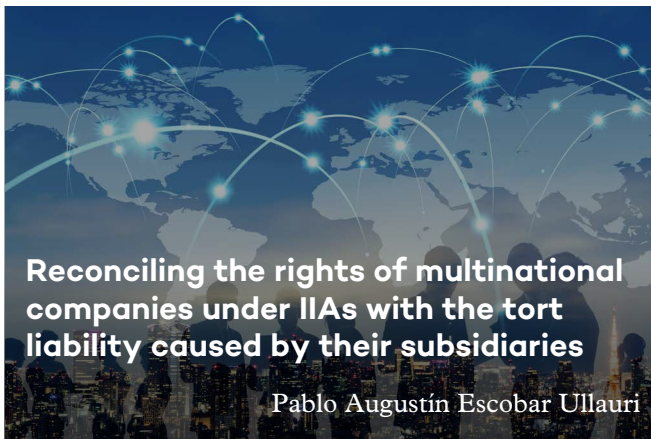




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Reconciling the rights of multinational companies under IIAs with the tort liability caused by their subsidiaries

Pablo Agustín Escobar Ullauri



Does the investment treaty regime promote good governance? The case of mining in Santurbán, Colombia

Anna Sands



The return of investment screening as a policy tool

Jonathan Bonnitcha



Corporate investors' nationality and reforming investment treaties: Can older-generation treaties undermine substantive reforms?

Anil Yilmaz Vastardis



The human rights binding treaty negotiation from an international investment law perspective

Joe Zhang



Are interpretative declarations appropriate instruments to avoid uncertainty? The cases of the Colombia–France BIT and the Colombia–Israel FTA

Carolina Olarte-Bacares, Enrique Prieto-Rios and Juan P. Pontón-Serra



Incorporating corporate social responsibility within investment treaty law and arbitral practice: Progress or fantasy remedy?

David Lark and A. Claire Cutler





Contents

INSIGHT 1 Reconciling the rights of multinational companies under IIAs with the tort liability caused by their subsidiaries.....	4
INSIGHT 2 The return of investment screening as a policy tool.....	7
INSIGHT 3 Are interpretative declarations appropriate instruments to avoid uncertainty? The cases of the Colombia–France BIT and the Colombia–Israel FTA.....	11
INSIGHT 4 Does the investment treaty regime promote good governance? The case of mining in Santurbán, Colombia.....	14
INSIGHT 5 Corporate investors’ nationality and reforming investment treaties: Can older-generation treaties undermine substantive reforms?	17
INSIGHT 6 The human rights binding treaty negotiation from an international investment law perspective.....	20
INSIGHT 7 Incorporating corporate social responsibility within investment treaty law and arbitral practice: Progress or fantasy remedy?	23
NEWS IN BRIEF	28
EU investment screening.....	28
EC suggests withdrawal is a possibility as Energy Charter Treaty modernization negotiations continue	28
Asia-Pacific leaders sign RCEP.....	29
UNCITRAL Working Group III pre-intersessional meeting on the use of mediation in ISDS....	29
IIA Reform Accelerator Launches.....	30
AWARDS AND DECISIONS	32
ICSID tribunal rejects denial of justice claim against the Republic of Panama	32
In another energy case against Italy, an ICSID tribunal rejects all claims on the merits on the basis that Italy acted reasonably and in the public interest	33
ICSID tribunal partially upholds jurisdiction claims under Austria–Poland Encouragement and Protection of Investments Agreement and rejects Achmea’s applicability.....	36
ICSID tribunal dismisses claims of Interocean Oil Development Company and Interocean Oil Exploration Company against Nigeria while upholding its jurisdiction to hear the claims solely based on Nigeria’s domestic investment statute	38
RESOURCES AND EVENTS	40

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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

Reconciling the rights of multinational companies under IIAs with the tort liability caused by their subsidiaries

Pablo Agustín Escobar Ullauri



Because of their structure, multinational corporations (MNCs) can resort to IIAs to protect their subsidiaries. Provided they fulfill certain conditions, MNCs can trigger the investor–state dispute settlement (ISDS) clause under a relevant IIA and seek monetary compensation from host states for the damages caused to their subsidiaries. Conversely, by virtue of the principles of corporate separation and limited liability, MNCs can take advantage of their structure to avoid liability for the damages caused by their subsidiaries. This contradictory treatment highlights the need for a more balanced approach with regards to the rights and obligations of MNCs under IIAs.

Connected when seeking compensation

The structure of MNCs comprises a parent company and its subsidiaries. UNCTAD defines a parent company as an “enterprise that controls assets of other entities in countries other than its home country”¹ while a subsidiary is defined as an “enterprise in which an investor, who is a resident in another economy, owns a stake that permits a lasting interest in the management of that enterprise.”²

Central to these definitions is the connection between the parent company and the subsidiary— i.e., the control that the former exercises over the latter—and is also one of the conditions that investors need to fulfill in order to benefit from the protection granted by IIAs. Access to ISDS is limited to nationals of the state parties to IIAs. Legal persons usually justify their nationality on the basis of their place of incorporation. In that regard, by their incorporation into one of the contracting parties to an IIA, the parent company of an MNC would meet the nationality criterion to qualify as an investor. Another condition for benefiting from the protection of IIAs is meeting the definition of protected investment. It is quite common that IIAs contain a list of assets that are deemed as investments for the purposes of protection, which usually include enterprises.

Lastly, under IIAs, the connection between the investor and the investment must be established. IIAs typically address this relationship by requiring that the investors own or control the investment. Since one of the characteristics of the structure of MNCs is the control that parent companies exercise over their subsidiaries, MNCs would also meet this condition and hence be entitled to protection under IIAs. The fact that the parent company and the subsidiaries are separate entities operating in a different jurisdiction, each with its own legal personality, is irrelevant for the purposes of IIAs; what matters is the connection between them. The same logic, however, does not apply when subsidiaries give rise to tort liability.

Separate when liability arises

In some instances, victims of tort caused by the subsidiaries of MNCs decide to seek redress before the courts of the parent company (home state) instead of their own domestic courts. Several factors may explain this decision, such as deficiencies of the judiciary in the host state, a more favourable liability regime in the home state, and the possibility of targeting the greater assets of the parent company. However, seeking redress before the courts of the home state has proven to be a challenging task because most jurisdictions adhere to the principles of corporate separation and limited liability.

¹ UNCTAD. (2017). *World Investment Report* p. 3. https://unctad.org/en/PublicationChapters/wir2017chMethodNote_en.pdf

² Ibid.



By their incorporation as legal persons under the law of host states, the subsidiaries of MNCs become entities distinct from the parent company. They acquire legal personality and hence are capable of acting independently and of exercising rights and undertaking obligations. In that regard, the principles of corporate separation and limited liability shield parent companies from the liability that may arise from the activities of their subsidiaries. Although such protection is not absolute, tort victims need to overcome significant legal barriers in their attempts to hold parent companies liable.

The first hurdle is convincing the foreign court to assert jurisdiction over the case. A common objection to extraterritorial civil jurisdiction raised by MNCs in common law states is the doctrine of *forum non conveniens*. Other jurisdictional objections include the doctrines of act of state and non-interference in the domestic affairs of other states. Victims may also be confronted with the generally high threshold for piercing the corporate veil as well as difficulties in establishing the existence of liability of the parent company with respect to the subsidiaries.

Hence, pursuant to the principles of corporate separation and limited liability, under the liability regime of most jurisdictions, parent companies and their subsidiaries are presumed not to be connected, regardless of the control parent companies exercise over their subsidiaries. Given the manner in which the control of parent companies over subsidiaries is treated under IIAs, it is conceivable that a parent company could resort to an IIA for protecting a subsidiary and simultaneously invoke the principles of corporate separation and limited liability to avoid being held responsible.

To some extent, this is what occurred in the Chevron case, which is one of the longest and most complex cases involving tort victims and corporate responsibility. In this case, the US courts declined to assert jurisdiction over the claim brought by the Lago Agrio plaintiffs on the basis of *forum non conveniens*. However, Chevron was able to directly challenge decisions of the Ecuadorian courts related to this by invoking the Ecuador–US BIT.

This contradictory treatment, in which MNCs benefit from the advantages of the two regimes, highlights the need for a more balanced and coherent approach to managing the relationship between corporations, their subsidiaries, and host states.

IIAs as a mechanism for balancing the rights and obligations of MNCs

Some of the criticisms levied at IIAs have focused on their asymmetry, as they traditionally impose obligations

exclusively on the host states, while only investors can trigger ISDS. To address these concerns, some new IIAs include provisions such as corporate and social responsibility clauses and make reference to the right of host states to raise counterclaims against the investor. For instance, the Colombia–United Arab Emirates BIT establishes a mechanism for obtaining an investor’s consent for counterclaims.³ However, while having such a mechanism marks a contrast with older IIAs, its operability is still limited, as it can only be invoked once the investor triggers an arbitral proceeding. Most importantly, it does not provide victims access to remedy. For instance, in *Burlington v. Ecuador*, although not expressly provided for under the Ecuador–US BIT, the arbitral tribunal accepted the counterclaim raised by Ecuador with respect to the harm caused by the investor to the environment and infrastructure and accordingly, ordered Burlington to pay USD 41 million in terms of compensation.⁴ However, the citizens who suffered the consequences of the environmental damage had no standing to initiate an arbitration against Burlington pursuant to the Ecuador–US BIT.

In parallel, there is renewed interest at the international level in initiatives on corporate responsibility and the liability of parent companies. These initiatives, which vary in terms of scope and nature, include the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights, and the proposal for a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.⁵

The evolution of IIAs with regard to investor’s obligations, on the one hand, and the international initiatives aimed at enhancing MNCs’ corporate social responsibility, on the other, seem to be moving toward some sort of convergence. In this context, new IIAs could serve as mechanisms for enhancing this convergence.

³ Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the United Arab Emirates <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5728/download>

⁴ Levine, M. (2017, September 26). Ecuador awarded USD 41 million in counterclaim against U.S. oil and gas company Burlington Resources. ITN. <https://www.iisd.org/itn/2017/09/26/ecuador-awarded-41-million-counterclaim-against-u-s-oil-gas-company-burlington-resources-matthew-levine>

⁵ Office of the United Nations High Commissioner for Human Rights (OHCHR). (2018, July 16) *Zero Draft: Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*. <https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/drafttbi.pdf>



As stated above, under IIAs, investors must demonstrate they own or control a covered investment. This connection between the investment and the investor, which is one of the conditions for benefiting from the protection of IIAs, could also operate inversely. Stated differently, tort victims should have access to a remedy against the parent company before the courts of the home state in those cases in which it is demonstrated that the parent company owns or controls the subsidiary that gave rise to the liability. The rationale underpinning this proposal is straightforward. If MNCs benefit from the rights conferred by IIAs to protect their subsidiaries, in exchange they should bear the eventual liability that such investment might give rise to.

The objective of this proposal is threefold. First, it would address one of the main deficiencies of the corporate responsibility framework by circumventing the legal hurdles posed by the principles of corporate separation and limited liability. Hence, tort victims could directly argue over the merits of the case instead of spending years litigating whether the foreign court has jurisdiction over the case. Secondly, it would provide an effective mechanism for enforcing corporate responsibility of MNCs while addressing the concerns expressed with regards to IIAs. Thirdly, it would serve as an incentive for capital-exporting countries to exercise more control over the MNCs under their jurisdiction.

The mechanism for implementing this proposal is relatively simple. The contracting parties to an IIA would incorporate a clause agreeing to grant jurisdiction before their courts to plaintiffs from the other parties alleging to have suffered damages caused by a subsidiary that is owned or controlled by a company under their jurisdiction. In other words, by virtue of this clause, the parties to an IIA would grant extraterritorial civil jurisdiction to their courts over alleged facts that occurred in the host state. Interestingly, Article 20 of the Reciprocal Investment Promotion and Protection Agreement between Morocco and Nigeria⁶ and Article 7.4 of the new Dutch model BIT contain some elements of the proposed clause.⁷

Furthermore, a review of the cases brought by tort victims against parent companies indicates that these cases usually involve mass personal injury resulting from environmental

harm or human rights violations. For this reason (and to prevent the abuse of a provision granting tort victims the right to initiate legal actions against the parent company) it seems advisable to specify that the grounds for bringing such actions are limited to serious offences.

Another element that should be incorporated into the clause is the applicable law, as not only would this avoid further litigation but—most importantly—it would be the legal framework for assessing the liability of the parent company. On this point it is worth recalling that one of the reasons that tort victims initiate legal actions against the parent company is the perception that the legal system of the home state is more favourable to their interests. Hence, it would be advisable to incorporate into the proposed clause language specifying that the applicable law is that of the home state or, in the alternative, to leave the decision of the choice of the applicable law to the foreign plaintiffs.

It is worth noting that unlike other ideas aimed at balancing IIAs (such as allowing third parties access to ISDS) the proposal outlined above does not entail a fundamental change to the international investment regime. It seeks to build upon what seems to be a gradual convergence between the progressive reform of IIAs and the increasing importance that home states of MNCs attach to corporate social responsibility as evidenced by the adoption of national legislation, as it was the case of France,⁸ and the development of international instruments on the matter.

In summary, IIAs could become an effective mechanism for addressing the limited liability of parent companies in relation to their subsidiaries, while balancing the rights and obligations of investors under those instruments. The rationale underpinning this proposal is that, since MNCs are considered to be connected to their subsidiaries when seeking protection under IIAs, that same connection should also be recognized when those subsidiaries incur tort liability.

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⁶ *Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic Of Nigeria* <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download>

⁷ Dutch Ministry of Foreign Affairs. (2019). *Nieuwe modeltekst investeringsakkoorden* (Netherlands model Investment Agreement). <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden>

⁸ Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.



INSIGHT 2

The return of investment screening as a policy tool

Jonathan Bonnitcha



One of the most striking trends in investment policy over the past decade has been the increased use of investment screening as a policy tool, particularly in developed economies. A recent example is the EU's new investment screening framework, which came into effect on October 11, 2020. The EU envisages a network comprising national investment screening mechanisms in each EU member state.¹ The EU regulation establishing the framework provides for coordination and information sharing among the member states, including a process by which the European Commission and other member states can provide comments on an investment undergoing screening in a member state.² New or enhanced investment screening requirements have been adopted in several other countries, including Australia, Canada, New Zealand, the UK, and the United States.³

¹ The decision to establish an investment screening mechanism remains within the exclusive competence of each member state, but the EU has encouraged all member states to establish a national investment screening mechanism and provides support to member states seeking to establish such mechanisms (see https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157945.pdf. As of November 4, 2020, 15 of the 27 EU member states had notified the Commission of the existence of a national investment screening mechanism. See https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf.

² Article 6 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0452&from=EN>

³ United Nations Conference on Trade and Development (UNCTAD). (2019). *National security-related screening mechanisms for foreign investment: An analysis of recent policy developments*. <https://investmentpolicy.unctad.org/publications/1213/investment-policy-monitor-special-issue--national-security-related-screening-mechanisms-for-foreign-investment-an-analysis-of-recent-policy-developments> (UNCTAD 2019)

Although this trend predates the COVID-19 crisis, it has accelerated in response to new concerns about foreign investment in light of the pandemic.

Investment screening, for the purposes of this article, refers to requirements under the law of the host state that foreign investors attain approval prior to (or concurrently with) making a new investment, along with the associated institutional mechanisms by which such approval is granted or withheld. Unlike other regulatory approvals that may be required to carry out an investment project—such as construction permits or mineral leases—investment screening relates to the *admission* of new foreign investment. Investment screening often involves the evaluation of prospective investments according to abstract criteria, such as “national security” or “the national interest.”⁴ The EU framework provides for screening on the grounds of “security or public order.”

Investment screening was widely used as a policy tool in *developing* countries prior to the 1990s. Many developing countries subsequently dismantled requirements for screening and approval as part of a general policy shift toward greater openness to foreign investment.⁵ For example, the early stages of South Korea's industrialization were characterized by a highly restrictive attitude to foreign investment, which was reflected in a cross-sectoral investment screening mechanism. The 1998 Foreign Investment Promotion Act ended the general requirement for new foreign investment to obtain government approval.⁶

The return of investment screening differs from this earlier era in that the countries involved profess a high degree of openness to new foreign investment. For example, Australia's investment policy, which provides

⁴ *Ibid.*, p. 2

⁵ Te Velde, D.W. (2001). *Policies towards foreign direct investment in developing countries: Emerging best-practices and outstanding issues*. Overseas Development Institute, pp. 17–18. <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5543.pdf>

⁶ Nicolas, F., Thomsen, S., & Bang, M. (2013). *Lessons from investment policy reform in Korea* (OECD Working Papers on International Investment, 2013/02). OECD Publishing. <http://dx.doi.org/10.1787/5k4376zqcpf1-en> p. 20.



the framework for investment screening by Australia's Foreign Investment Review Board, begins with the statement "The Australian Government welcomes foreign investment."⁷ Insofar as information is publicly available, it seems that only a small fraction of foreign investments are blocked as a result of screening.⁸ (It is also likely that some potential investment proposals never get off the ground due to the risk that they might be blocked as a result of screening.) Nevertheless, the return of investment screening shows that governments are taking a more active role in assessing the costs and benefits of foreign investments on a case-by-case basis rather than simply assuming that all foreign investment is beneficial.

Triggers and policy criteria in investment screening

There are important differences between the design and operation of investment screening mechanisms in different states. A comprehensive examination of different mechanisms is beyond the scope of this article.⁹ Nevertheless, it is possible to identify two key elements that are common to most investment screening mechanisms.

A first key element is the set of "triggers" that define the scope of the screening mechanism's operation. A proposed investment that meets a particular trigger must go through the screening process; a proposed investment that does not meet any of the triggers can generally go ahead without being evaluated or approved through the screening process. A second key element is the specification of policy criteria by which proposed foreign investments that fall within the scope of the screening mechanism are to be evaluated—for example, "national security" or "the national interest." There is normally a close relationship between these two elements. A proposed foreign investment in the

defence or military sector will normally trigger the operation of an investment screening mechanism that screens investments on national security grounds.

The variety of triggers for investment screening

Different investment screening mechanisms have different sets of triggers, which often operate in combination with one another. Among other factors, triggers may relate to:

- The value of the proposed investment
- The sector in which the proposed investment is being made
- The origin (home state) of the proposed investment
- The characteristics of the investor, particularly whether the investor is a state-owned enterprise or privately owned
- The type of asset being acquired—e.g., purchase of land vs. purchase of shares in a business enterprise
- In the case of investment in a business enterprise:
 - Whether the investment involves acquisition of an existing enterprise or, alternatively, establishment of a new enterprise.
 - The extent of ownership/control over the enterprise—e.g., shareholdings over the threshold of 10% may require screening.
 - The share of a product/service market that would be controlled by the enterprise. (This factor is particularly relevant in investment screening mechanisms that incorporate evaluation of investments on the grounds of competition policy, as is the case in the UK under the Enterprise Act 2002).¹⁰

The set of triggers reflects a set of assumptions about the risks associated with foreign investment that are built into the operation of any particular screening mechanisms. In general, investments in core infrastructure on which an economy depends,

⁷ Australian Department of the Treasury. (2020a). *Australia's foreign investment policy*. <https://firb.gov.au/guidance-resources/policy-documents>

⁸ For example, UNCTAD identifies 20 known foreign investments in nine host states that were blocked or withdrawn following screening on national security grounds between 2016 and September 2019. Over the same period, several thousands foreign investments were granted approval in these same countries, and many more foreign investments would have been made in each of these countries that without triggering the requirements of investment screening. UNCTAD, *supra* note 3, Annex I, Annex II.

⁹ Some law firms have compiled introductory overviews of the investment screening mechanisms in different countries. See, for example, DLA Piper. (2019). *Multi-jurisdiction guide for screening of foreign investment*. https://www.dlapiper.com/~media/files/insights/publications/2019/11/a00493_fdi_guide_v19.pdf. Even this relatively basic comparative review exceeds 100 pages.

¹⁰ For an overview, see DLA Piper (*supra* note 9). The UK is currently proposing amendments to this mechanism https://www.gov.uk/government/news/new-powers-to-protect-uk-from-malicious-investment-and-strengthen-economic-resilience?utm_source=3296e277-d0a4-44ec-9ff2-d6db10546512&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate



investments that create or consolidate monopoly power, and investments by foreign state-owned enterprises are more likely to trigger the operation of investment screening mechanisms.

Policy criteria applied in investment screening

One distinction among investment screening mechanisms is between those focused solely on national security considerations, as is the case in the United States, and those that integrate broader concerns, as is the case with the “national interest” test applied in Australia and the “net benefit” criterion applied in Canada.¹¹ However, in recent years, this distinction has become blurred through the adoption of progressively more expansive conceptions of national security in states where screening is limited to national security considerations.

For example, in August 2018, the U.S. Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA). FIRRMA concerns the role of the Committee on Foreign Investment in the United States (CFIUS)—the U.S.’s investment screening mechanism. FIRRMA defines CFIUS’s basic mandate in the same way as earlier legislation:

the Committee on Foreign Investment in the United States should continue to review transactions for the purpose of protecting national security and should not consider issues of national interest absent a national security nexus.¹²

But FIRRMA, in conjunction with its implementing regulations, changes the way in which CFIUS review operates in significant ways. First, it requires mandatory declaration to CFIUS of investment by an entity in which a foreign government has a substantial interest or investment by any investor in U.S. “critical technology” industries.¹³ Second, it gives CFIUS additional powers to review transactions involving a U.S. business that “maintains or collects sensitive personal data.”¹⁴ The combined effect of these changes is to significantly expand the domain of national security beyond traditional concerns relating to investment in the defence sector and critical infrastructure. Similar

changes are afoot in the UK under the National Security and Investment Bill. The UK government is currently conducting a consultation on expanding requirements to notify proposed foreign investment in a range of technology sectors, communications and “data infrastructure.”

Further developments in response to the COVID pandemic

In March 2020, the European Commission issued a formal communication to the member states containing new guidance on investment screening in light of the COVID-19 pandemic. As previously mentioned, the EU FDI Screening Regulation envisages review of foreign investment by a network of national screening mechanisms according to the policy criteria of “security or public order.” The guidance on COVID-19 does not formally change these criteria but instead encourages member states to interpret them broadly, taking into account:

- The risk that foreign acquisition of health care capacity or medical research establishments could “have a harmful impact on the EU’s capacity to cover the health needs of its citizens.”
- The risk of the sale of “undervalued” assets to foreign investors beyond the health care and research sector by European firms facing temporary financial hardship as a result of the pandemic.¹⁵

These same considerations are reflected in changes to the triggers for investment screening in several other countries.¹⁶ For example, Australia temporarily lowered the monetary trigger for investment screening to AUD 0,¹⁷ in light of concerns about the sale of distressed assets to opportunistic foreign buyers.¹⁸ The effect of this change is that any foreign investment in Australia must go through Australia’s investment screening mechanism

¹⁵ “Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation),” C(2020) 1981 final. https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf

¹⁶ Organisation for Economic Co-operation and Development (OECD). (2020). *Investment screening in times of COVID – and beyond*, p. 3. <http://www.oecd.org/coronavirus/policy-responses/investment-screening-in-times-of-covid-19-and-beyond-aa60af47/>

¹⁷ Australian Department of the Treasury. (2020c). *Temporary measures in response to the coronavirus [GN53]*. <https://firb.gov.au/guidance-resources/guidance-notes/gn53>

¹⁸ Australian Department of the Treasury. (2020b). *Q&A – Temporary changes to foreign investment framework*. <https://firb.gov.au/qa-temporary-changes-foreign-investment-framework>

¹¹ UNCTAD, *supra* note 3, p. 9.

¹² Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) § 1702 (9).

¹³ *Ibid.* § 1706.

¹⁴ § 1703 (4).



for the time being. Notwithstanding these changes, it is unclear whether any foreign investments in Australia or elsewhere have been blocked due to considerations relating to the COVID-19 pandemic.

Implications

The return of investment screening mechanisms has three related implications. First, it points to a growing consensus that all foreign investment is not equally beneficial. Instead of maximizing the *amount* of inward foreign investment, investment policy should be focused on maximizing the benefits of foreign investment. Screening of new foreign investment is one example from a wider policy tool-kit to achieve this goal.

The second implication relates to the importance for states of maintaining the necessary policy space under international agreements to allow for the operation of investment screening mechanisms. Several provisions found in investment treaties potentially create legal complications for the operation of screening mechanisms, including:

- **National treatment and most-favoured nation (MFN) treatment provisions**, insofar as those treaty provisions apply to the pre-establishment phase.
- **Prohibitions on the use of performance requirements.** Many investment screening mechanisms have the power to conditionally approve—as well as to block—foreign investment. Conditions attached to the approval of foreign investment can include requirements relating to the management structure, employment, and sourcing practices of the investment, among others. Such provisions are potentially inconsistent with the sweeping prohibitions on performance requirements found in some investment treaties.
- **Expropriation provisions.** In some countries, foreign investors do not have to obtain approval prior to making a new investment, but the screening mechanism is given the power to “call in”—that is, to force divestment of—investments that are subsequently identified as raising national security concerns. This is the model proposed under the UK’s National Security and Investment Bill. In the absence of appropriate exceptions, an arbitral tribunal might characterize the exercise of call-in powers as an expropriation requiring compensation under an investment treaty. This issue has received almost no attention to date, even though call-in powers are not unique to the UK’s investment screening mechanism.

Third, many of the concerns that are now addressed by investment screening were not foreseen even a decade ago. This is true both of the range of transactions that are now seen as implicating national security in some way, and of concerns relating to domestic security of supply in the health care sector and distressed asset sales prompted by the COVID-19 pandemic. In decades to come, investment policy may well be grappling with new issues that are difficult to anticipate now. This a further reason to ensure that the treaties being negotiated today do not unduly tie the hands of governments in the future.

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INSIGHT 3

Are interpretative declarations appropriate instruments to avoid uncertainty? The cases of the Colombia–France BIT and the Colombia–Israel FTA

Carolina Olarte-Bacares, Enrique Prieto-Rios, Juan P. Pontón-Serra



Background: Constitutional review and IIAs

According to the Colombian Constitution, the Constitutional Court must assess the constitutionality of all international treaties after signature and prior to ratification. As such, if the Court rules that the whole treaty or one of its clauses is unconstitutional, it cannot enter into force in its entirety.¹ In 2019, the Colombian Constitutional Court issued judgments C-252² and C-254,³ related to the constitutionality control of the BIT signed with France in 2014 and of the FTA signed with Israel in 2013, respectively.⁴

These two judgments have been regarded as landmark decisions⁵ for three main reasons. First, the Court considered that there were sufficient reasons to abandon the lenient standard of review that had characterized the constitutionality control carried out with regard to previous IIAs in favour of a stricter standard of review, assessing the treaties from the standpoint of reasonableness.⁶ Second, the Court used arbitral awards in order to understand the scope and content of each clause. Third, for the first time the Court conditioned the constitutionality of several provisions on the issuance of joint interpretative declarations that clarified their scope and content. However, the Court's methodology has raised different concerns,⁷ one of which was whether the joint interpretative declarations were suitable means under international law to address the Court's concerns of constitutionality.

The joint interpretative declarations

The Constitutional Court considered in judgment C-252 (France–Colombia BIT) that several provisions of the treaty, first, admitted interpretations that were contrary to the Constitution and, in particular, to the principles of equality, legal certainty, and national sovereignty and, second, affected the competences of national authorities. Accordingly, the Court aimed, through joint interpretative declarations, to (i) prevent that an unjustifiable treatment to foreign investors was granted against national investors, (ii) clarify vague aspects of the FET provision, and (iii) define the scope and content of expressions such as “inter alia,” “treatment,” “in like situations,” “legitimate

¹ Constitución Política de Colombia (1991) art. 141:10; the Spanish original of the Constitution can be found at http://www.secretariassenado.gov.co/senado/basedoc/constitucion_politica_1991.html.

² For a more detailed analysis of judgment C-252, see Ricaurte, F.S. (2019). Judgment C-252 of 2019 of the Constitutional Court of Colombia: Change of precedent on the control of BITs. *Investment Treaty News*. <https://rspace.iisd.org/itn/2019/09/19/judgment-c-252-of-2019-of-the-constitutional-court-of-colombia-change-of-precedent-on-the-control-of-bits-federico-suarez-ricaurte/>; the Spanish original of the judgment can be found at: <https://www.corteconstitucional.gov.co/relatoria/2019/c-252-19.htm>.

³ The Spanish original of judgment C-254 can be found at: <https://www.corteconstitucional.gov.co/relatoria/2019/C-254-19.htm>

⁴ Constitutional Court of Colombia, Judgment C-252 of 2019 (Reporting Judge: Carlos Bernal Pulido June 6, 2019) <https://www.corteconstitucional.gov.co/relatoria/2019/c-252-19.htm>; Constitutional Court of Colombia, Judgment C-254 of 2019 (Reporting Judge: José Fernando Reyes Cuartas June 6, 2019). <https://www.corteconstitucional.gov.co/relatoria/2019/C-254-19.htm>

⁵ Tamayo-Alvarez, R. (2020). Constitutionality of the Colombia-France bilateral investment treaty. *American Journal of International Law*, 114(3). 475.

⁶ According to judgment C-252, this implies analyzing (i) the legitimacy of the goals of the treaty and its provisions, and (ii) the suitability of the treaty measures to achieve these goals (Judgment C-252 of 2019, para. 65).

⁷ Alejandro Linares Cantillo, Clarification of the vote and partial dissenting vote in Judgment C-252/19 (June 6, 2019); Diana Fajardo Rivera, Partial dissenting opinion in Judgment C-252/19 (June 6, 2019); Zuleta, E. & Rincón, M.C. (2019, July 4). Colombia's Constitutional Court conditions ratification of the Colombia–France BIT to the interpretation of several provisions of the treaty. *Kluwer Arbitration Blog*. <http://arbitrationblog.kluwerarbitration.com/2019/07/04/colombias-constitutional-court-conditions-ratification-of-the-colombia-france-bit-to-the-interpretation-of-several-provisions-of-the-treaty/>; Tamayo-Alvarez, *supra* note 5, at 471–478.



expectations,” and “necessary and proportional,”⁸ which were included in the MFN, FET, and indirect expropriation provisions of the BIT.⁹ Following the judgment, on August 5, 2020, France and Colombia signed the joint interpretative declarations; some of its most relevant provisions are as follows:

1. “The Agreement shall not grant any unjustified or more favorable treatment to foreign investors with respect to national investors.”
4. “The legitimate expectations [...] refer to a situation when a Contracting Party had approached a specific investor to induce him to invest. Hence, creating reasonable expectations that motivate the decision of the latter to make or to maintain the investment and that, nonetheless, end up being frustrated by actions of the said Contracting Party.”
6. “Notwithstanding paragraph 4 of article 5 of the Agreement, the substantive obligations provided in other [IIAs] and commercial treaties signed between the Contracting Parties shall not constitute on their own ‘treatment’ in relation to the most favored nation principle and therefore shall not give rise to a breach of this Article [...]”
7. The assessment of the necessity and proportionality of a measure is to be made “[...] on a case by case analysis that will take into consideration the existence of appropriate and reasonable alternatives available in light of the circumstances. Also, the reasonable relationship of proportionality between the means employed and the importance of the objective pursued. It is understood that a measure will not need to be proportional if its impact is so severe in light of the objective pursued that seems manifestly excessive.”¹⁰

In the case of the Israel FTA, the Constitutional Court followed the same standard of review set by the judgment

on the France–Colombia BIT (C-252). It raised objections to particular provisions of the investment chapter by directly quoting some of its considerations put forward on judgment C-252 and requested both governments to make joint interpretative declarations. As a result of this judgment, Israel and Colombia agreed on a joint interpretative declaration negotiated during April and May 2020.

Paragraph 1 and 2 of this joint interpretation are analogous to paragraphs 1 and 6 of the joint interpretation on the France–Colombia BIT, respectively.¹¹ Moreover, the interpretation addresses the expression “reasonable expectations” by establishing that:

3. The assessment of the reasonable nature of an expectation depends “on factors such as whether the government provided the investor binding written guarantees and the nature and extension of the governmental regulation or the potential governmental regulation in the respective sector.”¹²

The joint interpretative declarations in light of the judgments C-252 and C-254 and of public international law: Amendments rather than interpretations?

The Court’s decision to request joint declarative interpretations can be explained by the fact that IIAs are encrypted. The term “encryption” has been previously employed to describe the “dialectical relationship of technicisms and vagueness” that characterizes the international investment law, specifically IIA and awards and which precludes public participation and public accountability.¹³

Nonetheless, it is doubtful whether the interpretative declarations effectively decrypt the treaties and fully resolve some of the concerns put forward by the Constitutional Court. As an example, paragraph 1 of the interpretation on the France–Colombia BIT, which

⁸ Judgment C-252, *supra* note 6.

⁹ *Agreement between the Government of the Republic of Colombia and the Government of the French Republic for the Promotion and Protection of Investments* (2014); the Spanish original of the BIT can be found at: http://apw.cancilleria.gov.co/Tratados/adjuntosTratados/6F5A7_FRANCIA_B-ACUERDOFOMENTOYPROTECCIONINVERSIONES2014-TEXT0.PDF

¹⁰ *Joint Interpretative Declaration between the Republic of Colombia and the French Republic Regarding the Agreement for the Promotion and Protection of Investments between Colombia and France*, Signed on July 14th, 2014 (2020) (unofficial translation from the Spanish original, which can be found at: http://apw.cancilleria.gov.co/Tratados/adjuntosTratados/17523_DECLARACION%20IN%20TERPRETATIVA%20CONJUNTA%20APPRI%20FRANCIA.PDF).

¹¹ *Joint Interpretative Declaration between the Republic of Colombia and the State of Israel Regarding the Free Trade Agreement between Colombia and Israel, Signed on September 30th, 2013* (2020) (unofficial translation from the Spanish original, which can be found at: http://apw.cancilleria.gov.co/Tratados/adjuntosTratados/C7994_DECLARACION%20IN%20TERPRETATIVA%20CONJUNTA%20AL%20TLC%20CON%20ISRAEL.PDF).

¹² Joint interpretative declaration, *supra* note 10, para. 3.

¹³ Prieto-Ríos, E. (2018). Encrypted international investment law in the age of neo-colonialism. In R. Sanin-Restrepo (Ed.), *Decrypting power*. Rowman & Littlefield Publishers.



aims to prevent an “unjustifiable” favourable treatment to foreign investors over national investors, does not, in fact, resolve the issue. The term “unjustifiable” was defined neither by judgment C-252 nor by the declarative interpretation. However, the BIT itself, which is now part of the Colombian legal system, could be considered both by national authorities and by arbitral tribunals as a justification for treating foreign investors more favourably than national investors.

Other provisions do not improve the ambiguity problem and, in some cases, worsen it. For instance, paragraph 4 of the interpretation on the Colombia–France BIT is circular, as it defines “legitimate expectations” by reference to “reasonable expectations.” Similarly, paragraph 3 of the interpretation on the Israel FTA fails to properly define “reasonable expectations” since it includes the expression “such as” before mentioning state conduct that would create said expectations. This expression opens the possibility that other state actions not mentioned in the joint interpretation may be considered to generate reasonable expectations.

Moreover, given the exact wording of the Court’s conditions on the treaties, some concerns were raised regarding the nature of the underlying statements that were requested by the Constitutional Court. Specifically, these relate to whether some of the requests made by the Court and included in the joint interpretative declarations were substantial changes to the treaties amounting to a real amendment and not mere interpretations of the legal instrument. In the scenario of an amendment, the treaties would require a renegotiation of their terms¹⁴ or even to reservations¹⁵ notwithstanding their bilateral nature.

While the 2011 ILC Guide to Practice on Reservations states that the interpretation of a bilateral treaty by one party that is accepted by the other party “constitutes an authentic interpretation of that treaty,”¹⁶ the 2013 ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties states that subsequent agreements on the understanding by the parties as to the meaning of the treaty are “authentic means of interpretation”¹⁷ that do

not “necessarily possess a conclusive, or legally binding, effect,”¹⁸ in opposition to an “authentic interpretation.”¹⁹ This makes the distinction between an interpretation and an amendment of the treaty crucial. The answer to this question can produce effects at the international level, given that tribunals would give the declarations a different weight depending on their nature. Furthermore, it will have an effect at the domestic constitutional level, given that, if the joint declaration constitutes an amendment, it would have to undergo the same ratification process as the treaties. It is worth recalling that the acceptance by arbitral tribunals of the interpretation of the Free Trade Commission of NAFTA aimed at limiting the reach of the MST depended mostly on whether it was deemed as a reasonable interpretation or as an amendment, in which case it was largely ignored.²⁰

Conclusion

From a constitutional and an international standpoint, it seems that the joint interpretative declarations on both treaties are not sufficient to overcome the encryption and uncertainty surrounding IIL. While the Constitutional Court was right to pursue a stricter constitutionality review of the treaties discussed here, the most suitable means to implement it are still to be found.

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¹⁴ Zuleta & Rincón, *supra* note 7.

¹⁵ Linares Cantillo, *supra* note 7.

¹⁶ General Assembly. (2011). *Reservations to Treaties. Text and Title of the Draft Guidelines Constituting the Guide to Practice on Reservations to Treaties, as Finalized by the Working Group on Reservations to Treaties from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011, A/CN.4/L.779 § (2011) Guideline 1.6.3.*

¹⁷ General Assembly. (2013b). *Subsequent agreement and subsequent practice in relation to the interpretation of treaties. Text of draft conclusions 1–5 provisionally adopted by the drafting committee at the Sixty-Fifth Session of the International Law Commission. 6 May–7 June and 8 July–9 August 2013. A/CN.4/L.813 § (2013) Draft conclusion 4.*

¹⁸ General Assembly. (2013a). *Report of the International Law Commission. Sixty-Fifth Session. Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties, 22.*

¹⁹ Gaukrodger, D. (2016). *The legal framework applicable to joint interpretative agreements of investment treaties.* OECD Working Papers on International Investment. <https://doi.org/10.1787/5jm3xgt6f29w-en>

²⁰ See for instance Brower, C.H. (2005). Why the FTC notes of interpretation constitute a partial amendment of NAFTA Article 1105. *Virginia Journal of International Law*, 46(2). 349.



INSIGHT 4

Does the investment treaty regime promote good governance? The case of mining in Santurbán, Colombia

Anna Sands



Supporters of the investment treaty regime often argue that it encourages good governance and the rule of law in countries to which it applies. The risk of investment claims is thought to incentivize states to create fair and consistent procedures for foreign investors which should then have positive spillover effects for the general population. However, there are very few studies empirically testing this proposition. My study of mining investments in the Santurbán páramo¹ in Colombia shows that the conception of good governance promoted by investment arbitration is an incomplete one. By prioritizing legitimate expectations and predictability, it does not give sufficient attention to systems of checks and balances existing in host states, and particularly to the role of the judiciary. It may even assume that judiciaries in developing countries are politicized or weak by default. The Santurbán study shows that, for a fuller understanding of the effect of the investment regime on good governance, checks and balances need to be considered alongside the predictability of a legal system.

The good governance rationale

Promoting good governance and the rule of law is frequently invoked as the rationale for the investment treaty regime. Supporters of investment arbitration

argue that its existence incentivizes the reform of domestic legal systems in developing countries and that the standards imposed on investors ensure predictability and consistency in decision making by domestic courts.² This justification has also been raised by investment tribunals. As analyzed by Sattorova,³ in a string of arbitral awards tribunals have proclaimed that transparency, stability, predictability, and consistency are elements of the FET standard.⁴ In *Occidental*, for example, Ecuador was sued for a denial of tax refunds to a foreign investor.⁵ The country's tax agency had annulled the grant of refunds, finding it based on a mistaken interpretation of tax law. The arbitral tribunal found that there was an international obligation not to alter the legal and business environment in which the investment had been made, which Ecuador had breached through its tax agency. In this and other cases, the tribunals have interpreted the FET standard to encompass not just a procedural standard on the clarity of changes to the legal environment but also a substantive requirement of legal stability.

The need for empirical testing

While the “good governance rationale” plays an important role in arbitral decisions and policy discussions, there has been little empirical testing of the proposition that recourse to investment arbitration enhances good governance and the rule of law. The few studies on the topic have questioned the validity of such arguments, primarily due to the finding that many officials from the studied countries had little awareness

¹ An alpine ecosystem.

² Dolzer, R. (2005). The impact of international investment treaties on domestic administrative law. *New York University Journal of International Law and Politics*, 37(4), 953–972; Muchlinski, P., Ortino, F., & Schreuer, C. (2008). Preface. In *The Oxford handbook of international investment law*. Oxford University Press.

³ Sattorova, M. (2018). *The impact of investment treaty law on host states: Enabling good governance?* Hart Publishing.

⁴ *Metalclad Corporation v. The United Mexican States*, ARB(AF)/97/1 (ICSID 2001). <https://www.italaw.com/cases/671>; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, No. ARB/06/11 (ICSID 2015). <https://www.italaw.com/cases/767>; *Técnicas Medioambientales Tecmed, S. A. v. The United Mexican States*, ARN(AF)/00/2 (ICSID 2003). <https://www.italaw.com/cases/1087>

⁵ *Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11



of the implications of investment treaties.⁶

There is also a need for more discussion of the role that domestic judiciaries play regarding investment treaty claims. Generally, the “good governance rationale” assumes that domestic judiciaries in developing countries are weak and likely to be politicized, and yet there has been a broader trend, in Latin America and around the world, of courts stepping outside of formalist conventions and taking a more activist stance toward protecting constitutional rights.⁷ In Latin America, courts have become much more important as political actors.⁸ This has taken place partly thanks to activist litigators emphasizing the role of courts as protectors of human rights, and it has been further aided by the development of protections of courts from political pressures.⁹ The perception of judicial bodies in the Latin America as by default weak and requiring substitution by an international arbitration body is out of date and does not give space to the role of domestic judiciaries in pursuing the rule of law.

My research on mining in the Santurbán páramo contributes to filling these gaps in the literature on investment treaties and good governance through an empirical study of the interactions between a domestic judiciary and investment arbitration.

The story of Santurbán

The páramo is a highland ecosystem, unique to the Andes, that is home to significant biodiversity and an important source of fresh water. Many of the Colombian páramos also happen to lie on gold and mineral reserves. During the Uribe administration (2002–2010) attracting foreign investment in extractive industries was a top priority, and many multinational mining companies initiated activity in these areas. This created a complicated situation for

the Santos governments (2010–2018), which, while supportive of extractive industries, wanted to develop environmental protection of the páramos. Santurbán, traditionally a mining region, was a particularly difficult case. Strong civil society groups in the cities surrounding the páramo oppose large-scale mining, while many people living in the páramo depend on some form of mining for their livelihood.

The government set out to delimit the páramos and prohibit mining within them. Nonetheless, the prohibition included a sunset clause that allowed those who had already obtained mining licences to continue.¹⁰ A Constitutional Court case found that clause to be unconstitutional and immediately placed a prohibition on mining.¹¹ The judges were aware that this could bring about investment claims—indeed, it was one of the key reasons for Judge Linares’ dissent, arguing for the sunset clause.

Subsequently, mining companies brought investment claims against the Colombian state. They based their claims, inter alia, on the legal uncertainty regarding the delimitation of the páramos.¹²

The Santurbán study analyzes the different stages of decision making that led to the prohibition of mining, and it is based on over 30 interviews with officials, judges, and civil society representatives, conducted during two months of fieldwork in Colombia. A detailed analysis of the decision-making process sheds light on the effects that investment arbitration can have on good governance in practice, in particular regarding the role of the national judiciary.

An incomplete concept of good governance/rule of law

Contrary to the findings of other empirical studies of the impact of investment treaties, officials and judges involved in the Santurbán case generally had a very high level of awareness of investment law and its implications. Further, Colombia has put in place programs to train

⁶ Bonnitcha, J. (2019). *The impact of investment treaties on domestic governance in Myanmar* (SSRN Scholarly Paper ID 3644056). Social Science Research Network. <https://doi.org/10.2139/ssrn.3644056>; Sattorova, M., *supra* note 3.

⁷ Gargarella, R., Domingo, P., & Roux, T. (2006). *Courts and social transformation in new democracies: An institutional voice for the poor?* Ashgate; Rodríguez-Garavito, C. (2011). Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America. *Texas Law Review*, 89(7), 1669–1698.

⁸ Helmke, G., & Figueroa, J. R. (2013). *Courts in Latin America*. Cambridge University Press.

⁹ Gonzalez-Ocantos, E. (2019). Courts in Latin American politics. In G. Prevost & H. Vandem (Eds.), *The Oxford encyclopedia of Latin American politics*. Oxford University Press. <https://doi.org/10.1093/acrefore/9780190228637.013.1680>; Rios-Figueroa, J. (2013). Institutions for constitutional justice in Latin America. In *Courts in Latin America* (pp. 27–55). Cambridge University Press.

¹⁰ Ley 1450 por la cual se expide el Plan Nacional de Desarrollo 2010–2014, 90 (2011). <https://www.dnp.gov.co/DNPN/Plan-Nacional-de-Desarrollo/Paginas/Planes-de-Desarrollo-anteriores.aspx>

¹¹ C035-16, (Colombian Constitutional Court 2016). <https://www.corteconstitucional.gov.co/relatoria/2016/c-035-16.htm>

¹² *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41.; *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12.; *Galway Gold Inc. v. Republic of Colombia*, ICSID Case No. ARB/18/13.



state officials about investment law, part of a broader strategy of creating a stable juridical environment.¹³ The risk of arbitration claims was discussed in the Constitutional Court, but the majority of the judges did not consider it a valid reason to allow mining in the *páramos*; rather, they founded their decision to prohibit it on constitutional principles. The judges I interviewed told me that there had been heated discussions about the risk that the proposed prohibition would lead to international claims. Nonetheless, the majority of the judges did not consider the risk of arbitration to be a relevant consideration. The judges saw their role as providing a counterweight to the short-term perspective of those in power through taking a more long-term view of the constitutional problem (paragraph 176 of the judgment). Thus short-term effects—the risk of arbitration—could be disregarded if protecting constitutional rights so required.

The mining companies suing Colombia claim that their legitimate expectations were violated due to Colombia's alleged uncertain, unstable, and unpredictable legal framework. However, the case study shows that any lack of predictability involved in the process of regulating was not due to weak and incompetent institutions. Rather, the shift in policy was due to strong institutions that were capable of exercising judgment independently of each other. The Constitutional Court made decisions that checked the power of the government. Many authors writing on the rule of law argue that an independent judiciary is one of its essential components.¹⁴ For the investment treaty regime to fully support the rule of law, it needs to recognize that there may be cases in which the correct functioning of an independent judiciary, which involves conducting review of laws created by the other branches of the state, leads to somewhat less stability and predictability of the legal regime governing the rights of the investor. Therefore, the “good governance rationale,” through being based on the presumption that judiciaries are weak and inefficient, ignores the possibility that the law-making process could lead to less predictable outcomes (thus creating legal uncertainty) precisely because the judiciaries are strong and doing their job.

The need to consider checks and balances

The impact of the investment treaty regime on the rule of law and good governance will vary contextually; to understand it better, we need to test it empirically. The Santurbán case highlights the crucial role of the domestic judiciary, which is not sufficiently recognized in the discussion of good governance and the rule of law in arbitration tribunals. It shows that the concepts of good governance and the rule of law in arbitral court decisions are incomplete, as they do not consider the importance of checks and balances in a state's decision-making process. A fuller understanding of these concepts would recognize that, at times, checks on the exercise of power can justifiably lead to less stability or predictability of the legal framework.

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¹³ CONPES. (2010). *National Council of Social and Economic Policy*, Doc. 36842 of 2010.

¹⁴ Bingham, T. H. (2011). *The rule of law*. Penguin.; Raz, J. (1979). *The authority of law*. Oxford University Press.



INSIGHT 5

Corporate investors' nationality and reforming investment treaties: Can older-generation treaties undermine substantive reforms?

Anil Yilmaz Vastardis



Scrolling through the UNCTAD investment dispute settlement database, one can detect—even without reading the awards or decisions—that some businesses publicly known to be corporate nationals of a particular state seek protection under investment treaties of other states. For instance, the UNCTAD database shows a claim filed by Chevron against the Philippines in 2019.¹ One would expect this claim to be filed under the U.S.–Philippines investment treaty, as Chevron Corporation is incorporated and headquartered in the United States. But it appears from the UNCTAD investment agreements database that there is no investment treaty between the United States and the Philippines. Instead, Chevron filed this claim under the Philippines–Switzerland investment treaty utilizing its Swiss subsidiary Chevron Overseas Finance GmbH.

One investor, convenient nationalities

This practice of nationality shopping is relatively common and largely permitted in investment treaty practice. It is enabled by investment treaty texts and generous arbitral interpretations of a corporation's link to its alleged home state.² In the example of Chevron, while it certainly has a corporate presence in Switzerland,

through which it may have channelled its investments to the Philippines, the question remains as to whether this alone makes Chevron a Swiss investor. The relevant investment treaty defines a protected Swiss “investor” to include any company incorporated under Swiss law. According to this definition, Chevron in the Philippines is a Swiss investor and not a U.S. investor. However, according to two prior investment treaty claims that Chevron filed against Ecuador, it is a U.S. investor.³ This is not an isolated instance. In its 2011 claim against Australia, Philip Morris argued it was a Hong Kong investor,⁴ while at the same time arguing in a 2010 claim against Uruguay that it was a Swiss investor.⁵ Philip Morris is a well-known, U.S.-headquartered tobacco company. But in investment treaty claims, it has never been a U.S. investor. Similarly, Mobil initiated a claim against Venezuela in 2007 as a Dutch investor⁶ and against Argentina in 1999 as a U.S. investor.⁷ Total was a French investor in its claim against Argentina in 2004⁸ but a Dutch investor in a claim against Uganda in 2015.⁹

Good governance and development narratives no longer justify manufactured nationalities

There are many similar instances of less well-known corporate investors relying on manufactured corporate identities or nationalities in order to invoke investment treaty protections—and all of this is often permitted within the boundaries of investment treaty law and corporate law. Taking a page from Katharina Pistor's *Code of Capital*, we can understand investment treaties

¹ *Chevron Overseas Finance GmbH v. The Republic of the Philippines* (PCA Case No. 2019-25)

² Yilmaz Vastardis, A. (2020). *The nationality of corporate investors under international investment law*. Hart Publishing, pp. 1-12.

³ *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (I) (PCA Case No. 2007-02/AA277); *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (II) (PCA Case No. 2009-23)

⁴ *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12)

⁵ *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7)

⁶ *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27)

⁷ *Mobil Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/99/1)

⁸ *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1)

⁹ *Total E&P Uganda BV v. Republic of Uganda* (ICSID Case No. ARB/15/11)



and corporate law principles as offering a legal coding of foreign investment that enables investors to change identity so as to increase the durability and priority of their interests.¹⁰ Those in favour of this flexibility of investment treaty law argue that we should focus on the bigger picture: the objective of investment law to enhance good governance, and economic development would be better achieved if all investors had access to treaty protections and investment arbitration, regardless of their origin or nationality.¹¹ Thus, it is in line with the objectives of investment treaties to interpret the concept of investor or corporate nationality expansively and flexibly—so much so that an investor can be a national of one state for the purpose of one claim and a national of another state for the purpose of another claim.

The good governance and development narratives of investment treaties, however, have been challenged by recent empirical work.¹² After 20 years of proliferation of investment treaty claims, there is little evidence to support these narratives as justification for expanding the personal scope of investment treaty protections. States have begun to pay some attention to the personal scope of their investment treaties, especially for corporate investors, in newly negotiated investment treaties. Increasingly, states are adopting more detailed clauses that require a corporate investor to have a stronger connection to its home state than merely being incorporated in that jurisdiction.¹³ The question of personal scope of investment treaty protection is also considered by the UNCITRAL Working Group III as one of the reform areas to overcome consistency and correctness problems in investor–state dispute settlement.¹⁴

The recently published UNCTAD IIA Reform Accelerator also identifies “investor” definitions among the eight key provisions of investment treaties in most need for reform. The objectives of these reform efforts are to tighten the definition of “investor” and introduce “denial of benefits” clauses to prevent corporate investors’ reliance on tenuous links with a home state to access treaty protection.

Reform and the pitfalls ahead

Reform is crucial in the area of personal coverage of treaties to (1) restore the reciprocal nature of investment treaty protections and (2) to avoid the reforms pursued by states on substantive investment treaty standards being sidestepped by investors by relying on the remaining older-generation investment treaties. The permissive definitions of investor in older treaties and expansive interpretations of even the tighter definitions by arbitral tribunals¹⁵ have resulted in an undermining of the reciprocal nature of investment treaty commitments among states. There is no barrier for a U.S. investor to rely on investment treaty protections for its investments in the Philippines, despite the two countries not having committed to extending such protection to each other’s investors. The definitions of investor, coupled with the convenience of creating corporate entities, artificially transform the standards of protection included in investment treaties into pseudo-*erga omnes* obligations for states which can be invoked by any investor, whether or not they are genuinely covered by a treaty. While reform of treaties is necessary to reverse this trend, treaty wording alone may not offer the tightening of standards the states are aiming for. Investment arbitration tribunals continue to have decisive input over the interpretation of treaty standards.¹⁶ This means that even tighter standards can be loosened in the process of arbitral interpretation. One of the key reforms added to investor definitions is to require that a protected investor has its real seat or substantial business activities in the home state. Yet, in a recent arbitral award in *Mera Investment v. Serbia*, the tribunal interpreted the concept of real seat as the place of incorporation and permitted a shell corporation indirectly owned by nationals of the host state to benefit from the investment treaty, despite the investor lacking the genuine connections to the home state sought in the investment treaty.¹⁷ Thus, textual reform of treaties may

¹⁰ Pistor, K. (2019). *The code of capital: How the law creates wealth and inequality*. Princeton University Press (2019), p. 3; See also Yilmaz Vastardis, A. (2020). Investment treaty arbitration as justice bubbles for the privileged. In T. Schultz & F. Ortino (Eds.) *The Oxford handbook of international arbitration*. Oxford University Press.

¹¹ Schill, S.W. (2009). *The multilateralization of international investment law*. Cambridge University Press, 17–18; Dolzer, R. & Schreuer, C. (2012). *Principles of international investment law* (2nd Ed.). Oxford University Press, p. 25.

¹² Sattorova, M. (2018). *The impact of investment treaty law on host states: Enabling good governance?* Hart Publishing, at 196: “The principal finding of our empirical investigation is that host states do not necessarily respond to their encounter with investment treaty law by becoming more risk-averse and compliant with good governance norms.”; On the contribution of IIL to economic development see Bonnitca, J., Poulsen, L., & Waibel, M. (2017). *The political economy of the investment treaty regime*. Oxford University Press. pp. 46–47.

¹³ See, e.g., EU–Singapore Investment Agreement adopting incorporation and real seat tests combined with substantive business operations (Art. 1 (2)(5)).

¹⁴ UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) 36th Session Vienna, 29 October–2 November 2018. Possible reform of investor–state dispute settlement (ISDS): Consistency and related matters, A/CN.9/WG.III/WP.150 [17]; UNCITRAL Working Group III (Investor–State Dispute Settlement Reform) 38th session Vienna, 14–18 October 2019. Possible reform of investor–state dispute settlement (ISDS): Shareholder claims and reflective loss, A/CN.9/WG.III/WP.170.

¹⁵ Yilmaz Vastardis, *supra* note 2, pp. 199–206.

¹⁶ Some new treaties have taken steps to establish bilateral treaty committees or other procedures to offer joint interpretations of treaty texts; See e.g. CETA, Korea–Uzbekistan BIT, Article 15.

¹⁷ *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2.



not achieve the outcomes desired with the current model of investment arbitration.

The second consequence of the current definitions of investor and arbitral interpretations is that they can undermine substantive investment treaty reforms pursued by host states. This is due to investors' ability to adopt a new (or rely on an existing) corporate nationality, established using subsidiaries or mailbox companies and based on tenuous links with a home state that has an older-generation treaty with the host state. In this way, investors who may genuinely be nationals of a home state that has recently signed a reformed treaty with the host state can sidestep the reformed treaty and rely on an older-generation treaty to bring their claims against the host state. Many new investment treaties introduce more nuanced substantive standards of protection and exceptions to the application of standards such as the FET standard or indirect expropriation in the areas of policies and measures introduced in the public interest.¹⁸ If, for instance, a Canadian investor within the EU wishes to avoid the provisions safeguarding the host state's right to regulate to achieve legitimate public policy objectives,¹⁹ it can rely on an older-generation investment treaty signed by the relevant EU member state and a third state in whose territory the investor can set up a shell corporation or has an existing subsidiary to reroute its investment before filing a claim and before a dispute becomes reasonably foreseeable.²⁰

Conclusion

Many states are working on reforming their investment treaties to curb the excesses of the older-generation investment treaties. Unlike their first-generation counterparts, these newer generation treaties are being negotiated with greater attention to detail and lessons learned. The process for any state to reform its entire investment treaty program can take a significant amount of time. In the meantime, investor definitions in treaties and expansive interpretation of this notion by arbitral tribunals can allow backdoor access for investors to older-generation treaties via subsidiaries or shell corporations based in third countries. Even if a state

reforms all its treaties and tightens investor definitions and includes denial of benefits clauses, there will still be a risk of arbitral tribunals undermining the objectives of the parties by interpreting the concepts incorrectly, as was done in *Mera Investment v. Serbia*. The problems with both investment treaty texts and the decisive interpretative influence exercised by arbitral tribunals over those texts indicate that even serious change to one aspect of the investment treaty system, in isolation, can be undermined in the absence of more systemic reform.

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¹⁸ See, e.g., CETA Article 8.9, Hong Kong- Australia BIT Articles 8 and 15.

¹⁹ CETA Article 8.9.

²⁰ The question of when nationality shopping this way becomes an abuse of rights is a contentious issue in arbitral awards. For more, see A Yilmaz Vastardis, *The Nationality of Corporate Investors under International Investment Law* pp. 221-222.



INSIGHT 6

The human rights binding treaty negotiation from an international investment law perspective

Joe Zhang



The 6th Session

The negotiation of the [binding treaty on business and human rights](#) resumed its 6th Session in Geneva from October 26 to 30, 2020. The session took place in the midst of the second wave of COVID-19 infections hitting Switzerland. Unlike the previous sessions, where the 754-seat Human Rights Room of the UN Geneva was packed with diplomats and representatives from NGOs, for the first time, most participants had to join the session by video conferences or merely following Internet live streamings.

The pandemic might have dampened the in-person participation, especially from states and international organizations, but it certainly did not impede delegates from expressing their views on the [third draft of the Legally Binding Instrument \(LBI\)](#). Despite the chair's attempt to accommodate as much as possible many of the earlier comments raised by states while still trying to keep the LBI a coherent document, it seems the chances for finding common ground among states have become even slimmer. As one delegate put it, states are facing a dilemma: while on the one hand, it is important to achieve an outcome that demonstrates their commitment to the highest values and standards of protection of human rights, on the other hand, practical constraints must be acknowledged to ensure these standards can be implemented.

A feeling of déjà vu

For people familiar with the ongoing investment law reform efforts at various international fora, there might be a feeling that they have already lived through many discussions similar to those that took place in the latest session of the binding treaty negotiation. The author would like to offer the following observations from the perspective of international investment law, hoping these can contribute to the negotiation on a binding treaty on business and human rights.

Scope

One of the key issues states will need to address when developing or negotiating an investment treaty is the scope of coverage. What is considered an investment that enjoys the protection of investment treaties? Can an investment still be protected by the investment treaty if it is not established or operated in compliance with host state law? According to [UNCTAD's database](#), most of the investment treaties in force today define investment and investor broadly. Although some limit treaty protection to investments that have been made “in accordance with the laws and regulations” of the host state, most say nothing about non-compliance during operation. Protection is therefore generally granted independent of the behaviour of the investor or investment.¹ As a result, states have often found themselves unexpectedly punished for regulating investors who have breached their human rights obligations or failed to meet environmental standards.²

¹ For more discussion on integrating investor obligations in investment agreements, see IISD. (2018). Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements. <https://www.iisd.org/system/files/material/report-expert-meeting-versoix-switzerland-january-2018.pdf>

² See for example, *Urbaser v. Argentina*, ICSID Case No. ARB/07/26 and *Bear Creek v. Peru*, ICSID Case No. ARB/14/2.



Similarly, during the binding treaty negotiation, the scope and definition articles were heavily debated. Article 3 of the LBI provides that the instrument applies to all “business enterprises.” Article 8 further requires state parties to impose liabilities on legal and natural persons for human rights abuses arising from their “business activities” or “business relationships.” All these terms are broadly defined in Article 1 of the LBI. According to the drafter of the LBI, this expansive approach was adopted to ensure the broadest range of businesses can be held accountable for human rights abuses resulting from their operation or that of their supply chains. Some participants criticized the approach during the debate, expressing the concern that businesses may be overburdened by some of these human rights responsibilities. Others defended the approach by citing the [United Nations Guiding Principles \(UNGPs\)](#)—Principle 14 of which explicitly acknowledges that businesses, regardless of their nature, size or structure, should be held accountable for any human rights abuses resulting from their business activities. If we compare this to the expansive rights and protections afforded to businesses under investment treaties, it seems only fair that the same broad scope should be applied in the human rights binding treaty to ensure these businesses are held to a certain level of human rights standards in their operations.

Access to justice

One of the primary purposes of the LBI is to “ensure [human rights victims’] access to justice.” (Art. 2.1.c) The current draft attempts to address this by, among other things, facilitating victims’ access to an appropriate forum where their grievance can be heard and providing them with access to the financial resources to lodge a claim.

In terms of access to an appropriate forum, the current draft LBI tries to limit the use of the forum non conveniens doctrine (Arts. 7.5, 9.3), which has prevented most victims from lodging claims against transnational corporations in their home state courts for human rights abuses which occurred in host states. Some states raised concerns that this may allow victims to engage in “forum shopping,” and may result in “multiple proceedings.”

These are both serious issues on the table to be addressed in investor–state arbitration reform processes as well. Indeed, under the current international investment law framework, we have seen a proliferation of cases of investor–state arbitration, with cases initiated against states in multiple fora by essentially

the same claimants based on the same set of facts. So far, according to UNCTAD’s database, more than two thirds of the existing investment treaties still do not contain any provisions addressing these multiple or parallel proceedings initiated by foreign investors. At the same time, however, victims of human rights abuses and violations do not usually have an alternative forum to receive meaningful remedies for their injuries, especially when home state courts—which would in many cases provide the most effective means of obtaining compensation—are inaccessible due to the forum non conveniens doctrine.

Furthermore, in many cases, victims of human rights abuses do not have sufficient financial resources to shop around different fora and initiate multiple proceedings. Indeed, they sometimes struggle to find the financial resources to be able to initiate proceedings at all. However, when the current draft LBI proposed providing victims with adequate financial support to lodge their claims (Art. 15), concerns were expressed about the possibility that this may fuel frivolous claims. At the same time, we are seeing an increasing use of third-party funding in investor–state arbitration. Speculative funders are financing claims against states in exchange for a contingency in the recovery. Some vulture funds have even turned this into a lucrative derivative business.³ Nevertheless, when this issue is raised at ongoing ISDS reform processes, very few states consider this practice should be banned, and some go as far as to object to proposals to increase transparency and require claimants to disclose the sources of their funding.

Human rights-compatible IIAs

Article 14.5 of the current draft LBI imposes an obligation on state parties to ensure the human rights compatibility of their investment and trade agreements, both in terms of the interpretation and application of existing treaties and the drafting and conclusion of future treaties. However, it is still not clear how this obligation is to be monitored or enforced, or to what extent this obligation will have an influence on ISDS tribunals. It is not unheard of for ISDS tribunals to

³ Dafe, F., & Williams, Z. (2020). Banking on courts: The rise of third party funding of investment arbitration. *Review of International Political Economy*. <https://www.tandfonline.com/doi/abs/10.1080/09692290.2020.1764378>



have misinterpreted the intention of the state parties and disregarded the interpretation notes.⁴ In this regard, the LBI should clarify that the interpretation and application of a trade or investment agreement on issues relating to human rights abuses is for the Joint Committee (Art. 15) to consider and the decision of the Joint Committee on this issue is binding on the tribunal. This is the approach adopted by the 2015 China-Australia FTA (Articles 9.11.4, 9.11.6, 9.18.3).

Conclusion

While there is a consensus among the states participating in the binding treaty negotiation that key elements of the relationship between business and human rights need to be addressed—including business accountability for human rights abuses and access to remedies by victims of human rights abuses—there are also serious disagreements about the scope and content of such a treaty. Some states see this negotiation as presenting an opportunity to establish a set of uniform and binding international human rights standards, both for states and businesses. Some states aim instead for incremental changes within the current international human rights law framework, for example, by closing some of the existing gaps but refraining from the creation of any new rights or obligations under international law. Finally, there are states which consider that actions taken by individual states and businesses to address human rights concerns are sufficient, and that the negotiation of the binding treaty would potentially hinder or even derail those efforts.

When following the UNCITRAL process on reforming investment arbitration, Anthea Roberts, an international investment law scholar, noted that states' positions there could largely be labelled as “revolutionists,” “reformists,” or “loyalists,” very similar to what is taking place in the negotiations for the binding treaty. In the same blog post, Roberts also observed that “change is coming; it is just a question of what change will occur and when and how it will transpire. Perhaps states will be able to agree on the

need to discuss such reforms in a multilateral forum, even if they remain unable to agree (at least for now) on what reform or reforms might need to be adopted.” The same questions remain with regard to the landscape of business and human rights.

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⁴ See Johnson, L. & Razbaeva, M. (2014). *State control over interpretation of investment treaties*. http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf



INSIGHT 7

Incorporating corporate social responsibility within investment treaty law and arbitral practice: Progress or fantasy remedy?

David Lark and A. Claire Cutler



Introduction

International investment law has come under increased scrutiny for several reasons.¹ One particularly salient criticism has been with respect to its “one-sided” nature, with investment treaties historically providing hard legal rights of protection to foreign investors with no corresponding legal responsibilities. This criticism has been strengthened by the rise in high-profile investor–state claims in recent years that highlight the direct intersection of investor rights with key areas of public interest.²

A number of recent reforms have attempted to address this imbalance through the wider incorporation of CSR principles within investment treaty text and arbitral practice. Within investment treaty texts, states are increasingly

opting to include CSR through either the incorporation of language within treaty preambles or through the inclusion of a broader substantive treaty provision (or chapter) directly targeting CSR. Within arbitral practice, foreign investor conduct is becoming a potential basis on which states may claim the inadmissibility of an investor–state claim or pursue counterclaims against foreign investors for harmful conduct.

In this article, we review some of the key features of these recent reforms in investment treaty law and practice. In conclusion, we argue that, despite these reforms being advanced as a progressive movement toward rebalancing international investment law, there is a need for deeper reflection on their broader practical and theoretical implications.

Incorporating CSR within investment treaty texts

CSR provisions as duties for states

The most prominent incorporation of CSR emerging within international investment law today is either through the inclusion of CSR language within an investment treaty’s preamble or through a dedicated CSR provision (or chapter) within the treaty’s body text.

With respect to preambles, UNCTAD’s mapping database currently lists 223 investment treaties, 170 of which are currently in force, as including “mention of human rights, labour, health, CSR, or poverty” within their preambles.³ In theory, these inclusions mark a step forward for establishing CSR standards within the guiding framework of the investment treaty. However, while preambles may provide some assistance in interpreting the object and purpose of the treaty in question, they are widely regarded as not producing the same substantive obligations as provisions held within the body of the treaty text.⁴

¹ See Kelsey, J., Schneiderman, D., & Van Harten, G. (2019). Phase 2 of the UNCITRAL ISDS Review: Why ‘other matters’ really matter. *Investment Treaty News*, 1(20), 8–10.

² A number of recent cases have shown the critical intersections of investor rights with: environmental protection (*Pacific Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12; *Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04); public health (*Philip Morris et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, UNCITRAL, PCA Case No. 2012-12); the right to water (*Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3; *Suez, Sociedad General de Aguas de Barcelona, S.A.; Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19); Indigenous rights; (*Chevron Corporation and Texaco Petroleum v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23; *Border Timbers Limited, et. al v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25); and, social rights (*Piero Foresti et. al v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01), among others.

³ UNCTAD (2020). *Investment Policy Hub: Mapping of IIA Content*. <https://investmentpolicy.unctad.org/international-investment-agreements/ii-a-mapping>

⁴ Dumberry, P. (2013, March 22). How to incorporate human rights obligations in investment treaties? *Investment Treaty News*. <https://www.iisd.org/itn/en/2013/03/22/how-to-incorporate-human-rights-obligations-in-bilateral-investment-treaties/>



By contrast, only 40 investment treaties, 23 of which are currently in force, include a separate provision (or chapter) that includes language promoting the adoption or strengthening of CSR initiatives.⁵ These provisions can vary widely in their terminology, influencing both the subject of responsibility and the nature of the obligation.

In most investment treaties, the included language is both voluntary and vague and reflects an added responsibility for states to either encourage CSR standards or pursue the adoption of domestic legislation to regulate foreign investor abuses. For example, Article 16 of the Canada-Kosovo FIPA provides that states “should encourage” enterprises to “voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies... [such as those addressing] labour, the environment, human rights, community relations, and anti-corruption.”⁶

In other investment treaties, there is more direct and affirmative reference to existing international instruments targeting CSR. Article 422 of the EU–Ukraine Association Agreement, reads that states “shall promote corporate social responsibility and accountability and encourage responsible business practices, such as those promoted by [the UN Global Compact, the ILO Tripartite Declaration, and the OECD Guidelines for Multinational Enterprises].”⁷ However, while the shift from “should” to “shall” suggests stronger incorporation in theory, these existing instruments of international law have been largely criticized to date for their weak language and voluntary nature.⁸

Another emerging strategy for CSR implementation within investment treaty text is to provide for extraterritorial jurisdiction relating to civil liability of

foreign investor conduct abroad. As written in Article 17.2 of the South African Development Community’s (SADC’s) Model BIT, this approach would oblige home states to “ensure that their legal systems and rules allow for, and do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investors in relation to their Investments in the territory of the *Host State*.”⁹ In theory, if phrased appropriately, this could serve as a useful response to the common *forum non conveniens* defence.¹⁰

CSR provisions as duties for investors

In addition to the above, a small number of investment treaties have explicitly imposed substantive obligations on foreign investors. Brazil’s recent investment treaty signed with Malawi provides an instructive example in this regard. While not currently in force, the treaty includes a section dedicated to CSR, Article 9, which states that “[t]he investors and their investment shall develop their best efforts to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host Party receiving the investment.”¹¹

Article 9 then lists a number of voluntary principles and standards for foreign investor conduct, covering diverse areas, such as: sustainable development; human rights; local employment and community engagement; corporate governance and self-regulatory practices; public health; and respect for local political activities and processes. Similar provisions can be found within the 2017 Intra-Mercosur Investment Facilitation Protocol, the 2016 Pan-African Investment Code, and the 2016 Argentina-Qatar BIT.

⁵ UNCTAD, *supra* note 3

⁶ See *Canada–Kosovo Foreign Investment Promotion and Protection Agreement*, Article 16. <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/kosovo/fipa-apie/text-texte.aspx?lang=eng>

⁷ See *EU–Ukraine Association Agreement*, Article 422. https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf

⁸ Cutler, A.C., & Lark, D. (2020). The hidden costs of law in the governance of global supply chains: the turn to arbitration, *Review of International Political Economy*, 10.1080/09692290.2020.1821748

⁹ See SADC Model Bilateral Investment Treaty Template with Commentary (2012), p. 37–38 at <https://www.iisd.org/itm/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>

¹⁰ *Ibid.*

¹¹ *Brazil–Malawi Investment Cooperation and Facilitation Agreement*, Article 9. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4715/download>



It is important to note, however, that the language within these treaties remains vague and voluntary in nature by utilizing the conditional terminology “should” and by referencing loosely defined “internationally recognized standards.” As above, despite the value of these inclusions in theory, there is a question as to whether they operate in practice to provide greater space for holding foreign investors accountable or whether they will lead to further ambiguity, complexity, and interpretational discretion within arbitral practice.

By contrast, the BIT between Morocco and Nigeria provides more direct, explicit, and comprehensive language on foreign investor obligations within its treaty text.¹² Indeed, rather than utilizing the “should” terminology, the treaty states that investor’s “shall” comply with CSR obligations and expands the scope of covered activity to include: impact assessment (Article 14); anti-corruption (Article 17); post-establishment environmental management, human rights, labour rights, and environmental rights (Article 18); corporate governance and practice (Article 19); and Home State civil liabilities (Article 20). The treaty also goes further to include a dynamic obligation, which reads that “[w]here standards of corporate social responsibility increase, investors *should* strive to apply and achieve the higher-level standards” (Article 24).¹³ While this treaty is not yet in force, it represents a more comprehensive step forward for setting clear standards on holding foreign investors accountable.

Incorporating CSR within arbitral practice

CSR as a means for inadmissibility

The increased incorporation of CSR language within investment treaties has also coincided with a gradual evolution in arbitral practice. While it is outside of the scope of this article to detail the growth of jurisprudence on these matters, a number of recent

cases have suggested that arbitral tribunals are increasingly willing to recognize a foreign investor’s conduct as a ground on which to refuse jurisdiction and/or admissibility of an ISDS claim.

In this regard, arbitrators have recognized the significance of foreign investor conduct in a number of cases to date, evoking a “minimum standard of corporate social diligence,” which includes the principles of “unclean hands,” a “duty of transparency,” and “unjust enrichment.”¹⁴ As stated within Monebhurrin’s detailed analysis of this trend, “[t]he inclusion of an expected [CSR obligation] of companies in investment agreements has arguably set the foundation and the first steps for the—surely slow—construction of a doctrine of a minimum standard of corporate social diligence: under this assumption, investors will have to be minimally (socially) diligent to claim the application of an investment agreement.”¹⁵

This optimism may be premature, however. As evidenced by existing ISDS decisions, the recognition of foreign investor obligations within arbitration has been notably inconsistent and ambiguous to date, showing promise mostly in instances of clear corruption rather than in areas related to human rights, labour, and environmental harms.¹⁶

CSR as a grounds for counterclaims?

Another development in arbitral practice has come through the possibility of states initiating counterclaims against foreign investors. While the outcome of counterclaims within ISDS cases have been diverging, there is some recent evidence to suggest that the counterclaims may become a new and novel mechanism for states to seek remedies for foreign investor conduct.

In *Urbaser v. Argentina*, which raised arguments

¹² See a discussion of Morocco’s new model BIT here: <https://www.iisd.org/itn/en/2020/06/20/moroccos-new-model-bit-innovative-features-and-policy-considerations-hamed-el-kady-yvan-rwananga/>

¹³ See Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download>

¹⁴ For a detailed analysis of evolving standards of corporate social diligence, see Monebhurrin, N. (2017). Mapping the duties of private companies in international investment law. *Brazilian Journal of International Law*, 14(2), 50–71.

¹⁵ *Ibid.*, 60.

¹⁶ For analysis of the inconsistency of foreign investment responsibilities in arbitral practice, see Marcoux, J.M. (2019). *International investment law and globalization: Foreign investment, responsibilities and international organizations*. Routledge Press: 54–59.



concerning the “human right to water,” the Argentinian government pursued a counterclaim alleging that the water concessionaire had failed to provide a necessary level of investment to ensure adequate access to water for its population.¹⁷ While the full extent of the ruling has been detailed elsewhere, some conclusions are worth noting here.¹⁸

First, on the question of whether the tribunal had jurisdiction to hear a counterclaim against a foreign investor, the tribunal rejected the argument that the investor did not consent to the possibility of counterclaims within the investment treaty. Instead, the tribunal maintained that “there is no provision stating that the investment’s Host State would not have any right under the BIT” to make a counterclaim regarding the foreign investor’s conduct.¹⁹ In doing so, the tribunal affirmed that a foreign investor could bear hard legal obligations enforceable within the context of an ISDS claim.

Second, the tribunal rejected a broader argument that foreign investors are not “formal subjects of international law,” most notably with respect to possessing internationally recognized responsibilities relating to overarching frameworks of public international law. In its ruling, the tribunal stated that “it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law.”²⁰ While the tribunal rejected Argentina’s counterclaim on merits, the case nonetheless affirms the potential to mobilize and draft treaty text with an ear toward embedding positive investor obligations enforceable in ISDS cases.

In a separate case, *Burlington Resources v. Ecuador*, there was a successful counterclaim relating to environmental and infrastructural damages in respect of a foreign investor’s conduct.²¹ Referencing both national tort law and broader international

law, Ecuador claimed an initial USD 2.8 billion in compensation, stating that the company had failed to maintain its investment’s infrastructure, leading to costly environmental damage that required soil and groundwater remediation. After conducting a site-by-site analysis of environmental and remediation costs, the tribunal awarded Ecuador USD 39.2 million for environmental remediation and USD 2.5 million for infrastructure damages.²² While the counterclaim award was significantly less than the amount initially claimed, and the overarching ISDS claim was still decided in favour of the investor for roughly USD 380 million, the case is often used as an illustrative example of the potential to pursue counterclaims in the context of an ISDS claim.

The promises and limitations of reform: Progress or fantasy remedy?

Combined, the above reforms to investment treaty law and practice suggest some promising avenues for rebalancing international investment law through the incorporation of CSR. However, there are some potential limitations of these reforms in theory and practice that deserve greater attention.

First, as discussed above, CSR language has been largely voluntary in nature. This raises questions regarding the extent to which these provisions may be used in practice and provides further ambiguity as to what the specific applicable standards of law are—and how they are to be incorporated. Indeed, there is very little evidence to date to suggest that CSR provisions will be mobilized consistently in practice. This should raise deeper questions regarding whether these advancements fundamentally operate to rebalance international investment law, or if they instead serve to further legitimize voluntary standards in place of more transformative alternatives.

Second, the incorporation of these standards does little to address foundational concerns relating to consistency, participation, and transparency within arbitral practice. While reforms to procedure and third-party access are taking place elsewhere, the nature of the reforms discussed above grant increased

¹⁷ *Urbaser S.A. and Consorcio de Agua Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26.

¹⁸ See Cutler and Lark, *supra*, note 8.

¹⁹ *Ibid.*, Award, para. 1183.

²⁰ *Ibid.*, Award, para. 1195.

²¹ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5.

²² *Ibid.*, Award, para. 468.



interpretive authority and discretion to private transnational arbitral tribunals on the appropriateness of the conduct of foreign investors and do not provide for explicit or meaningful access to those most directly impacted by CSR abuses. Consequently, we ask whether arbitral tribunals, rather than domestic courts, are the most appropriate forums to consider and adjudicate complaints relating to CSR abuses, even if only mobilized as a state defence.

Finally, we argue that reforms need to be conceptualized within the broader theoretical framework of trade and investment relations in the global political economy. At the core, the reforms listed above do not problematize, but rather reinforce, dominant assumptions about the necessity and impacts of policies aimed at liberalizing investment flows through increasingly broad-sweeping trade and investment treaties. As we discuss in our recently published article in the *Review of International Political Economy*, the result is that these reforms understood as progress may instead function to further legitimize and lock-in states to neoliberal disciplines while obscuring and deepening the costs associated with the expansion of transnational capitalism.²³

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²³ See Cutler & Lark, *supra* note 8.



NEWS IN BRIEF

EU investment screening

The EU's foreign investment screening mechanisms became operational on October 11, 2020. As we've reported, guidance on the screening mechanisms, which are implemented by individual member states, was released in March 2020 following the 2019 entry into force of the [FDI Screening Regulation](#).

Since April 2019, the EC and member states have made preparations for the implementation of the framework by establishing a mechanism for the exchange of information on FDI projects that are subject to screening; developing procedures to respond to FDI which may pose a security risk; and updating the list of "projects and programmes of Union interest" on which the EC will issue opinions [to be followed](#) by member states when assessing foreign investment into these projects. These include "projects and programmes which involve a substantial amount or a significant share of Union funding, or which are covered by Union law regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order" according to an [amendment](#) of the Annex to the 2019 Regulation.

[Germany](#) and [Ireland](#) have both recently tightened their FDI screening, in accordance with the EU Regulation.

EC suggests withdrawal is a possibility as Energy Charter Treaty modernization negotiations continue

On December 2, 2020, in an [answer](#) to questions submitted by MEPs, the EC suggested that the EU could exit the ECT.

Specifically, the Commission stated that if the modernization efforts do not meet core EU objectives related to the environment, such as alignment with the Paris Agreement, "in a reasonable timeframe", withdrawal from the treaty would be considered.

The latest round of ECT modernization negotiations took place via video conference from November 3 to 6, 2020.

[According](#) to the ECT, negotiations focused on pre-investment, regional organizations, and obsolete provisions, as well as continuing to discuss topics from the previous negotiation rounds. The latter included definitions of investor and investment and other standards of investment protection, frivolous claims, third-party funding, and security for costs.

As we [reported](#), in 2019 the ECT released a document outlining the positions held by various signatories on these issues.

A progress report, which we will report on in turn, will be presented at the year-end Energy Charter Conference. The next round of talks will be held in February or March 2021.



Asia-Pacific leaders sign RCEP

On November 15, 2020, 15 Asia-Pacific countries signed the Regional Comprehensive Economic Partnership (RCEP) nearly one year after negotiations came to a close.

The signatories include the 10 members of the Association of Southeast Asian Nations (ASEAN) and their six FTA partners, Australia, China, India, Japan, New Zealand, and South Korea. India withdrew from negotiations in 2019, reportedly citing its desire to safeguard domestic industries.

Chapter 10 of the agreement covers investment, and includes standard definitions of investor and investment (though excluding government procurement), and substantive investment provisions. The chapter also includes sections on investment promotion and facilitation, including, in Article 10.17.1(d), the commitment to establish or maintain “contact points, one-stop investment centres, focal points or other entities ... to provide assistance and advisory services to investors,” and, where appropriate, to amicably settle disputes between investors and state entities.

Notably, the agreement does not include ISDS at this time. However, Article 10.18 lays out a process for the parties to enter into discussions on whether to include ISDS, and apply the treaty’s prohibition of expropriation to taxation measures. These talks should take place in the next two years. Moreover, the RCEP confirms the existence of treaties among the signatories which are already in force, many of which include ISDS provisions.

The signatories have two years in which to ratify the treaty.

UNCITRAL Working Group III pre-intersessional meeting on the use of mediation in ISDS

On November 9, 2020, the Asian Academy of International Law hosted a virtual event on the use of mediation in investor–state dispute settlement. This event is one of several being organized by UNCITRAL in parallel to the formal meetings of the Working Group III on investor–state dispute settlement reform.

Mediation refers to a process “whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (‘the mediator’) lacking the authority to impose a solution upon the parties to the dispute.”¹ The objective is for the mediator to assist the parties in reaching a mutually acceptable settlement that resolves their dispute. If the parties cannot reach an agreement, either party may then continue with efforts to resolve the dispute through some other process—for example, investor–state arbitration. Mediation is something of a “hot topic” in international economic law at the moment: in 2016 the Secretariat of the Energy Charter adopted the Guidance on Investment Mediation;² in 2018 ICSID commenced work on a new set of rules for investor–state mediation;³ in September 2020 the Singapore Convention on Mediation entered into force.⁴ In the context of UNCITRAL Working Group III, both developed and developing states have supported greater use of mediation in investor–state disputes.

The event organized by the Asian Academy of International Law comprised more than 20 speakers spread over six hours, and supported by four lengthy background papers.⁵ Despite the number of speakers, several common themes ran across the event. Speakers generally agreed that greater use of mediation in investor–state disputes would be a good thing. Mediation was said to be quicker, cheaper, and more flexible than investor–state arbitration. It was also said to allow investors and host states to keep “sensitive” investor–state disputes confidential, in contrast to the trend for increased transparency in investor–state arbitration. Most importantly, mediation was said to be more likely to lead to “win–win” outcomes as compared to investor–state arbitration.

This positive account of mediation presents something of a paradox. There are only a handful of publicly known instances of investor–state mediation. In contrast, there are now more than a thousand known cases of investor–state arbitration. Why isn’t investor–state mediation used more widely?



The answer, according to many of the speakers, is that there are several obstacles to greater use of investor–state mediation, primarily obstacles to *states'* ability and willingness to participate. These include:

- he lack of an explicit legal mandate under investment treaties and national law to engage in mediation.
- Government officials' lack of familiarity with mediation.
- Bureaucratic challenges, such as the difficulty in coordinating multiple government agencies that may be involved in a dispute and ensuring that individuals representing the state in a mediation have the authority to negotiate and settle a dispute on behalf of the state.

There was discussion across multiple panels of how these obstacles might be addressed, as well as more detailed technical discussion about how the process of mediation should interface with investor–state arbitration.

This discussion illustrated an underlying assumption of the event: that mediation should be made more widely available as an *additional option* alongside investor–state arbitration (or, in the case of the EU's proposal, as an additional option alongside the possibility of bringing an investor–state dispute before a multilateral investment court). One speaker, for example, pointed to the possibility of multibillion dollar ISDS claims and explained that a state facing such a claim could benefit from agreeing to a mediated settlement for a fraction of that amount. However, there was no discussion of alternative options to reduce the risks associated with large ISDS claims, such as substantive reform to the content of investment treaties, or of the key question of whether greater use of mediation should be encouraged in preference to, or in conjunction with, such reforms.

This reflected a wider lack of engagement with potential downsides of greater use of mediation in investor–state disputes. The fact that some investor–state disputes are not suitable for mediation—for example, those involving significant public interests—was mentioned by some speakers, but the practical challenges that arise from the fact that public interests and commercial considerations are often bound up together in investor–state disputes was not substantively addressed. The tension between mediation, which is generally confidential, and the push for greater transparency in ISDS was identified by several speakers but not resolved. The possibility that some “obstacles” to state participation in mediation might serve important public interest functions was overlooked—for example, limits on government officials' ability to authorize the transfer of funds to

foreign investors following conclusion of a settlement agreement might serve an important function in reducing corruption, even if they also make mediation more cumbersome than would be the case in a purely commercial context.

None of this is to say that the use of mediation in investor–state disputes should be discouraged. Instead, states evaluating the role that mediation should play in investor–state disputes should consider *both* the potential benefits and the potential risks related to its uses.

¹ Singapore Convention on Mediation (2018), art 2(3).

² <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>

³ <https://icsid.worldbank.org/services-arbitration-investor-state-mediation>

⁴ <https://www.singaporeconvention.org/media/media-release/2020-09-12-singapore-convention-on-mediation-enters-into-force>

⁵ Readers interested in a more detailed summary of the event can refer to these background papers, which provide a good summary of the overall content and tone of the event: <https://aail.org/uncitral-wgiii-virtual-pre-intersessional/?fbclid=IwAR1YP-hIYynBEbmX5t4XAdidBaz7PqwWyhEuepvpIxeQFrW951ZOIwcz6pQ>. A full recording of the event is also available online <https://aail.org/past-event-2020-uncitral-wgiii/>

IIA Reform Accelerator Launches

UNCTAD's IIA Reform Accelerator launched in November 2020.

The Accelerator is a tool that aims to expedite the modernization of the existing stock of old-generation investment treaties. It is meant to help countries overcome the current challenges in IIA reform by suggesting concrete options to reform central IIA provisions. In doing so, the Accelerator provides a tool for coordination, focused discussion, and consensus-building on joint reform actions between multiple countries. It aims to help level the playing field for policy-makers and treaty negotiators by making the latest “IIA reform knowledge” and recent treaty practice more readily accessible. The Accelerator is underpinned by five elements, guiding and enabling change in the IIA regime: (1) An orientation toward sustainable development; (2) principles and options developed in UNCTAD's longstanding IIA reform policy tools; (3) flexibility to “adapt and adopt” in line with countries' specific needs; (4) collective peer learning; and (5) capacity building.



UNCTAD's IIA Reform Accelerator focuses on eight key IIA provisions: (1) the definition of investment; (2) the definition of investor; (3) national treatment (NT); (4) MFN treatment; (5) FET; (6) full protection and security (FPS); (7) indirect expropriation; and (8) public policy exceptions. The selected substantive provisions are those that are most frequently invoked in ISDS claims, including to challenge genuine public interest measures such as those for the protection of public health or the environment. They are also those that have a significant impact on sustainable development or affect the host state's ability to regulate in the interest of sustainable development. However, as IIA reform is a much wider endeavour, the IIA Reform Accelerator is intended as a starting point and a living document that will be regularly updated and further developed, including through the addition of further treaty provisions.

For each of the eight provisions, the Accelerator offers a menu of sustainable development-friendly options. For each option, the Accelerator offers ready-to-use model language that implements the reform approach and is based on a sample of actual treaties and model IIAs. Geographical representation of treaty parties and their development status has been taken into account in selecting the sample. Explanatory comments and annotations are provided for each model formulation and reform option to highlight their objectives and the interplay between different options. Various options arise for the Accelerator's use, including as the basis for joint interpretation, amendment, or replacement of old treaty provisions. The Accelerator allows countries to undertake these reform actions bilaterally, regionally, or multilaterally.



AWARDS AND DECISIONS

ICSID tribunal rejects denial of justice claim against the Republic of Panama

Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama, ICSID Case No. ARB/16/34

Marios Tokas

On August 14, 2020, an ICSID Tribunal examined the merits of the case of an alleged violation of the FET clause contained in Article 10.5.1 of the US–Panama Trade Promotion Agreement (TPA). The tribunal affirmed that both claimants had locus standi to pursue a denial of justice claim, as a component of the FET standard, despite the fact that Bridgestone Americas Inc. (BSAM) was not a party to the original judicial proceedings where the denial of justice allegedly took place. Eventually, however, the tribunal dismissed the claim as per its merit.

Background and claims

The claimants, Bridgestone Licensing Services, Inc (BSLS) and Bridgestone Americas (BSAM), are United States subsidiaries of the Japanese company Bridgestone Japan (BSJ). As such, the Bridgestone Group of Companies is conducting business in the manufacture and sale of tires under the trademarks FIRESTONE and BRIDGESTONE. These trademarks are both registered in Panama. BSLS is the owner of these trademarks and has granted BSAM a licence to use them in Panama. (paras 118–122)

In 2002, Muresa Intertrade S.A. (Muresa) applied to register the RIVERSTONE trademark for tires in Panama. BSJ and BSLS issued proceedings opposing the registration of the RIVERSTONE mark due to the confusion risk arising from its use. This proceeding proved unsuccessful. BSJ and BSLS filed an appeal that was subsequently withdrawn in September 2006.

In September 2007, a distributor of RIVERSTONE tires filed a civil tort claim in Panama against BSJ and BSLS for losses allegedly suffered as a consequence of the Trademark Opposition Proceeding. The claim was dismissed at first instance and on appeal. The decision was then reversed by the Supreme Court, which awarded USD 5 million in damages against BSJ and BSLS (para. 128). The Supreme Court found BSJ and BSLS liable for reckless and bad faith conduct of legal proceedings, which constitutes a civil tort

under Article 217 Judicial Code of the Republic of Panama.

The Supreme Court attached great significance to a letter sent from the legal representatives of Bridgestone to Muresa (the Foley Letter) in the finding of liability (para. 411). In the letter, the legal representatives of Bridgestone stated that opposition proceedings were going to be filed in various countries against the registration of the RIVERSTONE brand if Muresa would not abstain from selling the product. The admission and appraisal of this letter as evidence by the Panamanian Supreme Court constituted a main point in the claimants' argumentation. (paras 474–475)

Tribunal rejects respondent's objection that claimant had no locus standi to bring a claim of denial of justice

The respondent argued that BSAM lacked locus standi in advancing a claim of denial of justice, given that it was not itself a party to the proceedings in which the denial of justice occurred. The respondent based its submission on, among others, two basic points. First, that the exhaustion of local remedies is a prerequisite for a denial of justice claim and that to exhaust a particular remedy, one necessarily must first pursue it. Second, that if a party declines to pursue a remedy or argument, it could not properly argue a claim of denial of justice (paras 144–148).

The tribunal confirmed that this position of the respondent reflected international law. However, the tribunal clarified that this position could not automatically be applied to a complaint under the applicable investment treaty, which expressly protects “covered investments” and not “investors.” The tribunal pointed at Article 10.5.1 of the TPA, the legal basis of the claimants' claim, and emphasized that it was dealing with the treatment that should be accorded to the covered “investment” and not to the “investor.” It thus concluded that the relevant issue was not whether BSAM had suffered a denial of justice, but rather whether the investment had been denied fair and equitable treatment (paras 165–169).

Tribunal rejected the claim of denial of justice advanced by the claimants

In assessing the arguments, the tribunal first clarified that it did not purport to exercise an appellate function



(para. 410). Thereby, possible deficiencies of application of Panamanian procedural rules did not give rise to a denial of justice claim. The tribunal emphasized only an egregious error of law would amount to, or even contribute to, a denial of justice claim (para. 474).

The claimants' argument for denial of justice mainly involved (i) the alleged wrongful admission and error of appraisal of the Foley Letter as evidence and (ii) the alleged disregard of *res judicata*.

With regard to the alleged wrongful admission of evidence, the tribunal made no definitive finding as to whether the Supreme Court was correct, while failing to find evidence of denial of justice; although the tribunal considered that the Supreme Court gave unjustified weight to the Foley letter, it did not in itself constitute a reason for denial of justice (para. 474).

The tribunal also entertained the claimants' argument that the Supreme Court disregarded *res judicata* in concluding a bad faith initiation of legal proceedings. The claimants argued that in the Trademark Opposition Proceedings it was already established that the opposition was filed in good faith, which constituted a prerequisite for its admissibility. After examining the Panamanian rule of *res judicata*, the tribunal concluded that the principle did not apply. It commented, though, that "one might have expected the Supreme Court to remark upon the fact" (para. 483).

The tribunal eventually recognized that a judgment holding BSJ and BSLS liable simply for exercising their procedural right to file an objection to a trademark application would have been startling indeed. Still, the reasoning of the Supreme Court was understandable, despite its possible defects. The tribunal hence dismissed the claims (para. 547).

Notes: The tribunal was comprised of Lord Nicholas Phillips Baron of Worth Matravers (President, UK national), Horacio A. Grigera Naón (appointed by the claimants; Argentine national) and J. Christopher Thomas (appointed by the respondent; Canadian national). The award, dated August 14, 2020, can be found here: <https://www.italaw.com/sites/default/files/case-documents/italaw11771.pdf>

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In another energy case against Italy, an ICSID tribunal rejects all claims on the merits on the basis that Italy acted reasonably and in the public interest

Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50

Maria Bisila Torao

In an award dated September 4, 2020, an ICSID tribunal dismissed claims brought by Belgian-owned company Eskosol S.p.A. in liquidazione (Eskosol) against Italy following Italy's amendments to its incentives scheme for investments in the photovoltaic (PV) sector provided under Conto Energia III. The tribunal found that Italy's new measures were not in breach of Article 10 of the ECT, as Eskosol could not have expectations under the incentive regime because, by its terms, Conto Energia III did not provide benefits for any PV plant unless or until that plant actually entered into operation.

Background and claims

Between May and July 2010, Eskosol, the claimant, a locally incorporated entity majority owned by a Belgian company, acquired a 100% interest in 12 special purpose vehicles (SPVs), which in turn held land rights for the construction of PV plants in Southern Italy. To make their investment, the investors allegedly relied on guarantees provided in the various legislative decrees (Conto Energia) which formed part of Italy's incentives for investments in the country's PV energy sector.

In August 2010, Conto Energia III entered into force. Under its regime, power plants that entered into operation within the next 14 months would have the right to access incentivizing feed-in tariffs. However, this access was allowed only under several conditions.¹

At the time of the investment, the claimant sought to benefit from the feed-in tariffs regime under Conto Energia III. However, as Eskosol failed to obtain financing, the plants were never built.

In 2011, Italy implemented changes to this regime and adopted the Romani Decree and Conto Energia IV, which modified the incentives under the previous legislation. According to the claimant, the changes introduced by Conto Energia IV affected its investment to the point that Eskosol became insolvent and was put into liquidation. In response, Eskosol filed

¹ See Conto Energia III, CL-99, Art. 2(c).



for arbitration on December 9, 2015, claiming that Italy's conduct violated the FET standard protection of the ECT. In particular, the claimant argued that the regulatory changes introduced by Italy interfered with Eskosol's efforts to secure financing, violating its legitimate expectations.

Tribunal dismisses Italy's objection regarding the nationality requirement under Article 25 (2) (b) ICSID: Claimant's company remained under foreign control

Italy argued that Eskosol did not have the standing to bring a claim under Article 25 (2)(b) of the ICSID convention because, at the time of the request, the claimant was placed under receivership in Italy, and therefore controlled by the Italian bankruptcy receiver. Therefore, Italy argued, Eskosol did not satisfy the requirement of foreign control under this article and Article 26 (7) of the ECT.

When examining the language of Article 25 (2)(b), the tribunal stressed that the wording of the convention was not without ambiguity regarding the operative date for foreign control. For this reason, it expressed that prudence should be exercised to avoid ruling on unsettled points of law that were not strictly necessary to the resolution of the case at hand. Ultimately, the tribunal concluded that the answer to that question was not essential to resolve Italy's jurisdictional objection. By siding with Eskosol's argument, the tribunal determined that the only critical date for foreign control purposes was the date of the challenged state measures, at which time a Belgian company indisputably controlled Eskosol.

The tribunal further explained that while companies remain in bankruptcy proceedings, the receiver has the role of a trustee who does not exercise authority on their own behalf. As such, their nationality could not govern or determine access to the ECT or the ICSID Convention, primarily because determinations of foreign control in relation to accessing these treaties must be construed consistently with the object and purpose of the treaties. "It is a reality that a substantial number of foreign investments are made through [locally incorporated] companies [...], and that reality is reflected in both Article 25 (2) (b) of the ICSID Convention and Article 26(7) of the ECT." The tribunal concluded that not considering these companies under foreign control will deprive local companies owned by a foreign investor of the ability to bring "potential well-founded ECT claims" (para. 236).

The Blusun award: No duplication of proceedings or abuse of right as claimant is not the same party

Italy made the case that Eskosol's claims were abusive and should not be admitted because the dispute was substantially the same as the one in the [Blusun case](#)². The tribunal dismissed Italy's argument on the basis that it considered Eskosol and Blusun different parties "formally or in essence" as they did not have the same interests (para. 264).

The tribunal further explained that Blusun strongly resisted any input or participation by Eskosol when Eskosol sought to join the Blusun proceedings. Similarly, Eskosol did not rely on Blusun's owners as witnesses. For the tribunal, the fact that the minority shareholders in Eskosol were Italian nationals, unqualified to bring an arbitration in their own names, did not affect its assessment, because when a treaty authorizes a claim to be brought by a local company, that company speaks for itself and should be entitled to seek full redress. The tribunal acknowledged that a successful result of Eskosol's claim would eventually benefit Blusun. However, it concluded that the ultimate distribution of any recovery by the local company should not impact its right under the ECT to bring a claim on its own behalf, even if some of its shareholders may not qualify to bring a claim on their own under the ECT (para 266).

Alleged FET violation: Causation can only be observed once a treaty breach has been established/proven

Eskosol claimed that under a broad or flexible reading of the FET standard, the measures that Italy adopted violated its legitimate expectations as Italy failed to provide a stable framework for its investment. The claimant argued that Italy had acted arbitrarily, unreasonably, and disproportionately when changing the incentives regime. However, the majority of the tribunal explained that the issue of causation could only become relevant if a breach of Italy's duties was demonstrated, and Eskosol had not been able to convincingly argue that Italy's measures targeted the claimant or were discriminatory. The tribunal clarified that "if a state has not violated its treaty obligations with respect to a particular investor and investment, then it does not matter what consequences the State's non-wrongful action may have had for a specific business" (para. 380).

² *Blusun S.A., Jean-Pierre Lecorquier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3.



The tribunal then went on to examine whether Italy's conduct had breached the claimant's legitimate expectations in violation of Italy's obligations to maintain stability and whether Italy's conduct was non-transparent, arbitrary, disproportionate, and unreasonable.

Claimant's allegations of arbitrariness and disproportionality dismissed: General allusions to common knowledge do not qualify as evidence

Eskosol had argued that the Romani Decree and Conto Energi IV were arbitrary and unreasonable as Italy had acted on a pretext to favour the nuclear power industry. To support this allegation, Eskosol relied on a witness who argued that it was common knowledge that the changes to the incentives regime were the result of political calculations and not based on concerns of potential budget deficit. The majority of the tribunal reasoned that this allegation was similar to alleging that Italy had acted in bad faith. Allegations of bad faith, according to the arbitrators, require a higher standard of proof which the claimant had failed to satisfy because "common knowledge does not qualify as evidence." The majority relied on the approach taken by the tribunal in *El Paso v. Argentina* and concluded that arbitrariness examines not whether measures taken were the best but whether measures were based on a reasoned scheme that was itself reasonably connected to "*the aim pursued*" (paras. 385–386).

Italy's measures were reasonable as they aim to address public interest matter

The majority found that Italy's measures consistently pursued policy objectives and the public interest, and it considered the potential financial burden that the previous scheme would generate. The majority reasoned that calling into question the sustainability of the scheme was not irrational or unreasonable and explained by referencing *AES v. Hungary* that Italy's measures did not lack an appropriate logical explanation as they aimed to "address a public interest matter" (para. 400).

No legitimate expectations: Eskosol did not qualify for benefits therefore it cannot avail itself of rights that it does not have

The tribunal found that public government statements and statements made directly to the claimant before Conto Energia III was adopted did not constitute a guarantee that the Conto Energia II and III would remain unchanged. They were unable to find that general public statements made to potential investors could establish broader commitments than those provided by

the legislation itself: "legitimate expectations must be based on some form of State conduct, and not simply on the investor's own subjective expectations" (para. 452). The tribunal concluded that Eskosol did not have any legitimate expectations of the permanency of the incentives scheme. The tribunal further concluded that there was no evidence of representation or assurance by Italy that could have led the claimant to expect the regime would remain in place for an indefinite period.

More fundamentally, however, the tribunal found that Conto III could not have created legitimate expectations for Eskosol given its plants were never operational. The decree only extended benefits to existing, operational plans, and thus, the tribunal opined "Eskosol simply did not fall within that defined class of beneficiaries" (para. 449).

Costs

The tribunal stated that although Italy prevailed on the merits, the claimant had won against Italy's jurisdictional objections including Italy's preliminary objections under ICSID arbitration rule 41(5). Therefore, the tribunal concluded that each party should bear its own cost and 50% of the cost of the arbitration.

Notes: The tribunal was composed of Jean E. Kalicki (president, U.S. national), Guido Santiago Tawil (claimant's appointee, Argentinian national) and Brigitte Stern (respondent's appointee, French national). The award of September 4, 2020, is available at <https://www.italaw.com/sites/default/files/case-documents/italaw11779.pdf>.

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ICSID tribunal partially upholds jurisdiction claims under Austria–Poland Encouragement and Protection of Investments Agreement and rejects Achmea’s applicability

Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Poland, ICSID Case No. ADHOC/15/1

Sarthak Malhotra

In an award dated April 4, 2020, a tribunal administered under ICSID Additional Facility Rules rejected most of the objections to its jurisdiction over claims brought against Poland by three Austrian companies: Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG (together, “investors”). The seat of the arbitration was agreed by the parties to be Paris, France.

Background and claims

Raiffeisen Centrobank and Strabag were the joint parent companies of Syrena Immobilien Holding, which in turn wholly owned a shell company incorporated in Cyprus. This Cypriot shell corporation owned 99.6% of Syrena Hotels, a Polish Company. Syrena Hotels owned and operated two hotels in Warsaw. These hotels were sold to Strabag by Warsaw’s local government under a share purchase agreement as a part of the privatization process after the fall of the communist regime in Poland.

The investors alleged that a number of Polish government actions threatened their perpetual rights in the land and the ownership of the hotels. According to the investors, these actions violated Article 2(1) (FET), Article 2(2) (full protection), Article 3 (Treatment of Investments), Article 4 (Expropriation), Article 5 (Transfers), Article 7(1) (Other Obligations), Article 7(2) (Umbrella Clause), and Article 8 (Settlement of Investment Disputes) of Austria–Poland Encouragement and Protection of Investments Agreement (“Treaty”).

Poland challenged the tribunal’s jurisdiction over the investors’ claims on four grounds. These ground were: (i) the investors had not demonstrated that their claims *prima facie* fell under the Treaty provisions because these claims were fundamentally contractual in nature and were not in any event sufficiently characterized as breaching any of the Treaty provisions, (ii) the investors’ use of the Treaty was an abuse of process, (iii) the investors did not have the standing as “investors” under the Treaty, and (iv) the *Achmea* judgment rendered Article 8 of the Treaty invalid.

The investors had *prima facie* demonstrated that their claims fell under the relevant provisions of the treaty

The tribunal relied on the test formulated by Judge Rosalyn Higgins of the ICJ in her opinion in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*¹ for deciding preliminary jurisdictional objections. It held that the investors were only required to demonstrate whether the facts pleaded by them, if taken to be true, could possibly result in a breach of the treaty provisions.

According to the tribunal, the possibility of the investors’ claims giving rise to contractual claims did not alter the nature of the claims asserted in the arbitration. It found the claims to have been framed as concerning Poland’s substantive treaty obligations and not contractual claims.

The tribunal concluded that the claims relating to breach of Article 2(1), Article 2(2), Article 3, and Article 4 satisfied the *prima facie* standard. However, the claims relating to breach of Article 5, Article 7(1) and Article 8 were held to be insufficiently pleaded and not meeting the *prima facie* threshold.

The investors’ claim of the breach of the umbrella clause in Article 7(2) was based on violations of the share purchase agreement provisions. Poland objected to this claim on two grounds: firstly, Raiffeisen Centrobank and Syrena Immobilien could not advance claims relating to this agreement because they were not signatories to it, and secondly, the violations of the agreement could not be attributed to Poland because the international law of state responsibility only applied to violations of international law and not violations of a domestic law contract. The tribunal did not decide these objections and joined them to the merits of the dispute.

Poland could not establish that the investors’ use of treaty was an abuse of process

Poland alleged that the investors had committed an abuse of process by pursuing their contractual claims in international arbitration after pursuing some of the claims before Polish and Austrian courts. It also alleged that the investors were using international arbitration to pressure it to deprive third parties of their rights arising out of the legal regime that existed at the time when the investors made their investments.

¹ *Oil Platforms (Islamic Republic of Iran v. United States of America)* available here <https://www.icj-cij.org/en/case/90>



The tribunal rejected Poland's objections. It held that the threshold for finding abuse of process was high and mere bad faith did not imply abuse of process. It observed that the investors' claims were based on breaches of the treaty provisions and such claims could not have been raised in any other forum other than under Article 8 of the treaty.

The investors' corporate restructuring did not make them ineligible to claim benefits under the treaty

Poland alleged that the investors could not claim protection under the Treaty because they had transferred their investments in Syrena Hotels to the Cypriot company. According to the respondent, this potentially made the Cyprus–Poland BIT applicable to the dispute and the treaty no longer applied to the investors' claims. It also argued that the possible application of the two treaties could lead to abuse of process, and it was therefore necessary for the tribunal to determine which treaty most adequately applied to the investors' investment.

The tribunal found Poland's objection to be premature. According to the tribunal, the question of abuse could only arise and be addressed if and when the investors sought the protection under the Cyprus–Poland BIT. It took into account the investors' declaration that the Cypriot company would not initiate proceedings under the Cyprus–Poland BIT and held that there was not any conflict between the treaties that required resolution.

The tribunal also held that there was no requirement in the treaty to prove continuous direct ownership of the investment beyond the date of alleged breach by the host state. As such, the formation of a shell company as an intermediary company after the disputes had arisen did not prevent the investors from claiming protection under the Treaty for the breaches predating that restructuring.

Applicability of the *Achmea* judgment

As per Poland, the *Achmea* judgment held that the investor–state dispute settlement provisions in intra-EU BITs were incompatible with EU law. Poland argued that this rendered Article 8, the dispute settlement provision in the Treaty invalid.

The tribunal examined the law of the seat, that is, French law, and held that the question of existence and validity of an arbitration agreement was governed by international law principles that meet the fundamental requirements of justice in international trade. It held on this basis that EU law could not form part of the law applicable to the questions of the tribunal's jurisdiction. Having rejected the applicability of EU law, the tribunal

did not consider it necessary to examine the impact of the *Achmea* judgment on its jurisdiction.

The tribunal also applied Article 31 of the Vienna Convention on the Law of Treaties (VCLT) to hold that extrinsic factors such as the EU law or the *Achmea* judgment could not prevail over the ordinary meaning of the Treaty text. It concluded that the ordinary meaning of Article 8 was clear and unambiguous in constituting Poland's consent to arbitrate the disputes under the Treaty.

Poland also argued on the basis of *Achmea* judgment, Article 59(1) and Article 30(3) of the VCLT that the Treaty should be deemed to be terminated based on Poland's subsequent accession to the TEU and TFEU or, alternatively, applied only to the extent that its provisions were compatible with TEU and TFEU.

The tribunal rejected Poland's objection on the basis that the precondition of the "same subject matter" under Article 59(1) and Article 30(3) of the VCLT was not satisfied. The tribunal held that the Treaty and TFEU did not pertain to the same subject matter as the TFEU did not deal with the subject of investor–state dispute settlement or even arbitration. According to the tribunal, the *Achmea* judgment did not affect this conclusion because the *Achmea* judgment was limited to the principles of EU law and did not change this public international law relationship between TFEU and intra-EU BITs for the purposes of Article 59 and Article 30 of the VCLT.

Notes: The tribunal was composed of V.V. Veeder (president appointed by the party-appointed arbitrators, English national), Karl-Heinz Böckstiegel (claimants' appointee, German national) and Albert Jan van den Berg (respondent's appointee, Belgian national). The decision is available at <https://www.italaw.com/sites/default/files/case-documents/italaw11770.pdf>.

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ICSID tribunal dismisses claims of Interocean Oil Development Company and Interocean Oil Exploration Company against Nigeria while upholding its jurisdiction to hear the claims solely based on Nigeria's domestic investment statute

Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria, ICSID Case No. ARB/13/20

Viola Echebima

In an October 6, 2020 award, an ICSID tribunal considered indirect expropriation and breach of customary international law claims brought by two American companies, Interocean Oil Development Company and Interocean Oil Exploration Company (claimants), against the Federal Republic of Nigeria (respondent), pursuant to the Nigerian Investment Promotion Commission Act (NIPCA). These claims were largely based on international law principles of attribution. In particular, the claimants maintained that the collective actions of the respondent's agencies and domestic courts, as well as the private actions of Festus Fadeyi, which allegedly led to the expropriation of their investments in Nigeria, were attributable to the respondent.

The tribunal dismissed all claims on the merits and awarded costs in the sum of USD 660,129.87, in respondent's favour. Regardless of the dismissal, it is notable that the tribunal similarly dismissed all jurisdictional objections raised by the respondent.

Background and claims

The claimants, through the Nigerian corporate vehicle Pan Ocean Oil Company (Pan Ocean), owned a 40% participating interest in Nigerian Oil Mining Lease (OML) 98 and Oil Prospecting License 275 (the assets). Consistent with the Nigerian oil and gas joint venture structure, the respondent, through Nigerian National Petroleum Corporation (NNPC), retained the remainder of the interest in the assets. Until mid-1998, the claimants cumulatively held 2,500 shares, which were the only issued shares out of the Pan Ocean's 10,000 authorized shares.

However, in 2005, Fadeyi, as managing director of Pan Ocean, allotted the outstanding 7,500 shares to himself and associates. In addition, Fadeyi appointed new directors. These actions were taken without notice to or the participation of the claimants. Resolutions affecting these actions were subsequently validated by a Federal High Court (FHC), and relevant corporate documents

supporting the allotment were filed at the Nigerian corporate registry. These actions resulted in the dilution of the claimants' interests in Pan Ocean (and, ultimately, the assets) and caused the claimants to lose ownership and control of their investment in Pan Ocean, despite the claimants' persistent efforts to regain control.

Relatedly, the claimants alleged that the unlawful detention of Herbert Rooks (who was to have assumed Fadeyi's managerial role) by Nigerian security operatives, constituted part of the expropriatory and conspiratorial acts of the respondent; moreover, it constituted a violation of the respondent's protective duty under customary international law.

Premised on the foregoing, The claimants brought the claims against Nigeria pursuant to certain provisions of the NIPCA.

Pan Ocean's non-registration with the Nigerian Investment Promotion Commission (NIPC) did not rob the tribunal of jurisdiction to entertain the claims (but Justice Torgbor dissented)

Premised on the fact that the claims were solely based on NIPCA, as opposed to an international investment agreement or treaty, the respondent opposed the tribunal's jurisdiction, contending that the claimant had no basis to invoke the jurisdiction of the tribunal because Pan Ocean, having foreign shareholders, was not registered with the NIPC, and therefore could not claim any of the protections under NIPCA, including the ICSID-dispute resolution mechanism contemplated under Section 26 of the NIPCA.

In response, the claimants maintained that Section 29(2) of the NIPCA dispelled the need for registration because Pan Ocean was in existence prior to the enactment of the NIPCA; more so, the NIPCA was silent as to the legal implications for non-registration with the NIPC.

The tribunal, by a majority, dismissed the challenge, finding that it was not barred from assuming jurisdiction for this singular reason. Notably, the tribunal held that the claims related to the respondent's failure to protect the claimants' investment in Nigeria. What's more, the majority alluded to the fact that it would be unfair to refuse jurisdiction based solely on NIPCA registration technicalities.

Language in NIPCA is broad enough to entertain indirect expropriation claims and protections afforded under customary international law

Alternatively, Nigeria urged the tribunal to decline jurisdiction, arguing that the claims were outside the scope of the NIPCA as the protective guarantees



provided in Section 25 of NIPCA are limited to only direct expropriation. Moreover, the respondent contended that there was neither language in the NIPCA nor existing bilateral or multilateral agreements between the parties upon which claims for breach of customary international law could be found.

Conversely, the claimants asserted that based on the FHC decision, the involuntary surrender/dilution of their interest in Pan Ocean constituted indirect expropriation as contemplated by Section 25(1)(b) of the NIPCA. Regarding the contention against breaches of customary international law, the claimants argued that references to treaty agreements in the NIPCA implicate claims for customary international law breach. Additionally, the claimants maintained that customary international law was embedded in Nigerian legal system pursuant to Section 32 of the Interpretation Act.

The tribunal held that the broad language in Section 26 of the NIPCA covered the claims, even as customary international law had formed part of Nigerian law to the same extent as common law. It observed that a narrow construction of the NIPCA to hold otherwise would result in unwarranted findings.

Acts of NNPC, FHC, Fadeyi, and other state instrumentalities are not attributable to the respondent based on the relevant provisions of the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts (ILC Articles)

The claimants argued that the actions of the FHC in approving the dilutive corporate actions of Fadeyi, NNPC's failure to investigate into the affairs of Pan Ocean based on their joint venture relationship as well as its continuous interactions with Fadeyi (in his capacity as a representative of the OML 98 joint venture), were attributable to the respondent pursuant to Articles 4 and 7 of the ILC Articles.

However, the tribunal held that regardless of the fact that the claimants had lost their investment in Pan Ocean, the actions of Fadeyi and all state-owned instrumentalities were not tantamount to expropriation. Although the tribunal concluded that acts of Nigerian courts could amount to judicial expropriation, such finding could not be made in the present case as only a miscarriage of justice had occurred. The tribunal alluded to the fact that the claimants ought to have exhausted available domestic remedies by appealing the FHC's decision before a judicial expropriation could be considered to have taken place.

Regarding NNPC's inactions, the tribunal concluded that to the extent NNPC acted exclusively in a commercial capacity, the relevant provisions of the ILC Articles were not triggered to hold Nigeria culpable for expropriation.

No breach of minimum standard of treatment and FET standards

Finally, regarding Rooks arrest, the tribunal held that the claimants failed to link the arrest to a violation of these standards. Precisely, the tribunal noted that the standards for violation as articulated in *Neer v. Mexico* had not been established evidentially by the claimants.

Notes: The ICSID tribunal was composed of Prof. William W. Park (Presiding arbitrator, Swiss/American national), Prof. Julian D.M. Lew (British national; nominated by the claimants) and Hon. Justice Edward Torgbor (Ghanaian/British national; nominated by the respondent). The award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw11819.pdf>.

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