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Review of 2018 ICSID Awards

David Collins*

There were a number of decisions issued in the past year (from late October 2017 to mid-October 2018) by ICSID tribunals. This time for the sake of brevity, the review will cover only awards, rather than other kinds of decisions including procedural matters such as annulments. This is not to imply that such matters are unimportant, but given the increasing number of published decisions, editorial discretion must be exercised. As always, each of the cases below is publicly available on the italaw website in English, many of which have been redacted due to commercial sensibility. The awards are presented in chronological order of their date of release to the public.

The first case is *Bear Creek Mining Corporation v. Republic of Peru.* [1] This award concerned a Canadian mining company's activity in Peru which was strongly opposed by local communities, leading to protests and civil unrest. The state issued a decree revoking the investor's mining rights, which was identified in the claim as an indirect expropriation, breaching the Canada-Peru FTA. The tribunal dismissed the jurisdictional complaint based on the illegality of the investment because the FTA, unusually, did not require that the investment be conducted in accordance with local law. Examining the FTA's annex setting out the characteristics of an indirect expropriation (now common in modern investment treaties), the tribunal ruled that there had been an indirect expropriation in part because the investor's legitimate expectations had been violated. This turned on the circumstances, specifically the fact that the investor had not contributed to the civil unrest, indeed the government had evidently encouraged some of the protests. Additionally, the investor had not been invited to several meetings in which solutions to the crisis had been discussed. Damages were assessed based on fair market value linked to the costs to the investor in commencing the mining project, as future profits were too speculative. A notable dissent by Prof Sands indicated that the damages should have been reduced because the investor had failed to engage as fully as necessary with local communities.

The second case is *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela.*[2] This dispute examined events resulting

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[1] ICSID Case No. ARB/14/2 (4 December 2017)
[2] ICSID Case No. ARB/12/21 (7 December 2017)

from the expropriation of the two largest glass container production plants in the now troubled Venezuela. Following the election of President Chavez in late 1998, Venezuela undertook a series of measures in strategic sectors of the economy which included an expropriation law and the establishment of a new exchange control system. Venezuela' s expropriation law facilitated the forcible acquisition of property belonging to private persons in the state. The Claimants alleged that the ensuing expropriation of their business was carried out illegally (meaning discriminatorily) and with no compensation, breaching numerous obligations under the Netherlands-Venezuela BIT. Venezuela's primary objection was one of jurisdiction – that consent to arbitrate had not been tendered by the claimant until after Venezuela had withdrawn from the ICSID Convention, making the current ICSID proceeding illegal. Examining this issue, the tribunal noted important nuances in the provisions in the ICSID Convention covering consent to arbitrate. The tribunal stated that the meaning of "consent to the jurisdiction" cannot mean unilateral consent (such has an open offer to arbitrate contained in a BIT) rather than perfected consent, meaning receipt of consent in writing by both parties to the dispute at hand. Consequently, on the facts the tribunal decided that it lacked jurisdiction because the claimant only perfected the consent to arbitrate after Venezuela had already denounced the ICSID Convention, rendering it a nullity. Each party was ordered to bear its own legal costs with the claimant bearing the costs of the arbitration.

Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela,[3], another case against Venezuela, involved the nationalization of two fertilizer plants under similar conditions to those of the above case owned by a Swiss investor in 2010. The investor brought claims under the Venezuela – Switzerland BIT relating to breaches of national treatment, fair and equitable treatment, full protection and security, expropriation and the umbrella clause. Venezuela had attempted to argue that the Koch's activities in their country did not constitute an investment, however the tribunal disagreed, noting both the broad definition of investment in the relevant treaty and the fact that the project should not be disaggregated for the purposes of assessing its status as an investment, rather the whole of the activity should be evaluated. On the issue of expropriation, the tribunal ruled that Venezuela had acted in the public interest and had followed due process of law - therefore the expropriation was lawful. Considering that the expropriation was initially indirect but became direct after the decree, the tribunal held that the investor was nevertheless entitled to compensation which it had not received. All non-expropriation claims were dismissed due to a

[3] ICSID Case No. ARB/11/19 (7 December 2017)

lack of evidence of a loss that was sufficiently quantifiable in money. Compensation for the lawful expropriation was ordered including both pre and post award interest. A dissent by Douglas suggested that an expropriation of the investor's rights had not occurred given that some of the property was still exercisable under other foreign legal systems, such as the US. It is important to note that the investors later filed suit in a US federal court in order to enforce this award, demonstrating the practical limits of investment arbitration even within the ICSID system.

Lao Holdings N.V. v. Lao People's Democratic Republic,[4] considered whether the state of Laos infringed Lao Holding's (a Dutch company) gambling monopoly rights through by licensing rival casinos and therefore was in "material breach" of a settlement contract. It also evaluated whether the allegedly criminal conduct of various private entities that promoted creation of a potential rival casino, including a company in which the government of Laos held a minority interest, can be attributed to the host state of Laos and as such also be viewed as a material breach of the settlement agreement. The tribunal ruled that the settlement agreement concluded between the claimant and the host state did not impede the latter from launching a criminal investigation into alleged corruption after the settlement had been concluded as long as it was based on facts that pre-dated the settlement. However, this required that there was no ongoing investigation at the time of the settlement, but on the facts such an investigation had taken place. The tribunal concluded that both the increases in taxation beyond the agreed base rate, which helped competing casinos, and the continued criminal investigations into the claimant's conduct constituted material breaches, depriving the claimants of their bargain under their original agreement with the state. The entitlement to proceed with arbitration of additional issues relating to Laos' alleged breaches of the Laos-Netherlands BIT relating to the casino project was also affirmed, with costs to be decided once the outcome of that dispute is decided on a later date.

The next award to be discussed is *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*.[5] This matter involved a 15-year mobile telecommunications license which was subsequently sold, leading to a significant tax liability on the part of the sellers based on the increased goodwill of the company which had accumulated over the years. The amount of tax owed to the government under the sale was regarded by the claimant as a discriminatory

[4] ICSID Case No. ARB(AF)/12/6 (15 December 2017)
[5] ICSID Case No. ARB/13/38 (22 December 2017)

measure, breaching the Kuwait-Jordan BIT. The claimants also alleged violation of the treaty's provisions on fair and equitable treatment and full protection and security. The tribunal dismissed the claim, holding that the provisions of the BIT had not been breached by the imposition of tax on the sale of the license, focusing on the fact that the measure had not been arbitrary or abusive of due process. It stated that the Jordanian government cannot be held liable for the application of its own tax law as long as the conduct of the domestic courts was consistent with their obligation to behave in a manner which is not arbitrary. The imposition of the tax had not been politically motivated and therefore not arbitrary. Moreover, since the claimants had not submitted their own tax return, this required the state to conduct its own assessment of liability. According to the tribunal the ruling of the Jordanian tax court had also been reasonable, impartial and demonstrated good faith. There was a dissent from Fortier suggesting that some of the respondent's conduct had been arbitrary because the tax levied against the investor had partially been in response to media pressure.

In *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*,[6] the tribunal declined to take jurisdiction in this dispute regarding a fuel supply contract for an energy investment in the island country. The host state alleged that it had not consented to arbitration at ICSID and that the activity did not constitute an investment for the purposes of the Timor-Leste Foreign Investment Law, a domestic statute covering foreign investment. The controversy turned on whether the relevant contractual agreements incorporated consent to arbitration or whether they conferred jurisdiction on the domestic courts. The tribunal ruled in favour of the host state, holding that the references in the contractual documents to standard terms such as consent to arbitration were vague, failing to express an intent that they be incorporated into the main fuel supply agreement. Based on the conduct of the parties, the intent appeared to be to deal with any disputes in the domestic courts. On the basis of judicial economy, the tribunal declined to consider whether Lighthouse's activity constituted an investment for the purposes of the domestic investment statute because jurisdiction had already been denied on the basis of the failure of establishing consent to international arbitration at ICSID. Lighthouse was ordered to bear all costs in the matter, including the respondent's legal fees.

UAB E Energija (Lithuania) v. Latvia [7] was a claim brought by a Lithuanian energy company on the basis of alleged breaches of the fair and equitable treatment and full protection

[6] ICSID Case No. ARB/15/2 (30 December 2017)
[7] ICSID Case No. ARB/12/33 (30 Jan 2018)

and security obligations contained in the Latvia-Lithuania BIT. The investor held a thirty-year lease of a district heating system that was interrupted when an energy crisis was declared. All assets of the company were then seized by a newly elected government which objected to the privatization of the municipality's energy sector. Latvia brought a number of objections to the claim, including the lack of a dispute, the failure to mediate as required by the European Bank for Reconstruction and Development (EBRD), and delay. The tribunal dismissed these claims noting that the EBRD's approval was not required, that the dispute was sufficiently legal under Latvian law and that the case had been brought promptly. The tribunal ultimately held that the respondent state's behaviour was based on prejudice rather than fact, violating the fair and equitable treatment standard in the BIT. The state had acted in bad faith because it had endowed the Lithuanian company with additional capital only a week before the energy crisis was declared, suggesting that the crisis may have been used to pressure the investor into relinquishing some of its assets. Another claim for expropriation was denied on the grounds that the host state was entitled to revoke the licenses to supply heating due to non-payment, which had occurred. An additional issue relating to the claimant's attempted use of an MFN clause to bring in substantive benefits in another BIT (the granting of relevant permits) was not explored by the tribunal. The claimant was awarded damages and the respondent was required to pay half of the claimant's costs, although a dissent by Reinisch argued that each party should bear its own costs as neither the action nor the defence was frivolous.

Salini Impregilo S.p.A. v. Argentine Republic, [8] was a dispute issued this year which arose out of a contract for the construction of a toll road in Argentina by an Italian construction consortium brought under the Italy-Argentina BIT. The Claimant alleges that Argentina's acts of interference commenced in 2002, during the aftermath of their financial crisis, leading to the termination of the contract in 2014. Argentine alleged that the Italian company's claim is time-barred, being based on measures adopted more than a decade ago. This argument was rejected by the tribunal because the delay in bringing the claim was not unreasonable since there were ongoing negotiations and domestic judicial challenges. This situation consequently did not trigger the principle of extinctive prescription (prejudice to the defendant due to delay). Argentina further argued that the claimant did not satisfy the jurisdictional pre-conditions, namely that the BIT required parties to submit the dispute to the local courts for at least eighteen months before the start of arbitration. The Tribunal also rejected this exhaustion of local remedies argument because although the arbitration was indeed started only fifteen months

[8] ICSID Case No. ARB/15/39 (20 March 2018)

after the first local court hearing commenced, the tribunal ruled that to require the claimant to start over and re-file the arbitration now that the eighteen months has actually passed would be a waste of time and resources. More importantly, an administrative procedure had been commenced more than eighteen months before the arbitration was initiated. Deciding also against Argentina's argument that the local courts would be better suited to hear the claim, the ICSID tribunal held that even if it had the power to stay the present proceedings, it has not been shown that it is *forum non conveniens* and it would decline to exercise that power. There was an additional jurisdictional objection based on the fact that the claimant's shares in the toll road project was not an investment, but this was also thrown aside by the tribunal on the basis that it fit the definitions of investment in the relevant BIT.

ACP Axos Capital GmbH v. Republic of Kosovo[9] concerned the privatization of Kosovo's post and telecommunications company, PTK, for which the claimant Axos won a tender to buy 75 per cent of its shares. The Kosovar government withdrew from the sale, partially as a consequence of trade union protests, leading PTK to enter into a new contract with other companies. Axos asserted that Kosovo had expropriated Axos's investment and failed to accord fair and equitable treatment, prejudiced Axos's investment by taking arbitrary measures and failed to observe its obligations to Axos, all of which were violations of the Germany–Yugoslavia BIT. Kosovo argued that the tribunal lacked jurisdiction because Axos had neither established a protected investment within the meaning of the BIT nor made an investment as understood by the ICSID Convention. Axos countered that the existence of a sales contract constituted a valid investment under the BIT. The tribunal disagreed with this view on the basis that the bid by Axos was not a binding offer to acquire shares of PTK which had been accepted. Rather, the bid submission was merely an offer to be selected as a "selected bidder" therefore there was no offer and acceptance to form a contract. The tribunal ruled that, since no enforceable contract was in place, Kosovo could rightfully cancel the tender up until the very last moment of the signing of the transaction documents. Had Axos had believed that a binding contract had existed, it would have immediately signed the transaction documents, but a signature was not included. Instead, Axos attempted to negotiate the terms of the agreement and only offered to sign the documents several months later. The tribunal held that Axos would bear all arbitration costs and Kosovo's reasonable legal fees and expenses.

[9] ICSID Case No. ARB/15/22 (4 May 2018)

In *Mercer International Inc. v. Government of Canada,* [10] US company Mercer owned and operated a pulp mill in the Canadian province of British Columbia which used large amounts of electricity which were purchased at prevailing rates from a local utility. The pulping process also produced a by-product that could be converted into biomass-based electricity which Mercer sold at rates that were much higher than the rate at which it purchased electricity, subsidizing the pulp operations. After a change in government policy, a new generator baseline was set for the Celgar mill by the provincial government, hampering the claimant's profitability under this arrangement. Mercer alleged that Canada had failed to provide Mercer non-discriminatory treatment and the minimum standard treatment as provided for under NAFTA. The tribunal held that while some of Mercer's claims were time barred, other claims depended on actual or constructive knowledge of at least one other BC pulp mill in like circumstances having received more favourable treatment. They were therefore permissible. Additionally, some aspects of the claim were rejected on the basis that some of the activities should be construed as government procurement and were therefore excluded from NAFTA's scope and the tribunal's jurisdiction. On the issue of discrimination and taking into account the circumstances of a comparator domestic mill, the tribunal found on the facts that the foreign Celgar mill had not been discriminated against under NAFTA and, further, that the customary international law minimum standard would add nothing to the claim for compensation. Although the parties had criticized each other for inappropriate conduct during the arbitration, the tribunal considered these events as innocent mishaps brought about in part by a dispute that was very complicated. The tribunal held that Canada, as the successful party, should recover its legal costs from Mercer.

Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, Award [11] was another dispute relating to Spain's removal of its renewable energy incentive regime. Spain had attempted to stimulate investment in the renewable energy sector through a Royal Decree under which renewable energy generators would benefit from a premium set by the Spanish government above the wholesale market price. Here the Dutch investor Masdar argued that, by a series of disputed measures introduced between 2012 and 2014, Spain abolished this regime introducing a much less favourable one. This was depicted as unfair to Masdar which had made investments in three concentrated solar power (CSP) plants based on the earlier advantageous system. The claimant alleged that its investments had been affected by the disputed measures

[10] ICSID Case No. ARB(AF)/12/3 (14 May 2018)

[11] ICSID Case No. ARB/14/1 (23 May 2018)

and asserted that Spain had breached the fair and equitable treatment standard under the ECT. It also sought full reparation for the injury to its investments in the form of full restitution by re-establishing the situation that existed prior to Spain's alleged breaches of the ECT, along with monetary compensation for all losses suffered prior to the reinstatement. Spain alleged that Masdar's conduct was attributable to the United Arab Emirates (which owned the company) and which is not party to the ECT. Since the dispute was between two states, Spain argued that neither the ECT or ICSID were relevant. The tribunal rejected this objection since Spain had not adduced evidence supporting this control argument. The tribunal was satisfied that Masdar had made an investment within the definition in the ECT. Rejecting Spain's argument that the claim was based on an intra-EU BIT (and therefore transgressed the controversial *Achmea*[12] decision of the CJEU) the tribunal concluded that nothing in the text of the ECT precluded intra-EU disputes from its scope. According to the tribunal, EU law should not be viewed as incompatible with the provision for investor–state arbitration contained in the ECT. The *Achmea* judgment applied to BITs, it ruled, but not to multilateral treaties to which the EU itself is a party, such as the ECT. The tribunal went on to hold that the fair and equitable treatment standard could not include economic and legal stability, and foreign investors could not legitimately expect it, unless explicit undertakings were directly extended to investors. However, a specific commitment existed in the form of a resolution issued by Spain addressed specifically to each of the operating companies. As a consequence of these specific commitments, which were found to give rise to legitimate expectations, the tribunal found that Spain was in breach of its obligations to extent fair and equitable treatment. Holding that granting restitution of the original renewable energy regime would materially affect Spain's legislative authority, the tribunal decided to grant the investor monetary compensation instead.

Mobil Investments Canada Inc. v. Canada, Decision on Jurisdiction and Admissibility[13] was another dispute based on a challenge to Canada's implementation of the Guidelines for Research and Development Expenditures which introduced mandatory research and development expenditure requirements relating to offshore petroleum projects in the province of Newfoundland and Labrador. Here the claimant, a US oil company, sought damages for expenditures it allegedly incurred in 2012-2015 as a result of Canada's continued enforcement of the 2004 Guidelines and based on breaches of NAFTA. This case differed from an earlier

[12] Case C-284/16 (7 March 2018) CJEU
[13] ICSID Case No. ARB/15/6 (26 July 2018)

one brought by Mobil in that this one was concerned solely with a claim for damages which it is said have already become "actual"; there was no claim in respect of future losses. On the first jurisdictional issue, the tribunal was not convinced by Canada's argument that the claim was time-barred on the basis of when the facts became known to the claimant. The tribunal looked closely at the doctrine of good faith in international law, noting that a party to a treaty is under a specific obligation to perform its obligations under the treaty, derived from the principle *pacta sunt servanda*. Good faith, in contrast, concerns the manner in which that obligation is to be performed. Flowing from this, Mobil could not have known that Canada would continue to enforce the 2004 Guidelines against it. Indeed, Mobil could reasonably have expected that Canada would not do so. Turning to the key issue of *res judicata* (whether this claim should be barred because it had already effectively been decide in an earlier case brought by Mobil against Canada) the tribunal considered that the decision of the Board to continue enforcing the 2004 Guidelines notwithstanding the decision of the *Mobil I* tribunal was an act separate and distinct from the promulgation of the 2004 Guidelines and their enforcement until that date. Moreover, the earlier tribunal said on more than one occasion that it was not making a final determination. Since both of Canada's procedural objections were denied, the tribunal the claim on the merits would proceed in a post-hearing brief, at which point costs would also be decided.

In *A11Y LTD. v. Czech Republic*[14] the claimant was a UK-based developer of assistive technology solutions for people with sensory disabilities seeking to use the internet. It alleged that the respondent state targeted its business and ultimately destroyed its investment by taking over its business operations and imposing price caps and other harmful restrictions on the delivery of its service (such as mandatory add-on services which had to be tendered at reduced rates or free to the public) as part of a public health policy change in the host state. The claimant brought a claim under the UK-Czech BIT on the basis of indirect or creeping expropriation. Part of the allegations related to the fact that the Czech government had pursued the changes in policy with insufficient transparency and made derogatory statements against the investor in public (on television) regarding their overpricing of their services. The tribunal first considered a jurisdictional objection raised by respondent regarding whether or not it satisfied the definition of investment. The tribunal ruled in favour of the claimant, holding that the relevant provision of the applicable BIT refers broadly to "every kind of asset" which includes assets in the form of know-how, technical expertise and goodwill, as well as conventional financial

[14] ICSID Case No. UNCT/15/1 (26 July 2018)

contributions in the host state. On the issue of expropriation, the tribunal decided that the language contained in various statements issued by the respondent state was neutral and applied uniformly to all companies – they did not target the claimant. With regard to other acts of the Czech Ministry of Labour, the tribunal found that claimant did not meet the required burden of proof and that much of the loss suffered by the investor was due to the fact that its business model, in which it charged very high rates, was unsustainable in the longer term and in fact was "doomed to fail". The tribunal held that the claimant bears the combined tribunal costs and each party bears its respective legal costs.

Lion Mexico Consolidated L.P. v. United Mexican States[15] was a decision on jurisdiction related to a Mexico's judicial conduct with respect to a claim regarding the default payment of three mortgages and three promissory notes by two private Mexican companies to the claimant, a US company. The mortgages and the promissory notes, subject to Mexican law, formalized three loans by the claimant to the borrowers. Upon the expiry of the repayment deadlines and the default of payment, the claimant attempted to use to Mexican state's judiciary to resolve the matter but received an inadequate result. At the ICSID tribunal, the claimant alleged that respondent's courts and public registries authorised a fraud based upon a forged loan restructuring agreement. This resulted in the unlawful cancellation of claimant's mortgages and loans, both of which could be qualified as a protected investment under NAFTA. Mexico denied this allegation, arguing that there was a single and unique transaction, insufficient to qualify as an investment. The arbitral tribunal partially agreed with this assertion, ruling that the promissory notes could not be viewed as investments since there was no contribution of capital. On the other hand, the arbitral tribunal felt that the mortgages did meet the requirements of NAFTA as protected investments: they fell within the category of assets in the form of "intangible real estate" and have been used for economic benefit or another business purpose. Mexican law was in conformity with this view. As a consequence of this assessment, the tribunal concluded that it has jurisdiction over the respondent's measures that affected the mortgages. The decision on costs was reserved pending the outcome of the case on its merits.

Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain[16] concerned another claim against Spain under the ECT, alleging breach of the fair and equitable treatment obligation, on the basis that regulatory changes in the renewable energy sector completely "wiped out" the previous incentive scheme which Antin

[15] ICSID Case No. ARB(AF)/15/2 (7 August 2018)
[16] ICSID Case No. ARB/13/31 (7 August 2018)

had legitimately expected to continue. Dismissing Spain's objections to jurisdiction, the tribunal delivered similar arguments to those in previous ECT claims based on Spain's revocation of renewable energy subsidies, including the one discussed above. The tribunal rejected Spain's attempts to reopen argument that the claims brought against it were contrary to EU law and its appeal to the recent *Achmea* decision which denied justiciability of an arbitration clause in an intra-EU BIT. The legitimate expectations of the investor in this instance were held to be sufficient to ground a claim based on the ECT, regardless of the revocation of the unworkable incentive scheme. The tribunal ruled that at the time of Antin's investment, the most significant changes to Spain's renewable energy incentive regime only affected certain types of installations (PV), not CSP-based projects of the kind which Antin was using. It further observed that the investor had undertaken thorough due diligence before investing which had concluded that there was strong government support for the CSP sector. Additionally, Antin claimed that the Spanish government had given assurances at meetings that the CSP sector should be considered a stable regulatory regime, leading to the reasonable conclusion that the CSP regime in which Antin operated was unlikely to be significantly changed. The tribunal stated that changes to a state's regulatory framework must be consistent with assurances on stability of the regulatory framework as provided by the state and which are required by the ECT, an instrument designed largely to ensure regulatory stability. The tribunal further held that investors' legitimate expectations must be assessed objectively at the time the investment was made. Such expectations must originate from some affirmative action of the state. These may be either specific commitments or representations. In this regard, Spain had repeatedly emphasised the stability of its renewable incentive regime in reports, press releases, the preamble of its royal decrees, government plans and advertising material. The tribunal rejected the respondent's argument that Antin could only have a legitimate expectation of a reasonable return on their investment. In order for Spain's reformed regime to comply with ECT's requirements for stable and predictable conditions for investment, the payment due to renewable energy providers must be based on identifiable criteria, but Spain did not identify the parameters by which it identified the standard installation on which the reasonable return was based, nor even it how the revision of the reasonable rate would be calculated. Although the investor could not recover "historic" losses, it was entitled to damages based upon projected future cash flows over a 25-year lifespan of the plant.

Finally, *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*[17] arose out of the host state's refusal, after the Croatian War of Independence, to recognize a purchase of the family-run meat enterprise by Mr Gavrilović and related measures undertaken by the state which damaged the investor's profitability. According to laws of the Federal People's Republic of Yugoslavia, companies like those of the claimant (based on its size and the nature of its business) were transformed into social ownership. The ensuing effect on the business led the claimant to challenge several measures allegedly adopted by the respondent which undermined the value of the investment, including irregularities in the bankruptcy process, failure of police to protect the claimant's factories, blocking of registration of private property, forced sales and restricted access to finance. This were framed as breaches of the Austria-Croatia BIT's provisions on prohibition of unlawful expropriation, the fair and equitable treatment, national treatment and its obligations under the umbrella clause. The tribunal first upheld jurisdiction by accepting that the claimants are investors that have made an investment. The tribunal rejected the notion that the investments were tainted with illegality because of a criminal trial which had taken place in the context of political persecution decades earlier. Despite the fact that the bankruptcy proceeding exhibited some irregularities, the arbitral tribunal ruled that it was the state which orchestrated a scheme to return the claimant's business. Since different state entities of that period were involved in the allegedly illegal return scheme, it was estopped from raising the illegality objection. Turning to the merits, the tribunal partially accepted that the respondent state expropriated the claimants' investment, finding a direct expropriation in each case where the respondent registered itself as owner over a plot of land. Still, the tribunal rejected the allegations of indirect expropriation on the basis of insufficient causality been alleged BIT breaches and loss suffered by the investor. Moreover, there was limited evidence that the investor was going to use the property to generate profits as they stated. All of other claims were also dismissed for a lack of evidence.

To conclude this year's review of ICSID awards, it would seem as though jurisdictional challenges appear to occupy most of the various ICSID tribunals' time this year, with familiar questions relating to timing and the definition of investment dominating. On more substantive issues the tribunals are sensitive to the investor's legitimate expectations, particularly where there have been assurances by the host state, but they are not prepared to be creative in terms of loss where an allegedly profitable future is uncertain. More specifically, in relation to the high-profile claims brought against Spain for the removal of its renewable energy incentives,

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[17] ICSID Case No. ARB/12/39 (7 August 2018)

enforcement of these awards may prove problematic. The European Commission has warned Spain that it cannot pay out any tribunal awards in respect of its renewable incentive scheme because this would constitute illegal state aid. Moreover, any attempt to enforce the award in EU Member State courts could be challenged on the basis that the *Achmea* judgment renders intra-EU investor-state arbitration illegal under EU law. Accordingly, the future of intra-EU based claims, of which a significant portion of ICSID caseload is occupied, is highly uncertain.