



AN ONLINE JOURNAL ON INVESTMENT LAW AND POLICY FROM A SUSTAINABLE DEVELOPMENT PERSPECTIVE

ISSUE 3. VOLUME 10. SEPTEMBER 2019



Judgment C-252 of 2019 of the Constitucional Court of Colombia: Change of precedent on the control of BITs

Federico Suárez Ricaurte



Ivory Coast's New Investment Code: Focus on issues related to sustainable development and dispute settlement

Mouhamed Kebe, Mahamat Atteïb & Mouhamoud Sangare



Toward a Code of Conduct for Investment Adjudicators: Can ethical standards salvage ISDS?

Martin Dietrich Brauch





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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

Judgment C-252 of 2019 of the Constitutional Court of Colombia: Change of precedent on the control of BITs

Federico Suárez Ricaurte



Judgment C-252 of the Constitutional Court of Colombia,¹ on the constitutionality of the Colombia–France BIT,² has aroused interest³ for being the response of the constitutional judge to the way in which foreign investment protection clauses are incorporated into domestic law. I set out below some aspects of the context in which this decision was taken, the main points addressed in the judgment and the reasons supporting it. My concluding remarks highlight the limits established by the court for the negotiation of treaties of this type, with the caveat that genuine protection of the national interest in this area involves making deeper changes in the management of economic foreign policy.

Background

A first important aspect is the legal context of this judgment. Under the more than 24 BITs, FTAs and other investment-related treaties ratified by the Colombian state⁴ at the time the judgment was handed down, there were 20 ISDS claims filed by multinationals against Colombia, 9 of which were in the direct settlement phase and 11 of which had gone to formal proceedings. Notably, these claims total USD 9.525 billion, a sum greater than 10 per cent of the entire national budget for 2019 and which can only increase when interest and legal and arbitration costs are added in.⁵ In addition, 9 of the 11 claims undergoing arbitration proceedings are based on alleged international wrongful acts on the basis of judgments issued by the very Constitutional Court, in either “tutela” or constitutionality proceedings.

These elements are added to certain features of the global context that increase the high vulnerability and risk that states such as Colombia face with regard to ISDS. By end 2018, states had signed 3,322 investment protection treaties. While the number of treaties ratified has marginally decreased, the number of claims by foreign investors has increased, reaching 942 worldwide. Of known cases, 61 per cent were decided in favour of investors.⁶

Empirical evidence on this subject indicates that developing countries are net losers in ISDS and, in general, the big winners are multinational corporations or individual billionaires from capital-exporting

¹ Constitutional Court of Colombia (CCC), Judgment C-252 2019. Retrieved from <http://www.corteconstitucional.gov.co/relatoria/2019/c-252-19.htm> [Judgment].

² Agreement between the Government of the Republic of Colombia and the Government of the French Republic on the promotion and reciprocal protection of investments, 10 July 2014. Retrieved from <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3488/colombia--france-bit-2014-> [Colombia–France BIT].

³ See, for example, 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*. Retrieved from <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>; Prieto, G. (2019, July 29). The Colombian Constitutional Court judgment C-252/19: A new frontier for reform in international investment law. *EJIL Talk*. Retrieved from <https://www.ejiltalk.org/the-colombian-constitutional-court-judgment-c-252-19-a-new-frontier-for-reform-in-international-investment-law/#more-17376>

⁴ Judgment, *supra* note 1, para. 50.

⁵ Judgment, *supra* note 1, para. 60.

⁶ UNCTAD. (2018). *World investment report: Investment and new industrial policies*. UNCTAD: Geneva. Retrieved from https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf



countries, as well as the arbitrators, who are paid substantial fees for deciding disputes.⁷

Interpretative method: prior situation and the change of precedent introduced by the judgment

The constitutionality review of international treaties in Colombia is exercised over two aspects: the instrument's approval process and the compatibility of the treaty's substance with the constitution. On account of various particular features of constitutionality review, the type of review being carried out by the court over the substantive clauses of investment treaties was limited to cross-checking them against the constitution, with no reference to the scope of such clauses in dispute settlement by arbitrators.⁸

The court firstly reiterated that investment treaties are consistent with the constitution according to the criteria of national interest; reciprocity; and the internationalization of its political, economic and social relations.⁹ The change of precedent made by the Court in C-252 of 2019 was in the study of the substantive compatibility of the investment protection clauses with the constitution. The court disaggregated the mandates derived from each treaty clause, checked their scope against relevant guideposts that awards had set over material control clauses, and determined which were admissible and which were inadmissible based on constitutional interpretation. It complemented this exercise with a review of the current global debate on investment law, comparing

the Colombia–France BIT to recent developments in the area such as USMCA, CPTPP, the Indian model investment treaty and CETA, as well as domestic law decisions such as those adopted by the French Constitutional Council for CETA and the 2015 Trade Promotion Authority (TPA) of the United States. Several of these committed France both domestically and externally and contained elements that differed from those that France had agreed with Colombia.

The Court's decision

The Constitutional Court advised the President of the Republic of Colombia that if he decided to complete the treaty's ratification process, he should make a joint interpretative declaration with France to clarify the terms indicated by the judgment.¹⁰ The court established seven conditions:

1. The substantive rights granted to foreigners must not lead to “unjustified more favourable treatment than the treatment accorded to nationals.”¹¹

For a better understanding of the conditions set by the court with respect to the FET standard for foreign investors,¹² see the relevant part of the treaty article on FET (unofficial ITN translation from Spanish original):¹³

Each of the Contracting Parties shall accord fair and equitable treatment **in accordance with applicable international law to the investors of the other Contracting Party and to their investments in their territory.** For greater certainty, the obligation to provide fair and equitable treatment includes, *inter alia*:

- a) The obligation to not deny justice in civil, criminal or administrative proceedings in accordance with the principle of due process.
- b) The obligation to act in a transparent, non-discriminatory and non-arbitrary manner with respect to investors of the other Contracting Party and their investments.

This treatment is consistent with the principles of predictability and consideration of investors' **legitimate expectations.** [...] [emphasis added]

⁷ Schultz, T., & Dupont, C. (2014). Investment arbitration: promoting the rule of law or over-empowering investors? A quantitative empirical study. *European Journal of International Law*, 25(4), 1147–1168. Retrieved from <http://www.ejil.org/pdfs/25/4/2551.pdf>; Van Harten, G., & Malysheuski, P. (2016). Who has benefited financially from investment treaty arbitration? An evaluation of the size and wealth of claimants. *Osgoode Legal Studies Research Paper Series*, 12(3), No. 14. Retrieved from <https://digitalcommons.osgoode.yorku.ca/olsrps/135>; Comisión para la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje en Materia de Inversiones (CAITISA, Comisión for the Citizens' Integral Audit of Reciprocal Investment Protection Treaties and the International Investment Arbitration System). (2017). *Auditoría integral ciudadana de los tratados de protección recíproca de inversiones y del sistema de arbitraje en materia de inversiones en Ecuador. Informe ejecutivo*. Retrieved from <http://caitisa.org/index.php/home/enlaces-de-interes>; Olivet, C., Müller, B. & Ghiotto, L. (2019, April). *ISDS in numbers: Impacts of investment arbitration against Latin America and the Caribbean*. Transnational Institute: Amsterdam. Retrieved from <https://www.tni.org/en/publication/isds-in-numbers>

⁸ See CCC, Judgment C-750 2008 (Colombia–United States FTA). Retrieved from <http://www.corteconstitucional.gov.co/RELATORIA/2008/C-750-08.htm>; CCC, Judgment C-608 2010 (Colombia–Canada FTA). Retrieved from <http://www.corteconstitucional.gov.co/relatoria/2010/C-608-10.htm>, among others.

⁹ Constitución Política de Colombia, 1991, Art. 226. Retrieved from <http://www.suin-juriscol.gov.co/viewDocument.asp?ruta=Constitucion/1687988>

¹⁰ Judgment, *supra* note 1, para. 68.

¹¹ Judgment, *supra* note 1, para. 112.

¹² Judgment, *supra* note 1, para. 174.

¹³ Colombia–France BIT, *supra* note 2, Art. 4(1), first part.



Regarding the FET standard, the Court laid down three conditions:

2. The term “*inter alia*” must be interpreted restrictively, in an analogical sense and not a comprehensive one; in other words, it is prohibited to limitlessly commit the state to obligations that are not agreed between the parties.¹⁴
3. The term “in accordance with applicable international law to investors of the other Contracting Party and to their investments in their territory” is subject to its content being determined by the parties (through a joint interpretation) in order to have legal certainty on what states commit to.¹⁵
4. The term “legitimate expectations,” also used in the expropriation clause as one of the factors to be considered in determining indirect expropriation,¹⁶ must be understood as “taking into account that these will only come into effect on condition that they derive from specific, repeated acts carried out by the Contracting Party that induce the good-faith investor to make or maintain the investment and that there are abrupt and unexpected changes made by government that affect their investment.”¹⁷

The court also established conditions related to the national treatment and MFN standards. See the relevant part of the text of the clause for better understanding (unofficial ITN translation from Spanish original):¹⁸

Each Contracting Party shall in its territory apply to the investors of the other Contracting Party, in respect of their investments and activities related to their investments, **treatment** no less favourable than that granted in **like situations** to its investors or the treatment granted to the investors of the most-favoured nation if such treatment is more favourable [emphasis added].

The two conditions established by the court were the following:

5. The term “like situations” should also be detailed

in such a manner that is consistent with legal certainty.¹⁹

6. While Congress reserves competence in the ratification phase of the treaty, the court stated that the word “treatment” must be understood to preserve “the power of the President of the Republic with regard to directing international relations, and concluding treaties, pursuant to article 189.2 of the constitution.”²⁰

Finally, the court established a condition concerning the article on expropriation and compensation. See the relevant part of the text of the clause for better understanding:²¹

Measures taken by a Contracting Party that are designed to protect legitimate public policy objectives, such as public health, security and environmental protection, do not constitute indirect expropriation when they are **necessary and proportionate** in the light of these objectives and are implemented in such a way that they effectively respond to the public policy objectives for which they were designed [emphasis added].

7. In this context, the Court established the condition that the term “necessary and proportionate” should be understood in such a way that “the freedom of structuring and autonomy of national authorities is respected for the purposes of, respectively, ensuring public order and protecting legitimate public policy objectives.”²²

However, the interpretative method and conditions laid down with regard to the substantive protection clauses were not similar in the ISDS analysis. Intervening Magistrates Álvarez,²³ Urueña²⁴ and Correa²⁵ and the reasoning of Magistrate Carlos Bernal’s opinion warned of the risks of what was agreed there, such as the lack of interpretation in conformity with human rights of certain arbitration decisions, the trend of states losing cases in such instances, the possible revision of judgments of the

¹⁴ Judgment, *supra* note 1, para. 208.

¹⁵ Judgment, *supra* note 1, para. 204.

¹⁶ Colombia–France BIT, *supra* note 2, Art. 6(2)(c): “[...] To determine whether a measure or series of measures by one Contracting Party constitute an indirect expropriation, a case-by-case analysis shall be performed considering among other factors: ... c) The consequences of the measure or series of measures on the investor’s **legitimate expectations**” [emphasis added].

¹⁷ Judgment, *supra* note 1, para. 212.

¹⁸ Colombia–France BIT, *supra* note 2, Art. 5(1).

¹⁹ Judgment, *supra* note 1, para. 256.

²⁰ Judgment, *supra* note 1, para. 256.

²¹ Colombia–France BIT, *supra* note 2, Art. 6(2), last part.

²² Judgment, *supra* note 1, paras. 247, 248 and 250.

²³ Judgment, *supra* note 1, paras. 361–363.

²⁴ Judgment, *supra* note 1, para. 364.

²⁵ Judgment, *supra* note 1, para. 373.



Constitutional Court by arbitrators and the amounts claimed, which may substantially affect the state's finances. Despite these warnings, the court declared the pure and simple enforceability of the agreement, that is, its constitutionality or applicability.²⁶

Additional comments on the decision

ISDS, the design of the substantive provisions of investment treaties and the content of various arbitration awards develop and contain an unjustified and inappropriate limitation on the regulatory capacity of the state and its environmental, administrative and economic prerogatives. This limitation translates as excessively preferential

"Judgment C-252 of the Colombian Constitutional Court reflects the need to rethink foreign policy with regard to international economic law for Colombia and for developing countries. The court's judgment establishes new criteria and, in turn, helps the country review its agenda in terms of international economic law in matters of investment as well as trade, double taxation and intellectual property."

treatment to FDI that ultimately becomes a severe impairment to the economic and political sovereignty of states, especially if they are developing states.

It is unprecedented—and equally important—that the Constitutional Court has set limits and constraints on the traditional interpretation of the investment protection clauses of FET, national and MFN treatment, and expropriation. However, if the court had serious objections regarding the constitutionality of certain terms (as it did, indeed, have) a declaration of partial unenforceability or non-constitutionality of the elements that ran counter to the constitution would have been more practical. This is all the

more true given that the interpretive declaration has to be agreed with France and is not subject to consideration by Congress, public opinion or the court itself.

This judgment also reflects the need to rethink foreign policy with regard to international economic law for Colombia and for developing countries. The court's judgment establishes new criteria and, in turn, helps the country review its agenda in terms of international economic law in matters of investment as well as trade, double taxation and intellectual property,²⁷ given that several of the premises mentioned have implications in these areas.

The importance of reviewing the policy of the Colombian state on these issues is pressing, bearing in mind that the first ISDS award against the Colombian government was issued in late August 2019. This award requires Colombia to pay Glencore USD 19 million plus interest and legal costs. The content of this decision has serious consequences for the fundamental powers of the state to sanction fiscal or administrative violations incurred by multinational companies.²⁸

Similarly, given the nature of the judgment of the Constitutional Court, this decision does not imply an immediate review of trade, investment or intellectual property agreements, matters that are generating many of the international claims that foreign investors have brought before ISDS and that endanger the regulatory capacity and autonomy of the Colombian state. Therefore, an authentic and integral defence of Colombia's interests requires a review of the management of the country's international relations, which is headed by the executive branch. In addition, there should be an increase in the levels of control and deliberation that the legislative branch and civil society have over the process of the incorporation of instruments such as international agreements on investment and trade.

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²⁷ Externado Radio. (2019). El control constitucional en el tratado de libre inversión entre Colombia y Francia. *Derecho a la Carta*, 331 [audio podcast]. Retrieved from <https://www.spreaker.com/user/externadoradio/331-el-control-constitucional-en-el-tbi->

²⁸ Glencore International A.G. and C.I. Prodeco S.A. vs. Republic of Colombia, ICSID Case No. ARB/16/6, Award, August 27, 2019. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw10767_0.pdf



INSIGHT 2

Ivory Coast's New Investment Code: Focus on issues related to sustainable development and dispute settlement

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Ivory Coast adopted a new investment code on August 1, 2018.¹ This new law² features a variety of innovations ranging from the revitalization of the institutional framework to the reconfiguration of tax rules to new obligations on investors. It therefore supports the aims of transparency and investment attractiveness.

Among the main innovations, two specific elements deserve attention in light of the overall agenda of reform of the international investment regime for sustainable development: (1) investment dispute settlement mechanisms and (2) the promotion of productive and socially responsible investment and local content requirements.

1. Innovations in investor–state dispute settlement

Article 50 of the new code provides for three distinct dispute settlement arrangements.

The first of these arrangements is an amicable settlement procedure. The code specifies that any resulting settlement agreement is legally binding on the parties, who shall endeavour to comply with it as soon as possible. Any violation of the settlement agreement could be sanctioned under civil liability regulations.

Next, unless this amicable settlement procedure enables an agreement to be reached within 12 months, UNCITRAL conciliation rules apply.

Finally, under the new code, the parties can still “agree to submit their dispute to arbitration by the Arbitration Centre of the Common Court of Justice and Arbitration [CCJA] of the Organization for the Harmonization of Corporate Law in Africa [OHADA].”³ By comparison, the old code stated that “the parties’ consent to the jurisdiction of ICSID or its Additional Facility, as the case may be, ... is established by this article, for the Republic of Ivory Coast, and shall be expressed specifically in the authorization application, for the person concerned.”

Three main observations arise from the new dispute settlement provision: (a) the withdrawal of direct access to ICSID arbitration; (b) the inclusion of a fork-in-the-road clause for the investor; and (c) the promotion of OHADA institutional arbitration.

a. Withdrawal of direct access to ICSID arbitration

The legislators opted for deleting the unilateral offer of consent to ICSID arbitration, while favouring the CCJA Arbitration Centre over other arbitration institutions. This does not, in principle, exclude the possibility of investors resorting to other arbitration forums, notably ICSID. This provision suggests that there no longer is direct state consent to investor–state arbitration.

In any case, the choice of an arbitration institution by the investor, including the CCJA, must be made in the authorization application, which is subject to the

¹ Ordinance No. 2018-646 of August 1, 2018, available in French at <http://www.tourisme.gouv.ci/uploads/Ordonnance-2018-646-du-01-08-2018code-investissement.pdf.pdf> [2018 Code]. The new code repeals and replaces Ordinance No. 2012-487 of June 7, 2012 on the Investment Code, available in French at <http://www.droit-afrique.com/upload/doc/cote-divoire/RCI-Code-2012-des-investissements.pdf> [2012 Code].

² The code is supplemented by decrees dated December 18, 2018 on (1) the organization and functioning of the Authorization Committee of the Investment Promotion Agency and (2) businesses eligible for the tax credit for the opening of share capital to nationals for investment promotion purposes.

³ 2018 Code, *supra* note 1, Article 50.



approval of the state. This therefore presupposes that the state's consent and its choice of arbitration forum will be expressed in the new authorization template to be adopted.

This innovation appears to respond to the criticism to ISDS in recent years, in particular the thorny issue of host state consent to investor–state arbitration.⁴

This innovation is probably not unrelated to the case of *Société Resort Company Invest Abidjan v. Ivory Coast*. In this case, the tribunal explicitly recommended, in the award on jurisdiction of August 1, 2017,⁵ that Ivory Coast reform its corresponding legislation due to the ambiguity of its offer to arbitrate. Indeed, the arbitral tribunal considered that an authorization application accepted by the investor constitutes proof of the investor's consent to ICSID arbitration. The tribunal relied upon the aforementioned Article 20 of the 2012 Ivory Coast Investment Code. The tribunal nonetheless acknowledges that Article 20 is not a model of clarity and would therefore benefit from being reformed:

If the Côte d'Ivoire, upon receipt of the Tribunal's decision, maintains its disagreement with the majority of the Tribunal's analysis, then its remedy can be swift and straightforward: it can introduce amendments to Article 20 of the 2012 Code and to its model "demande d'agrément" [*authorization application*] with the effect that prospective investors will be in no doubt as to the manner in which they are to convey their consent to ICSID arbitration.⁶

b. Inclusion of a fork-in-the-road clause for the investor

The new code provides that the choice made by the investor implies the waiver of any other offer of arbitration. This innovation introduces a fork-in-the-road clause incorporated in some investment treaties. This clause means that by opting for a specific dispute settlement route (for example, national courts), the investor irrevocably waives any other means of dispute settlement (for example, arbitration institutions).

Moreover, the recent BITs signed by Ivory Coast entail such commitments.⁷

c. Promotion of OHADA institutional arbitration

The code recognizes the CCJA Arbitration Centre of OHADA as an investment arbitration forum open to the disputing parties. This explicit reference to an African arbitration centre is an innovation that reflects a trend adopted in several recent investment laws in French-speaking Africa.⁸

The inclusion of the CCJA forum in the new Ivorian code is justified by two close relationships: Ivory Coast is a member of OHADA and also home to the OHADA CCJA. This recourse to the CCJA can also be explained by the recent reform of OHADA arbitration law, which now expressly opens the way to investment arbitration. The CCJA Arbitration Centre has thus administered several investor–state disputes on the basis of an arbitration agreement. Overall, the new offer of arbitration contributes to the promotion of African arbitration centres and points to a degree of agreement within the continent on the shaping of international investment law.⁹

2. Strengthened environmental obligations and introduction of local content requirements

Unlike the old code, which made only one-off, sometimes allusive references to sustainable development,¹⁰ the new code expressly states that it aims to promote sustainable development by fostering productive and socially responsible investment.¹¹

Thus, the code establishes an express obligation for all investors to comply with existing laws and regulations relating to environmental protection and, in their absence, with applicable international standards.¹² The

⁴ Mbengue, M.M. (2012, 19 July). Consent to arbitration through national investment legislation. *Investment Treaty News*, 2(4), 7–9. Retrieved from https://www.iisd.org/pdf/2012/iisd_itn_july_2012_en.pdf

⁵ *Société Resort Company Invest Abidjan, Stanislas Citerici and Gérard Bot v. Republic of Côte d'Ivoire*, ICSID Case No. ARB/16/11, Decision on the Respondent's Preliminary Objection to Jurisdiction. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/italaw9371.pdf>

⁶ *Ibid.*, subsection 157.

⁷ See, for example, Article 12 of the 2016 Ivory Coast–Turkey BIT, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3694/c-te-d-ivoire---turkey-bit-2016->

⁸ See, for example, the 2012 Investment Code of Togo (Article 8), the 2012 Investment Code of Mali (Article 29) and the 2015 Investment Code of Guinea (Article 43), all available in French at <http://www.droit-afrique.com>, and the 2018 Investment Code of Burkina Faso (Article 39), available in French at https://www.assembleenationale.bf/IMG/pdf/loi_038_portant_code_des_investissements.pdf

⁹ Mbengue, M.M., & Schacherer, S. (2017). The "Africanization" of international investment law: The Pan-African Investment Code and the reform of the international investment regime. *The Journal of World Investment & Trade*, 18(3), 414–448.

¹⁰ 2012 Code, *supra* note 1, Articles 3 and 38.

¹¹ 2018 Code, *supra* note 1, Article 3.

¹² 2018 Code, *supra* note 1, Article 36.



legislator has thus carried out a certain normative densification of the former provisions, which at the time invited the investors to promote those environmental obligations. In addition to being mandatory, the new provisions are coupled with sanctions for non-compliance: the violation of environmental obligations by the investor entails the withdrawal of its authorization by the Ivory Coast Investment Promotion Agency.¹³ This regulatory change responds to the need to reinforce environmental requirements for investment, as recognized by the UN Guiding Principles on Business and Human Rights.

The goal of sustainable development is also demonstrated by the new local content provisions for the strengthening of the socioeconomic impact of investment within the national territory.

Foreign investors are urged to rely on local companies in the conduct of their operations, in order to benefit from certain advantages offered by the new legal framework. The objective is, of course, to open up areas of opportunity for local small and medium-sized enterprises and to give a more inclusive character to Ivorian economic growth.

As a consequence, large foreign companies eligible for benefits under the new code and belonging to category 1 or 2¹⁴ are entitled to tax credits¹⁵ provided that they apply a local content policy on job creation, the opening of share capital to nationals and outsourcing. In practical terms, an additional tax credit of 2 per cent is granted to the foreign investor if the number of Ivorian executives and management staff (senior management such as directors, production manager, operations manager, sales manager etc.) represents 90 per cent of the total workforce in these two categories of employees.¹⁶

The same tax credit is granted to companies that subcontract to national companies the production of goods intended to be incorporated in a final product in Ivory Coast or abroad. This benefit is also extended to companies that open their share capital to nationals.¹⁷ An implementing decree of December 18, 2018 makes this tax credit accessible to eligible companies that have opened at least 15 per cent of their share capital to Ivorian nationals.

Conclusion

In short, the new code offers important innovations for the promotion of sustainable development. It remains to be hoped that these innovations will be aligned with the country's network of BITs as well as with its investment contracts to ensure overall consistency of the legal regime applicable to investments in Ivory Coast.

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¹³ 2018 Code, *supra* note 1, Article 48.

¹⁴ Category 1 includes agriculture, agribusiness, health and hospitality. The hospitality sector is eligible only if the amount of the planned investments is equal to or greater than 5 billion [CFA] in zone A, and 2 billion in zones B and C. Note that the Ivorian territory is divided into three zones designated A, B and C as defined by a decree adopted by the Council of Ministers. Category 2 includes first the sectors of activity not included in Category 1, then the sectors of activity not expressly excluded by Article 6 of the Investment Code (the business sector, the banking and financial sectors, the non-industrial building sector and the liberal professions) and finally the hospitality sector for investments involving amounts below the thresholds set for Category 1.

¹⁵ A tax credit is a reduction of a tax paid by a business or an individual, in the form of a refund. It is a fiscal incentive that aims to support certain sectors of activity that take into particular account the requirements of sustainable development.

¹⁶ 2018 Code, *supra* note 1, Article 21.

¹⁷ 2018 Code, *supra* note 1, Article 21.



INSIGHT 3

Toward a Code of Conduct for Investment Adjudicators: Can ethical standards salvage ISDS?

Martin Dietrich Brauch



*Book review of Katia Fach Gómez's Key Duties of International Investment Arbitrators: A transnational study of legal and ethical dilemmas.*¹

The idea of entrusting party-appointed arbitrators with powers to decide investor–state disputes through final and binding awards, inherited from commercial arbitration and traditionally accepted as appropriate, now causes discomfort among critics. Growing questions about arbitrators' independence and impartiality have prompted a reflection on the legitimacy of international arbitration as a mechanism for settling investment disputes that often involve regulatory issues and the public interest.

These concerns are now fuelling ISDS reform initiatives touching on arbitrators' ethics. Modern investment treaties and treaty models increasingly include stricter ethical standards. Furthermore, in its new agreements the EU has replaced traditional ISDS with an Investment Court System (ICS), featuring standing first-instance and appellate tribunals composed of tenured adjudicators. The EU's goal is to make ICS global by establishing a multilateral investment court (MIC). The ongoing process to amend ICSID rules and regulations

has also involved discussions on developing a code of conduct and requiring stricter ethical standards. Finally, in the ongoing process for multilateral ISDS reform at UNCITRAL Working Group III, states have identified “concerns pertaining to arbitrators and decision makers,” including their (apparent) lack of independence and impartiality, the limitations in existing mechanisms to challenge them and their qualifications to decide cases. The working group concluded that it is desirable for UNCITRAL to develop reforms addressing those concerns and will tackle them as it reaches the solution-development stage of its mandate.

Katia Fach Gómez thus sets out to “provide a detailed analysis of a significant set of duties that are attributed to investment adjudicators—both traditional international investment arbitrators and also prospective members of the tribunal/judges” (p. 9). Her timely analysis will serve as invaluable input into discussions on adjudicators' ethics in the abovementioned reform processes and in the EU-led establishment of a MIC. In turn, developments in these processes will soon necessitate a second edition of the book.

The author chose not to devote a chapter to the duty of independence and impartiality, which are already widely discussed in the literature and case law. The book focuses instead on duties that “have thus far been viewed as less clearly-defined, or even secondary” (p. 10): the duties of disclosure, personal diligence and integrity, confidentiality, control of arbitration costs, and continuous training.

Chapter 1: Introduction. A transnational study of legal and ethical dilemmas

To describe the main characteristics of ISDS and its evolution, the author pays specific attention “to recent developments in this area that have arisen from EU initiatives” (p. 1). For example, she notes how various elements in the EU ICS proposal—such as the appointment of judges by a committee, their “quasi-civil servant status” and fixed salary, the random assignment of cases and the appellate mechanism—reflect the notion of public justice that the EU aims to embed in this court-like system and an eventual MIC (pp. 4–5). ISDS reform

¹ Fach Gómez, K. (2019). *Key duties of international investment arbitrators: A transnational study of legal and ethical dilemmas*. Springer: Cham. Retrieved from <https://www.springer.com/gp/book/9783319981277>



processes at UNCITRAL, ICSID and the renegotiation of NAFTA earn a brief mention (pp. 5–6).

The EU-centric perspective throughout the book may be explained by the author's background and by her laudable intent to bring a positive contribution to EU initiatives. In addition, the EU's resolve to create a MIC suggests that it will create it even if the idea fails to gain consensus support at UNCITRAL. That said, given that various states have not concluded and may not intend to conclude agreements with the EU featuring an ICS and may decide against joining a MIC, ISDS reform initiatives at UNCITRAL and ICSID may have greater relevance globally.

The author's apparent endorsement of the EU's idea that the ICS/MIC proposal "dynamites" and fully replaces the "old ISDS" mechanism (p. 5) could also have been framed in a more nuanced manner. While ICS/MIC may respond to certain ethical concerns, it fails to address other concerns with ISDS. Like classic ISDS, ICS/MIC offers foreign investors an extraordinary treaty-based legal remedy, without offering the same rights to other investment-relevant stakeholders, such as domestic investors, affected individuals or communities, or even states. Despite its ethical enhancements, ICS/MIC is only a partially improved version of ISDS² and, in that sense, still reflects a 1960s' world view (p. 3).

The introductory chapter also points to the lack of systematization in how treaties and arbitration rules address arbitrators' duties, but welcomes the code of conduct as "an interesting novelty that has begun to emerge in the investment arbitration milieu over recent years," including in proposals by academics, model BITs, EU treaties and the ICSID rule amendment process (p. 8). The chapter cautions that recent codes of conduct are "drafted in general and ambiguous terms" and are not necessarily comprehensive.

Chapters 2 and 3: The duty of disclosure

Chapter 2 discusses arbitrators' duty "to disclose a series of circumstances that may connect them with the case or its participants" (p. 25). The author first analyzes the formal aspects and content of statements of impartiality and independence required by disclosure rules under

ICSID and other arbitration institutions and rules, such as the ICC, the Singapore Investment Arbitration Centre (SIAC), the PCA and UNCITRAL, as well as similar rules outside the investment arbitration context, such as the CJEU and the WTO.

Noting the virtues of more modern approaches, the author stresses that ICSID could "refine and strengthen its demands in matters of arbitrator disclosure" (p. 37). Finding that ICSID arbitrators' alleged ignorance of a particular circumstance has often been accepted to avoid disqualification, she calls for rephrasing ICSID texts on the duty of disclosure to "enable a shift away from arbitrator-centred towards more party-centred standards" (p. 44). She also recommends including "explicit references to the on-going nature of the duty of disclosure," emphasizing the need for continuous trust between the adjudicator and the parties (p. 50).

"Katia Fach Gómez points to the lack of systematization in how treaties and arbitration rules address arbitrators' duties, but welcomes the code of conduct as 'an interesting novelty that has begun to emerge in the investment arbitration milieu over recent years'."

Importantly, Fach Gómez makes the case for arbitration institutions taking a more active role in ensuring compliance with this duty of disclosure, such as by reviewing arbitrators' statements and CVs, or organizing mandatory courses covering "issues such as ethics and integrity," among others (p. 68). She looks into the rare cases in which arbitration institutions applied penalties to *commercial* arbitrators who failed to fulfil their duty of disclosure, but expresses skepticism as to the possibility of holding *investment* arbitrators liable, as their "immunity...has so far proved to be an almost unshakable principle" (p. 70).

Chapter 3 takes a deep dive into the Guidelines on Conflicts of Interest in International Arbitration of the International Bar Association (IBA); references to it in investment disputes and in some recent investment treaties; and their potential influence in the development of codes of conduct. The author presents detailed case

² IISD Investment Program. (2017, March). *Reply to the European Commission's public consultation on a multilateral reform of investment dispute resolution*. Retrieved from <https://www.iisd.org/library/reply-european-commission-s-public-consultation-multilateral-reform-investment-dispute>



studies on three controversial investment arbitration topics—repeat appointments, issue conflict and multiple hatting—and their links with the duty of disclosure.

Chapter 4: The duty of personal diligence and integrity

To define the contours of the duty of personal diligence and integrity, Fach Gómez starts with the non-delegation of responsibilities, studying the practice of ICSID arbitrators to hire assistants in addition to the official ICSID secretary and examining related proposals in the ICSID rule amendment process. She looks into the case of *Yukos v. Russia*, where Russia challenged the USD 50 billion awards in the Dutch courts, partly on the grounds of an assistant being heavily involved in the arbitral deliberations, including at the awards stage, “in breach of the Tribunal’s mandate to personally perform these tasks” (p. 135). While noting that this aspect was not determinant of the set-aside of the award, the author supports clarifying the rules by listing the tasks of assistants or determining that their tasks should be set in consultation with the parties.

"Like classic ISDS, ICS/MIC offers foreign investors an extraordinary treaty-based legal remedy, without offering the same rights to other investment-relevant stakeholders, such as domestic investors, affected individuals or communities, or even states. Despite its ethical enhancements, ICS/MIC is only a partially improved version of ISDS."

The author explores two more aspects of the duty of personal diligence and integrity. As to arbitrator time-related availability, she notes the influential wording of the 1994 NAFTA Code of Conduct, as well as proposed ICSID rule amendments to strengthen arbitrators’ commitment to availability and efficiency throughout the proceedings. Furthermore, given the successful challenges against arbitrators in *Burlington v. Ecuador* and *Perenco v. Ecuador*, she supports including references to “dignified behaviour” in future codes of conduct (p. 153).

Chapter 5: The duty of confidentiality

For Fach Gómez, there is convergence between an investment adjudicator’s “duties as guarantor of transparency vis-à-vis the public, and his/her duty of confidentiality with respect to the participants in the proceedings” (p. 171). She considers that the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration are an “extremely important international text” that can serve as a reference on transparency, while noting that confidentiality is ultimately linked to arbitrators’ prohibition of *ex parte* communications and with the arbitration institutions’ duty to respect the privacy and secrecy of tribunal deliberations and drafts (p. 166). She also notes that states’ increased adoption of improved transparency standards means that the scope of the duty of confidentiality tends to become narrower, with “little information that can still be classified as non-public” (pp. 172–173).

"For Fach Gómez, there is convergence between an investment adjudicator’s 'duties as guarantor of transparency vis-à-vis the public, and his/her duty of confidentiality with respect to the participants in the proceedings'."

Chapter 6: Other duties. Control of arbitration costs and continuous training

Referring to the cases of *Getma v. Guinea*, in which arbitrators unilaterally increased their own fees, and *Chevron and Texaco v. Ecuador*, where the presiding arbitrator was paid fees of about USD 1 million, Chapter 6 briefly explores the duty of arbitrators to rationalize arbitration costs. This duty is linked to another category of concerns identified by UNCITRAL member states as desirable to be reformed: the significant costs and duration of ISDS proceedings.

The author points to ICSID rule amendment proposals aimed at strengthening arbitrators’ duty to control costs, such as establishing time limits for rendering awards, determining payment of arbitrators after specific milestones, or sanctioning delays by reducing arbitrators’ fees. She also highlights provisions related



to costs in the EU ICS approach, such as provisions that disallow multiple claims, along with articles that address security for costs and third-party funding, as well as the establishment of a retainer scheme for adjudicators (pp. 180–181).

Finally, the author says that international adjudicators have a duty to develop their professional skills continuously. In her view, increased knowledge and sensitivity of adjudicators regarding ethical standards and human rights, for example, could lead to higher-quality decisions. She supports the role of arbitral institutions, the EU and UNCITRAL in examining the issue further (p. 185).

Chapter 7: Conclusion. A new code of conduct for present and future investment adjudicators

The final chapter summarizes Fach Gómez's policy recommendations and her case for a "new code of conduct for present and future investment adjudicators" (p. 203). Again, she praises the EU initiatives in this area, saying that these "constitute an advance in terms of systematization, visibility, transparency and accountability" that could help "spark a race to the top" (p. 191–192).

"A code of conduct is not a panacea for the wider and deeper problems inherent in the ISDS regime. A pool of investment adjudicators compliant with the highest ethical standards can only do limited good if the law they are applying is fundamentally flawed."

I read this optimism with mixed feelings. Fach Gómez's book offers a persuasive account of the potential virtues of codes of conduct in attaining higher ethical standards of investment adjudicators and thus improving the ISDS regime. However, her work also points to their limitations and the need for refinement, given that these efforts are still in the early stages and suffer from "ambiguity and lack of completeness," which also apply to "the content of the specific investment arbitrators' duties that would give shape to the code of conduct" (p. 192).

Fach Gómez also points to questions that have emerged in the UNCITRAL process: "how should ethical rules be enforced and by whom (arbitrators, parties, institutions, others)?" (p. 18). She says that these questions "should be answered in the future with a call to develop a range of disciplinary instruments, available should investment adjudicators fail to comply with their duties" (p. 18). But how likely is it that such disciplinary instruments would be developed and effectively used, given that "almost unshakable principle" of investment arbitrator immunity (p. 70)?

More fundamentally, a code of conduct is not a panacea for the wider and deeper problems inherent in the ISDS regime. Broadly worded substantive provisions still exist in imbalanced investment treaties, granting rights to foreign investors without subjecting them to enforceable obligations. These treaties still allow foreign investors to challenge government measures aimed at achieving national development priorities, the SDGs, and climate change mitigation and adaptation objectives. A pool of investment adjudicators compliant with the highest ethical standards can only do limited good if the law they are applying is fundamentally flawed.

Author

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NEWS IN BRIEF

UNCITRAL secretariat publishes documents to be considered at October 2019 session of Working Group III on ISDS reform

Delegates to the UNCITRAL Working Group III process on multilateral ISDS reform will meet again in Vienna during the week of October 14–18, 2019. In the previous session, held in April 2019 in New York, the working group had agreed that in the October session it would develop a project schedule for reforms and “discuss, elaborate and develop multiple potential reform options simultaneously,” focusing on two tracks: structural reforms and other types of solutions.

The draft agenda for the Vienna session indicates that the working group is expected to continue its consideration of ISDS reform based on notes prepared by the secretariat and on submissions from governments to the UNCITRAL secretariat.

Documents prepared by the secretariat include newly published notes on reform options (also available in tabular form), the establishment of an advisory centre, selection and appointment of adjudicators, and possible solutions regarding third-party funding, as well as two yet-to-be-published working papers, focusing on a code of conduct and on shareholder claims and reflective loss.

Submissions made to the secretariat by the following governments are publicly available: Brazil; Chile, Israel and Japan (joint submission); China; Colombia; Costa Rica (submissions I and II); Ecuador; EU and its member states (including an addendum); Indonesia; the Republic of Korea; Morocco; South Africa; Thailand; and Turkey.

Any further submissions made by states—as well as translations of submissions in all six official UN languages—will be published on the working group's webpage as they become available. Submissions made by international and non-governmental organizations and other resources are available on a separate page of the working group's website.

(Editor's note: IISD, the publisher of ITN, has made four joint submissions with the Columbia Center on Sustainable Investment [CCSI] and the International Institute on Environment and Development [IIED]: [1] Draft Treaty

Language – Withdrawal of consent to arbitrate and termination of international investment agreements; [2] Draft Text Providing for Transparency and Prohibiting Certain Forms of Third-Party Funding in Investor–State Dispute Settlement; [3] Third Party Rights in Investor–State Dispute Settlement: Options for reform; and [4] Shaping the Reform Agenda: Concerns identified and cross-cutting issues.)

ICSID rule amendment process: Third working paper released in August 2019, consultation with states scheduled for November 2019, approval expected for October 2020

On August 16, 2019, the ICSID secretariat released the third working paper featuring proposed rule amendments, based on inputs from member states and the public. Proposed amendments include language on expedited arbitration, time limits to which tribunals would be subject, the ability for tribunals to name independent experts and security for costs, among others.

The ongoing rule amendment process was announced in October 2016 during the meeting of ICSID's Administrative Council, which is the Centre's governing body and features representatives from its member states. The process is devoted mainly to possible revisions of procedural rules and regulations. The original ICSID Arbitration Rules date back to 1967 and were amended three times before the current process—in 1984, 2002 and 2006.

In addition to the working papers, there are also two compendiums of state and public comments on them, the latter of which features feedback received by late June 2019. *(Editor's note: one set of public stakeholder comments featured in the latest compendium was submitted by IISD, the publisher of ITN.)*

According to the third—and most recent—working paper, the ICSID secretariat will hold an in-person



consultation on the document with ICSID member states from November 11 to 15, 2019. The secretariat's goal is for the November consultation to be "the final, or at least penultimate, consultation before the amended rules are placed before the Administrative Council for a vote."

In the previous [working paper](#), the secretariat had aimed for a vote on the proposed amendments during the council's October 2019 meeting. Given that the consultation with member states will take place after this year's council meeting, the target [has been pushed](#) to October 2020.

The ICSID Convention itself is not subject to change under this amendment process. ICSID is an arbitration institution housed within the World Bank Group and which is tasked with administering investor–state disputes. The latest edition of ICSID [caseload statistics](#) found that 56 cases were registered in 2018 under the ICSID Convention and Additional Facility Rules, the latter of which involves cases that fall outside the scope of the treaty. By June 30, 2019, 22 cases had been registered in 2019. The grand total over ICSID's history under ICSID and Additional Facility Rules numbers at 728, including both treaty-based and contractual disputes.

RCEP ministers: 2019 deal in sight, market access talks advancing swiftly

Negotiations for the RCEP trade and investment deal should be finalized by the end of 2019 and have seen notable progress on market access negotiations and services-related annexes, according to a statement issued in August by ministers from the 16 countries involved in the process.

The 16 countries include all 10 members of ASEAN, as well as their FTA partners, namely Australia, China, India, Japan, New Zealand and South Korea. RCEP ministers wrapped up their eighth intersessional ministerial meeting on August 3, 2019, in Beijing.

Their [joint media statement](#) afterward highlighted "mutually satisfactory outcomes" for approximately two-thirds of the talks involving market access, without elaborating further. Other advances achieved in recent months include the finalization of talks on financial services, as well as on telecommunications and professional services, all three of which are captured in

annexes to the RCEP text.

Prior to the meeting, Australian Minister for Trade, Tourism and Investment Simon Birmingham told the local [Radio National](#) station that RCEP talks are seeing "real momentum" and "political will" when it comes to finalizing negotiations in 2019.

Looking ahead, other RCEP trade officials have suggested that the deal's signature could come next year, assuming the negotiations themselves do stick to the 2019 timeframe.

"Our progress right now stands at about 60 per cent, as we have finished negotiations on seven out of 20 main issues on the RCEP," said Thailand's Deputy Prime Minister and Commerce Minister Jurin Laksanawit in comments to the [Bangkok Post](#). The seven issues refer to the number of chapters completed in the overall negotiations, separate from the annexes. Another RCEP ministerial-level meeting is planned for September in the Thai capital city.

EU–China investment negotiations: Advances on national treatment, financial services

Talks for an EU–China BIT have made some progress in the areas of financial services and national treatment, according to a report circulated by the European Commission in July, with another negotiating round planned for the week of September 23.

The one-page [report](#) covers the 22nd negotiating round since formal talks were launched in November 2013. It also describes the discussions on environment and labour issues, without elaborating further on the details of those talks. The report also noted that "more tangible progress" is needed in the area of state–state dispute settlement, which also featured in the latest round.

National treatment is a sensitive issue and also featured in a [dedicated study](#) commissioned by Brussels. The 2015 study, prepared by Covington & Burlington LLP, asked whether obtaining national treatment under the BIT would mean that European investments in China would be subject to the latter's policies and regulatory framework on domestic investments.

Also in question is whether obtaining national treatment under the BIT would be sufficient for



European investors to have improved market access terms, given how Chinese approval processes work in practice and depending on what industries that Beijing pushes to keep on a negative list excluded from national treatment obligations.

“Potential foreign investors will want to look carefully at approval requirements and underlying policies applicable to domestic investors in their specific industries to determine the extent to which national treatment alone would open new doors for them in China,” the study said. It also called for strong terms in the BIT on transparency in relation to administrative decision making and “affirmative market access commitments” that are modelled after the Canada–EU CETA.

The 22nd negotiating round was held from July 15–19 in Brussels, Belgium, with the September round set for Beijing. Leaders from the two economic giants said [earlier this year](#) that they planned to finalize negotiations for an “ambitious” investment agreement in 2020, which would eventually replace the various existing BITs that individual EU member states have with China. Of the 28 EU member states, [only Ireland](#) has not negotiated a standalone investment agreement with Beijing.

Investment facilitation: WTO members involved take stock of progress, look to intensify work

The 70 WTO members participating in the structured discussions on a possible multilateral framework on [investment facilitation](#) concluded their current phase of work in late July and are reportedly looking to “intensify” their efforts after the organization’s annual August hiatus.

At a stocktaking session on July 18, Colombian Ambassador to the WTO Juan Carlos González, in his capacity as the group’s coordinator, outlined the [discussions’ state of play](#) and potential next steps, particularly given the interest that several participants have expressed in having an outcome in time for the next WTO ministerial conference in June 2020. González has now finished serving as coordinator, with the role going to Chilean Ambassador to the WTO Eduardo Gálvez.

The joint initiative’s participants have been meeting on a near-monthly basis since January to examine various country-level examples that could inform the “elements” of this planned multilateral framework.

Those meetings were held in January, March, April, May and June, and were devoted to “improving the transparency and predictability of investment measures,” “streamlining and speeding up administrative procedures and requirements,” “enhancing international cooperation, information sharing and the exchange of best practices, and [the] development dimension.” These areas were those listed in the [joint statement](#) that formally launched this initiative in December 2017.

According to a summary by González, participants have circulated 40 written submissions that outline examples from different participants, which linked back to the “checklist” of issues that came from last year’s discussions. There have also been examples that González has submitted in his capacity as coordinator, namely for the discussions on cross-cutting issues. While these written submissions are listed on the [WTO’s online documents portal](#), most are restricted to member access only. These submissions have been discussed by participants, along with other “suggestions,” and now form part of a “compendium of text-based examples” designed to collect the input received to date.



González noted that participants have different views over the level of convergence on certain items, and therefore whether they are ready to move to text-based discussions from September onward. The work program for the rest of the year will be determined during an organizational meeting taking place after August. He reported that participants are now looking to discuss the framework itself, given the focus to date on what elements might go inside that framework. They have asked the coordinator to prepare a working document that will facilitate that effort, as well as making it clearer where participants have common ground and where there are areas of divergence.

An earlier summary by the coordinator on the March discussions had indicated that participants were generally of the view that this example-driven discussion from January to July 2019 could help inform future obligations that they may take on under such a framework.

“There was broad agreement that the concrete examples presented helped visualize how the different elements contained in the checklist could be converted into operational commitments. While some of the submitted examples were already adapted to a multilateral investment facilitation context, many of them needed to be specifically customized,” the summary said.

African Continental Free Trade Agreement (AfCFTA) operational phase kicks off, with eyes on implementation and Phase II talks, including investment

The African Union formally kicked off the operational phase of the African Continental Free Trade Agreement (AfCFTA) during a high-level summit in Niger in early July 2019 that brought together heads of state and government from across the continent.

The trade agreement has been in force since late May 2019. The only member of the African Union that had not signed the accord at the time of this writing was Eritrea, given that Benin and Nigeria signed on during

the July summit. The agreement has been ratified by 27 countries out of the 54 signatories.

Further negotiations are still planned for Phase II of the agreement, given that Phase I was primarily focused on areas such as goods and services trade, as well as dispute settlement. Those Phase II talks are expected to continue throughout 2020, with the next key milestone being the adoption of terms of reference for the working groups tasked with those processes.

Niger President Issoufou Mahamadou told the summit that “the optimization of the [AfCFTA’s] positive effects will be achieved only if the protocols already signed...are accompanied by agreements, currently being negotiated, on investment, competition and intellectual property.”

In the meantime, ensuring a smooth implementation of the first phase will be crucial, with United Nations Deputy Secretary-General Amina J. Mohammed saying at the summit that the UN is looking to help the AfCFTA’s parties take the necessary steps, including at the national level.

“We are committed to working with African institutions to mobilize the resources that will be required for full implementation of the [AfCFTA]. In the first instance, the African Regional Integration Trust Fund will support countries to mobilize resources to finance regional integration,” she said, highlighting the potential for funding from sources such as regional development banks and the Belt and Road Initiative.

Other officials, such as African Union Commission Chairperson Moussa Faki Mahamat, similarly said that while the AfCFTA’s operational launch was an important milestone, much work remains to ensure a smooth rollout, including on developing the necessary infrastructure and securing more approvals of the AfCFTA protocol on facilitating the free movement of people within the continent’s borders.



Energy Charter Treaty: EU Council endorses negotiating directives for Brussels

The European Council has approved negotiating directives for the EU's participation in talks to modernize the ECT, confirming its decision during a meeting on July 2, 2019.

The European Commission submitted a proposal for a negotiating mandate in May 2019, citing the need to bring the 1994 trade and investment agreement in line with current practice and norms relating to investment protection. The ECT applies to the energy sector, with the stated objective of setting “a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits.”

Contracting parties have been actively looking at updating the accord over the past two years, though formal negotiations are not due to start until later in 2019.

“Those outdated provisions are no longer sustainable or adequate for the current challenges; yet it is today the most litigated investment agreement in the world,” the European Commission said in May when requesting approval of the negotiating mandate. To date, 122 disputes have been filed under the treaty, which has over 50 contracting parties. This includes nearly all EU member states, as well as the EU and Euratom in their own rights.

The European Council decision authorizing the negotiating directives has a dedicated section on investment protection, calling for the modernized ECT to be aligned with the relevant provisions of the latest EU agreements, along with ensuring “a high level of investment protection” and “legal certainty for investors and investments of Parties in each other's market.”

Notably, the directives say that the EU should aim to have the ECT be subject to its proposed MIC, which it has proposed in the context of the UNCITRAL Working Group III process on multilateral ISDS reform. The EU's approach of negotiating an ICS in its more recent investment agreements is meant to lay the groundwork for a future MIC, even if the proposal does not gain traction within UNCITRAL.

The directives also note that ISDS reform processes underway in other forums—specifically UNCITRAL and ICSID—should be reflected in the modernized ECT, though it stops short of saying that ECT negotiations should wait until those other deliberations are completed.

Items slated to come up in the ECT modernization negotiations, according to a list of priority topics approved by the Energy Charter Conference last year, include the definition of FET, a regular feature of ECT arbitrations, including some high-profile cases involving renewable energy. The EU negotiating directives say that an updated FET clause should be “appropriately circumscribed for interpretation purposes.”

The directives also say that the modernized ECT “should explicitly reaffirm the right of ECT Contracting Parties to take measures to achieve legitimate public policy objectives, such as the protection of health, safety, the environment or public morals, social or consumer protection (‘right to regulate’).” The “right to regulate” was also in the list approved by the Energy Charter Conference in 2018.

The EU's directives also call for the revised treaty to “contribute to the achievement of the objectives of the Paris Agreement,” referring to the United Nations agreement on tackling greenhouse gas emissions that has been in force since November 2016. It also states that the modernized ECT's sustainable development provisions should feature language on “climate change and clean energy transition in line with the Paris Agreement” as well as terminology in the latest agreements negotiated by Brussels, along with those currently being developed.



AWARDS AND DECISIONS

Spain is ordered to pay damages of EUR 290.6 million in NextEra renewable energy case

NextEra Energy Global Holdings B.V and NextEra Energy Spain Holdings B.V v. Kingdom of Spain, ICSID Case No. ARB/14/11

Gabriela Barcellos Scalco

An ICSID tribunal ordered Spain to pay two Dutch investors EUR 290.6 million in compensation for its breach of the FET standard under ECT Article 10(1), as well as one-third of the investors' legal costs.

Background and claims

The claimants—NextEra Energy Global Holdings B.V and NextEra Energy Spain Holdings B.V (jointly, NextEra)—are companies incorporated under the laws of the Netherlands. NextEra invested in the construction of two concentrated solar power plants, the Termosol Plants.

NextEra claimed that after their Spanish subsidiaries committed to constructing the plants and spent around EUR 750 million in the construction, Spain altered the regulatory framework applicable to it, negatively affecting the profitability of the project. The changes to the regime provided that the plants would be paid on the basis of capacity, not on the basis of production, and that additional tariffs would be applicable.

NextEra initiated arbitration on May 23, 2019 arguing that Spain had breached its obligation FET under ECT Art. 10 in three ways: (1) by frustrating NextEra's legitimate expectations, (2) by breaching its duty to provide a stable, consistent and transparent framework, and (3) by failing to adopt reasonable, proportionate and non-discriminatory measures.

To justify these claims, NextEra alleged that absent the original regulatory framework, which committed to maintaining a production-based remuneration regime and to providing certainty around the premiums and tariffs, they would never have invested. Spain, however, alleged that NextEra should have been aware that changes could be made to the regulatory regime.

Decision on jurisdiction, liability and quantum principles: FET breach through frustration of NextEra's legitimate expectations

On March 12, 2019 the tribunal rendered its *Decision on Jurisdiction, Liability and Quantum Principles*. First, the tribunal decided it had jurisdiction over the matter, as NextEra qualified as an investor. Spain objected to the tribunal's jurisdiction, arguing that the ECT did not apply to intra-EU disputes and relying on the *Achmea* judgment of March 6, 2019. The tribunal, however, dismissed this objection, concluding that Spain's consent to submit ECT disputes to arbitration did not exclude intra-EU investment disputes.

As for the liability portion, the tribunal started by assessing whether Spain breached NextEra's legitimate expectations protected by ECT Art. 10(1). The tribunal decided that the change in regulation itself would not be a sufficient basis for the breach of NextEra's expectation that the terms of the prior regulatory framework would be guaranteed. However, it considered that the statements and assurances made directly to NextEra by Spanish authorities served as grounds to justify NextEra's legitimate expectation.

The tribunal decided that the changes made to the regulatory framework were substantial, especially considering the following:

- (i) The plants were now to be paid on the basis of capacity, not on the basis of the amount of electricity produced.
- (ii) The regulated Feed-in Tariff (FiT) and the pool plus premium options were abolished.
- (iii) Remuneration was no longer payable for the life of the plants but was limited to a 25-year "regulatory useful life."
- (iv) Indexation of tariffs to the consumer price index (CPI) was abolished.
- (v) Electricity generated through natural gas as a support fuel now received no payment other than the prevailing market price, while under Royal Decree (RD) 661/2007 (confirmed by RD 1614/2010), plants had been entitled to use



natural gas as a support fuel for up to 12 or 15 per cent of their annual production (depending on whether they sold at a feed-in option or they sold through the pool plus premium option).

- (vi) The market price remuneration was subject to a new 7 per cent levy on gross revenues.

Therefore, considering the assurances made by Spain to NextEra, the tribunal held Spain liable for the damages incurred.

As for the valuation of damages, the tribunal disregarded the discounted cash flow (DCF) method of valuation; instead, it considered that the appropriate method for valuation would be to calculate the value of the assets and a reasonable return on that value. This decision was justified by the fact that the application of the DCF method requires finding an appropriate base for the forecast of future earnings. As the Termosol Plants had been in operation for less than one year when the breach occurred, the tribunal did not consider the profits forecast as sufficient to apply the DCF method. Therefore, the tribunal decided that the investors were entitled to damages based on a return on the capitalized value of their assets as of June 30, 2016, on the basis of the Weighted Average Capital Cost of the Termosol Plants plus a premium of 200 basis points. It also held that NextEra was entitled to post-judgement interest of 5-year Spanish sovereign bonds as at the date of the award.

In sum, the tribunal affirmed its jurisdiction to rule on NextEra's claims; on the merits, it decided that Spain did not comply with its obligation to provide FET under ECT Article 10(1) by failing to protect NextEra's legitimate expectations. Holding that NextEra was entitled to damages, the tribunal ordered NextEra to recalculate their damages in light of the quantum principles described.

Decision on quantum, interest and costs

On March 21, 2019, NextEra responded to the March 12 decision, submitting a calculation of EUR 290.6 million and asking the tribunal to specify the applicable interest rate. In its April 5 reply, Spain stated that it had no observations on the calculation. It also submitted that the tribunal had already decided on the interest rate applicable and that it was not appropriate to revisit this discussion.

As Spain did not question the accuracy of NextEra's calculation applying the principles provided by the March decision, the tribunal accepted the calculation,

ordering Spain to pay EUR 290.6 million to NextEra. As for interest, the tribunal decided that it would be determined on the basis of 5-year sovereign bonds as of the date of the March decision.

The tribunal considered that even though Spain lost on all the jurisdictional grounds and on the merits, its arguments on jurisdiction were not trivial, and NextEra's arguments on the merits were not fully endorsed. Accordingly, it ordered Spain to pay two-thirds of the costs of the proceedings and NextEra to pay one-third. It also ordered Spain to bear its own legal costs and one-third of NextEra's.

Notes: The arbitrators were Donald M. McRae (Presiding arbitrator, appointed by agreement of the parties, Canadian and New Zealand national), Yves Fortier (claimant's appointee, Canadian national) and Laurence Boisson de Chazournes (respondent's appointee, French and Swiss national). The award of May 31, 2019 is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10568.pdf>. The Decision on Jurisdiction, Liability and Quantum Principles of March 12, 2019 is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10569.pdf>.

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Spain held liable for breach of FET under the ECT for frustrating legitimate expectations of 9REN, a Luxembourg-based renewable energy investor

9REN Holding S.À.R.L. v. The Kingdom of Spain, ICSID Case No. ARB/15/15

Yashasvi Tripathi

On May 31, 2019, an ICSID tribunal held that Spain violated FET under ECT Art. 10(1) through the frustration of legitimate expectations of Luxembourg-based renewable energy investor 9REN Holding S.À.R.L. (9REN) but dismissed the expropriation claims. It ordered Spain to pay damages of EUR 41.76 million plus interest compounded annually and legal and other costs of EUR 4.609 million.



Backgrounds and claims

On April 23, 2008 9REN acquired 96.5 per cent shareholding in companies involved in renewable energy production in Spain for EUR 211 million. In response to Spain's changes to its energy sector regulations between 2010 and 2014, 9REN commenced arbitration against Spain on March 31, 2015 claiming breaches of the FET, impairment and umbrella clauses (ECT Art. 10), and expropriation (ECT Art. 13).

In particular, 9REN contended that (1) Royal Decrees (RDs) 2007 and 2008 guaranteed stability and non-revocation of the benefits of FIT and certain premium rates throughout the lifetime of facilities registered before September 29, 2008; (2) the reforms introduced by Spain should be interpreted contextually as aiming at attracting investors; and (3) Spain dismantled the scheme under the RDs, because of which 9REN had originally invested, leading 9REN to sell its investment.

Spain countered that (1) it had the right and the duty to regulate its energy sector in the public interest, exercising its sovereign authority; (2) 9REN knew or should have known about the changes brought by the reforms had it performed due diligence; and (3) the reforms were also aimed at ensuring the economic sustainability of the Spanish Electricity System (SES).

Achmea objection dismissed

Relying on the CJEU's reasoning in *Achmea*, Spain objected to the tribunal's jurisdiction. It contended that the effect of the ECT arbitration was to remove a dispute between an EU investor and an EU member state from EU courts, circumventing EU law.

Per the tribunal, *Achmea* distinguished intra-EU BITs from multilateral treaties such as the ECT and recognized that the EU is subject to non-EU dispute resolution mechanisms under treaties to which it is a party. The tribunal held that *Achmea* could not have contemplated that the EU will be subject to ECT claims but that EU member states would be immunized. Furthermore, it noted that nothing in the ECT text or in *Achmea* differentiates the rights and remedies of ECT's EU and non-EU members. Accordingly, it dismissed the objection.

No legitimate expectation absent clear and specific commitments

The tribunal sought to balance the state's regulatory autonomy against international obligations. It acknowledged a state's sovereign right to regulate its economy in the interest of its citizens. Noting previous

awards (*Saluka v. Czechia*, *El Paso v. Argentina and Glamis v. United States*), the tribunal held that enforceable legitimate expectations arise only when a state makes very specific promises and representations to an investor or when the change of the legal framework is total, and that FET should not be interpreted to mean freezing of economic and legal regulations.

The tribunal held that though there was no specific communication to the investor from an authorized Spanish official that RD 2007 benefits were irrevocable, RD 2007 was a specific and clear undertaking (para. 295) as it was addressed to an "identifiable class of persons" ("prospective investors whose money was solicited by Spain's FIT program") (para. 257), the purpose and object of the regulation was specific ("inducing investments"—para. 295), and it succeeded in attracting 9REN's investment. Thus, it concluded that RD 2007 created legitimate expectations of stability of 9REN's benefits (para. 259).

Contextual reading of RD and 9REN's reliance on it gave rise to legitimate expectation

For the tribunal, RD 2007 should be read in the "broader context in which it was made and its clear and obvious paramount purpose" (para. 266), which was to induce investments in renewable energy (para. 266). It considered that Spain was under pressure from the EU to meet its renewable energy targets and hence dramatically improved its regime through RD 2007.

Accepting the testimony of 9REN's director and the due diligence opinion obtained by 9REN, the tribunal held that 9REN would not have invested EUR 211 million had it known that Spain might retroactively change the tariffs for completed projects (paras. 270–273). Further, considering the "large up-front costs" (para. 273) of the investment, it concluded that it was reasonable that 9REN would have required and did require a guarantee to make such an investment.

Timing of the investment is when the investment is made and not when it is implemented

Spain contended that 9REN's investment was not covered by RD 2007 as 9REN did not invest by the cut-off date of September 29, 2008 and that legitimate expectations should be assessed at the date of the final step of the investment. However, according to the tribunal, Spain confused the date on which the investment was made with the date of registration of projects. It sided with 9REN, concluding that it had invested in one go and before the cut-off date.



Frustration of legitimation expectation leads to violation of FET

The tribunal concluded that Spain frustrated 9REN's legitimate expectations, given that Spain's representation of benefits under RD 2007 was clear and specific and 9REN's expectations of tariff stability were reasonable and legitimate. However, it noted that the frustration of legitimation expectations does not necessarily mean a violation of FET (para. 308).

Here, the tribunal analyzed other factors, including the financial vulnerability of 9REN's projects, with "heavy up-front capital costs" (para. 311), locked in the long term, and the fact that Spain alone was to benefit from the rising energy prices, but the burden of falling prices was borne by the investors. The tribunal held that such one-sided treatment violated FET under the ECT.

Tribunal rejects breaches of transparency and non-discrimination obligations

9REN claimed that Spain violated the ECT's impairment clause through non-transparent and discriminatory measures. It argued that its returns were determined through complex formulas under the new regime; it also argued that the Tax on the Value of the Production of Electrical Energy (TVPEE) was not a genuine tax, but that it discriminated between renewable and conventional energy producers. Spain countered that the new regime was more detailed and specific and had meticulous details to calculate returns.

The tribunal found that the newer regime had different variables and explicit formulas for arriving at the compensation of investors, which might have made it complex, but not necessarily non-transparent. Further, it concluded that Spain's measures were rationally connected to a legitimate state objective: ensuring the solvency of SES. Accordingly, it held that the measures were not unreasonable or arbitrary. It also held that the TVPEE issue lies beyond its jurisdiction by virtue of tax carve-out of ECT Art. 21.

Legislation and administrative regulations are not covered by ECT's umbrella clause

9REN argued that under the RDs Spain undertook explicit obligations to pay the investors and that these undertakings are protected by the ECT's umbrella clause. The tribunal rejected the claim, agreeing with Spain that the clause does not protect statutory obligations. It reasoned that the term "any obligation" must be interpreted in accordance with other terms used in Art 10(1): "entered into" and "with an investor." It concluded that these terms cover bilateral obligations,

such as a contract, concession or a licence, but not a state's legislation or regulations, which it does not "enter into" (para. 342). Bringing the RDs under the umbrella clause, according to the tribunal, would conflate the protections under FET and the umbrella clause.

Loss in value of 9REN's shares does not constitute expropriation

The tribunal held that the loss in value of 9REN's shares in Spanish companies did not constitute an expropriation (paras. 369–372). It clarified that 9REN did not have any right to revenue from electricity sold to SES, but that the downstream operating companies did. Though the value of 9REN's shares was impacted by the regulatory changes, Spain never denied any payments, and 9REN never alleged loss of control of shares. Therefore, the tribunal dismissed the expropriation claim.

Notes: The tribunal was composed of Ian Binnie (president, appointed by agreement of the parties, Canadian national), David R. Haigh (claimant's appointee, Canadian national) and V.V. Veeder, (respondent's appointee, British national). The award of May 31, 2019 is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10565.pdf>

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Clorox's claims against Venezuela are dismissed on jurisdiction for lack of "action of investing"

Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015-30

Inaê Siqueira de Oliveira

A tribunal in a PCA-administered arbitration conducted in Spanish under the 2010 UNCITRAL Arbitration Rules issued its final award on May 10, 2019 in a case based on the Spain–Venezuela BIT. On jurisdictional grounds, the tribunal dismissed the case against Venezuela initiated by Spanish-based company Clorox Spain S.L. (Clorox) in May 2015.



The underlying dispute and the transfer of shares from Clorox International to Clorox Spain

The award summarized all arguments on issues of merits (paras. 437–781), although the tribunal did not decide them. The claimant’s locally incorporated company, Clorox Venezuela, manufactured cleaning products. Clorox complained against legislative and administrative measures adopted by Venezuela as of November 2011 that curbed Clorox’s ability to establish prices and conduct its business operations. According to Clorox, the measures breached the BIT clauses on FET, full protection and security, and expropriation.

U.S.-based Clorox International was the sole shareholder of Clorox Venezuela from the 1990s, when it was established, until April 2011, when Clorox Spain (the claimant) was constituted and immediately assigned all of Clorox International’s shares in Clorox Venezuela.

Venezuela’s jurisdictional objections

Venezuela presented several objections to jurisdiction: (i) lack of a qualified investor, (ii) lack of a protected investment, (iii) abuse of process and (iv) treaty shopping. The tribunal analyzed only the former two, deciding that Clorox was *prima facie* an investor, but that its shares were not a protected investment for lack of an “action of investing.”

Venezuela’s objection that Clorox Spain did not qualify as an investor for not having a protected investment

Venezuela alleged that Clorox International was the true investor (para. 210) and that Clorox Spain, a shell company without substantive links to its place of incorporation (paras. 213–216), had not made the investment.

Venezuela emphasized the wording of Article 1(2) of the BIT, which defines investments as assets “invested by investors” (“*invertidos por inversores*”) (para. 230). According to the respondent’s interpretation, the Spanish word “*por*” (“by”) would require a link between investor and investment, usually of cause–consequence (para. 226). Invoking *Quiborax v. Bolivia*, Venezuela argued that mere ownership of shares was insufficient to define an investment, because an “action of investing” was also needed (para. 229).

The respondent also borrowed the *Salini* test from ICSID case law, arguing it was not fulfilled because Clorox had neither undertaken risk nor made a contribution of capital, assets or know-how.

In turn, Clorox alleged that it qualified as an investor pursuant to the BIT, which only required

incorporation in one of the Contracting Parties (para. 334). Clorox argued that Venezuela’s attempt to add requirements to the BIT—substantial business activities in the place of incorporation, for instance—should be rejected, given that those requirements would need to be explicit in the treaty text (para. 335). It asked the tribunal to acknowledge that its ownership of shares in Clorox Venezuela constituted in and of itself a protected investment.

The tribunal’s two-step analysis

As the parties had heavily disputed the burden of proof on issues of jurisdiction, the tribunal remarked that (i) Clorox had the burden of proving personal, subject-matter and temporal jurisdiction (jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis*, respectively), but that (ii) Venezuela had the burden of proving affirmative defences, abuse of process and treaty shopping (para. 785). On the *Salini* argument, the tribunal briefly mentioned that it considered that discussion not to be relevant to the case (para. 819).

Despite seeing Venezuela’s objections as “two sides of the same coin,” having Article 1(2) of the BIT as common starting point (paras. 786–787), the tribunal addressed them in turn.

First, the tribunal looked into the definition of investor. It sided with Clorox and found that the BIT only required incorporation, not substantive economic activities or other criteria (para. 769). Thus, it held that Clorox *prima facie* fulfilled the *ratione personae* requirement to claim BIT protection (para. 797). However, it added that a duly incorporated legal person only becomes a protected investor “if it has made an investment that fulfills the definition of protected investment” (para. 798).

Second, the tribunal concluded that, being the sole shareholder of the locally incorporated company, Clorox *prima facie* had a protected investment (para. 800). However, relying on the wording of Article 1(2), it added that protection was limited to assets “invested by an investor.” It confirmed that understanding by mentioning other BIT articles, which refer to investments “made” by an investor (“*inversiones efectuadas*” and “*inversiones realizadas*”). Accordingly, the tribunal held that the BIT required an “action of investing” (para. 802).

Since nothing in the BIT prevented indirect investment (para. 803; para. 816), the tribunal turned to the issue of whether Clorox had made such “action of investing” (para. 805). It noticed that Clorox’s position conflated



having an asset with making an investment, as if there were no distinction between them (para. 808; para. 821), and that Venezuela’s argument on the issue had changed over the course of the arbitration (para. 809).

For the tribunal, there was evidence of an investment in Venezuela, but not of Clorox’s “action of investing,” as required by the BIT (para. 815). Considering that Clorox Spain was constituted on April 25, 2011, with a social capital made of shares transferred to it by Clorox *International*, the tribunal noted that there was no real exchange in that transaction (para. 830) and that, had it not been for that transfer of shares, Clorox itself would not exist (para. 831). The tribunal concluded that, since there was no “action of investing” on its part, Clorox did not have a protected investment.

Allocation of costs

Considering UNCITRAL Arbitration Rule 42(1), which provides for a costs-follow-the-event approach, the tribunal decided that Clorox should bear all arbitration costs and reimburse Venezuela’s legal defence costs (approximately. USD 4.5 million) (paras. 845–847).

Notes: The tribunal was composed of Yves Derains (president appointed by the PCA, French national), Bernard Hanotiau (claimant’s appointee, Belgian national) and Raúl E. Vinuesa (respondent’s appointee, Argentinian national). The award of May 10, 2019 is available, in Spanish only, at <https://www.italaw.com/sites/default/files/case-documents/italaw10549.pdf>.

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Jurisdiction declined in case against Uruguay as ICSID tribunal concludes that American company lacked ownership or control over the investment

Italba Corporation v. Oriental Republic of Uruguay, ICSID Case No. ARB/16/9

Vishakha Choudhary

In an arbitration initiated by U.S.-based Italba Corporation (Italba) against Uruguay, the ICSID tribunal declined its subject-matter jurisdiction. In its award of March 22, 2019, the tribunal concluded that Italba lacked ownership or control over the investment in dispute.

Background and claims

In 1997, the Uruguayan Ministry of National Defense granted Italian national and permanent U.S. resident Gustavo Alberelli the authorization to commercially provide dedicated wireless digital lines for data transmission. Further, the National Communications Authority DNC allocated to him the exclusive use of stipulated frequencies. Between 1999 and 2000, Alberelli transferred the authorization and frequencies to Trigosul Sociedad Anónima (Trigosul), a Uruguayan company allegedly acquired by him and his mother, Carmela Caravetta Durante, through Italba between 1996 and 1999.

Trigosul allegedly failed to pay its regulatory dues from July to September 2009. Additionally, upon inspection, the Uruguayan Regulatory Unit for Communications Services (URSEC) did not find Trigosul’s premises at its registered address. Hence, it recommended the revocation of Trigosul’s 1997 authorizations and the release of its frequencies. This was implemented in January 2011.

Trigosul challenged the URSEC resolution and consequent actions. A Uruguayan court’s finding in October 2014 annulled the revocation of Trigosul’s authorization and granted the company rights to new frequencies. In Trigosul’s view, however, these new frequencies were worthless. Moreover, it considered that the delayed restoration of its rights in 2016 was a breach of Uruguay’s obligation to tender prompt, adequate and effective compensation for its expropriatory acts.

Claiming full ownership and control over Trigosul, Italba instituted ICSID proceedings against Uruguay under the Uruguay–United States BIT (the BIT). It argued that Trigosul’s licence and associated rights were “investments” within the meaning of BIT Article 1, and characterized Uruguay’s actions as expropriatory,



discriminatory, and in breach of the FET and full protection and security clauses.

Italba's challenge to Uruguayan expert rejected

Italba challenged the independence of Uruguay's expert, Eugenio Xavier de Mello Ferrand, alleging that he was a partner at a law firm concurrently representing Uruguay in another arbitration at the time. In response, the expert stressed that his firm was structured as an "economic interest group" (GIE, in its Spanish acronym), wherein each attorney and his or her clients have individual attorney-client relationships, independent and autonomous from other members of the firm.

The tribunal examined the structure of GIEs in Uruguayan law and concluded that, while such entities were formed to develop the economic activity of their members, these members were neither entitled to work jointly nor to seek shared profits. Further, it pointed to the distinct mode of operation of law firms in Latin America, where attorneys share expenses and facilities, but derive no benefit from each other's work. In this light, the tribunal equated the GIE model of de Mello's firm to a "barristers' chambers in England," distinguishing it from "a law firm in which the members are in partnership and share profits" (para. 151).

Recognizing that there is no automatic disqualification "where a member of a barristers' chambers acts as an arbitrator in a case where another member is acting as counsel" (para. 151), the tribunal denied de Mello's automatic disqualification as an expert. Additionally, it found Prof. de Mello under no obligation to disclose the ongoing activities undertaken by other members of his firm, due to the independent operations of each member.

These findings were corroborated by reference to the [IBA Rules on Taking of Evidence in International Arbitration](#). The rules do not compel experts to furnish details of present or past relationships between the parties and their organizations—instead, the expert's objectivity must be assessed based on his own economic or personal position.

Concluding that Prof. de Mello was not aware of his firm's engagements with Uruguay and did not derive any benefit from those engagements, the tribunal denied Italba's request to exclude his report from the record.

Italba fails to demonstrate ownership of Trigosul

Italba asserted its ownership over Trigosul on several grounds. First, it argued that through successive transfers, Trigosul's shares now belonged to Italba. Second, it claimed that, as indicated on the back

of the share certificates, they had been endorsed in favour of Italba. Third, Italba asserted that it made investments and negotiations on behalf of Trigosul. Thus, according to Italba, both the formal actions and the economic reality evinced its ownership of Trigosul. Conversely, Uruguay criticized these arguments based on inconsistencies and discrepancies in Italba's evidence.

At the outset, the tribunal noted that Trigosul's share certificates did not expressly suggest Italba's ownership—only Ms. Durante's and Mr. Alberelli's. Their exclusive shareholding was further confirmed in three folios of the book of minutes of shareholders' and board of directors' meetings.

It also found that only one of the six available share certificates recorded an endorsement in Italba's favour. Since this endorsement did not stipulate a place, the validity of the endorsement was checked under the law of Uruguay, where Trigosul was established, registered and operated. However, Uruguayan law compels notification of every endorsement in a registered securities ledger and a record in the company's stock ledger. The endorsement in question was found to be invalid, since it was both unregistered and unrecorded. The tribunal also noted that this invalid endorsement could not show Trigosul's intention to transfer its entire shareholding to Italba. Here, taking note of Mr. Alberelli's experience as a businessman, the tribunal refused to excuse the inconsistencies in Trigosul's books as his "lack of legal knowledge" (para. 209).

With respect to the economic reality of Trigosul's ownership, the tribunal followed Prof. de Mello's reasoning—the doctrine's relevance was limited to cases where a company's legal personality was misused to commit fraudulent acts. Additionally, Italba failed to furnish evidence of participation in Trigosul's shareholder meetings, share in its profits and losses, role in the management of its business, or contributions to its capital. Thus, the tribunal held that Italba did not qualify as Trigosul's owner under Uruguayan law.

The tribunal also assessed Italba's claims of ownership under the laws of the U.S. state of Florida, where it was incorporated. Florida law requires delivery of the share certificates, intent to transfer the shares, and the acceptance of the shares by the transferee. Citing insufficient evidence on all three counts, the tribunal dismissed Italba's contentions.

Italba did not control Trigosul

Article 1 of the BIT defines "investments" as assets owned or controlled by investors. The tribunal



acknowledged that this article extends the BIT's protection to investments merely "controlled" by investors. Since the term was not defined in the treaty, the tribunal ascertained its meaning based on the facts of the case.

Italba claimed that by making business decisions for Trigosul, contributing to its capital, funding its operations and representing itself to third parties as Trigosul's owner, it exercised "control" over Trigosul. Upon evaluation of the evidence in this regard, the tribunal found that Italba's claims were based on inconclusive evidence and inconsistent with documentary evidence filed by its witnesses. As evidence, Italba also alluded to the potential joint ventures it was negotiating, claiming Trigosul as its subsidiary, to realize the full value of its investments in Trigosul. The tribunal found no dispositive value in this fact alone.

Thus, dismissing Italba's claims of ownership and control over Trigosul, the tribunal declined jurisdiction under Article 25 of the ICSID Convention. Consequently, Uruguay's other jurisdictional objections were not evaluated by the tribunal.

Decision and costs

The tribunal upheld Uruguay's objections to jurisdiction. Based on both parties' agreement that the "loser pays" principle applied and on the tribunal's discretion to allocate costs under Article 61(2) of the ICSID Convention, the tribunal directed Italba to bear its own costs and reimburse all of Uruguay's costs. Due to insufficient basis, it denied Uruguay's request for interest on costs.

Notes: The tribunal was composed of Rodrigo Oreamuno (president, appointed by the parties, Costa Rican national), John Beechey (claimant's nominee, British national), and Zachary Douglas (respondent's nominee, Australian national). The award is available at <https://www.italaw.com/sites/default/files/case-documents/italaw10439.pdf>

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In yet another solar energy incentives case against Italy, ECT tribunal applying proportionality test finds breach of legitimate expectations

CEF Energia B.V. v. The Italian Republic, SCC Arbitration V (2015/158)

Alessandra Mistura

On January 16, 2019, a tribunal constituted under the ECT issued its award in *CEF Energia B.V. v. Italy*, partially upholding the investor's claims in connection with its investment in the photovoltaic sector in Italy. This adds to the long series of cases arising out of Italy's reform of its scheme of incentive tariffs for solar energy (see, for example, *Blusun v. Italy* and *Greentech v. Italy*).

Background of the dispute

Between 2010 and 2012, CEF, a company constituted under the laws of the Netherlands, acquired shares in three Italian companies: Megasol, Phenix and Enersol. Following the acquisition, Megasol and Phenix applied for the incentive tariffs established under Italy's so-called Conto Energia decrees, enacted to implement Legislative Decree No. 387/2003. As for Enersol, at the time of the acquisition it had already been granted the incentives through a specific contract with the relevant Italian administrative entity. Eventually, Megasol and Phenix also obtained the incentives.

In 2015, CEF commenced arbitration against Italy, challenging several measures that directly or indirectly amended the incentive tariffs scheme. Such measures included the *Spalmaincentivi* decree, which reduced the incentives' amount; the administrative fees associated with the payment of the incentives; the imbalance costs scheme; and fiscal measures such as the "Robin Hood" tax and other immovable property taxes. CEF asserted that such measures breached the FET standard, the umbrella clause, the obligation to provide a transparent legal framework and the obligation not to unreasonably impair the investment under ECT Article 10.

Tribunal rejects intra-EU jurisdictional objection

As a preliminary matter, the tribunal dismissed Italy's objection that it lacked jurisdiction to hear the case because the ECT does not cover intra-EU disputes. The tribunal noted that there is no implicit or explicit carve-out in the ECT for intra-EU disputes and that this finding has not been altered by either the enactment of subsequent EU fundamental treaties or the CJEU's decision in *Achmea*. The tribunal held that *Achmea* was "of limited application" (para. 97) as it



concerned exclusively the ISDS clause in the relevant BIT, rather than the compatibility of the whole ISDS system with EU law.

Tribunal limits the scope of CEF's FET claim

On the merits, the tribunal first stated that only those investors' expectations that existed when the investment was made fell under the FET standard. With respect to both Megasol and Phenix, the tribunal noted that when the investment was made they still had a number of conditions to satisfy before being granted the incentives, and that CEF could not have any expectations on the success of their applications. On the contrary, the tribunal pointed out that Enersol had already been granted the desired incentive tariffs at the time of CEF's investment. Thus, according to the tribunal, the investor had legitimate expectations with respect to the payment of incentives only to Enersol, but not to Megasol or Phenix.

The tribunal also held that the complaints arising from administrative fees, imbalance costs, the Robin Hood tax and immovable property taxes all fell under the tax carve-out provided under ECT Article 21. In determining what constituted a "taxation measure" for the purpose of ECT Article 21, the tribunal granted a high level of deference to the broad definition provided by the Italian Constitutional Court.

Thus, the tribunal narrowed down CEF's FET claim to the breach of legitimate expectations caused by the enactment of the *Spalmaincentivi* with respect to CEF's investment in Enersol.

Through due diligence and proportionality, tribunal finds breach of legitimate expectations

In determining whether Italy breached CEF's legitimate expectations, the tribunal adopted a two-step approach. As a first step, the tribunal investigated the origin and scope of CEF's legitimate expectations and whether CEF reasonably relied on them. The tribunal noted that CEF's expectations were both precise in their origin from explicit acts of Italy, and specific as to what Enersol was to receive by way of incentive and for how many years.

As for reliance on such expectations, the tribunal examined CEF's due diligence in the performance of its investment. In particular, Italy argued that a due diligence report prepared by CEF's legal counsel warned CEF of the risk of enactment of retroactive laws that would have amended the energy sector incentive program. Thus, CEF could not reasonably

rely upon the expectations on the stability of Italy's regulatory framework on solar energy incentive tariffs. CEF, however, rejected this argument, stating that the report made clear that the risk of retroactive changes was extremely low and concerned exclusively those companies that had not yet entered into an incentive contract, which was not Enersol's case. The tribunal supported CEF's argument, holding that it had indeed reasonably relied upon its legitimate expectations.

As for the second step, the tribunal applied the proportionality criteria set out in *El Paso v. Argentina* to determine whether CEF's legitimate expectations had been breached. In this context, the tribunal noted that there is an "acceptable margin of change" where the state can exercise its regulatory powers in the public interest and amend its regulatory framework without breaching investors' legitimate expectations. To determine whether such acceptable margin of change has been transgressed, the tribunal must carry out "a balancing and weighing exercise" between the claimant's expectations and the respondent's right to regulate.

The tribunal observed that Italy's amendments to its regulatory framework were reasonable and pursued a public interest objective. It also stated that tribunals should grant sovereigns a high level of deference, which, however, is not absolute. Regulatory changes, the tribunal held, must be balanced against the respondent's specific commitments and freely assumed international obligations vis-à-vis the investor. In the event of higher "level of engagement" between the state and the investor, as in the case at stake, less deference should be attributed to acts that, even if reasonable, end up breaching investors' expectations.

Thus, the majority concluded that the *Spalmaincentivi* breached ECT Article 10(1) in respect of CEF's legitimate expectations on its investment in *Enersol*. Arbitrator Giorgio Sacerdoti dissented, stating that the balancing and weighing exercise should have led the tribunal to reach the opposite conclusion. In particular, he noted how the findings of the due diligence report on the possibility of unilateral amendment, the reasonableness of Italy's regulatory changes, the transparent way in which they were adopted and the existence of a legitimate public interest all led to the conclusion that CEF could not reasonably rely on its legitimate expectations.

Remaining claims dismissed on the merits

The tribunal dismissed the umbrella clause claim, which rested on the allegation that Italy had breached



the incentive contracts with respect to all three of CEF's investments. The tribunal gave great deference to the contracts' qualification as "accessory contracts to public measures" under Italian law, which entailed the respondent's power to unilaterally amend them. Since the obligations under the umbrella clause must be discharged in accordance with the law applicable to them, and since Italian law provided for unilateral amendment, the tribunal ruled that Italy did not breach the obligations owed to CEF under the umbrella clause.

Lastly, the tribunal dismissed the claims of failure to provide a transparent legal framework and of unreasonable impairment, having already determined that Italy's regulatory measures were reasonable.

Based on the above, Italy was ordered to pay CEF EUR 9.6 million in damages, plus compound interest until the date of payment of the award at an annual rate of LIBOR+2 per cent, as well as EUR 1 million as a share of CEF's costs and legal fees.

Notes: The tribunal was composed of Klaus Reichert (president appointed by the disputing parties, German and Irish national), Klaus Sachs (claimant's appointee, German national) and Giorgio Sacerdoti (respondent's appointee, Italian national). The award is available at <https://www.italaw.com/cases/7364>. The award is currently being challenged before Swedish Courts, which have stayed execution until further notice.

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RESOURCES AND EVENTS

RESOURCES

Judicial Acts and Investment Treaty Arbitration

By Berk Demirkol, published by Cambridge University Press, August 2019

This book focuses on distinctive particularities of judicial acts of states, which are becoming increasingly subjected to international investment claims. In order for the state to incur responsibility for a wrongful act committed in the exercise of its judicial function, there are some specific conditions that should be met: the investor must establish that the state is responsible for a breach attributable to the state; the investment tribunal has jurisdiction over the particular dispute; and the damage that the investor has suffered is a result of the particular breach. The author addresses questions in relation to the substance, jurisdiction, admissibility and remedies in cases where state responsibility arises from a wrongful judicial act. Available at <https://www.cambridge.org/academic/subjects/law/international-trade-law/judicial-acts-and-investment-treaty-arbitration>

Review of ISDS Decisions in 2018: Selected IIA reform issues

By UNCTAD, published by UNCTAD, July 2019

This IIA Issues Note reviews publicly available decisions in ISDS cases, with a focus on cases and issues of relevance for treaty drafting and IIA reform. In 2018, arbitral tribunals rendered at least 50 substantive ISDS decisions, of which 29 were publicly available as of January 2019. The decisions touched upon many IIA reform topics, including preserving the right to regulate, improving investment dispute settlement and ensuring investor responsibility. Most decisions were based on old-generation treaties signed in the 1990s or earlier. Policy-makers may wish to consider the implications of these decisions for the drafting of future treaties and the modernization of existing ones. Available at <https://investmentpolicy.unctad.org/publications/1206/review-of-isds-decisions-in-2018-selected-ii-a-reform-issues>. A compilation of case-by-case tables giving an overview of key issues addressed by ISDS tribunals in 24 cases in 2018 is available as supplementary material at <https://investmentpolicy.unctad.org/publications/1207/supplementary-material-to-review-of-isds-decisions-in-2018-selected-ii-a-reform-issues>

[org/publications/1207/supplementary-material-to-review-of-isds-decisions-in-2018-selected-ii-a-reform-issues](https://investmentpolicy.unctad.org/publications/1207/supplementary-material-to-review-of-isds-decisions-in-2018-selected-ii-a-reform-issues)

Mediation in International Commercial and Investment Disputes

By Catharine Titi and Katia Fach Gómez (Eds.), published by Oxford University Press, July 2019

The book indicates that the resolution of international commercial and investment disputes has been dominated almost exclusively by international arbitration, but that international mediation and conciliation are now coming to the fore. The EU is encouraging international mediation in both the commercial and investment spheres; the 2019 Singapore Mediation Convention of UNCITRAL aims to ensure enforcement of international commercial settlement agreements resulting from mediation; the first investor–state disputes are mediated under the International Bar Association (IBA) rules; ICSID’s conciliation mechanism is resorted to more often than in the past; and the International Chamber of Commerce (ICC) has recently administered its first mediation case based on a BIT. In this context, the book brings together experts from academia, mediation and arbitration institutions, and international legal practice to discuss mediation in international commercial and investment disputes. Available at <https://global.oup.com/academic/product/mediation-in-international-commercial-and-investment-disputes-9780198827955>

Expropriation in Investment Treaty Arbitration

By Johanne M. Cox, published by Oxford University Press, July 2019

Part of the Oxford International Arbitration Series, this work provides a comprehensive guide to expropriation in international investment law and how it is applied in practice. The author offers a detailed examination of existing case law, from which common substantive principles of the international law on expropriation are drawn out. Relevant cases from the International Court of Justice (ICJ), European Court of Human Rights (ECHR) and Iran–U.S. Claims Tribunal are considered to complement the focus on investment treaty arbitration and ICSID, NAFTA and ECT cases. The book traces the evolution of expropriation in investment law, examines the interplay between



expropriation and other standards of treaty protection (such as FET) and critically assesses the relevance of expropriation. Available at <https://global.oup.com/academic/product/expropriation-in-investment-treaty-arbitration-9780198804918>

International Economic Law After the Global Crisis: A tale of fragmented disciplines

By C. L. Lim and Bryan Mercurio (Eds.), published by Cambridge University Press, July 2019

This collection explores the theme of fragmentation within international economic law, covering issues concerning monetary cooperation, trade and finance, trade and its linkages, international investment law, intellectual property protection and climate change. Investment-related chapters include “The schizophrenia of countermeasures in international economic law: The case of the ASEAN comprehensive investment agreement”; “Greek debt restructuring, *Abaclat v. Argentina* and investment treaty commitments: The impact of international investment agreements on the Greek default”; “Chinese bilateral investment treaties: A case of ‘internal fragmentation’”; “A post-global economic crisis issue: Development, agriculture, ‘land grabs’, and foreign direct investment”; and “Intellectual property rights in international investment agreements: Striving for coherence in national and international law.” Available at <https://www.cambridge.org/academic/subjects/law/international-trade-law/international-economic-law-after-global-crisis-tale-fragmented-disciplines>

Sustainable Trade, Investment and Finance: Toward responsible and coherent regulatory frameworks

By Clair Gammage & Tonia Novitz (Eds.), published by Edward Elgar, 2019

Sustainable development remains a high priority in international politics and commerce. This book explores how the contours and facets of economic, environmental and social sustainability are reflected in the legal norms that govern trade, investment and finance. Examining a range of issues arising from private initiatives, national conduct and international organizations, the chapters interrogate the role of powerful global actors in the pursuit of sustainable development. The authors identify and investigate challenges to the realization of a coherent sustainable development policy, engaging with the complex interactions of international, regional and national mechanisms that pose significant problems for the future of the planet, its people and their prosperity. Available at <https://www.e-elgar.com/shop/sustainable-trade-investment-and-finance>

EVENTS 2019

September 18–19

ITA–IEL–ICC JOINT CONFERENCE ON INTERNATIONAL ENERGY ARBITRATION, Institute for Transnational Arbitration, Institute for Energy Law of the Center for American and International Law, ICC International Court of Arbitration, in Singapore, <http://www.cailaw.org/Institute-for-Transnational-Arbitration/Events/2019/ita-iel-icc-asia-conference.html>

September 25–26

3rd UNCITRAL WORKING GROUP III INTER-SESSIONAL REGIONAL MEETING ON ISDS REFORM, in Conakry, Guinea, <https://uncitral.un.org/en/events/25-26.9.2019>

September 25

14th ANNUAL COLUMBIA INTERNATIONAL INVESTMENT CONFERENCE, “Aligning Corporations with the Sustainable Development Goals,” at Columbia University Faculty House, in New York, United States, <http://ccsi.columbia.edu/2019/09/25/14th-annual-columbia-international-investment-conference-aligning-corporations-with-the-sdgs>

September 26–27

COLLOQUIUM “ACTORS IN INTERNATIONAL INVESTMENT LAW: BEYOND CLAIMANTS, RESPONDENTS AND ARBITRATORS,” at University Paris II Panthéon-Assas, in Paris, France, <https://www.transnational-dispute-management.com/news/20190926.pdf>

October 3–4

14th ICC NEW YORK CONFERENCE ON INTERNATIONAL ARBITRATION, International Chamber of Commerce, in New York, United States, <https://iccwbo.org/event/icc-new-york-conference-international-arbitration>



October 7–11

15th IGF ANNUAL GENERAL MEETING: “MINING IN A CHANGING CLIMATE,” Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, in Geneva, Switzerland, <https://www.igfmining.org/event/15th-annual-general-meeting>

October 7–11

WTO PUBLIC FORUM, at Centre William Rappard, in Geneva, Switzerland, https://www.wto.org/english/forums_e/public_forum_e/public_forum_e.htm

October 14–18

38th SESSION OF UNCITRAL WORKING GROUP III, “INVESTOR–STATE DISPUTE SETTLEMENT REFORM,” United Nations Commission on International Trade Law, Vienna, Austria, https://uncitral.un.org/en/working_groups/3/investor-state

October 25–26

WORLD TRADE FORUM, “INTERNATIONAL ECONOMIC DISPUTE SETTLEMENT: DEMISE OR TRANSFORMATION?” at World Trade Institute (WTI) of the University of Bern, and the European University Institute (EU), Bern, Switzerland, https://www.wti.org/media/filer_public/b1/2e/b12e1c5d-8def-40ad-92bf-6c77cd3ffcfc/call_for_papers_wtf_2019.pdf

October 29–30

6th OECD FORUM ON GREEN FINANCE AND INVESTMENT, at OECD, in Paris, France, <http://www.oecd.org/cgfi/forum>

November 4–7

INVESTMENT ARBITRATION MASTERCLASS, at International Energy Charter, in Brussels, Belgium, <https://energycharter.org/what-we-do/knowledge-centre/training-programmes/training-programme-4-7-november-2019>

November 13

UNCTAD HIGH-LEVEL IIA CONFERENCE 2019, at UNCTAD, Palais des Nations, Geneva, Switzerland, <https://investmentpolicy.unctad.org/pages/1047/high-level-ia-conference-2019>

November 22

CONFERENCE ON INTERNATIONAL ARBITRATION AND MEDIATION, at Fordham Law School, in New York, United States, <http://law.fordham.edu/ciam2019>

November 26–27

GREEN GROWTH AND SUSTAINABLE DEVELOPMENT (GGSD) FORUM, at OECD, in Paris, France, <http://www.oecd.org/greengrowth/ggsd-forum.htm>



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Investment Treaty News (ITN)

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