow?	12
INSIGHT 4 Fighting Bribery and Corruption in Africa: From AU and OECD conventions to a general principle of international investment law.....	14
NEWS IN BRIEF	18
January UNCITRAL session considers appellate mechanism, standing court, and arbitrator and adjudicator issues.....	18
Investment facilitation talks set sights on WTO MC12 outcome, prepare for negotiations in March	19
ECT modernization: Conference meets in December 2019, sets stage for 2020 negotiating meetings	19
China–EU investment talks: Negotiators debate new market access offers, eyeing 2020 outcome.....	20
Trump signs USMCA, bringing NAFTA's replacement closer to entry into force	20
Brexit: United Kingdom leaves EU amid questions on future trade, investment relationships.....	21
Australia trade deals with Hong Kong, Peru enter into force, Indonesia agreement ratified.....	22
AWARDS AND DECISIONS	23
In a new ICSID award, Spain's reforms of the renewable energy sector are found not to violate the ECT.....	23
Hungary held liable for expropriating the investment of a British investor and ordered to pay EUR 7 million in compensation for damages.....	25
The BIT is not in force: Mozambique prevails on jurisdiction in case against South African investor.....	26
CMC's claims dismissed on the merits: While a settlement agreement may be considered an investment under the BIT and the ICSID Convention, Mozambique did not agree to one.....	28
RESOURCES AND EVENTS	30

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LIST OF ACRONYMS

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



INSIGHT 1

The Best of Two Worlds? The Brazil–India Investment Cooperation and Facilitation Treaty

Martin Dietrich Brauch



Two innovative investment treaty models developed by major emerging economies came to light in 2015 when Brazil concluded its first Cooperation and Facilitation Investment Agreements (CFIAs, or ACFIs, in its Portuguese-language abbreviation)¹ and India approved its revised model BIT.² Since then, both models have been influential in the global debate about options for reforming international investment law for sustainable development.³

The year 2020 begins with a long-anticipated⁴ marriage between the two: on January 25, Brazil and India concluded their Investment Cooperation and Facilitation Treaty (ICFT).⁵ This piece provides a preliminary overview of the structure and provisions of the treaty, outlining which elements of the Brazilian approach and of the Indian model it incorporates.

Preamble and Part I (Scope and Definitions)

Preamble. Repeating language from the Indian model BIT, the preamble of the ICFT sets high hopes for the cooperation in and facilitation of investments, which, according to the text, “will” be conducive to business activity, economic cooperation and sustainable development. This language is more assertive than that used in other treaties concluded by Brazil—for example, “recognizing the essential role of investment in promoting sustainable development”⁶—and is quite optimistic given the difficulty of establishing any link between investment treaties and FDI flows.⁷ Even so, the preamble importantly and positively reaffirms “the right of Parties to regulate investments in their territory in accordance with their law and policy objectives.”

¹ Most of the investment agreements concluded by Brazil since 2015 are available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil>. For earlier commentary on Brazil’s CFIAs, see, for example: Morosini, F., & Sanchez Badin, M. R. (2015, August). The Brazilian agreement on cooperation and facilitation of investments (ACFI): A new formula for international investment agreements? *Investment Treaty News*, 6(3), 3–5. <https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements>; Bernasconi-Osterwalder, N., & Brauch, M. D. (2015, September). *Comparative commentary to Brazil’s cooperation and investment facilitation agreements (CFIAs) with Mozambique, Angola, Mexico, and Malawi*. <http://www.iisd.org/library/comparative-commentary-brazil-cooperation-and-investment-facilitation-agreements-cifas>; and Martins, J. H. V. (2017). Brazil’s cooperation and facilitation investment agreements (CFIA) and recent developments. *Investment Treaty News*, 8(2), 10–12. <http://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins>

² Government of India. (2015). *Model text for the Indian bilateral investment treaty*. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download>. The only publicly available text of a post-2015 treaty concluded by India prior to the Brazil–India ICFT is that of the 2018 Belarus–India BIT. See Treaty Between the Republic of Belarus and the Republic of India on Investments, September 24, 2018. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3839/belarus-india-bit-2018>

³ According to UNCTAD’s analysis, the treaties concluded by Brazil and by India in 2018—building on their respective 2015 model treaties—include many provisions geared toward sustainable development-oriented reform of IIAs. United Nations Conference on Trade and Development (UNCTAD). (2019, June). Taking stock of IIA reform: Recent developments. *IIA Issues Note*, 3. https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf

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⁵ Investment Treaty News (ITN). (2016, December). *Brazil and India initial bilateral investment treaty (BIT); text yet to be published*. <https://www.iisd.org/itn/2016/12/12/brazil-and-india-initial-bilateral-investment-treaty-bit-text-yet-to-be-published>

⁶ Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the United Arab Emirates, March 15, 2019. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4896/brazil-united-arab-emirates-bit-2019> [hereafter 2019 Brazil–UAE CFIAs].

⁷ See 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*, No. 2018/01. OECD Publishing. <https://doi.org/10.1787/e5f85c3d-en>; Bonnitcha, J. (2017, September). *Assessing the impacts of investment treaties: Overview of the evidence*. IISD. <https://www.iisd.org/library/assessing-impacts-investment-treaties-overview-evidence>



Objective. The stated objective of the treaty is “to promote cooperation between the Parties in order to facilitate and encourage bilateral investments” (Art. 1). Like other treaties concluded by Brazil since 2015, the ICFT sets out to achieve this objective not through investment protection and ISDS, but through an institutional framework to manage an investment cooperation and facilitation agenda, as well as risk mitigation and dispute prevention mechanisms.

Definition of investment. In line with the Brazilian and Indian models, the ICFT adopts an enterprise-based definition of investment. To be covered by the treaty, the investment must be subject to direct or indirect ownership or control or—a criterion used in recent Brazilian treaties—“a significant degree of influence” by an investor of the other state party. It must also have “the characteristics of an investment, including the commitment of capital, the objective of establishing a lasting interest, the expectation of gain or profit and the assumption of risk” (Art. 2.4).

Building on both models, the definition of investment also includes a comprehensive list of exclusions, covering orders or judgements in judicial, administrative or arbitral proceedings; debt securities; expenditures incurred prior to obtaining necessary licences; portfolio investments; and intangible rights such as goodwill, brand value and market share (Art. 2.4.1).

Definition of investor. Investors may be natural persons (nationals, citizens or permanent residents) or enterprises (other than branches). Enterprises must be organized in accordance with the law of their home state and have substantial business activities in the territory of that state (Arts. 2.5 and 2.8).

Scope. The ICFT will apply to measures (including laws, regulations, decisions and others) relating to existing investments and those established, acquired or expanded after its entry into force, provided that they are admitted in accordance with host state law (Art. 3.1). The article on scope expressly excludes the application of the treaty to any pre-investment activity (Art. 3.5), that is, those undertaken prior to the establishment of the investment, including those undertaken to comply with “sectorial limitations on foreign equity, and other specific limits and conditions applicable under any law relating to the admission of investments in the territory of the Party” (Art. 2.10). Local government measures, laws or measures regarding taxation and government procurement, among others, are also excluded from the scope of application of the treaty (Art. 3.6).

Part II (General Obligations of the Parties): Investment protection provisions

Standard of treatment. Like the Indian model and the post-2015 treaties concluded by Brazil, there is no reference to the “fair and equitable” standard. Instead, the ICFT includes a provision on the treatment of investments (Art. 4.1), “based on the applicable rules and customs of international law as recognized by each of the Parties and their respective national law,” which prohibits the parties from subjecting investments to a closed list of breaches: denial of justice in judicial or administrative proceedings; fundamental breach of due process; targeted discrimination; or manifestly abusive treatment. In addition to these four types of conduct, which appear in the Indian model, the closed list of breaches in the ICFT also includes “discrimination in matters of law enforcement, including the provision of physical security.” This had appeared, with slightly different wording, in some other treaties recently concluded by Brazil that also adopted an Indian-style exhaustive list of breaches.⁸

National treatment. Foreign investors and investments are also promised national treatment in like circumstances (Art. 5.1). A clarification is included that “like circumstances” depends on the totality of circumstances, “including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare or regulatory objectives” (Art. 5.2). Also building on recent treaties concluded by Brazil, a clarification is included that national treatment does not oblige a party “to compensate for inherent competitive disadvantages which result from the foreign character of the investors and their investments” (Art. 5.3).

MFN. In line with India’s strong opposition to the MFN clause in investment treaties, as a result of the country’s negative experience with the *White Industries* case,⁹ the ICFT does not include one, even though it is a prominent feature in all other treaties concluded by Brazil since 2015.

⁸ Cooperation and Investment Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Guyana, December 13, 2018, Art. 4(1). <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3864/brazil---guyana-bit-2018->; 2019 Brazil-UAE CFTA, *supra* note 6, Art. 4(2).

⁹ *White Industries v. India*, Final Award, November 30, 2011. <http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>. See also Ranjan, P. (2012, April). The White Industries arbitration: Implications for India’s investment treaty program. *Investment Treaty News*, 2(3), 13–14. <https://www.iisd.org/itm/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program>



Expropriation. The ICFT prohibits direct expropriation by either party, except where implemented for reasons of public purpose, in a non-discriminatory manner, on payment of effective and adequate compensation, and in accordance with due process of law (Art. 6.1). Indirect expropriation, as is the case with all other Brazilian treaties post-2015, is explicitly excluded (Art. 6.3). Even so, the treaty replicates from the Indian model the clarification that “non-discriminatory regulatory measures...designed and applied to protect legitimate public interest or public purpose objectives... shall not constitute expropriation” (Art. 6.4).

Transparency. Following both the Brazilian and the Indian models, the ICFT contains a provision requiring each party to publish laws, regulations and other materials pertinent to matters covered by the treaty in electronic format, as well as to publish proposed measures and to provide interested persons and the other party a reasonable opportunity to comment on them. Both obligations, however, are subject to the party’s respective domestic laws (Art. 8).

Transfers. The ICFT contains an article on the freedom of transfers (Art. 9). In line with both the Brazilian and the Indian models as well as other new-generation IIA models, the provision safeguards the right of parties to adopt temporary and non-discriminatory regulatory measures in the event of a balance-of-payments crisis (Art. 9.2–3). It also allows parties to prevent transfers through the application of their laws on bankruptcy, compliance with judgements and awards, and compliance with labour obligations, among others (Art. 9.4).

Anti-corruption. Mirroring other recent treaties concluded by Brazil, the ICFT commits the parties to “adopt measures and make efforts to prevent and fight corruption, money laundering and terrorism financing... in accordance with its laws and regulations” (Art. 10.1). It also clarifies that the ICFT does not require the parties to protect investments made with capital or assets of illicit origin, or established or operated through illegal acts subject to asset forfeiture under domestic law (Art. 10.2). In addition to this article in Part II (on state obligations), anti-corruption is also addressed in Part III (on investor obligations).

Part III (Investor Obligations or Responsibilities)

Compliance with laws. The first of two articles in Part III (Art. 11) replicates the text of an article of the Indian model BIT (also Art. 11). It imposes a binding obligation on investors and investments to

comply with all investment-relevant laws, including those on taxation; prohibits them from bribing public officials; and commits them to providing all information required by the state parties.

CSR. In turn, the other article in Part III (Art. 12, Corporate Social Responsibility) closely follows the approach and language on CSR adopted by Brazil in its other post-2015 treaties. First, the article creates a best-efforts obligation on investors and investments to “strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article and internal policies, such as statements of principle that have been endorsed or are supported by the Parties” (Art. 12.1). Unlike other Brazilian treaties, the ICFT does not mention any specific sets of standards, such as the OECD Guidelines on Multinational Enterprises. The list of voluntary principles and standards for responsible business conduct resembles the lists seen in previous treaties negotiated by Brazil and covers elements including sustainable development, human rights, local capacity building, creation of human capital, good corporate governance and non-discrimination among employees (Art. 12.2).

Part IV (Institutional Governance, Dispute Prevention and Settlement)

Joint Committee and National Focal Points.

The ICFT creates a Joint Committee composed of government representatives of both state parties to oversee the implementation of the agreement (Art. 13) and to develop and discuss an Agenda for Further Investment Cooperation and Facilitation (Art. 25). Each state also commits to designating a National Focal Point (or Ombudsperson) to support investors of the other state party. In Brazil’s case, as in similar agreements, the focal point will be the Executive Secretariat of the Foreign Trade Board (CAMEX) (Art. 14.2), while India will establish its own within the Department of Economic Affairs in the Ministry of Finance (Art. 14.3). The functions and responsibilities of these treaty bodies mirror those of the treaty bodies established under the very first agreements concluded by Brazil pursuant to this model.¹⁰ The ICFT also requires the parties to share—particularly through these treaty bodies—information concerning business opportunities,

¹⁰ See *supra*, note 1.



incentives, legal frameworks, customs procedures, tax regimes and other investment-related matters (Art. 15). While the obligations are binding (“[t]he Parties shall exchange information...” and “the Party shall provide, when requested, in a timely fashion, information...”), they are not listed as matters that a state–state dispute settlement tribunal may examine (Art. 19.3).

Dispute Prevention Procedure. Also following the 2015 Brazilian model, the ICFT includes a state–state procedure designed to prevent investment-related disputes (Art. 18). When one of the state parties considers that the other state adopted a measure in breach of the ICFT, the first state submits a written request to the Joint Committee, along with the underlying finding of fact and law. The Joint Committee then meets within 90 days from the date of the request, and within 120 days from that meeting (extendable by mutual agreement), evaluates the submission and prepares a report with its findings, aimed at resolving the dispute—or preventing its escalation. (All proceedings and documents are confidential, except for the report.) Only if the Joint Committee fails to resolve the dispute, either of the parties may submit it to state–state arbitration.

Disputes between Parties. Deviating from the Indian model BIT, the ICFT does not include an ISDS provision. ISDS is known to be a no-go for Brazil, which has provided for state–state arbitration only in all of its ACFIs. While the ICFT is no exception, it evidences the evolution of Brazil’s ACFIs. In the very first ACFI, concluded by Brazil with Mozambique in 2015, there was merely a reference to the possibility of the parties resorting to state–state arbitration should the Joint Committee procedure fail to resolve the dispute.

In turn, the ICFT contains a detailed provision on state–state arbitration (Art. 19). The parties may submit the dispute to ad hoc arbitration or to a permanent arbitration institution, and the purpose of the arbitration is to decide on interpretation of or compliance with the treaty; the ICFT expressly excludes the possibility of a compensation award (Art. 19.2). The arbitral tribunal has jurisdiction only over matters pertaining to Part I (scope and definition), Part II (general obligations of the parties, with some exceptions), Article 16 (treatment of protected information), Article 21 (prudential measures) and Part VII (the final provisions) of the treaty. The state–state tribunal has no jurisdiction over the transparency (Art. 8) and anti-corruption (Art. 10.1) obligations, the investor obligations and responsibilities

(namely, compliance with domestic laws and CSR) and the institutional governance provisions, including the information-sharing obligations (Art. 15).

Each state has the right to appoint one tribunal member, and the two members appoint a third-state national as chairperson of the tribunal; the President of the International Court of Justice may be invited to make any necessary appointments (Art. 19.4–5).

Notably, the ICFT requires arbitrators to have experience in public international law, international investment or trade law, or resolution of investment disputes; to be independent of either state; and to comply with a code of conduct included in Annex II to the treaty. The code of conduct deals with matters including the disclosure of circumstances that may raise questions regarding the arbitrators’ independence, impartiality or freedom from conflicts of interest, and sets rules for challenges and replacements of arbitrators. It also includes a non-exhaustive list of circumstances under which a “justifiable doubt as to an arbitrator’s independence or impartiality or freedom from conflict of interest shall be deemed to exist” (Annex II, para. 10).

A decision of the tribunal is binding on the parties (Art. 19.7). Although arbitration costs are to be shared between the parties, and each party must bear its own legal costs, the tribunal has the discretion to “direct that the entire costs or a higher proportion of costs shall be borne by one of the two disputing Parties” (Art. 19.8).

Part V (Exceptions)

Like other treaties concluded by Brazil, the ICFT includes specific exceptions regarding tax measures (Art. 20), prudential measures relating to the financial system (Art. 21) and measures to ensure that investment activity is undertaken in accordance with labour, environmental and health laws of the host state, as well as a provision forbidding the lowering of standards in those areas (Art. 22).

In addition, closely following the Indian model BIT, the ICFT includes a general exceptions provision covering measures to protect public morals or maintain public order; protect human animal or plant life or health; protect and conserve the environment; among others (Art. 23), and a provision to safeguard parties’ essential security interests (Art. 24), further detailed in an annex (Annex I).



Summary of the main features

Courtesy of two emerging economies, the 2020 Brazil–India ICFT brings to the IIA world a blend of two of the most innovative investment treaty models developed in recent years:

- Building on both the Brazilian and the Indian approaches, the ICFT features an enterprise-based definition of investment, with exclusions aimed at clarifying the types of foreign investment that the state parties intend to facilitate and encourage.
- The ICFT’s focus is on investment facilitation, following the Brazilian model, but its limited investment protection provisions again combine the two approaches. MFN is excluded, in line with the Indian model. Only direct expropriation is covered (and not indirect expropriation), in accordance with the Brazilian approach. The term “fair and equitable” is avoided, in line with both models. Instead, a provision on “treatment of investments” is included, reflecting the closed-list approach of the Indian model, which Brazil had also incorporated into and built on in some of its other recently concluded treaties.
- In some respects, the sum of approaches results in a sum of texts: India brings its language on investors’ obligation to comply with domestic laws; Brazil brings its provision on CSR. Some exceptions articles come from Brazil (on tax measures; prudential measures; and labour, environmental and health measures), followed by others that come from India (on general exceptions and essential security interests).
- Finally, the dispute prevention and settlement provisions are Brazilian-style, based on the (still untested) preventive procedure before the Joint Committee and on the possibility of state–state arbitration only. Here, the ISDS mechanism of the Indian model stood no chance against Brazil’s resolve not to negotiate treaties providing for investor–state arbitration.

Author

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INSIGHT 2

UNCITRAL Working Group III Debate: Enforceability of awards by an appellate mechanism or an investment court under the ICSID and New York Conventions

N. Jansen Calamita



During the discussions in the resumed 38th session of UNCITRAL Working Group III—held in Vienna from January 20 to 24, 2020—a principal issue under consideration by delegates was the enforceability of “awards” rendered by an appellate mechanism or an investment court. The centrality of the issue of enforcement in the discussions rests upon the requirement that in order for a new dispute resolution system to be effective and to create confidence among its users, its outcomes will need to be predictably enforceable.

A new appellate mechanism or investment court will need an enforcement mechanism

If states decide to create a multilateral appellate mechanism or an investment court, the instrument creating this new body will need to include a *sui generis* or self-contained mechanism for recognition and enforcement—in other words, a provision whereby the parties to the new body agree to be bound by and to enforce its awards. The language used in this respect would be fairly straightforward to draft and could be modelled on the language of Article 54 of the ICSID Convention¹—to the effect that parties agree to recognize awards rendered by the new body, to treat them as

binding and to enforce them within their territories as if they were final judgments of a court in that state.

Such a solution, however, would only bind parties to the new appeals body or investment court. It would not and could not bind states that do not join the institution and do not sign up to the new instrument. That then raises the critical question of how enforcement and recognition of awards could be affected in non-party states.

Enforcing awards in the existing ISDS regime: The ICSID and New York Conventions

In the present investor–state arbitration regime, the ICSID and New York Conventions provide an effective legal framework for the enforcement of arbitral awards in third states. Enforcement under these conventions, however, entails certain requirements. The awards in question must satisfy conditions that are set out in the conventions. ICSID Convention Article 54 requires that the award be one that has been “rendered pursuant to this Convention,” that is, has resulted from an arbitration conducted in accordance with the convention’s requirements.² In the case of the New York Convention, on the other hand, the requirements are somewhat more flexible. The convention applies to the enforcement and recognition of any foreign “arbitral award”—a term that is not strictly defined—with the proviso that individual states may reserve the right to apply the New York Convention to arbitral awards in “commercial” disputes only.³

These, then, are the enforcement mechanisms that have successfully underpinned the existing investor–

¹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington, signed March 18, 1965, entered into force October 14, 1966 [ICSID Convention]. <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>

² ICSID Convention, *supra* note 1, Art. 54.

³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, signed June 10, 1958, entered into force June 7, 1959 [New York Convention]. <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>



state arbitration regime. The question that arises for the working group, however, is whether the outcomes produced through a new appellate mechanism or investment court will be able to take advantage of the enforcement regimes of the ICSID or New York Conventions. In other words, will they be compatible with this existing enforcement regime?

Enforcement under the ICSID Convention

Neither an appellate mechanism nor an investment court structure is compatible with the ICSID Convention. Article 53 notes that ICSID Convention awards “shall not be subject to any appeal or to any other remedy except those provided for in this Convention”⁴—such as the annulment mechanism under Article 52. Moreover, as noted, the ICSID Convention applies only to arbitration that proceeds “pursuant to” the convention’s terms, a condition that would not be satisfied by an arbitration that has been subject to an appellate mechanism or, even less, by an award issued by an investment court.

In principle, it is possible to amend the ICSID Convention either to provide for an appellate mechanism or to permit the establishment of one. The difficulty in this regard, however, is that amendment of the ICSID Convention requires the agreement of all parties to the convention,⁵ which may not be politically feasible at present.

Alternatively, some of the parties to the ICSID Convention could enter into a so-called *inter se* amendment to modify the terms of the ICSID Convention among themselves. There is significant doubt and disagreement regarding this difficult question.⁶

At issue is whether it is permissible to modify a treaty *inter se* where the treaty specifically prohibits the proposed modification. VCLT Article 41 provides that an *inter se* modification may not be made where the modification in question is prohibited by the treaty.

⁴ ICSID Convention, *supra* note 1, Art. 53.

⁵ ICSID Convention, *supra* note 1, Art. 66.

⁶ See, for example, Calamita, N. J. (2017). The (in)compatibility of appellate mechanisms with existing instruments of the investment regime. *Journal of World Investment and Trade*, 18(4), 585–627; Kaufmann-Kohler, G. & Potestà, M. (2016, June 3). *Can the Mauritius Convention serve as a model for the reform of investor–state arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap*. Geneva Centre for International Dispute Settlement (CIDS). https://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf; Reinisch, A. (2016). Will the EU’s proposal concerning an investment court system for CETA and TTIP lead to enforceable awards? – The limits of modifying the ICSID Convention and the nature of investment arbitration. *Journal of International Economic Law*, 19(4), 761–786.

Arguably the ICSID Convention contains such a prohibition.⁷ As noted, Article 53 mandates specifically that an ICSID Convention award “shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”⁸ Moreover, ICSID Convention Article 26 provides expressly that “consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy,” such as, for example, an appeal.⁹

Beyond this prohibition, VCLT Article 41 further prohibits *inter se* modifications where they affect the performance of the obligations of other parties to the treaty or are in conflict with the object and purpose of the treaty.¹⁰ An *inter se* modification may indeed affect the performance of non-parties to the modification by expanding the scope of disputes over which their domestic courts will have no scope for even limited review in the event of recognition and enforcement. There is also the question whether it is in keeping with the object and purpose of the ICSID Convention to fragment the structure of ICSID arbitration into an “à la carte” mechanism in which there may coexist ICSID arbitrations not subject to appeal, ICSID arbitrations subject to an appellate mechanism and perhaps investor–state cases decided not by an ICSID tribunal but by an investment court. Again, these are difficult issues, but the working group will need to consider them going forward.

Enforcement under the New York Convention

Beyond these points about the compatibility—or lack of compatibility—of an appellate mechanism or investment court with the ICSID Convention, the working group must also consider the alternative possibility of using the New York Convention for enforcement and recognition. Here, there may be less cause for concern regarding compatibility and, indeed, there appears to be no major disagreement among scholars that have looked at the issue in depth.

As noted above, the New York Convention provides a flexible, internationalized mechanism for the enforcement of foreign arbitral awards in its more than 150 state parties. However, it applies only to “arbitral awards,” and so a question that arises in connection

⁷ Vienna Convention on the Law of Treaties, signed May 23, 1969, entered into force January 27, 1980 [VCLT]. <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

⁸ ICSID Convention, *supra* note 1, Art. 53.

⁹ ICSID Convention, *supra* note 1, Art. 26.

¹⁰ VCLT, *supra* note 7, Art. 41.



with an appellate mechanism—and more still with an investment court—is whether the outcomes produced through these processes can be considered “arbitral awards” for the purposes of the convention.

On this point, there appears to be an academic consensus that even with respect to a permanent investment court staffed by judges, without participation of the investor in their appointment, the outcomes of such a body or of an appellate mechanism should be treated as arbitral awards.¹¹ New York Convention Article I specifically notes that arbitral awards include those awards “made by permanent arbitral bodies to which the parties have submitted” their dispute. Moreover, there is some practice among states to support the conclusion that the awards of a standing arbitral body with state-appointed members should be treated as arbitral awards for the purposes of the New York Convention. Specifically, awards rendered by the Iran–United States Claims Tribunal—a tribunal constituted entirely by state-appointed judges—have been given recognition under the New York Convention,¹² as have, at an earlier point in history, awards rendered by the Courts of Arbitration of the Chambers of Commerce in Comecon States during the Soviet period.¹³

As to whether awards rendered in connection with an investment treaty can be treated as “commercial” for the purposes of the New York Convention—in the event that states have made a reservation to this effect—again, there is reason to think that such awards would satisfy the requirement. This issue has already arisen under the current investor–state arbitration regime, and domestic courts that have considered the issue have consistently concluded that an investment treaty arbitration qualifies as “commercial” for New York Convention purposes.¹⁴

There is one issue, however, on which there is some question about the application of the New York Convention to awards produced by an appellate mechanism or an investment court. In the working group’s discussions about an appellate mechanism or a court system, it has been noted that the new process should culminate in a final award that is not itself subject to further review. This is the approach pursued, for

example, in the EU’s current bilateral practice.¹⁵ New York Convention Article V, however, provides courts at the enforcement jurisdiction with a limited power of review with respect to both aspects of procedural fairness and the public policy of the country in which enforcement is sought.¹⁶

The question that arises is whether the parties to an appellate mechanism or investment court could bypass this process of review by the courts of enforcing jurisdictions. The answer here is likely not. In the first place, it is for each state party to the New York Convention to determine for itself in good faith how to apply the convention’s provisions. Looking at state practice around the world, one finds that many states will not allow the parties to an arbitration to waive review either as to matters of procedural fairness or, more emphatically, as to the question of the enforcing jurisdiction’s public policy. This means that although the New York Convention would likely apply to support the recognition and enforcement of an appellate mechanism or investment court award, those awards would still be subject to review at the enforcing jurisdiction under Article V, and this cannot be avoided. This is not to say, incidentally, that New York Convention enforcement should be therefore seen as inadequate. To the contrary, the convention has proven to be an effective mechanism for enforcement in the current system. Rather, the point is to note the limits of relying on the New York Convention for the enforcement of appellate mechanism or investment court awards.

Concluding remarks

The issues raised by the question of enforceability are complex, difficult and subject to some disagreement among commentators. As a result, as the working group moves forward with its work, states will need to consider these issues carefully and to give them a complete and open airing. Failing to address these issues at the outset would lay the foundations for difficulties down the road.

Author

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¹¹ See *supra* note 6.

¹² See *Ministry of Defense of Islamic Republic of Iran v. Gould, Inc.*, 887 F2d 1357 (9th Cir 1989), *cert. denied*, 110 S Ct 1319 (1990).

¹³ See Van den Berg, A. J. (1981). *The New York Convention of 1958: Towards a uniform judicial interpretation*. Kluwer International, pp. 378–379.

¹⁴ See *Republic of Argentina v. BG Group PLC*, 764 F Supp2d 21 (DDC 2011), reversed by 665 F3d 1363 (DC Cir 2012), reversed by 134 S Ct 1198, 1204 (2014). See also *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664 (British Columbia Sup Ct 2001), para. 44.

¹⁵ See, for example, Singapore–European Union Investment Protection Agreement, signed October 15, 2018, Art 3.22(1). <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3545/eu---singapore-investment-protection-agreement-2018>

¹⁶ New York Convention, *supra* note 3, Art. V.



INSIGHT 3

Diversity of Adjudicators in a Reformed ISDS Regime: Is the WTO a good model for developing countries to follow?

Jane Kelsey



In 2017 the UNCITRAL Working Group III was given a broad mandate to work on the possible reform of ISDS. Delegations of UNCITRAL members are currently considering solutions to problems identified in previous stages, which include proposals for a standing appellate body and a two-tier MIC. When the 38th session of the working group resumed in Vienna from January 20 to 24, 2020, one of the agenda items was the appointment and selection of adjudicators. The following intervention was made by Professor Jane Kelsey and acknowledged during the deliberations by representatives of six states (China, Guinea, Indonesia, Nigeria, Pakistan and South Africa) and the United States Council for International Business (USCIB).

Throughout this working group process, developing countries have consistently called for greater diversity of adjudicators. Diversity—in particular development diversity, and not just geographical diversity—is not an end in itself. Nor is it a matter of increasing the opportunities for personal advancement.

Development diversity is a prerequisite to doing justice. It helps ensure that appropriate understandings of law and culture are brought to the matters under dispute. In the context of investment disputes, it ensures that adjudicators can interpret core legal concepts through a development lens, something we have rarely seen to date. That does not imply a lack of impartiality and independence; instead, it provides a means to bring fuller insights to bear on interpretation and adjudication. Diversity is also a prerequisite to confer legitimacy on a system that is widely viewed as biased to foreign investors and capital-exporting states.

It is being said that systemic reforms, especially a standing two-tier appellate system, can deliver diversity of adjudicatory appointments. But there is no guarantee that will happen. The WTO is often used as an example. However, experience at the WTO shows that formal commitments to diversity are not enough. The WTO Dispute Settlement Understanding (DSU) has a diversity requirement, and Appellate Body members are supposed to be broadly representative of the membership. Yet panellists are overwhelmingly from the global North,¹ as are more than half the Appellate Body members appointed so far.² This is a longstanding situation that reflects development asymmetries in the appointment criteria and processes, institutional design and operation of the WTO's dispute settlement system.

One problem is that traditional appointment criteria are likely to result in the continued dominance of an arbitral elite, in a self-perpetuating cycle. That would be even more problematic if appointments in a standing investment court are for six- or even nine-year terms.

A second problem is that too much power has been vested in an unaccountable secretariat.³ The WTO secretariat recommends the first instance panellists, and disputing states can only object to them for compelling reasons.⁴ Recent academic research concluded that the secretariat has significantly more influence over drafting the reports than panellists themselves, which in turn affects the role of precedent and limited dissent.⁵ Developing countries' concerns about institutionalized bias at the secretariat level have largely been ignored.

¹ Johannesson, L. & Mavroidis, P. (2017). The WTO dispute settlement system 1995–2015: A data set and its descriptive statistics. *Research Institute of Industrial Economics*, Paper no. 1148, p. 46, Figures 3, 4. <http://www.ifn.se/wfiles/wp/wp1148.pdf>

² World Trade Organization. (2019). *Appellate body members*. https://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm

³ Garver, R. (2019, December 10). WTO Suspending its Role as Arbitrator in Global Trade Conflicts. *Voice of America*. <https://www.bloomberg.com/news/articles/2019-12-04/trade-war-latest-wto-geneva-europe-switzerland-tariffs>

⁴ World Trade Organization. (1994). *WTO Understanding on rules and procedures governing the settlement of disputes*, Article 8.6. https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

⁵ Pauwelyn, J. & Pelc, K. (2019). *Who writes the rulings of the World Trade Organization? A critical assessment of the role of the secretariat in WTO Dispute Settlement*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458872



A third, institutional, problem is that developing countries have been unable to get agreement to fix the dispute settlement system after fundamental development asymmetries became apparent. A review process was built into the DSU. It failed to meet its first deadline and a second deadline set under the Doha Development Round in 2001.⁶ The review remains inconclusive due to the lack of political will in a consensus-based system.⁷ Now the United States is using the consensus decision-making process to demand reforms and hold the system to ransom while developing countries' concerns remain unresolved.⁸

If these problems arise in the WTO context, which is supposed to be a member-controlled institution, how would the promise of diversity, or the many other promises being made to developing countries during the working group process, play out in a MIC or a standing appellate mechanism? We invite developing countries to consider the risk that they may agree to such a system in the expectation of major changes to the current ISDS regime, but be unable to fix it if those promises fail to materialize.

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⁶ World Trade Organization. (2003, June 6). *Dispute Settlement Body. Special Session. Report by the Chairman, Ambassador Péter Balás (TN/DS/9)*. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/DS/9.pdf>

⁷ World Trade Organization. (2019, June 17). *Dispute Settlement Body. Special Session. Report by the Chairman, Ambassador Coly Seck (TN/DS/31)*. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/DS/31.pdf>

⁸ Raghavan, C. (2019, March 25). *WTO-MTS facing existential threat, needs political decisions*. *SUNS*, #8873. <https://www.twn.my/title2/unsd/2019/unsd190307.htm>



INSIGHT 4

Fighting Bribery and Corruption in Africa: From AU and OECD conventions to a general principle of international investment law

Guy Marcel Nono



With a view to helping to bridge the gap between international anti-corruption norms and BITs concluded by African Union (AU) and OECD member states and ensure the liability of multinational corporations, this piece argues for the recognition of the prohibition of bribery and corruption as a general principle of international investment law.

Background: International conventions and soft law on corruption

Both the OECD and the AU have concluded anti-corruption conventions stressing the liability of corporations and have engaged themselves in soft-law initiatives to curb corrupt behaviour of the transnational firms from which most of the world's investments come.

Under the OECD Anti-Bribery Convention, the countries of origin of multinational companies have committed themselves to repress through these companies the corruption of foreign public agents with intent to obtain or keep foreign investment in an unlawful manner.¹

Unlike the OECD Anti-Bribery Convention, the AU Anti-Corruption Convention is not directed explicitly and exclusively to the corruption of foreign public

agents. It calls on African states to adopt all necessary measures to define as offences acts of corruption committed by any person—including private sector agents—with regard to public agents.²

The OECD Anti-Bribery Convention also obliges states that have made bribery of their own public officials a predicate offence for the purpose of the application of their money-laundering legislation to do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.³ In turn, the AU Anti-Corruption Convention engages states to criminalize in their domestic law the laundering of corruption proceeds.⁴

The AU Anti-Corruption Convention does not address the duty of accuracy of the company's accounting standards. On the other hand, the OECD Anti-Bribery Convention requires that states provide for civil, administrative or criminal penalties for companies having their nationality that omit to provide the exact information on their financial statements in their country of origin.⁵

The AU Anti-Corruption Convention entered into force on August 05, 2006. As of October 2019, 43 out of 55 AU countries have ratified this convention. However, there is not yet a public directory of legislative measures adopted by each AU country to evaluate the trend in terms of national implementation of this treaty by member states as required under the convention.

In addition to these international legal instruments, there is an increasing number of noteworthy soft-law initiatives against corruption:

- The OECD Guidelines for Multinational Enterprises consist of a detailed code of conduct recommended by governments for the responsible behaviour of multinational enterprises in the domain

¹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, 37 ILM 4 (1998), preamble, para. 1; Arts. 1(1), 2) and 3(1) [OECD Anti-Bribery Convention]. https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

³ OECD Anti-Bribery Convention, *supra* note 1, Art. 7.

⁴ AU Anti-Corruption Convention, *supra* note 2, Art. 6.

⁵ OECD Anti-Bribery Convention, *supra* note 1, Art. 8.



of the fight against corruption. These guiding principles, although voluntary, encourage corporate social responsibility (CSR).⁶

- The Draft Pan-African Investment Code⁷ introduces several obligations that foreign investors must comply with if they want to invest in Africa. This soft-law instrument is considered as a model BIT to guide AU states in the negotiation of IIAs⁸ and will likely serve as an important reference in the negotiations of the investment protocol to the African Continental Free Trade Area (AfCFTA) agreement. The draft code prohibits investors from influencing African public officials with any personal payments or rewards in order to obtain or keep foreign investment in an unlawful manner; it also introduces CSR provisions.
- The Publish What You Pay initiative leads a campaign for the compulsory disclosure of the procedures to obtain licences, contracts and revenues relating to the exploitation of natural resources.⁹
- The Extractive Industries Transparency Initiative (EITI) invites multinational companies to publish the amounts paid to states to extract their natural resources. In return, host state governments must publish the revenues received from extractive industries.¹⁰

Since the adoption of international anti-corruption instruments and initiatives, there have been increased anti-corruption efforts on the part of multinational companies.¹¹ These efforts result from the international conventions and the soft-law initiatives listed above, and include:

- The adoption of mandatory codes of conduct, specifying behavioural rules that employees must adopt

- The threat and application of disciplinary sanctions against employees attempting to corrupt foreign public agents
- The creation of ethics committees to verify company compliance with its anti-corruption commitments
- Internal and external audits on the way these companies implement their anti-corruption promises.

International investment case law on corruption

In international investment arbitration, there are at least 20 known cases where the investor was either implicitly or explicitly alleged to have paid a bribe to host state officials in making an investment.¹²

Arbitral tribunals have accepted to hear and determine disputes in which corruption was invoked incidentally. In some cases, tribunals have held that corruption is contrary to international public order,¹³ declining their subject-matter jurisdiction or dismissing the investor's claim.

Several ICSID cases exemplify this. Below, I look into ISDS cases brought involving bribery between OECD investors and African states to argue that African states should use international investment law to help tackle the problem of corruption.

In the *World Duty Free v. Kenya* case,¹⁴ the investor initiated contract-based arbitration at ICSID for the alleged expropriation of its investment. The Kenyan president had allegedly received a payment of USD 2 million from a foreign investor to establish its activities in Kenyan airports. The Kenyan state pleaded the nullity of the contract, maintaining that a bribe had been paid and that the conclusion of the contract had been contrary to Kenyan law. In its defence, the investor admitted to having obtained the contract by making a personal donation to the Kenyan president, arguing, however, that this was done in conformity with Kenyan habits and customs.

The *World Duty Free* tribunal—relying on Kenyan national legislation, anti-corruption treaties, arbitral

⁶ Organisation for Economic Co-operation and Development. (2011). *OECD guidelines for multinational enterprises*. <http://www.oecd.org/daf/inv/mne/48004323.pdf>

⁷ United Nations Economic Commission for Africa. (2016). *Draft Pan-African investment code*. UN Doc. E/ECA/COE/35/18, Arts. 21 and 22. <https://repository.uneca.org/handle/10855/23009>

⁸ Hedar, A. (2017). *The legal nature of the Draft Pan-African Investment Code and its relationship with international investment agreements* (Investment Policy Brief, 9), p. 1. https://www.southcentre.int/wp-content/uploads/2017/07/IPB9_The-Legal-Nature-of-the-Draft-Pan-African-Investment-Code-and-its-Relationship-with-International-Investment-Agreements_EN.pdf

⁹ Van Oranje, M. & Parham, H. (2009). *Publishing what we learned: An assessment of the Publish What You Pay coalition*, p. 25–30. <https://eiti.org/sites/default/files/documents/Publishing%20What%20We%20Learned.pdf>

¹⁰ Extractive Industries Transparency Initiative. (2019). *EITI Standard 2019*. <https://eiti.org/document/eiti-standard-2019>

¹¹ Organisation for Economic Co-operation and Development. (2003). *Enhancing the role of business in the fight against corruption – 2003 Annual Report on the Guidelines for Multinational Enterprises*. OECD. <https://www.oecd.org/daf/inv/mne/enhancingtheroleofbusinessinthefightagainstcorruption-2003annualreportonthe guidelinesformultinationalenterprises.htm>

¹² Levine, A.J.M. (2019). *Canadian initiatives against bribery by foreign investors*, p. 14 (box 9). IISD. <https://iisd.org/sites/default/files/publications/canadian-initiatives-against-bribery-foreign-investors.pdf>

¹³ See *World Duty Free Co Ltd v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, October 4, 2006, 46 ILM 339 (2006), paras. 152, 155.

¹⁴ *Id.*, paras. 105–107, 143–157. See also Johnson, L. (2011). *World Duty Free v. Kenya*. In: N. Bernasconi-Osterwalder & L. Johnson. (Eds.). *International investment law and sustainable development: Key cases from 2000–2010*. IISD. <https://www.iisd.org/itm/2018/10/18/world-duty-free-v-kenya>



awards and domestic court judgments—concluded that corruption is contrary to the international public order of most, if not all states. It also concluded that the personal donation made to the Kenyan president was an act of corruption contrary to international public order. On these grounds, the arbitrators rejected the investor’s claim.

In *Wena Hotels v. Egypt*,¹⁵ the dispute was initiated by a British company after the alleged expropriation of two hotels whose management contracts it had received from Egypt. Wena sought compensation based on the Egypt–United Kingdom BIT. In its defence, Egypt put forward that Wena had illicitly tried to influence the decision made by the Egyptian governmental agency to obtain these hotels’ management contracts.

The *Wena* arbitrators paid particular attention to the allegations of corruption, but dismissed Egypt’s defence, concluding that it failed to prove its allegations. However, the tribunal suggested that it would have otherwise dismissed Wena’s claim, holding that, “[i]f true, these allegations are disturbing and ground for dismissal of this claim,” and noting that “international tribunals have often held that corruption of the type alleged by Egypt [is] contrary to international *bonos mores*.”¹⁶

In *AHCA v. Congo*, the dispute was submitted by the African Holding Company of America (AHCA) and the Société africaine de construction au Congo S.A.R.L (SAFRICAS) against the Democratic Republic of the Congo (DRC), on the basis of an arbitration clause included in the DRC–United States BIT. The origin of the dispute lies in a debt owed by the DRC to SAFRICAS for the construction of a road in Congo. Afterwards, SAFRICAS assigned its claim to AHCA. In its defence, the DRC asserted that there was no contract because the construction contract granted to SAFRICAS was obtained through corrupt practices.

The *AHCA* tribunal found that the DRC did not prove its corruption allegations, but, unlike the *Wena* tribunal, did not discuss the possible consequences of a finding of corruption.¹⁷

Final remarks—A way forward for anti-corruption obligations on investors?

While most BITs do not impose a direct obligation on multinational companies to fight corruption, states should consider including such obligations in IIAs they negotiate or renegotiate, building on recent treaty practice.¹⁸

However, even in the absence of a treaty-based anti-corruption obligation on investors, the arbitral jurisprudence admits that the prohibition of corruption is a general principle of international investment law.¹⁹ Accordingly, arbitrators should apply the international law obligation on investors to refrain from corrupt behaviour when making an investment. Their failure to do so could lead to the nullity of the resulting award, because “a non-application of the proper law may constitute an excess of powers which calls for annulment.”²⁰

Because the prohibition of corruption is part of the general principles of international investment law, a state, even in the absence of a clause requiring the multinational companies to fight against corruption, could initiate arbitration to claim against a multinational company for the corruption of its public agents. This possibility would depend on whether the state has a legal basis to do so under investment treaties or investor–state contracts referring to international law as the applicable law, as well as an arbitration clause. In addition, ISDS clauses in investment treaties or investor–state contracts could oblige the parties to respect the general principles of international investment law. In any such arbitration, the tribunal would need to apply the general principle prohibiting corruption. Similarly, a company that is under pressure to pay a bribe could bring an arbitration claim to denounce corruption.

¹⁵ *Wena Hotels Ltd v. Arab Republic of Egypt*, Case No. ARB/98/4, Award, December 8, 2000, 41 ILM 881 (2000). <https://www.italaw.com/sites/default/files/case-documents/ita0902.pdf>

¹⁶ *Id.*, para. 111.

¹⁷ *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on the objections to jurisdiction and admissibility, July 29, 2008, paras. 52–54. <https://www.italaw.com/sites/default/files/case-documents/ita0016.pdf>

¹⁸ The 2005 IISD model BIT, the 2012 SADC model BIT and the 2016 Morocco–Nigeria BIT include anti-corruption obligations on investors and investments, and the 2016 CETA excludes investments made through corruption from dispute settlement. See Levine, M. J. (2019, June). A bit of anti-bribery: How a corruption prohibition in FIPAs can bring a minimum standard of conduct for Canadian investors abroad. *Investment Treaty News*, 10(2), 8–11. <https://www.iisd.org/itn/2019/06/27/a-bit-of-anti-bribery-how-a-corruption-prohibition-in-fipas-can-bring-a-minimum-standard-of-conduct-for-canadian-investors-abroad-matthew-levine>

¹⁹ See Schreuer, C. (2009). *The ICSID Convention – A commentary*. Cambridge University Press, p. 608.

²⁰ *Id.*, p. 556.



In a forward-looking manner, if a host state fails to denounce corruption, civil society organizations (CSOs) could do so by filing a petition to submit an *amicus curiae* brief in a pending arbitration. This could be done by including an optional additional protocol on corruption to the ICSID Convention.²¹ Given that arbitral tribunals currently have discretion as to whether to accept and how much weight to give *amicus* submissions, states could consider rules to allow CSOs easier access to arbitrations as *amici*.²² This could be done, for example, in the context of ongoing ISDS reform efforts at UNCITRAL Working Group III and of the current ICSID rule amendment process. Finally, they could consider ways to allow CSOs to bring their corruption complaints to arbitral tribunals or international institutions, building on practices in human rights bodies, such as the “calls actions” received by the African Commission on Human Rights.²³

Author

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²¹ The question of how this protocol would operate and how to ensure a tribunal would have to consider requests by CSOs would need to be fully developed in a separate article.

²² IISD. (2019, April). *Summary comments to the proposals for amendment of the ICSID arbitration rules*. Geneva: IISD. <https://www.iisd.org/library/summary-comments-proposals-amendment-icsid-arbitration-rules>

²³ This idea is borrowed from the African Commission on Human Rights, *Association pour la sauvegarde de la paix au Burundi / Kenya, Uganda, Rwanda, Tanzania, Zaïre (DRC), Zambia*, 157/96 HRCLA (CommAfr DHP 2003), paras. 1, 63. <https://www.achpr.org/sessions/descions?id=140>



NEWS IN BRIEF

January UNCITRAL session considers appellate mechanism, standing court, and arbitrator and adjudicator issues

Negotiators working on multilateral reform solutions to ISDS reconvened in Vienna in January 2020 to resume their 38th session, holding talks around the possibility of an appellate mechanism, the benefits and challenges of setting up a permanent court on investment issues, and the process around choosing arbitrators and adjudicators.

The meeting, held under UNCITRAL's Working Group III on ISDS Reform, built on earlier discussions held in Vienna in October 2019. It is part of the third phase of a years-long process to identify concerns involving ISDS and possible reform options. According to an advance copy of the meeting report, the discussions around the above-mentioned reform options were “preliminary” in nature, looking to better understand their potential merits and pitfalls before going into further detail.

On the subject of the appellate mechanism or a stand-alone review mechanism—the reform option that gained the most attention at the meeting, according to some observers—negotiators considered the impact on how long cases take and what they currently cost. They also asked whether this mechanism could lead to a more coherent or more fragmented system, and whether having one body tasked with cases under multiple treaties could “result in endowing too much interpretative power to such a body.” These questions will be considered again at a later stage, pending further discussion on the “main elements of an appellate mechanism.”

Other points raised on the appellate mechanism included the nature and scope of appeals that it would consider, such as how extensive the grounds would be for appealing a tribunal decision, and what decisions might be eligible for appeal and what actions an appellate mechanism could take.

The subject of an appellate mechanism will be examined in more detail in subsequent working group sessions, with the UNCITRAL Secretariat tasked with preparing a table that would capture the issues involving “the nature, scope, and effect of appeal” and related draft provisions.

The other option for the secretariat, aside from a table, would be to name which considerations require answers from the working group going forward.

Another open question is how decisions taken by “a permanent appellate mechanism or a standing first-tier body” might be enforced, and what this would mean for those states that do choose to take part in such mechanisms, as well as those which do not. How this enforcement might work relative to the systems currently in place, such as the ICSID Convention and New York Convention, was also raised, among various other questions. (*Editor's note: Professor N. Jansen Calamita discusses these matters in an Insight published in this issue of ITN: "UNCITRAL Working Group III Debate: Enforceability of awards by an appellate mechanism or an investment court under the ICSID and New York Conventions."*)

Regarding the other issues tackled in Vienna in January, one key issue considered was how much a permanent court or MIC might cost, along with where this money may come from and what financial demands this could place on developing states in particular. As with the appellate mechanism, the UNCITRAL Secretariat has been tasked with analyzing possible options and preparing related documents for the working group to consider.

Meanwhile, the discussion on adjudicators and arbitrators dealt largely with whether to set up a “roster of qualified candidates and the setting up of a permanent body composed of full-time adjudicators,” looking at questions such as party appointment and how it affects issues of independence and impartiality, as well as what lessons could be drawn from the arbitral institutions already in place. If a permanent body of full-time adjudicators is established, where it may be located and hosted remains an open question, among other issues. (*Editor's note: This issue of ITN includes as an Insight the full text of the intervention made by Professor Jane Kelsey on these matters at the meeting in Vienna: "Diversity of Adjudicators in a Reformed ISDS Regime: Is the WTO a good model for developing countries to follow?"*)

The UNCITRAL Secretariat has been asked to conduct further analysis on all issues raised under this agenda item, including the interaction of these options with



other issues already under consideration, as well as how potential reforms could be integrated into current treaties “or any other relevant instrument.”

It was also acknowledged that the comments and suggestions made on either option (ad hoc or permanent appeal mechanism, or MIC) do not imply a prior or definitive choice in favour of any option. Indeed, participants recognized that there several issues that are common to all of the options discussed, though these could have very different implications depending on the option involved.

The next Working Group III session is slated for March 30–April 3, 2020, in New York. An annotated provisional agenda is [available online](#), together with a series of secretariat documents and government submissions. The secretariat documents cover dispute prevention, mitigation and mediation; treaty interpretation by state parties; security for costs and frivolous claims; multiple proceedings and counterclaims; and a multilateral instrument on ISDS reform, all of which are on the meeting agenda, together with government submissions.

Investment facilitation talks set sights on WTO MC12 outcome, prepare for negotiations in March

The 99 WTO members involved in structured discussions on a possible multilateral framework on [investment facilitation](#) are slated to transition into negotiating mode from March 2020 onward in a bid to announce a “concrete outcome” at the WTO’s 12th Ministerial Conference in Nur-Sultan, Kazakhstan, in June 2020.

The group co-sponsoring this “Joint Statement Initiative” has expanded significantly since its launch in December 2017. The most recent addition was the Philippines, which formally joined during an informal [ministerial-level meeting](#) on the subject. That event took place in parallel to the World Economic Forum (WEF) Annual Meeting in Davos-Klosters, Switzerland, on January 23.

The structured discussions in the later months of 2019 were devoted to streamlining an extensive working document that set out, in seven sections, possible provisions that could feature in the planned framework, without prejudging what participating WTO Members’ positions might be once negotiations begin. According to

a [summary](#) of the December 2019 stocktaking meeting by the group’s coordinator, talks in the early weeks of 2020 will aim to set the stage for negotiations in March, with subsequent meetings planned before the June ministerial.

Those talks will be based on a new, streamlined text, circulated by the group’s coordinator in January 2020 to WTO members. The text remains a restricted document on the WTO website. As the participants prepare to transition to a new mode of work, various questions remain on the planned framework’s scope, development provisions and other issues. It also remains unclear at this stage what institutional arrangements may apply to such a framework, if completed, given the rules for incorporating new agreements into the WTO architecture, as well as past ministerial decisions that have said that consensus is required by the WTO membership to negotiate on issues that were not already under the Doha Round agenda.

A detailed history of the investment facilitation talks and the July 2019 working document that served as the basis of the September–December 2019 discussions is available online in the [IISD library](#) in English and French. (*Editor’s note: The publication was prepared under the TAF2+ Umbrella Grant on New WTO issues, funded by the UK Government and implemented jointly by IISD, CUTS International, BKP Economic Advisors and InterAnalysis at the University of Sussex. Its views reflect those of the authors and not necessarily those of TAF or the UK Government.*)

ECT modernization: Conference meets in December 2019, sets stage for 2020 negotiating meetings

The negotiations for ECT modernization are now underway, with the first such meetings held in December 2019 and at least four other sessions planned over 2020.

The talks took place following the Energy Charter Conference meetings in Brussels from December 10–11, 2019. According to a Conference [meeting summary](#) issued thereafter, the “top priority” for next year will be the modernization process.

The first negotiating round was held in Brussels starting on December 12, though a public summary of those discussions is not available. The talks were initially meant to be held in Albania, but a natural disaster in the Balkan



country caused a [change in venue](#). Subsequent talks, according to the [provisional timetable](#) released last year, are planned in April, July, and October 2020, with a stocktaking planned for December.

Even with the modernization negotiations underway, the potential for the process to resolve the treaty's many known challenges remains unclear. The existing treaty, which dates back to the mid-1990s, has seen the highest number of investment arbitrations among IIAs, as well as the largest investment arbitration awards on record. Questions remain over whether the modernization process [will be sufficient](#) to make the deal conducive to ambitious climate action and whether contracting parties [might be better served](#) by pursuing [termination or withdrawal](#).

China–EU investment talks: Negotiators debate new market access offers, eyeing 2020 outcome

The talks between China and the EU for a Comprehensive Agreement on Investment saw an important milestone in December 2019, as the two sides exchanged new market access offers. They had exchanged market access offers once previously, in July 2018.

The exchange took place during the [25th negotiating round](#), which also featured discussions involving the treatment of state-owned enterprises, state–state dispute settlement, sustainable development, transparency and other topics.

Another negotiating round was held in mid-January 2020 to examine the offers in further depth, with a 27th round slated for early March 2020 in Beijing.

While the results of the latest round are not yet publicly known, EU officials have already indicated that they would like to see revisions in the latest market access offer from their Beijing counterparts.

“While many European companies invest in China and benefit from its vast domestic market, I am well aware of the many challenges they face in terms of access and predictability,” said EU Trade Commissioner Phil Hogan on January 20, 2020, [during an event](#) devoted to the China–EU relationship.

Citing desired improvements in market access for European investors in China, Hogan reiterated that Brussels is still hoping to wrap up the talks with Beijing this year, so long as the deal is sufficiently ambitious. The 2020 target was announced during a [leaders’ summit](#) in Belgium last April.

Hogan also suggested that greater market opening would be needed than what is currently on offer.

“Meeting halfway will not work for the EU, as our market is largely open. We expect an effort towards rebalancing this asymmetry,” he said at the time, calling for similar levels of improvement in ensuring there is an equal “playing field” in China for European investors when it comes to the legal and regulatory frameworks in place.

Some China-based experts, however, [have said](#) that these requests may prove difficult to meet and warned that it could further hurt the pace of the negotiations. Talks on a China–EU investment agreement have been formally underway for over six years, having launched in 2013.

Trump signs USMCA, bringing NAFTA’s replacement closer to entry into force

The United States–Mexico–Canada Agreement (USMCA) has been ratified and signed into law in the United States, bringing the trade and investment deal one step closer to entry into force. Of the three countries involved, the only one that has not completed its ratification processes is Canada.

The USMCA would replace the long-standing NAFTA that has governed trade between the three countries since the mid-1990s. While the new agreement was signed in late 2018 and [ratified by Mexico](#) in June 2019, efforts to ratify the agreement in Canada and the United States have taken longer to conclude, albeit for different reasons.

The ratification of the agreement in the United States involved the negotiation of various changes with Canada and Mexico to the existing text, given concerns raised by many Democrats in Congress over whether the deal’s provisions were sufficiently stringent in the areas of labour and environment, both in terms of the rules themselves and the monitoring and enforcement mechanisms in place.



The final [Protocol of Amendment](#) features a series of amendments to the USMCA's provisions, specifically on initial provisions and general definitions; automotive rules of origin; intellectual property rights; labour; environment; and a “facility-specific rapid response labour mechanism.”

Notable among the changes is revised language that would prevent USMCA parties from blocking the establishment of a dispute settlement panel, which had been one of the [significant problems](#) that had emerged under the original NAFTA in relation to state–state dispute settlement.

Another significant change is language in the environment chapter, specifically in a new footnote, which states that “for purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise.” Similar language has also been inserted in the labour chapter in relation to the enforcement of labour laws.

In Canada, the process to ratify the USMCA was put on hold in 2019 as a result of the country's federal elections. The implementing legislation for USMCA, which is known as CUSMA in Canada, was [introduced again](#) into the Canadian Parliament as of January 29, 2020 for consideration.

Brexit: United Kingdom leaves EU amid questions on future trade, investment relationships

The United Kingdom's exit from the EU formally took place on January 31, 2020, following years of talks and repeated extensions in the Brexit deadline. With the United Kingdom now in an 11-month transition period, questions remain over the shape of the country's future trade and investment relationship with the EU and other partners, though some further indications of what this may entail are beginning to emerge.

How Brexit will affect the United Kingdom's trading and investment relationships with non-EU countries after the transition period concludes at the end of December may vary. According to a [guidance note](#) published by the British government on trade agreements with countries outside the EU, London is aiming to “reproduce the effects of existing EU agreements for when they no longer apply to the UK,” noting that such arrangements

have already been made and signed with various countries or groups of countries.

The list does not cover all countries and has some [notable exceptions](#), such as the EU–Japan Economic Partnership Agreement and the Canada–EU CETA. In some cases, such as CETA, “engagement” is ongoing, while in the case of Japan, the two sides are set to negotiate a new agreement, built on what has already been agreed.

Some of these trade agreements have investment chapters or related investment protection agreements. There are also a host of EU BITs and British BITs, and questions have been raised by [legal analysts](#) on the impact of Brexit on EU BITs should new arrangements not be reached before the transition period's close.

Regarding its WTO commitments, all EU member states are also members of the WTO in their own individual capacity, as is the EU collectively. Goods and services schedules are expressed in EU terms, and one of the significant questions raised in Geneva during the Brexit process has been how to separate out the United Kingdom's commitments from those of the EU bloc and how the engagement with other WTO Members on the subject should work.

Some of these issues have implications for investment, given that certain WTO Agreements have investment-related provisions, such as the Agreement on Trade-Related Investment Measures (TRIMs), and the General Agreement on Trade in Services (GATS), specifically involving services under “Mode 3,” involving commercial presence of a foreign services supplier in another WTO member's territory.

The United Kingdom circulated a [communication](#) in early February summarizing the steps taken to date on those fronts, and plans to join the Government Procurement Agreement (GPA) in its individual capacity, given that it is currently a party under the EU. The EU, for its part, has circulated a “[Note Verbale](#)” summarizing the transition agreement for WTO Members' information.

A [statement](#) issued on February 3, 2020 outlines what British Prime Minister Boris Johnson and his government are looking to achieve in the talks with Brussels on the future relationship. On the issue of cross-border services trade and investment, they have called for “measures to minimize barriers to the cross-border supply of services and investment, on the basis of each side's commitments in existing FTAs,” adding that there is the scope to make even deeper commitments in some types of services.



Australia trade deals with Hong Kong, Peru enter into force, Indonesia agreement ratified

The new year saw the entry into force of two new trade deals involving Australia, namely those involving Peru and Hong Kong. The two agreements both feature investment chapters and were ratified in the Australian legislature in late December, together with a separate accord involving Indonesia.

In the case of the Australia–Hong Kong FTA, the [new agreement](#) terminates the long-standing BIT between the two partners, which dates back to 1993. The investment chapter includes an ISDS mechanism, with some measures excluded from challenge, such as those relating to certain public health measures (including tobacco control) along with investment screening decisions made under Australia’s Foreign Investment Review Board.

A summary of the [agreement’s investment outcomes](#) also notes that a provision was included to protect the states’ right to regulate in areas relating to the arts and certain public services, along with Indigenous traditional cultural expressions.

The [Australia–Peru FTA](#) also includes an investment chapter and ISDS mechanism, with similar phrasing on the right to regulate in the public interest. ISDS does not apply to certain social services, creative arts, foreign investment screening decisions and Indigenous traditional cultural expressions.

Another notable development is the Australian legislature’s ratification of the [Comprehensive Economic Partnership Agreement \(CEPA\)](#) with Indonesia, the most populous economy in Southeast Asia. The agreement includes an investment chapter with an ISDS mechanism, and again includes references to certain aspects of public health, tobacco control and foreign investment screening as being among the areas excluded from ISDS. The CEPA is still pending ratification in Indonesia before it can enter into force.



AWARDS AND DECISIONS

In a new ICSID award, Spain's reforms of the renewable energy sector are found not to violate the ECT

Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain, ICSID Case No. ARB/15/1

Marios Tokas

On December 2, 2019, an ICSID tribunal found that Spain complied with its ECT obligations and that the claims raised by German investors were meritless. Thus, the tribunal ordered the claimants to pay EUR 2.3 million toward Spain's legal fees and USD 362,237 toward Spain's arbitration costs.

Background and claims

In 2009, the Andasol 3 power generation facility was built in Andalusia, southern Spain, by Marquesado Solar S.L. (Marquesado), a Spanish company that is directly or indirectly wholly owned by German company Stadtwerke München GmbH (SWM) along with a group of other German companies. SWM and the other companies alleged that their decision to build and operate the plant was based on the guarantees provided by the Spanish regulatory system of incentives for investments in the renewable energy sector—specifically, Royal Decree (RD) 661/2007.

In 2012, Spain reformed its renewable energy regime by imposing additional levies, altering the feed-in tariff remuneration to producers and limiting the eligibility requirements for incentives. In response, the claimants and Marquesado initiated ICSID arbitration against Spain on December 29, 2014, claiming breaches of ECT Article 10(1), including the FET, umbrella and non-impairment clauses.

Tribunal dismisses Spain's jurisdictional objections related to claimants' EU nationality and EU law

The tribunal dismissed Spain's objection that Marquesado was not a covered investor, considering that it was controlled by investors of another contracting state. Additionally, it considered that ECT Article 26(1) does not distinguish between different types of contracting parties, thus applying to disputes between an investor from an EU state and another EU member state (para. 129).

The tribunal found that the EU's accession to the ECT did not nullify the competence of ECT tribunals for intra-EU disputes. In particular, the tribunal denied Spain's argument that ECT Article 1(2) provides for the transfer of adjudicating competence from the ECT to a Regional Economic Integration Organization (REIO)—such as the EU—when the latter joins the ECT (para. 131). Additionally, the tribunal declined to recognize the prevalence of EU law over ECT Article 25, since the latter simply prohibits non-EU member states that are contracting parties to the ECT from benefitting from treatment between EU member states (para. 132).

Spain argued that no jurisdiction existed over the dispute since SWM, as a publicly owned company, should be equated with Germany and that disputes between EU member states fell within the CJEU's jurisdiction. However, the tribunal rejected the argument since SWM was constituted as a company under German law and thus fell within the definition of "investor" under ECT Article 1(7), notwithstanding its shareholding status (para. 134).

Lastly, the tribunal declined to dismiss the case on the basis of the incompatibility of ECT with EU law following *Achmea*. It found that, even if completely accepting Spain's and *Achmea's* views on legal conflict, the ECT should prevail, since ECT Article 16 provides that in instances of conflict the more favourable rule would apply. According to the tribunal, the ECT is the more favourable rule in the present case, given that the EU system does not allow an investor to seek recourse to an arbitral tribunal (paras. 145–146).

Spain's jurisdictional objection relating to taxation measures is upheld

The tribunal accepted Spain's argument that the 7% levy imposed by Law 15/2012 on the value of electricity produced was excluded from its jurisdiction under the taxation carve-out contained in ECT Article 21. By interpreting the terms of Article 21 in light of their ordinary meaning (paras. 163–168) and the *travaux préparatoires*, the tribunal considered the levy a "tax measure," declining its jurisdiction over the law (paras. 172–176).

The ECT does not provide an enforceable right to a stable legal framework

Turning to the merits, the tribunal rejected the claim



that ECT Article 10(1) imposes a self-standing enforceable obligation on contracting parties to provide stable and equitable conditions to investors. Indeed, it held that Article 10(1) is “far too general” to impose specific directions and obligations, and that it informs the other obligations such as the FET standard in Article 10(1) (paras. 196–198).

Spain’s measure did not breach its obligation to provide FET to claimants

The tribunal dismissed the claimants’ allegations that Spain failed to provide a stable regulatory regime, frustrated claimants’ legitimate expectations, failed to act transparently and adopted unreasonable or disproportionate measures.

First, the tribunal found that the Spanish regulatory reform did not take place with the intention to drastically alter the regulatory framework after the desired investment was made, like a “bait-and-switch” stratagem. In the tribunal’s view, the measures were legitimately undertaken to protect public policy and the sustainability of the Spanish electricity system (paras. 257–261).

Second, it deemed that the claimants failed to prove that the Spanish regulatory framework or the actions or inactions of the Spanish authorities guaranteed a stable remuneration for the electricity produced. Rather, it concluded that any prudent investor having undertaken appropriate due diligence would not have legitimately expected such a stable income stream for its investment (para. 308).

Lastly, the tribunal rejected the claimants’ arguments on transparency, unreasonableness and disproportionality. It considered that the measures adopted under the regulatory reform were transparent and involved prior consultations and preliminary reports (para. 315). What is more, the measures bore a reasonable relationship to the objective of achieving the sustainability of the electricity system and reducing the tariff deficit, while the burden imposed on the claimants was proportional to the aim and purpose of the contested measures (paras. 320–322 and 354–355).

Tribunal reaffirms reasonableness of contested measures and denies operation of umbrella clause

The tribunal reaffirmed that Spain’s measures were reasonable and thus did not violate the obligation under ECT Article 10(1) to refrain from impairing investments through unreasonable measures (para. 364). Furthermore, it considered that Spain did not enter into any contractual or contractual-like obligations with

the claimants. It also held that the claimants’ alleged agreement of July 2010 (a press release issued by Spain) and a 2011 resolution by Spain’s Directorate General for Energy Policy and Mines did not have any legal binding force as such (para. 383–384).

Allocation of costs and expenses

The tribunal took into account the ECT’s silence on the allocation of costs and expenses but decided to examine the circumstances in order to reach a fair result. In light of the legality of the challenged measures, the failure of Spain’s jurisdictional objections and the high amount of costs, the claimants were ordered to bear to 83.3% of Spain’s costs and expenses (para. 403–405).

Kaj Hobér’s dissenting opinion: no expectation of stability of hydro investments

In his dissenting opinion on the merits, Kaj Hobér considered that the radical and fundamental changes to the regulatory regime of Spain violated its obligations under ECT Article 10(1) since they were incompatible with the investors’ legitimate expectations. The dissenting arbitrator stressed that legitimate expectations should not be equated to a guarantee or promise (para. 10) but considered that expectations were created based on the Spanish regulatory framework, the representations and the statements made by Spanish officials, referring to regulatory certainty and stability (para. 16).

Notes: The tribunal was composed of Jeswald W. Salacuse (president appointed by the ICSID Secretary General, U.S. national), Kaj Hobér (claimants’ appointee, Swedish national) and Zachary Douglas (respondent’s appointee, Australian national). The award of December 2, 2019, including the dissent, is available at <https://www.italaw.com/cases/7791>

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Hungary held liable for expropriating the investment of a British investor and ordered to pay EUR 7 million in compensation for damages

Magyar Farming Company Ltd, Kintyre Kft, and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27

Maria Bisila Torao

On November 13, 2019, an ICSID tribunal ordered Hungary to pay damages to a British investor in compensation for its breach of the Hungary–United Kingdom BIT as well as half of the investor’s legal costs. The tribunal awarded approximately EUR 7 million in damages.

Background and claims

Between 1990 and 1994, Hungary carried out a profound transformation of its agricultural industry by privatizing over 85% of the country’s farmland. To regulate the acquisition and ownership of farmland, Hungary enacted the Arable Land Act, which provided that only Hungarians were allowed to acquire agricultural land. Foreigners could only lease land either from the state or from Hungarian nationals for a limited period of 10 years and with a maximum area of 300 hectares (para. 110).

In this framework, in 1997, a group of British farmers sought to invest in Hungary’s agricultural sector. They incorporated Magyar Farming Company Ltd as a holding company in the United Kingdom, and Kintyre Agricultural Trade and Services Kft as its Hungarian subsidiary (collectively, Magyar). In 1998, Kintyre acquired 95.13% of Inicia ZRT, a Hungarian company that owned privatized farmland. At the time of the investment, the investor relied on Inicia’s lease agreement, a 10-year profit lease under the Arable Act that provided for a statutory pre-lease right.

In 1999, Inicia’s lease was extended for 10 years starting from July 1999. Later, in 2002, the Arable Land Act was amended, extending agricultural leases periods from 10 to 20 years. Accordingly, Inicia requested a modification of its lease, and as a result, in 2006, Inicia’s lease was extended to 2014. The authorities considered that the 20 years would run from the date in which the lease was concluded.

In 2010, Hungary sought to reform the agricultural sector, redistributing state-owned farmland to promote family farms over farming companies. Under the Act on the National Land Agency (the 2010 Act), the pre-lease rights were maintained but later removed in 2011 (the

2011 Amendment). As a result, Inicia’s lease was divided into several plots and awarded to local farmers by way of public tender. In response, Magyar and Inicia filed for arbitration against Hungary claiming expropriation of their leasehold rights to the land in breach of Hungary–United Kingdom BIT Article 6(1).

Tribunal dismisses Hungary’s intra-EU and subject-matter jurisdictional objections

In its first jurisdictional objection, Hungary argued that the BIT’s dispute resolution clause (Art. 8) was incompatible with the EU Treaties, referencing the *Achmea* decision (para. 172–173), and that such incompatibility between the BIT and the EU treaties should be resolved in favour of EU law.

The tribunal reasoned that the ICSID Convention is not subject to a national legal system. As a result, the validity of the arbitration agreement or arbitrability of the dispute cannot be governed by a *lex arbitri*. Therefore, for the purposes of this arbitration, the tribunal decided not to consider the consequences, if any, of the application of a particular *lex arbitri*—EU law, in this case (para. 203).

Further, Hungary contended that the dispute did not fall within the scope of the BIT’s dispute resolution provision, and therefore the tribunal could not rule on Hungary’s conduct because none of its actions amounted to expropriation. The tribunal rejected this argument, relying on well-established case law (*Inmaris v. Ukraine, CSOB v. Slovak Republic and Holiday Inn v. Morocco*) and affirming that, for purposes of subject-matter jurisdiction, the existence of an investment must be assessed as a whole (para. 274–275).

Hungary’s amendment of the 2010 Act amounted to an unlawful expropriation as no compensation was paid

Hungary argued that the statutory pre-lease right was provided by general legislation, which the state could modify for policy reasons, and therefore the right was not capable of being expropriated (paras. 340, 346).

The tribunal, however, concluded that although the state has a right to regulate, this power should not be exercised retroactively (para. 347). The tribunal further explained that the standard contained in Article 6 of the Hungary–United Kingdom BIT provides for protection of vested rights. Hence, “if a general statute gives private parties a possibility to acquire rights of economic value, changes to that legislation should not affect rights that had already been acquired under the statute. In this



sense, the doctrine of vested rights is closely intertwined with the principles of non-retroactivity and legal certainty” (para. 347).

Hungary also argued that a bona fide exercise of the state’s right to regulate is exempt from the duty to pay compensation. The tribunal disagreed and reasoned (referencing *Pope & Talbot v. Canada*) that an unqualified exception from the duty of compensation for all regulatory measures could not be created as it would be incompatible with the standard language of non-expropriation provisions of investment treaties—such as Article 6 of the BIT—which require compensation for direct and indirect expropriation even if the measures are for public purposes, non-discriminatory and compatible with due process of law (para. 364).

The tribunal continued by agreeing with the approach taken in *Saluka v. Czechia* that there is no comprehensive test to distinguish regulatory expropriation (for which compensation is required) from an exercise of police or regulatory powers, which does not give rise to a duty of compensation (para. 365).

Damages and cost

Hungary relied on an expert report that estimated the range of the claimants’ loss between EUR 3.4 million and EUR 5.6 million. According to Hungary, the standard of compensation should be the “fair market value of the investment expropriated,” as provided by BIT Article 6(1). In turn, the claimant’s expert presented three different valuations to the tribunal using data from different dates.

The tribunal rejected Hungary’s valuation methodology, accepting as a starting point the second of claimants’ valuation, in which they relied on a discounted cash flow (DCF) valuation as of July 2015 using data available at the time (para. 404-407). However, the claimants’ expert applied a 25% discount on the actual value of the farm, which the tribunal found unreasonably high, considering that any liquidity discount would be marginal. Consequently, the tribunal applied a 5% liquidity discount, concluding that this percentage would be a more appropriate measure (para. 413).

In conclusion, the tribunal awarded EUR 7.1 million in compensation for the expropriation of claimants’ investment out of the EUR 17.9 million initially claimed. The tribunal also ordered Hungary to reimburse the claimants for the tribunal cost in the amount of USD 282,224.40 and legal costs in the amount of GBP 296,456, EUR 19,473 and HUF 26,495,585.50.

Notes: The tribunal was composed of Gabrielle Kaufmann-Kohler (president appointed by the parties, Swiss national), Stanimir A. Alexandrov (claimants’ appointee, Bulgarian national), Inka Hanefeld (respondent’s appointee, German national). The award of November 13, 2019 is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10914.pdf>

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The BIT is not in force: Mozambique prevails on jurisdiction in case against South African investor

Oded Besserglik v. Mozambique, ICSID Case No. ARB(AF)/14/2

Alessandra Mistura

On October 28, 2019, a tribunal constituted under the ICSID Additional Facility dismissed the claims brought by Oded Besserglik (OB), a national of South Africa, against Mozambique on the grounds that the South Africa–Mozambique BIT never entered into force.

Background

In the late 1990s, OB and a business partner purchased shares in Natal Ocean Trawling (NOT), a South African company having an ongoing partnership for the fishing of prawns with Mozambican state-owned enterprises Emopesca and its subsidiary Sulpesca. NOT then purchased 40% of Sulpesca’s shares against a consideration payable in instalments. NOT regularly paid two of the instalments due, with the remaining amount being guaranteed by a lien on the fishing vessels owned by OB and used by Sulpesca for the performance of fishing activities.

Following the fishing vessels’ hijacking by one of NOT’s managers and the persistent lack of payment of the consideration for the purchase of Sulpesca’s shares, Emopesca first obtained a judicial seizure of the



vessels. It subsequently proceeded to transfer Sulpesca's shares—including those sold to NOT but never fully paid for—to a third company. As a consequence, OB commenced arbitration against Mozambique, claiming that the latter unlawfully expropriated the vessels and NOT's shares in Sulpesca and failed to afford OB FET and full protection and security.

Tribunal evaluates the timeliness of the jurisdictional objection

As a preliminary matter, the tribunal ruled on the admissibility of Mozambique's jurisdictional objection, based on the allegation that the BIT on which OB's claims rested never entered into force. The tribunal noted that Article 45(2) of the Additional Facility Rules sets out a clear obligation to file objections without delay and, as far as possible, immediately after the constitution of the tribunal. It is only when the objection rests on facts that were unknown at this time that the party may file the objection at a later stage, and in any case no later than the time limit set for the submission of the counter-memorial. The tribunal noted that the latter represents the "outer limit" for raising a jurisdictional objection and cannot be subject to further extensions (para. 267).

In this case, Mozambique filed the jurisdictional objection three years after the constitution of the tribunal, well after the time limit under Article 45(2). Moreover, the tribunal stated that it was impossible for Mozambique not to have reasonably known that the BIT was not in force already at the time of the constitution of the tribunal, given that a simple examination of its own records would have sufficed to gain such knowledge. Thus, the tribunal held that Mozambique failed to meet the time limits set under Article 45(2) for the filing of the jurisdictional objection.

Regardless of the delay, the tribunal must rule on its own competence

Despite Mozambique's delay in filing the jurisdictional objection, the tribunal ultimately held that it had the obligation to independently consider its jurisdiction pursuant to Article 45(3) of the Additional Facility Rules. Indeed, since the objection concerned the BIT's lack of entry into force, it affected the very possibility of initiating arbitration, as it signalled the potential nonexistence of Mozambique's consent to arbitrate. Hence, the tribunal could not refuse to consider an objection of such a fundamental nature once it had been brought to its attention.

The tribunal also noted that, while Article 45(3) states that it "may" on its own initiative decide if the dispute

is within its own competence, the use of this verb only grants the power to consider issues of competence even if not raised by the parties. However, according to the tribunal, it does not give it power to disregard issues of competence merely because the relevant objection was raised too late.

To determine whether there was consent to arbitration, the tribunal looks at the BIT's entry into force

The tribunal then examined the four elements advanced by Mozambique to prove that the BIT was not in force. First, it analyzed the allegation that the procedure for entry into force set out under BIT Article 12 was never completed. This article required not only the treaty's ratification but also a notification from each party to the other that their own internal ratification processes had been completed. In this sense, ratification was only "a step toward the entering into force of the BIT" (para. 341). Since the evidence provided by OB could not conclusively demonstrate that the notification required under BIT Article 12 was ever provided by either Mozambique or South Africa, the tribunal could not conclude that the BIT was in force.

This conclusion was further validated by Mozambique's second argument, concerning an exchange of diplomatic notes between Mozambique and South Africa whereby both states confirmed that the BIT was indeed not in force. Taken together, these two elements were deemed conclusive on the matter. Thus, the tribunal did not need to examine Mozambique's third and fourth allegations, relating to, respectively, the circumstances that South Africa never completed the BIT's internal ratification process of the BIT and that the BIT was never registered with the UN Secretariat under Article 102 of the UN Charter.

The finding that the BIT never entered into force meant that the two bases of jurisdiction grounding OB's claims, one being the BIT itself and the other being Mozambique's Investment Law, did not exist. Indeed, the Investment Law required the parties' express agreement to submit the dispute to arbitration. However, OB identified such express agreement in the BIT itself, thus also linking the claims brought under the Investment Law to the BIT's entry into force.

Claimant's last plea for estoppel is also dismissed

Lastly, the tribunal examined OB's argument that, even if the BIT was not in force, Mozambique should be estopped from raising this circumstance in light of Mozambique's representations to foreign investors



that the BIT was indeed in force. In other words, according to OB, the tribunal should have found that Mozambique implicitly consented to jurisdiction through its words, conduct or silence.

The tribunal, however, held that the requirements under BIT Article 12 could not be presumed met by invoking the doctrine of estoppel, as a treaty's entry into force was purely a matter of law. Moreover, it clarified that to apply the doctrine of estoppel, OB would have needed to show that it had relied in good faith on Mozambique's representations prior to the making of the investment, but no such proof was ever provided to the tribunal.

Based on the above, the tribunal dismissed the case on the basis of lack of jurisdiction. It further held that each party was to bear its own legal costs, while administrative costs of the proceeding (USD 489,929.26 USD) were to be shared equally.

Notes: The tribunal was composed of Makhdoom Ali Khan (president appointed by the Chairman of ICSID's Administrative Council, Pakistani national), L. Yves Fortier (claimant's appointee, Canadian national) and Claus von Wobeser (respondent's appointee, Mexican national). The award is available at <https://www.italaw.com/cases/7663>

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CMC's claims dismissed on the merits: While a settlement agreement may be considered an investment under the BIT and the ICSID Convention, Mozambique did not agree to one

CMC Muratori & Cementisti and others v. Republic of Mozambique, ICSID Case No. ARB/17/23

Inaê Siqueira de Oliveira

In May 2017, Italy-based company CMC Muratori & Cementisti and two of its subsidiaries based in Mozambique (jointly, CMC) filed for ICSID arbitration under the Italy–Mozambique BIT based on the non-payment of an alleged settlement agreement. The award, published in October 2019, dismissed Mozambique's jurisdictional objections but rejected all CMC's claims on the merits, finding that Mozambique did not enter into a settlement agreement. Arbitration costs were equally split.

The alleged settlement agreement

In 2005, CMC won a public tender to repair part of a highway (Lot 3 Project) (para. 92). The contract, financed by the European Development Fund, was signed with the national road administration of Mozambique (ANE, in its Portuguese acronym).

CMC concluded the work, but in mid-2009 the parties engaged in negotiations regarding additional payments. CMC alleged increased costs given delayed access to construction sites and unforeseen days off, among other issues. According to the contract, the claim should first be decided by the engineer/supervisor of the project (para. 98). Out of more than EUR 12.7 million claimed, the engineer/supervisor found that EUR 2.4 million was due (para. 110), and ANE authorized the payment of the latter amount (para. 115).

Dissatisfied with the outcome, and with a different repair project underway (Lot 2 Project), CMC insisted on negotiating with ANE (paras. 117–122). On October 30, 2009, ANE offered an additional payment of EUR 8.2 million. On November 2, CMC replied, stating that “we agree with your proposal...clarifying that [it] is additional to the amount already certified and processed for the payment” (para. 131). Soon thereafter, elections took place in Mozambique, and negotiations, although extended for years, eventually stalled.

Prima facie, a settlement agreement is an investment under the BIT and the ICSID Convention

Mozambique argued that a settlement agreement was not an investment under the BIT and the ICSID Convention. It relied on the Salini test from ICSID case law, stating



it was not fulfilled by a settlement agreement for lack of contribution of capital, duration, risk and contribution to national economic development (paras. 180–181).

As to the definition of investment under the BIT, the tribunal found that the settlement agreement was a “credit for sums of money...connected with an investment,” and, as such, it was within the meaning of Article 1(1)(c) of the Italy–Mozambique BIT.

As to the interpretation of the ICSID Convention, the tribunal rejected the so-called “double-keyhole” test, according to which an investment must meet the requirements of both the BIT and Article 25 of the ICSID Convention. Relying on *SGS v. Paraguay*, to which it referred as a middle ground approach, the tribunal found that the BIT definition of investment did not “exceed what is permissible under the ICSID Convention” (para. 194).

Other jurisdictional objections

Mozambique also argued that (i) the ICSID arbitration was in conflict with the Cotonou Convention, signed between the EU, EU member states and a group of countries in Africa, the Caribbean and the Pacific (ACP countries); (ii) the CJEU decision in *Achmea* had rendered the arbitration clause in the BIT invalid; and (iii) the claims were purely contractual.

The contract for the Lot 3 Project contained a dispute resolution clause requiring any dispute to be submitted to arbitration pursuant to the Cotonou Convention, to the exclusion of any other arbitration rules (paras. 224–225). According to Mozambique, the dispute should be referred to that form of arbitration. CMC, on the other hand, argued that the forum selection clause in the Lot 3 contract did not prevent it from bringing a treaty claim under the BIT (para. 254).

The tribunal found, first, that the Cotonou Convention and the BIT had a “very small” overlap of subject matter (para. 272) and that, to the extent they overlapped, the treaties were compatible (para. 277). Second, it found that the Cotonou Convention provided for arbitration of disputes arising “during the performance” of contracts financed under its framework, which was not the case, as the dispute, although related to a financed contract, had arisen out of disagreement on whether additional payment for completed work was due (paras. 282–287).

The tribunal rejected the *Achmea* objection, as it understood that the CJEU decision had no effect over extra-EU investment treaties (paras. 317–318).

As to the objection that the claims were contractual,

the tribunal recalled that CMC had alleged breaches of substantive BIT standards—FET, discrimination and legitimate expectations, among others—all of which were treaty claims, regardless of their merit (para. 221).

Claims dismissed on the merits as Mozambique did not agree to the alleged settlement

In the merits, CMC argued that Mozambique’s actions related to the alleged settlement agreement—refusal to honour its undertaking to pay; unreasonable delay in responding to CMC’s requests for payments etc.—had breached substantive BIT-based standards of treatment owed to foreign investors.

Whether there was a settlement agreement in the first place was the most controversial issue. While CMC argued that its reply of November 2, 2009, was an acceptance of the previous offer made by ANE, and thus had created a valid and binding settlement agreement, Mozambique argued that CMC’s reply was a counteroffer, not an acceptance (para. 371).

Both parties presented expert evidence on Mozambican law, which they agreed was the applicable law to determining whether an agreement had been reached. After examining the wording of the letters exchanged between CMC and ANE, as well as correspondence exchanged between the Director of ANE and the Minister of Public Works at the time, the tribunal reasoned that ANE had not intended to offer EUR 8.2 million in addition to the EUR 2.4 million already paid (para. 389). Thus, it agreed with Mozambique that CMC had made a counteroffer.

As CMC’s merits claims were, to a greater or lesser extent, predicated on the existence of a settlement agreement, the tribunal dismissed all of them.

Allocation of costs

Finding that each party succeeded in different aspects of the case (CMC on jurisdiction and Mozambique in the merits), the tribunal decided that the parties should bear their respective costs and split the arbitration costs evenly (para. 486).

Notes: The tribunal was composed of John M. Townsend (president appointed by the co-arbitrators, U.S. national), Peter Rees (claimants’ appointee, British national) and J. Brian Casey (respondent’s appointee, Canadian national). The award of October 24, 2019 is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10879.pdf>

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RESOURCES AND EVENTS

RESOURCES

Investment Facilitation: History and the latest developments in the structured discussions

By Sofia Baliño, Martin Dietrich Brauch and Rashmi Jose, published by IISD and CUTS International, January 2020

This negotiating brief was prepared for the Geneva Seminar on the Joint Statement Initiative (JSI) devoted to investment facilitation held on January 28, 2020. The brief outlines the history and developments of investment-related discussions in the World Trade Organization (WTO) context, looking specifically at investment facilitation at the WTO as well as in other forums and contexts. This material has been produced with funding by UK aid from the UK Government. It was produced as part of the TAF2+ Umbrella Grant Project on New WTO Issues, a project of the Trade and Investment Advocacy Fund (TAF2+), and implemented by IISD, in consortium with CUTS, BKP Economic Advisors, and InterAnalysis. Views expressed in the publication are the authors' own and do not necessarily reflect the UK Government's official positions or those of TAF2+. Available at <http://bit.ly/ifseminar>

Joint D-8 Organization for Economic Cooperation – UNCTAD Guiding Principles for Investment Policymaking

By UNCTAD, published by UNCTAD, January 2020

In January 2020, countries members of the D-8 Organization for Economic Cooperation (Bangladesh, Egypt, Nigeria, Indonesia, Iran, Malaysia, Pakistan, and Turkey) agreed on a set of non-binding Guiding Principles for Investment Policymaking jointly developed with UNCTAD. The principles were developed in line with the recommendations of the UNCTAD–D-8 Expert Meeting on “International Investment Policy Reform for Sustainable Development” held in Istanbul, Turkey in September 2019. They provide guidance

for investment policymaking with a view to promoting inclusive economic growth and sustainable development; promoting coherence in national and international investment policymaking; fostering an open, transparent and conducive global policy environment for investment; and aligning investment promotion and facilitation policies with sustainable development goals. Available at <https://investmentpolicy.unctad.org/publications/1221/joint-d-8-organization-for-economic-cooperation---unctad-guiding-principles-for-investment-policymaking>

The ICSID Convention, Regulations and Rules: A practical commentary

By Julien Fouret, Rémy Gerbay and Gloria M. Alvarez (Eds.), published by Edward Elgar, 2019

This commentary offers a new, forward-looking and highly practical interpretation of the ICSID Convention and its associated documents. It is written by a team of experts from private practice, government and academia in the field of international investment law and arbitration, drawn from different backgrounds and jurisdictions. The book provides systematic article-by-article coverage of the convention itself as well as the institution rules, the ICSID arbitration rules, and the ICSID administrative and financial regulations, including commentary as well as analysis of relevant case law. It also includes analysis of current thinking around proposed amendments to ICSID rules and an examination of future developments in their interpretation and implementation. Available at <https://www.e-elgar.com/shop/the-icsid-convention-regulations-and-rules>



The Protection of Foreign Investment in Times of Armed Conflict

By Jure Zrilic, published by Oxford University Press, December 2019

This book explores how foreign investment is protected in times of armed conflict under the investment treaty regime. It does so by combining insights from different areas of international law, including international investment law, international humanitarian law, international human rights law, the law of state responsibility, and the law of treaties. While the protections have evolved over time, with the investment treaty regime providing the strongest legal framework for protecting investors yet, there has been an apparent shift in treaty practice towards safeguarding a state's security interests. The author identifies and analyses the flaws in the existent normative framework, but also highlights the potential that investment treaties have for minimizing the devastating effects of armed conflict. Crucially, he argues that a new approach is needed to appropriately balance the competing interests of host states and investors when it comes to investment protection in armed conflicts. Available at <https://global.oup.com/academic/product/the-protection-of-foreign-investment-in-times-of-armed-conflict-9780198830375>

International Governance and the Rule of Law in China under the Belt and Road Initiative

By Yun Zhao (Ed.), published by Cambridge University Press, December 2019

This book examines China's role in the field of international governance and the rule of law under the Belt and Road Initiative from a holistic manner. It seeks alternative analytical frameworks that take into account legal ideologies and ideals as well as local demand and socio-political circumstances to explain China's legal interactions with countries along the Road. The work evaluates the changes that the initiative might bring to the field of international law and international governance; explores possible approaches to deal with new legal issues that arise under the initiative in China and countries along the Belt and Road; and examines China's role in international governance and rule of law under the initiative and discusses how national laws can be

reformed to accommodate new demands in the new global and regional order. Available at <https://www.cambridge.org/academic/subjects/law/international-trade-law/international-governance-and-rule-law-china-under-belt-and-road-initiative>

Foundations of International Economic Law

By David Collins, published by Edward Elgar, 2019

This introductory textbook explores key legal principles and institutions underpinning the global economy. Featuring discussion of the economic rationale and social impact of the various legal regimes, the author explores the four main pillars in international economic law: international trade, international investment, monetary relations, and development. The book offers an overview of the international legal frameworks and organizations that govern the economic relations among and between states and multinational enterprises. The author highlights the leading cases of international tribunals and the most pressing debates, drawing attention to the role of law in balancing the goal of economic liberalization with important public interest values and the tension between sovereignty and commitment to international rules. Available at <https://www.e-elgar.com/shop/foundations-of-international-economic-law>

The Selection and Removal of Arbitrators in Investor-State Dispute Settlement

By Chiara Giorgetti, published by Brill, September 2019

The first part of the book explains the selection of arbitrators procedurally and comparatively under the most-often used arbitration rules. She then reviews critically arbitrators' necessary and desirable qualities, and addresses some important and related policy issues, such as diversity and repeat appointments. In her work, she also includes an assessment of the calls to review how arbitrators are appointed, and specifically the proposal by the European Commission to create a permanent investment tribunal, the UNCITRAL Working Group III reform process and the ICSID rules amendment proposal. In its second part, the book examines how arbitrators



can be removed and reviews first the applicable provisions, under a variety of arbitration rules, to remove arbitrators who fail to possess the necessary qualities. It then also reviews the relevant case-law on challenges, including a critical assessment of the reasons and calls for reform of the ISDS regime. Available at <https://brill.com/view/title/56250>

Performance Requirement Prohibitions in International Investment Law

By Alexandre Genest, published by Brill, September 2019

In exploring the prohibition of performance requirements in investment treaties, the author focuses on answering two questions: first, how do states prohibit performance requirements in investment treaties? And second, how should such prohibitions of performance requirements be interpreted and applied? The author proposes an empirical typology of performance requirement prohibitions in investment treaties and an in-depth analysis of arbitral awards on the subject. He formulates remarks for a more deliberate and informed interpretation and application of existing performance requirement prohibitions. Available at <https://brill.com/view/title/54255>

EVENTS 2020

Since this issue was drafted many events planned for the following months have been cancelled or postponed in light of the COVID-19 risks. Checking dates in the referred links is recommended.

March 10–12

6th SOAS ARBITRATION IN AFRICA CONFERENCE, “Legal Culture and Arbitration/ADR in Africa,” hosted by School of Oriental and African Studies (SOAS) University of London, in Douala, Cameroon, <https://researcharbitrationafrica.com>

March 12–13

23rd ANNUAL IBA ARBITRATION DAY, “Innovation 360: New and novel ideas for the practice of arbitration—critically tested,” International Bar Association (IBA), at Ciragan Palace Kempinski, Istanbul, Turkey, <https://www.ibanet.org/Conferences/conf1004.aspx>

March 16

6th ANNUAL CONFERENCE ON INVESTMENT TREATIES, “Business Responsibilities and Investment Treaties,” at OECD Conference Centre, in Paris, France, <https://www.oecd.org/investment/conference-investment-treaties.htm>

March 18

ICSID–ABU DHABI GLOBAL MARKET (ADGM) JOINT CONFERENCE, “Investment Treaty Arbitration in the Middle East,” at Al Maryah Ballroom, The Four Seasons Hotel, Al Maryah Island, Abu Dhabi, United Arab Emirates, <https://www.adgmac.com/event/investment-treaty-arbitration-in-the-middle-east>

March 30–April 3

39th SESSION OF UNCITRAL WORKING GROUP III, “Investor–State Dispute Settlement Reform,” United Nations Commission on International Trade Law, New York, United States, https://uncitral.un.org/en/working_groups/3/investor-state



April 7–9

14th FORUM ON RESPONSIBLE MINERAL SUPPLY CHAINS, at OECD Conference Centre, in Paris, France, <http://mneguidelines.oecd.org/forum-responsible-mineral-supply-chains.htm>

May

13th ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS, IISD and Government of Thailand, in Bangkok, Thailand, <https://www.iisd.org/event/13th-annual-forum-developing-country-investment-negotiators>

June 3–5

2nd ANNUAL CONFERENCE OF THE AFRICAN ARBITRATION ASSOCIATION (AfaA), “Reform and Innovation in International Dispute Resolution: African Perspectives,” at Mövenpick Ambassador Hotel, in Accra, Ghana, <https://afaa.ngo/page-18154>

June 16–17

2020 OECD GLOBAL FORUM ON RESPONSIBLE BUSINESS CONDUCT, OECD Conference Centre, in Paris, France, <https://mneguidelines.oecd.org/global-forum>



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Investment Treaty News (ITN)

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