



RCIL ARBITRATION NEWSLETTER

September 2023

INVESTMENT ARBITRATION AND CLAIMS

Canadian gold mining company settles with Tanzania

29th September 2023

A Canadian gold mining company has agreed to settle its ICSID dispute with Tanzania over the revocation of a project licence.

Winshear filed the arbitration in 2020 under the Canada-Tanzania bilateral investment treaty, seeking compensation for the alleged expropriation of its investment after Tanzania passed a law abolishing its retention licence and transferring its rights to the government. It launched proceedings in relation to the gold project in south-west Tanzania, which it began developing in 2006.

Vancouver-based Winshear Gold announced on 19 September that it had suspended its ICSID arbitration against Tanzania, saying it had reached a conditional settlement agreement with the state. However, it cautioned that there is “no guarantee that the conditional settlement agreement will be concluded”.

Mexico risks claims from lithium mining investors

28th September 2023

A Chinese lithium producer says it is considering bringing a claim against Mexico after its mining concessions were cancelled for allegedly failing to meet

investment obligations – as the state pursues a wider programme of nationalisation that practitioners say could lead to treaty cases.

The company did not specify which mechanism it would pursue. However, Yonggao Wu – a lawyer at Chinese firm Jincheng Tongda & Neal who regularly advises China’s ministry of land and resources – told Chinese news outlet ‘The Paper’ that Ganfeng could bring an ICSID claim under the Mexico-China bilateral investment treaty.

Ganfeng, the world’s largest producer of lithium batteries, says it held nine concessions to explore for lithium in Mexico, including an open-pit project in the state of Sonora – estimated to contain more than 8 million metric tons of lithium carbonate. The Chinese company acquired the concessions in 2021 when it purchased their previous holder, London-listed Bacanora Lithium, for US\$260 million.

According to Ganfeng, Mexico’s General Directorate of Mines (DGM) said last month it had cancelled the concessions after Ganfeng failed to meet minimum investment obligations for their development between 2017 and 2021.

Awards emerge in Bangladeshi energy disputes

15th September 2023

As Bangladesh contends with an energy crisis, details of two concluded arbitrations against state entities in that sector have come to light – including one where a contractor unsuccessfully argued that an influx of Rohingya refugees from Myanmar prevented it from building a solar park.



Southern Solar Power, a Bangladeshi subsidiary of US-based SunEdison, saw its ICC claim against the Bangladesh Power Development Board (BPDB) summarily dismissed in a partial award in January 2021, it has emerged.

The company had sought US\$18 million and declaratory relief to reinstate a power purchase agreement. The ICC tribunal dismissed the claim and certain counterclaims by BPDB worth US\$88 million without an evidentiary hearing – Southern Solar Power Limited v Bangladesh Power Development Board (ICC Case No. 23904/TO/AZR)

Foley Hoag and Alliance Laws are also representing another state entity, Bangladesh Petroleum Exploration and Production Company (Bapex) in three ICSID proceedings against Canada's Niko Resources – including two cases that have so far lasted 13 years.

Moreover, Another Niko subsidiary lodged a third ICSID case in 2019 against Bangladesh and Bapex, claiming US\$100 million for withheld payments relating to a different gas block. That case is yet to reach a hearing.

Failed BIT claim leads to human rights complaint

15th September 2023

A Spanish-Venezuelan businessman has complained to the European Court of Human Rights over the Dutch courts' refusal to review the dismissal of a US\$240 million investment treaty claim against Venezuela.

In an application filed on 21 August, Manuel García Armas alleges that his right to a fair trial has been violated because of the Dutch courts' conclusion that they cannot review arbitral awards that decline jurisdiction based on the lack of a valid arbitration agreement.

He says he has been denied right of access to a court and equality of arms in breach of article 6(1) of the European Convention on Human Rights. The businessman argues that Dutch law precludes reviewing negative jurisdiction awards based on the incorrect assumption that the claim will still be pursuable before domestic courts, which is not the case for a Dutch-seated international arbitration based on a BIT.

Sunken treasure saga leads to mega-claim against Colombia

14th September 2023

A US company is pursuing a US\$10 billion investment treaty claim against Colombia over treasure in the wreck of a Spanish galleon that sank off the coast of Cartagena more than three hundred years ago. Delaware-registered Sea-Search Armada filed a notice of arbitration in December last year under the United States-Colombia trade promotion agreement.

The company accuses Colombia of unlawfully expropriating its rights to around US\$10 billion worth of treasure found by its predecessors over 40 years ago on the wreck of the San José galleon.

Details of the UNCITRAL claim have just appeared on the website of the Permanent Court of Arbitration in The Hague, which is administering the case.

Ukraine warned of BIT claim over bank takeover

08th September 2023



A Luxembourg company linked to Russian-Israeli billionaire Mikhail Fridman says it has notified Ukraine of a potential investment treaty claim over the “illegal expropriation” of one of the country’s biggest banks – while accusing the state of aggravating the dispute by bringing criminal charges against the businessman.

Luxembourg-registered ABH Holdings confirmed in a statement yesterday that it filed a notice of dispute against Ukraine in June. ABH was set up as a holding company for the Russian financial conglomerate Alfa Group.

According to media reports, Russian financier Andrei Kosogov owns a roughly 41% stake in ABH, with Fridman and another Alfa executive, Peter Aven, owning smaller stakes. The dispute concerns Sense Bank – formerly known as Alfa Bank Ukraine – which was majority owned by ABH prior to its nationalisation by Ukrainian authorities in July this year.

Hong Kong investors prepare treaty claim over Credit Suisse

05th September 2023

Hong Kong investors affected by the write-down of Credit Suisse bonds are reportedly preparing an investment treaty claim against Switzerland – weeks after an Australian funder announced it would back another group of bondholders represented by Allen & Overy.

The first public instance of Hong Kong investors taking legal action over the Swiss authorities’ decision to write down nearly US\$18 billion worth of Credit Suisse additional tier (AT1) bonds as part of an emergency deal to rescue the bank.

The Chinese firm Fangda Partners intends to file a notice of dispute later this month under the Hong Kong-Switzerland bilateral investment treaty on behalf of several family offices and retail investors. Any arbitration would be brought under UNCITRAL rules.

Portugal is ordered to pay 23.6 million euro in arbitration dispute with postal company over damages suffered during pandemic

03rd September 2023

CTT, a Portuguese acronym for Correios, Telégrafos e Telefones, is the oldest company in Portugal, having been founded by King Manuel I in 1520. The company was recently privatised, and it now list foreign investment funds as its main shareholders

In June 2021, CTT lodged arbitral proceedings against the state, seeking around 67 million EUR in compensation for Portugal’s decision to prolong a concession contract in 2021, and in view of further damages allegedly suffered due to the pandemic.

In an award dated September 27, 2023, an undisclosed arbitral tribunal found that the pandemic qualified as an unexpected change of circumstances that justified compensating CTT to the tune of 6.8 million EUR. As for the prolongation of the concession, CTT says that the tribunal agreed that this had impacted the contract’s economic equilibrium, awarding 16.7 million EUR in compensation on that ground.

INSTITUTIONS, PEOPLE AND GROUPS

UN tribunal hears states on climate change

05th September 2023

Arbitration practitioners from several well-known law firms and chambers have appeared before a UN tribunal that has been asked to clarify states' obligations to protect the world's oceans from the effects of climate change.

The International Tribunal for the Law of the Sea (ITLOS) in Hamburg yesterday concluded a two-week hearing where it heard from more than 50 states and international organisations. The tribunal is considering a request for an advisory opinion on the obligations of states under the United Nations Convention on the Law of the Sea (UNCLOS) to protect the marine environment from the effects of climate change.

ITLOS is expected to issue the advisory opinion in the next six to eight months.

World Bank is looking for new ICSID secretary-general

05th September 2023

The World Bank is seeking applications for the role of Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID), following the decision of the Centre's current Secretary-General, Meg Kinnear, to retire next year.

In 2009, Ms. Kinnear, who formerly served as Director General of Canada's Trade Law Bureau, was elected in accordance with Article 10 of the ICSID Convention. Ms. Kinnear subsequently served two six-year terms, before being re-elected for a third term in September 2020.

Consequently, the World Bank is currently seeking applications for the position of ICSID Secretary-General (which includes acting as Vice President of the World Bank), with the press release stressing that the role calls for "intellectual leadership in the field of international investment law and dispute resolution", and includes tasks such as the administration of the Centre, the appointment of staff, the registration of cases, the supervision of cases administered by ICSID, and the oversight of ICSID's finances.

CONFERENCES AND EVENTS

2023 UNCITRAL South Asia Conference

17th September 2023

UNCITRAL RCAP held the 2023 UNCITRAL South Asia Conference, a flagship event co-hosted with the Ministry of External Affairs, Republic of India and the UNCITRAL National Coordination Committee of India on 14 - 16 September in New Delhi. Global and regional legal and judicial experts shared insights on commercial law topics including the digital economy, MSMEs and access to credit, insolvency, investor-state dispute settlement reform, international commercial arbitration and mediation, and more. Special highlights included a high-level inaugural and roundtable sessions focusing on regional perspectives on UNCITRAL.



Further details and video recording of the conference can be [found here](#).

GLOBAL ARBITRATION TRENDS & REPORTS

China adopts commercial exception to state immunity

1st September 2023

Foreign states will no longer be granted immunity from suit or execution in mainland China and Hong Kong in respect of commercial activities following new legislation that takes effect from the start of next year. The People's Republic of China (PRC) adopted the Foreign State Immunity Law on 1 September. The PRC Ministry of Foreign Affairs said in a statement that the reform would bring its state immunity regime "in line with international practices". Government officials have indicated that the new law will also apply in Hong Kong and Macau.

The new law introduces a "commercial activities" exception to the immunity that states enjoy from the jurisdiction of the PRC courts in respect of lawsuits; and immunity from execution against their property. It also introduces new exceptions to the immunity of foreign states from the jurisdiction of PRC courts in various arbitration-related proceedings, including the enforcement and set-aside of awards and validity of an arbitration agreement.

These exceptions apply where a foreign state has agreed to arbitrate disputes arising from commercial activities with an organisation or individual of another state, including the PRC. They also apply where a foreign state has

agreed to arbitration of an investment dispute, for instance in an investment treaty.

China now joins the many other jurisdictions that follow the "restrictive" approach to immunity, including the US, UK, India, Singapore, Australia, New Zealand and most of the EU.

Silicon Valley centre seeks feedback on AI guidelines

31st August 2023

The Silicon Valley Arbitration and Mediation Centre (SVAMC) is inviting comments on its newly published draft guidelines on the use of artificial intelligence in international arbitration. Foreign states will no longer be granted immunity from suit or execution in mainland China and Hong Kong in respect of commercial activities following new legislation that takes effect from the start of next year.

The draft is divided into three chapters: guidelines applicable to all participants; guidelines for parties and their representatives; and guidelines for arbitrators. Under the guidelines, all users of international arbitration must ensure they understand the AI technology they are using – and take steps to mitigate any biases, limitations or risks. Users must also ensure that the technology does not breach any confidentiality obligations.

The draft provides that parties and their representatives must review all AI-generated material used in the arbitration and shall be deemed responsible for any uncorrected errors or inaccuracies contained therein.

Parties, representatives and experts are also prohibited from using AI in ways that affect the integrity of the arbitration or otherwise disrupt the conduct of



the proceedings. The subcommittee noted that the ability of AI to produce doctored material or “deepfakes” increases the risk of falsified evidence – and said parties must remain vigilant to that risk. Moreover, under the guidelines, arbitrators shall not delegate any part of their personal mandate to any AI tool, particularly their decision-making function.

Once the consultation is concluded and a final version of the guidelines is published, the SVAMC plans to invite international arbitration institutions to share interpretations and guidance, which will be compiled into a separate chapter of the guidelines.

TREATIES, CHARTERS AND CONVENTIONS

A new era for investment disputes across Africa?

20th September 2023

The modernisation of the African investment treaty system and implementation of the African Continental Free Trade Area is underway, with the African Union’s adoption of the final draft of the investment protocol earlier this year,

The African Continental Free Trade Area (AfCFTA) is already the world’s largest free trade area by number of countries participating, uniting virtually the entire African continent (only Eritrea has refused to sign the establishing treaty). It has been predicted to have an enormous impact in terms of intra-African trade, which at around 15% of total trade done by African states

currently lags far behind comparative trading within other continents: intra-continent trading is around 59% in Asia, and as high as 68% in Europe.

In the protocol, a uniform system of investor protection is set out amongst African nations, replacing the existing system of BITs. In introducing these protections, many of which apply for the first time amongst African nations which previously had no treaties in place between them, the protocol demonstrates many novel features, both in terms of states’ liberty to legislate, and also relating to the conduct of the investor, with more stringent requirements introduced in relation to states’ benefits from the investment, as well as investor behaviour. And All intra-African BITs to be terminated and replaced with the protocol.

UK may withdraw from ECT if modernization is not approved by November 2023

1st September 2023

The UK government is reviewing its Energy Charter Treaty (ECT) membership, leaving open the possibility for the state’s withdrawal from the treaty if modernized terms are not agreed on by November 2023.

The announcement underlines that UK has been a strong advocate of the ECT modernization process, noting that with the modernized terms, the ECT would have a much stronger focus on promoting clean, affordable energy, such as carbon capture, utilisation and storage as well as hydrogen and other renewables. According to the announcement, a modernized ECT would also strengthen the UK government’s sovereign right to change its energy system to reach net zero and protect UK investors abroad.



However, the decision of several EU member states to withdraw from the ECT, has, in the words of the UK Minister of Energy, led to an impasse on modernisation.

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