News and Notes from

Institute for TRANSNATIONAL ARBITRATION

The Institute for Transnational Arbitration

A Division of

The Center for American and International Law

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2ND ITA CONFERENCE ON INTERNATIONAL ARBITRATION IN THE MINING SECTOR

Conference Report by Elizabeth Argento (Wilson Laycraft, Calgary)

On March 6 and 7, 2024, the ITA held its second annual ITA Conference on International Arbitration in the Mining Sector at the Shangri-La hotel in Toronto, Canada. The conference consisted of eight panels that covered a broad range of considerations related to the arbitration of mining disputes. Panels addressed topics such as quantifying damages in mining arbitrations; maximizing access to arbitration for mining investments; settlement mechanisms; injunctive relief in mining disputes; and developments within mining arbitrations. Attendees of the conference were welcomed by the ITA Chair, Tomasz J. Sikora (Exxon Mobil Corporation, Houston). Mr. Sikora noted that the ITA has recognized the critical nature of the mining industry and that the practice of arbitration in these mining disputes deserves special focus.

Robert Reyes Landicho (Vinson & Elkins, Houston) and Tomasz J. Sikora (Exxon Mobil Corporation, Houston)

I. Expert Determination and Accelerated Dispute Resolution (March 7, 2024)

Moderator: Liz Snodgrass (Three Crowns LLP, Washington, D.C.)

Panelists: Guilherme Recena Costa (Barrick Gold Corporation, New York); Mohamed Shelbaya (Gaillard Banifatemi Shelbaya Disputes, Paris); Lindsey Schmidt (Gibson, Dunn & Crutcher LLP, New York)

This panel considered the use of expert determination and accelerated dispute resolution for mining disputes, and noted that mining disputes are often compatible with arbitration since the subject matters of the disputes tend to be technically complex. As such, parties may wish to select decision-makers who have the ability to understand such complex issues. The panel accordingly considered whether providing a forum where technical experts could act as the decision-maker could be a useful and attractive alternative means of resolution for parties to mining disputes.

Liz Snodgrass (Three Crowns LLP, Washington, D.C.), Lindsey Schmidt (Gibson, Dunn & Crutcher LLP, New York), Mohamed Shelbaya (Gaillard Banifatemi Shelbaya Disputes, Paris), and Guilherme Recena Costa (Barrick Gold Corporation, New York)

A. Expert Determination for Mining Arbitrations

The panel moderator, Liz Snodgrass, posed a question to the panel regarding when parties to a mining dispute may want to utilize expert determination, as opposed to traditional arbitration, to seek resolution. Lindsey Schmidt noted that expert determination is a form of alternative dispute resolution which provides parties with the opportunity to have their dispute submitted to an expert of their choosing who can render a binding decision on the parties. While this form of alternative dispute resolution provides parties with the opportunity to have an expert, as opposed to an arbitral tribunal, render a binding decision, such decision is often limited in

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scope. As Ms. Schmidt noted, the issues often referred for expert determination tend to be singular issues, and are often technical, as opposed to legal, in nature.

Ms. Schmidt noted that the primary advantage of expert determination is that it enables the parties to have an expert directly decide technical issues as opposed to having a tribunal consider highly technical questions, which would likely require the assistance of experts. As such, expert determination allows for certain issues to be determined in a more expeditious and cost-effective manner. A further advantage of expert determination is that the expert is not bound by the procedural requirements that bind tribunals. This can allow for the issue to be heard quicker as experts are not required to hold hearings. It was noted that the decision can be based on the expert's own expertise. Accordingly, if the facts that relate to the issue can be ascertained from documents, and are not significantly contested, expert determination may be a good option for parties. It was further noted that parties considering this form of dispute resolution need to be aware that decisions provided by experts are not directly enforceable as arbitral awards are. Ms. Schmidt noted that if the expert's decision is not complied with, a party's recourse would be a claim for breach of contract.

Guilherme Recena Costa then spoke about drafting effective expert determination clauses. Mr. Costa identified a few considerations for counsel when drafting these clauses in order for them to best serve their purpose. The first consideration is to include an appointment mechanism. Mr. Costa suggested that counsel and parties avoid appointing a specific individual within the clause, as that individual may be unwilling or unable to act if they are so required. Another consideration is that there should be an appointing authority within the clause. This is a key consideration as there should be a way in which expert determination could proceed if the opposing party refuses to cooperate with the appointment of the expert. The next consideration for counsel is the procedure that should be followed by the expert. Mr. Costa suggested that it may be useful to contemplate whether an expert may deal with incidental legal issues that might arise to the extent that they are relevant to the determination of the issue that the expert is considering. Finally, Mr. Costa noted that enforcement should also be considered since a party's recourse for non-compliance with an expert's decision is a breach of contract claim. Therefore, parties may want to consider enforcement mechanisms at the drafting stage and whether expedited arbitration procedures could be used with expert determination as a way in which enforcement could be obtained.

Mohamed Shelbaya then highlighted that one of the benefits of expert determination is the expertise that these decision-makers offer to the dispute. However, while there are benefits, Mr. Shelbaya identified that one of the pitfalls with this form of dispute resolution is the status of the decision itself. Parties must carefully consider what issues the expert will be asked to decide. Parties should be cautious that the expert's decision does not exceed its original scope as it may affect the binding nature of the decision. Parties will also need to consider the applicable legal system as there are different approaches to what issues experts can consider, including direct or incidental considerations of legal issues. Mr. Shelbaya noted that various institutional rules tend to permit experts to consider any issue within the scope determined by the parties. However, it was noted that problems may arise if courts in domestic legal systems, when reviewing a decision, disagree with the scope of the expert's mandate. As an example, Mr. Shelbaya noted that the English legal system would likely permit an expert to make a legal determination if it is incidental to the technical issue at hand so long as the parties provided an express mandate to the expert that such determinations could be made. On the other hand,

it was noted that French law would never uphold a decision where an expert made a determination on a legal matter. This would lead to the expert's decision being recharacterized as an award, which would then be subjected to the requirements of recognition of arbitral awards, which are not usually complied by the expert.

B. Accelerated Dispute Resolution in Mining Arbitrations

The panel then shifted their focus to address how accelerated dispute resolution could be utilized for mining disputes. Mr. Shelbaya began the discussion by distinguishing emergency procedures from accelerated dispute resolution processes. In so doing, he noted that emergency arbitration serves to provide parties with provisional relief until a tribunal can be assembled. These emergency procedures may prove to be useful, especially if a particular action, such as drilling, needs to occur as soon as possible and a decision is required immediately. While the usefulness of these procedures was highlighted, so were the limitations; namely, decisions rendered using emergency procedures are provisional and parties will still need the tribunal to order final relief. Mr. Costa then addressed how parties can best prepare for expedited arbitration. Mr. Costa noted that more effort may be required to prepare for the expedited process in a short period of time, which will often require cooperation between in-house and external counsel.

It was suggested that while there are benefits to expedited and accelerated procedures, there are also pitfalls in requiring that the arbitral process be held within such a short period of time. It was also noted that parties should be cognizant of the potential issues that could arise from such abridged timelines at the drafting stage of their expedited arbitration clause to ensure that, should a dispute arise, there will be adequate procedures in place to ensure the expedited procedure can serve its purpose, while the parties are still cooperative.

In concluding remarks, Ms. Snodgrass noted that it is encouraging to see that parties have a desire to use these expedited procedures and that the institutional frameworks that exist are useful to parties, either adopted as they are written or as inspiration for techniques that could be utilized by parties faced with a dispute.

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EMISSION ALLOWANCES – PROBLEM OR PROPERTY?

Report by Aaron Tan
(Holman Fenwick Willan, Singapore)

1. Introduction

The purchase of emission allowances around the world is growing and a natural question that arises is what sorts of protections are available to individuals or investors who purchase them. One possibility is that an investor could avail itself of protections under a bilateral investment treaty ("BIT") and argue that the purchased emission allowance in question is an investment entitling it to the protections under the BIT. For example, this may be possible under BITs that incorporate provisions protecting intangible property, including the Singapore – Myanmar BIT (2019) as well as the Indonesia – Singapore BIT (2018).

The question that remains, however, is whether emission allowances are considered intangible property worthy of protection? The recently released decision of *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada,* ICSID Case No. ARB/20/52, Award ("*Koch Industries*") dated 24 March 2024 seems to have answered this question in the negative.

2. Facts

Ontario introduced the Climate Change Mitigation and Low-Carbon Economy Act ("Cap and Trade Act") under which Koch Supply & Trading ("KS&T") purchased emission allowances over several tranches. These allowances were initially stored in KS&T's Ontario Compliance Instrument Tracking System Service ("CITSS") account before being transferred to its United States ("U.S.") CITSS account. By May 15, 2018, emission allowances worth USD 30,158,240.95 were left in the Ontario CITSS Account.

On July 3, 2018, the newly elected Premier Doug Ford rescinded the Cap and Trade Act. In response, KS&T applied for compensation in Ontario before eventually resorting to an investment treaty claim under the former North American Free Trade Agreement ("NAFTA"). One of the key issues was whether the emission allowances were "property" under Article 1139(g) of NAFTA.

3. The Discussion of the Scope of Property Under NAFTA

Article 1139(g) of NAFTA defines what an investment is. It states that "investment means … real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purpose."

In *Koch Industries*, the tribunal sought to determine whether an emission allowance qualified as an intangible property under NAFTA by first, looking to international law for a definition of property. Because the tribunal did not find a definition of property under either international law or NAFTA, it turned next to the law of the territory. *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada,* ICSID Case No. ARB/20/52, Award dated 24 Mar. 2024 ¶ 163.

Accordingly, the tribunal looked to the laws of Ontario for a test for the definition property. The tribunal found that the laws of Ontario did not provide a unified test for determining the existence of property and the cases provided by the claimant only went as far as demonstrating that an essential attribute of property under the common law of Canada is that "exclusive control" must be demonstrated. *Id.* ¶ 239. The tribunal observed that whether exclusive control exists depends on the extent of the discretionary power of the government over the rights of the holder of the corresponding asset. *Id.* ¶ 270.

The tribunal then assessed whether the statute that created the emission allowances complied with this definition of property under the laws of Ontario. Specifically, the tribunal examined the purpose of the Cap and Trade Act and whether the provisions of the Act pointed towards a finding of exclusive control. The tribunal observed that the Cap and Trade Act envisioned that emission allowances would be subject to a strict regulatory scheme and that the government would exercise a significant degree of control over emission allowances. *Id.* ¶¶ 289-290. The Tribunal found that the purpose and context of the Cap and Trade Act indicated that the emission allowances were subject to a strict regulatory scheme controlled by the government, which leans against a finding of exclusive control. *Id.* ¶ 291. This conclusion was supported by the various subsections of the Cap and Trade Act which pointed towards a significant amount of governmental discretion.

On the specific facts of *Koch Industries*, the tribunal found that the emission allowances did not qualify as property under the laws of Ontario and concluded that emission allowances were not property under NAFTA. *Id*. ¶¶ 313-317.

4. Conclusion

The developments under Article 1139(g) of NAFTA will be highly significant for potential investors. First, investors will need to conduct significant due diligence on whether the purchase of emission allowances satisfies the definition of property under either international law or domestic law. As seen in the *Koch Industries* Award, the Tribunal's decision turned heavily on the interpretation of domestic Canadian property law.

Second, it is instrumental for investors to consider the regulatory framework in which they are making their investment under Article 1139(g) of NAFTA. The *Koch Industries* decision turned on the fact that the Cap and Trade Act provided for governmental intervention that undermined "exclusive control." Bearing this in mind, an investor will need to consider whether the regulatory framework that gives rise to the emission allowances contains provisions that undermine the national framework for determining whether there is intangible property.

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US SUPREME COURT MANDATES STAY OF PROCEEDINGS PENDING ARBITRATION: IMPLICATIONS AND UNANSWERED QUESTIONS IN *SMITH V. SPIZZIRRI*

Report by Sushant Mahajan
(Visiting Scholar at George Washington University Law School, Washington, D.C.)

1. Introduction

Smith v. Spizzirri, No. 22-1218. In a 9-0 decision, the U.S. Supreme Court held that Section 3 of the Federal Arbitration Act ("FAA") does not permit district courts to dismiss a case when a party requests a stay pending arbitration. The case involved a group of delivery drivers who sued their employer, alleging violations of federal and state employment laws. The central question was whether the district court was required to stay the proceedings pending arbitration, as requested by a party, or if it had the discretion to dismiss the case outright when the dispute was subject to an arbitration agreement.

2. The Circuit Split

Before this judgment, there was a significant circuit split on this issue. The Ninth Circuit, among others, allowed district courts the discretion to dismiss cases subject to arbitration, even when a stay was requested. This approach was grounded in the belief that dismissal would avoid unnecessary court administration when the entire dispute was subject to arbitration. Conversely, the Second, Third, Sixth, Tenth, and Eleventh Circuits interpreted Section 3 of the FAA to mandate a stay, emphasizing the statutory language that courts "shall" stay the trial pending arbitration upon the request of a party.

The distinction is significant because staying litigation keeps it active on the docket, ensuring the court retains the supervisory authority over the arbitration. If litigation is dismissed, there is no standing court to oversee the arbitration, requiring new litigation for judicial intervention. Moreover, a stay order cannot be immediately appealed without the trial court's permission, whereas a dismissal can be appealed immediately, allowing a party to continue fighting arbitration.

3. The Supreme Court's Decision

The Supreme Court, in a unanimous opinion written by Justice Sonia Sotomayor, held that the plain text of Section 3 of the FAA requires a court to stay proceedings when a party requests it, reflecting a mandatory obligation. Specifically, the use of "shall" creates an obligation impervious to judicial discretion, and the term "stay" in its traditional legal sense, means a temporary suspension of proceedings. *Smith v. Spizzirri*, 601 U.S. 472, 476-478 (2024).

The Court also observed that because the FAA aims to facilitate arbitration and to ensure that disputes are resolved through arbitration as agreed by the parties, allowing dismissal would undermine this purpose by potentially delaying arbitration through appeals of dismissal orders. Additionally, the Court opined that the FAA envisions a supervisory role for courts, including assisting in the appointment of arbitrators, enforcement of arbitration agreements, and confirming arbitral awards. Dismissing cases outright could complicate these supervisory functions and lead to inefficiencies. *Id*. at 477-478.

4. Implications of Smith v. Spizzirri

The Supreme Court's decision in *Smith v. Spizzirri* has significant implications for arbitration practice in the United States, including the following:

- **Uniformity in Application**: The decision resolves the circuit split, establishing a uniform rule across federal courts that requires a stay of proceedings when a party requests it under Section 3 of the FAA.
- **Enhanced Efficiency**: By mandating stays instead of dismissals, the Court aims to streamline the arbitration process, preventing delays and additional costs associated with appeals of dismissal orders.
- **Judicial Oversight**: The ruling underscores the role of courts in supervising the arbitration process, providing necessary support while maintaining the integrity of the arbitral system.
- **Statutes of Limitation**: The stay of proceedings ensures that statutes of limitation do not expire during the pendency of arbitration. This protection offers significant peace of mind to parties, knowing their claims will not be time-barred while arbitration is ongoing.

5. Unanswered Questions

Despite the clarity provided by the decision, some questions remain unanswered. First, the Court did not address what actions a court can take if neither party requests a stay. The decision focuses on the obligation to stay proceedings upon request, leaving the court's discretion in the absence of such a request an open issue. Second, the judgment also does not clarify what the court should do if a party explicitly asks for a dismissal instead of a stay. This ambiguity leaves room for further interpretation and potential litigation regarding the boundaries of a court's authority under these circumstances. Lastly, the case could create inconsistencies between federal and state courts as state courts are not bound by *Smith v. Spizzirri*. State procedures may allow interlocutory appeals or dismissals even when arbitration is compelled, potentially undermining the uniform application of the FAA. This could lead to varied interpretations and enforcement of arbitration provisions across different jurisdictions.

In conclusion, the Supreme Court's judgment in *Smith v. Spizzirri* clarifies that federal courts must stay proceedings pending arbitration when requested, enhancing consistency, efficiency, and the enforceability of arbitration agreements under the FAA. This decision is a significant step in reinforcing the federal policy favoring arbitration and providing clear guidance to lower courts and litigants while also highlighting areas requiring further judicial interpretation.

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INSTITUTE FOR TRANSNATIONAL ARBITRATION EXPERTS...IN THE NEWS UPDATES

Alexis Foucard of **Clifford Chance** has joined ITA as an Associate Member.

Arbitral Institution Member the **Center of Arbitration and Conciliation of the Bogota Chamber of Commerce ("CCB")** has designated **Molly García Tafur** as their Advisory Board representative.

Glenn P. Hendrix of **Arnall Golden Gregory LLP** has joined ITA as an Associate Member.

Frederick R. Fucci of **Fucci Law & ADR, PLLC** has joined ITA as an Associate Member.

Fernando Ayala has joined ITA as an Associate Member.

Dr. Tímea Csajági of **Wolf Theiss** has joined ITA as an Associate Member.

Sponsoring Member **Beck Redden LLP** has designated **Troy Ford** as their Advisory Board representative.

Édgar Eduardo Méndez Zamora of **Aguilar Castillo Love** has joined ITA as an Associate Member.

Kathleen Paisley of **Paisley Bvba** has joined ITA as an Associate Member.

Sponsoring Member **Miller Canfield** has designated **Frederick A. Acomb** as their Advisory Board representative.

Sustaining Member **Three Crowns LLP** has designated **Nicola Peart** as an Advisory Board representative under 40.

Stavros L. Brekoulakis of **Queen Mary University of London - Centre for Commercial Law Studies** has joined ITA as an Academic / Government / Non-profit Member.

Gordon T. Arnold of **Saunders McKeon** has joined ITA as an Associate Member.

Fátima Cristina Bonassa of **F Bonassa Advogados** has joined ITA as an Associate Member.

Supporting Member **Arnold & Porter** has designated **Katelyn Horne** as an Advisory Board representative under 40.

Supporting Member **Covington & Burling LLP** has designated **Patricia Snell** as an Advisory Board representative under 40.

Supporting Member **Arnold & Porter** has designated **Sally Pei** as a member of the Advisory Board.

Cynthia Cwik of **Matrix ADR LLC** has joined ITA as an Associate Member.

Angélica María Perdomo Luna of **Zuleta Beyond Borders** has joined ITA as an Associate Member.

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Mark B. Helm of **Helm ADR LLC** has joined ITA as an Associate Member.

Dhouha Oueslati of **AD FIDAL Tunisia** has joined ITA as an Academic / Government / Non-profit Member.

Iuri Ribeiro Novais Dos Reis of **Machado, Meyer, Sendacz, and Opice Advogados** has joined ITA as an Associate Member.

Supporting Member **Boies Schiller Flexner LLP** has designated **Timothy Foden** as a member of the Advisory Board.

Supporting Member **Boies Schiller Flexner LLP** has designated **Lindsay Holcomb** as an Advisory Board representative under 40.

Supporting Member **Boies Schiller Flexner LLP** has designated **Kristen M. Young** as a member of the Advisory Board.

Aayushi Singh has joined ITA as an Academic / Government / Non-profit Member.

Sustaining Member **Hughes Hubbard & Reed, LLP** has designated **Gaela K. Gehring Flores** as a member of the Advisory Board.

Alejandro Martínez de Hoz of **Paul Hastings LLP** has joined ITA as an Associate Member.

Angelia Thng of **Braddell Brothers LLP** has joined ITA as an Associate Member.

Sustaining Member **White & Case** has designated **Anne Véronique Schlaepfer** as a member of the Advisory Board.

Aleksandra Zanowska of **Arb Law** has joined ITA as an Associate Member.

Arbitral Institution Member the **London Court of International Arbitration ("LCIA")** has designated **Dr. Jacomijn J. van Haersolte-van Hof** as their Advisory Board representative.

Nelson Timken of **Timken Dispute Resolution LLC** has joined ITA as a Correspondent Member.

Carlos I. Guaia of **Guaia International Arbitration** has joined ITA as a Correspondent Member.

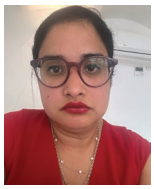
ITA Chair **Tomasz Sikora**, senior counsel at **Exxon Mobil Corporation**, was elected to the Governing Board of the International Council for Commercial Arbitration ("ICCA").

Stephan Wilske, partner at **Gleiss Lutz**, presented on the issues in Investor-State Dispute Settlement triggered by practice and technological development, and published a paper on the same topic, entitled "What's Really Wrong with ISDS?—A Critical Analysis of Phantom Issues and Real Issues Triggered by Practice and Technological Development" in the *Contemporary Asia Arbitration Journal*. Further, in November 2023, Mr. Wilske was appointed as Honorary Professor at the Friedrich-Schiller-University in Jena, Germany.

Nudrat Piracha, partner at **Samdani Qureshi Aqlaal** and the first woman residing in Pakistan to be appointed on the International Centre for Settlement of Investment Disputes ("ICSID") Annulment Committee, was empaneled by several key arbitration centers, including the Beijing International Arbitration Centre ("BIAC"). She also was included on the reserve lists of the Singapore International Arbitration Centre ("SIAC"), International Institution for Conflict Prevention & Resolution ("CPR"), Dubai International Arbitration Centre ("DIAC"), Abu Dhabi Global Market Arbitration Centre ("ADGM"), and the Kigali International Arbitration Centre ("KIAC").

Moreover, Dr. Piracha was recently featured in the exhibition of women who have contributed to the law in the last 100 years and in an international documentary featuring five women lawyers from Pakistan, which premiered in Denmark.

David Sharp, **FCIArb**, presided as Chair of the North America Branch of the Chartered Institute of Arbitrators ("NAB") at its Annual Members Retreat in San Diego and moderated a CLE discussion with Amb. (r.) David Huebner C.Arb. FCIArb, Chair of the International Board of Trustees of CIArb.



Ruchira Kaur Bali, a PhD candidate at **LUISS Guido Carli University**, was appointed to Editor Reviewer Board of Journal of Legal, Ethics, and Regulatory Issues. She also presented papers at the British and Irish Law Education and Technology Association's 39th Conference in April 2024 and the Asian Society of International Law's Junior Scholar Workshop in May 2024.

Job Owiro, an Advocate of the High Court of Kenya, recently joined the Litigation and Dispute Resolution department at **Muri, Mwaniki, Thige and Kageni Advocates**.

SCOREBOARD
OF ADHERENCE TO TRANSNATIONAL ARBITRATION TREATIES
(as of July 15, 2024)

ABBREVIATIONS

NY	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly, 1958 New York Convention)
ICSID	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (commonly, ICSID Convention 1965)
IA	Inter-American Convention on International Commercial Arbitration (commonly, Panama Convention) (1975)
USBIT	United States Bilateral Investment Treaty
TIP	US Treaties with Investment Protection Provisions
ECT	Energy Charter Treaty (1998)
MC	United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (commonly, Mauritius Convention) (2017)

SYMBOLS

S	Signed, but not ratified
R	Ratified, acceded or succeeded
A	Subscribed, but not signed, ratified or paid
(*)	Capital-exporting country under MIGA
N/A	Not applicable

CHANGES FROM PREVIOUS ISSUE

NY	None
ICSID	Equatorial Guinea (S)
IA	None
USBIT	None
ECT	None
MC	European Union (S)
TIP	None

NATION	NY[1]	ICSID[2]	ECT[3]	IA	USBIT	TIP[4]	MC
Afghanistan	R	R	R			R	
Albania	R	R	R		R		
Algeria	R	R				S	
Andorra	R						
Angola	R	R				S	
Antigua and Barbuda	R					R[23]	
Argentina	R	R		R	R	R	
Armenia	R	R	R		R	S	
Australia	R	R	S			R / S[19]	R
Austria	R	R	R				
Azerbaijan	R	R	R		R		
Bahamas	R	R				R[23]	
Bahrain	R	R			R	R / S[24]	
Bangladesh	R	R			R		
Barbados	R	R				R[23]	
Belarus	R	R	S[20]		S		
Belgium	R	R	R				S
Belize	R	S				R[23]	R
Benin	R	R				S[22] / R[29]	R
Bhutan	R						
Bolivia[6]	R			R		S[31]	R
Bosnia and Herzegovina[7]	R	R	R				
Botswana	R	R				R[26]	
Brazil	R			R		R	
Brunei Darussalam	R	R				R / R[27]/S[19]	
Bulgaria	R	R	R		R		
Burkina Faso	R	R				S[22] / R[29]	
Burundi	R	R				R[25] / R[30]	
Cambodia	R	R				R / R[27]	
Cameroon	R	R			R		R
Canada	R	R				R[8] / S[19]/S[21]	R

Cape Verde	R	R				S[22]	
Central African Republic	R	R					
Chad		R					
Chile	R	R		R		R / S[19]	
China (People's Republic)[9]	R	R					
Colombia	R	R		R		R / S[31]	
Comoros	R	R				R[30]	
Congo	R	R			R		S
Congo (Democratic Republic of)	R	R			R	R[30]	
Cook Islands	R						
Costa Rica	R	R		R		R[10]	
Côte d'Ivoire	R	R				S[22] / R[29]	
Croatia[7]	R	R	R		R		
Cuba	R						
Cyprus	R	R	R				
Czech Republic	R	R	R		R		
Denmark[11]	R	R	R				
Djibouti	R	R				R[30]	
Dominica	R					R[23]	
Dominican Republic	R	S		R		R[10]	
Ecuador	R	R		R		S[31]	
Egypt	R	R			R	R / R[30]	
El Salvador	R	R		R	S	R[10]	
Equatorial Guinea		S					
Eritrea						R[30]	
Estonia	R	R	R		R		
Eswatini		R				R[26] / R[30]	
Ethiopia	R	S				R[30]	
Fiji	R	R					
Finland	R	R	R				S
France[12]	R	R	R[32]				S
Gabon	R	R					S
Gambia		R				S[22]	R
Georgia	R	R	R		R	R	
Germany	R	R	R[33]				S
Ghana	R	R				R / S[22]	
Greece	R	R	R				
Grenada		R			R	R[23]	
Guatemala	R	R		R		R[10]	
Guinea	R	R				S[22]	
Guinea-Bissau		S				S[22] / R[29]	
Guyana	R	R				R[23]	
Haiti	R	R			S	R[23]	
Holy See (Vatican City)	R						
Honduras	R	R		R	R	R[10]	
Hungary	R	R	R				
Iceland	R	R	R			S	
India	R						
Indonesia	R	R				R[27]	
Iran	R						
Iraq	A	R				S	R
Ireland	R	R	R				
Israel	R	R				R	
Italy	R	R					S
Jamaica	R	R			R	R[23]	
Japan	R	R	R			S[19]	
Jordan	R	R	R		R	R	
Kazakhstan	R	R	R		R	R[28]	
Kenya	R	R				R[25] / R[30]	

Kiribati							
Korea (Republic) (South)	R	R				R	
Kosovo		R					
Kuwait	R	R				S / S[24]	
Kyrgyzstan	R	R	R		R	R[28]	
Lao People's Democratic Republic	R					R / R[27]	
Latvia	R	R	R		R		
Lebanon	R	R				S	
Lesotho	R	R				R[26]	
Liberia	R	R				R/S[22]	
Libyan Arab Jamahiriya						S / R[30]	
Liechtenstein	R		R				
Lithuania	R	R	R		R		
Luxembourg	R	R	R[34]				S
Madagascar	R	R				R[30]	S
Malawi	R	R				R[30]	
Malaysia	R	R				R / R[27] / S[19]	
Maldives	R					R	
Mali	R	R				S[22] / R[29]	
Malta	R	R	R				
Marshall Islands	R						
Mauritania	R	R					
Mauritius	R	R				R / R[30]	R
Mexico	R	R		R		R[8]/S[19]/S[21]	
Micronesia		R					
Moldova	R	R	R		R		
Monaco	R						
Mongolia	R	R	R		R	R	
Montenegro	R	R	R				
Morocco	R	R			R	R	
Mozambique	R	R			R	R	
Myanmar (Burma)	R					S / R[27]	
Namibia		S				R[26]	
Nauru		R					
Nepal	R	R					
Netherlands[13]	R	R	R				S
New Zealand[14]	R	R				R / S[19]	
Nicaragua	R	R		R	S	R[10]	
Niger	R	R				S[22] / R[29]	
Nigeria	R	R				R	
North Macedonia[7]	R	R	R				
Norway	R	R	S				
Oman	R	R				R / S[24]	
Pakistan	R	R					
Palau	R						
Panama	R	R		R	R	R	
Papua New Guinea	R	R					
Paraguay	R	R		R		S	
Peru	R	R		R		R / R[18]/S[19] / S[31]	
Philippines	R	R					
Poland	R		R[35]		R	R[27]	
Portugal	R	R	R				
Qatar	R	R				S / S[24]	
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Russian Federation	R	S	S		S		
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St. Vincent and the Grenadines	R	R				R[23]	

Samoa		R					
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Sao Tome and Principe	R	R					
Saudi Arabia	R	R				R / S[24]	
Senegal	R	R			R	S[22] / R[29]	
Serbia[7]	R	R					
Seychelles	R	R				R[30]	
Sierra Leone	R	R				S[22]	
Singapore	R	R				R / R[27]	
Slovakia	R	R	R		R		
Slovenia[7]	R	R	R				
Solomon Islands		R					
Somalia		R				R[30]	
South Africa	R					R / R[26]	
South Sudan		R				R[25]	
Spain	R	R	R				
Sri Lanka	R	R			R	R	
Sudan	R	R				R[30]	
Suriname	R					R[23]	
Sweden	R	R	R				S
Switzerland	R	R	R			R	R
Syrian Arab Republic	R	R					S
Taiwan							
Tajikistan	R		R			R[28]	
Tanzania	R	R				R[25]	
Thailand	R	S				R / R[27]	
Timor Leste	R	R					
Togo		R				S[22] / R[29]	
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Turkey	R	R	R		R	S	
Turkmenistan	R	R	R			R[28]	
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Ukraine	R	R	R		R	S	
United Arab Emirates	R	R				S / S[24]	
United Kingdom[15]	R	R	R				S
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West Bank and Gaza[17]	R						
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Notes: (1) Extends to metropolitan and overseas constituent territorial subdivisions but not to overseas dependent territories. Consult UNCITRAL for definitive status, as well as for the reservations to the Convention. (2) Extends to metropolitan and overseas constituent territorial subdivisions and to overseas dependent territories unless specifically excluded. (3) 1991 European Energy Charter was signed by the the United States of America (US or USA). European Union and EURATOM have ratified the ECT. (4) Treaties signed or ratified by the US with provisions on investments. (5) See also 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. (6) ICSID Convention entered into force for Bolivia on July 23, 1995. On May 2, 2007, Bolivia denounced the ICSID Convention, with effect on November 3, 2007. The Government of Bolivia delivered notice to the United States on June 10, 2011, that it was terminating the "Treaty Between the Government of the US and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment." As of June 10, 2012 (the date of termination), the treaty ceases to have effect, except that it continues to apply for another 10 years to covered investments existing at the time of termination. (7) As of 4 February 2003, The Federal Republic of Yugoslavia has changed its name to "Serbia and Montenegro." Montenegro declared itself independent from Serbia on June 3, 2006. Bosnia & Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, and Slovenia are separated successor states to parts of the former Yugoslavia and have succeeded to the NY. The Former Yugoslav Republic of Macedonia changed its name to the Republic of North Macedonia on 12 February 2019. (8) Included in the North American Free Trade Agreement among the United States, Canada and Mexico. (9) NY: includes Hong Kong Special Administrative Region. (10) Included in the Dominican Republic - Central America - United States Free Trade Agreement. (11) NY: includes Faeroe Islands and Greenland. (12) NY: includes, inter alia, French Guiana, French Polynesia, Guadeloupe, Martinique, Mayotte, New Caledonia, Réunion, and St. Pierre and Miquelon. (13) NY: includes Aruba and Netherlands Antilles. (14) ICSID Convention: excludes Cook Islands, Niue and Tokelau. (15) NY: includes Bermuda, Cayman Islands, Gibraltar, Guernsey, Isle of Man, and British Virgin Islands. ICSID Convention: excludes British Indian Ocean Territory, Pitcairn Islands, British Antarctic Territory and Sovereign Base Areas of Cyprus. ICSID Convention: continues to include Hong Kong Special Administrative Region. (16) NY: includes, inter alia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico and US Virgin Islands. (17) West Bank and Gaza are not recognized as states by the United States. (18) United States - Peru Trade Promotion Agreement. (19) Trans-Pacific Partnership signed on February 4, 2016. (20) The State has signed the ECT and it applies it provisionally, under Art. 45 of the ECT. (21) USMCA signed on November 30, 2018. (22) Economic Community of West African States (ECOWAS) – US Trade and Investment Framework Agreement (TIFA) signed on August 5, 2014. (23) Caribbean Community (CARICOM) – US TIFA, in force on May 28, 2013. (24) Gulf Cooperation Council – US Framework Agreement signed on September 25, 2012. (25) East African Community – US TIFA, entered into force on July 16, 2008. (26) Southern African Customs Union – US TIFA, entered into force on July 16, 2008. (27) Association of South-East Asian Nations (ASEAN) – US TIFA, entered into force on August 25, 2006. (28) Central Asia – US TIFA, entered into force on June 1, 2004. (29) West African Economic and Monetary Union (WAEMU) – US TIFA, entered into force on April 24, 2002. (30) Common Market for Eastern and Southern Africa (COMESA) - US TIFA, entered into force on October 29, 2001. (31) Andean Community (ANCOM) – US Trade and Investment Council signed on October 30, 1998. (32) France withdrawal from the Energy Charter Treaty shall take effect on 8 December 2023. (33) Germany withdrawal from the Energy Charter Treaty shall take effect on 21 December 2023. (34) Luxembourg withdrawal from the Energy Charter Treaty shall take effect on 17 June 2024. (35) Poland withdrawal from the Energy Charter Treaty shall take effect on 29 December 2023.

SOURCES:

This issue was compiled by Co-Editors Crina Baltag and Monique Sasson of The Institute for Transnational Arbitration based on the following sources: United Nations; ICSID; UNCITRAL; Organization of American States; Energy Charter Secretariat; UNCTAD and the Office of the United States Trade Representative. The Scoreboard is designed to be a convenient reference and it is not intended to be relied on as legal advice. Please consult the sources directly to confirm the status of any particular ratifications, reservations, changes, special conditions or new developments.

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