Young ITA Newsletter

YOUNG ITA

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- **Mentoring** – Updates on the current mentoring programme will be made on the Young ITA LinkedIn Page.
- **Events** – Please monitor the Young ITA LinkedIn Page for details of future Young ITA events, and be sure to join Young ITA for email announcements of future events here.
- **Reporting for Young ITA** – Please see page 46 of the newsletter for information on how to get involved with preparing pieces for the newsletter, or in reporting on Young ITA events in the future.

Featured Article:

by Marianne L. Beyer,[1] Patrick Menin,[2] and Rafael Henrique Reske[3]

Is Latin America far from the renewable energy transition? An overview of investment arbitration law[4]

Abstract: The renewable energy transition is critical for combating climate change, with countries worldwide setting ambitious goals to achieve sustainability by 2030. This paper examines whether Latin America is adequately equipped to support this transition through its investment arbitration framework, focusing on the interplay between international investment law and renewable energy development. It traces the evolution of investment protection mechanisms, from the adoption of Bilateral Investment Treaties (BITs) and the ICSID Convention. Through an analysis of key arbitration cases, the paper highlights systemic inefficiencies and the divergence between legal frameworks and the urgent needs of the energy transition. These cases illustrate the tension between attracting foreign investment and implementing robust environmental policies, demonstrating the need for a re-evaluation of existing investment systems. The paper concludes by advocating for adaptive legal frameworks that balance economic stability, investor protection, and environmental priorities, enabling Latin America to align with global sustainability targets effectively.

INTRODUCTION

International investment law "emerged through evolution, rather than revolution."[5] Investments and their protection have evolved since the last century. Some of us might remember that, at first, investors lacked direct protection under international law. The cause was a lacuna in customary international law, where new forms of foreign capital in shares could not fall under any known rule at the time.[6] Even the International Court of Justice ("ICJ") in the *Barcelona Traction* case concluded that the investors did not have the right to claim on their own, only through the State in which they

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are nationals.[7]

This damaging situation for those who invested in foreign States found its solution: the negotiation and subscription of Bilateral Investment Treaties ("BIT") and the birth of the International Center for Settlement of Investment Disputes ("ICSID") Convention. These two resources, together, left behind the Calvo doctrine.[8] That new regime offers bespoke protections for investments: any claim raised by an investor against the State in which the investment is located, can be (ultimately) solved through arbitration, with the BITs including mechanisms to secure their economic efforts imposing expropriation, fair and equitable treatment ("FET)", full protection and security ("FPS"), among other standards.

Nowadays, investments have evolved so much that they reached a breaking point. They are such complicated juridical acts that we can ask ourselves: are the BITs enough and/or adequate to ensure the investments' security?

To frame our analysis, we are focusing on the year 2025, a crucial point situated five years before the global benchmarks set for 2030. Countries worldwide have joined forces to act against climate change,[9] and the ways to achieve this objective are through sustainability and renewable energies. This requires new investments and contracts to achieve the rapid transition needed.[10]

THE LATIN AMERICAN SYSTEM TO PROTECT INVESTMENTS

Commonly, arbitration procedures are divided into investment and commercial arbitrations. Commercial arbitrations are those usually related to private parties, generally involving disputes and conflicts related to specific issues arising out of their contractual-based relationship. Investment arbitrations are related to the position of the State vis-à-vis an individual, discussing issues that are generally not related to a common

commercial contractual relationship, and instead are contained in rules of greater scope that include investors in a single body of regulations.[11]

However, this dichotomy is sometimes criticized. In fact, some authors do not think conceptualizing investment and commercial arbitration differently is appropriate. For them, what defines the dichotomy between two essential terms is not the object of the dispute (if it involves investments or private contracts) but rather the form of agreement on the arbitration clause.[12] On one hand, we have arbitrations based on contractual clauses, and arbitration clauses inserted in investment treaties, on the other.[13]

The confusion arises precisely because it is more common in commercial arbitrations to verify contractual arbitration clauses and, likewise, in investment arbitrations, arbitration clauses arising from international treaties. Nevertheless, it is important to consider that a treaty is "an international agreement,"[14] which can be concluded as an intention to arbitrate. This, however, is not an absolute rule. It is possible, for example, for investment arbitrations to exist even if there is no investment treaty signed between the States. This would be the case for some contracts between private parties and public authorities concluded within the Brazilian context, for example. In them, the content would reflect something similar to the provisions of a treaty (which, if seen from this perspective, would be an investment arbitration), but, at the same time, the instrument is celebrated from a private relationship contracted for that specific case.

Therefore, to begin our debate, it is necessary to establish that an absolute dichotomy does not exist between commercial or investment arbitrations. The analysis should rest on identifying which system is better suited to the specific case at hand.

A. Treaty-based protection

Generally, a State has two reasons for concluding investment treaties with other countries.

Firstly, to promote greater foreign investment in the country. The ratification of a treaty brings (at least in intention) a more positive vision and greater security to the interests of the investor, who would not be at the mere mercy of the State to which it will allocate resources. As an example, we can mention the ICSID Convention, which contains an interesting recognition and enforcement of arbitral awards system, simplifying the need for *exequatur*.[15]

Secondly, the treaty system is adopted because in many cases the internal system of the country receiving the investments is not suitable or adaptable to different legal concepts of foreign investors. The existence of possible regulatory instability in the country is also considered, especially in those countries with a not-so-established economy and in which there is no government policy separated from State policy (which leads to potentially radical changes with each election).

It is important to mention that, within this framework, States have concluded not only BITs but also multilateral treaties. A most recent and clear example of this kind of treaty, related to the article's topic, is the Energy Charter Treaty ("ECT"). We will analyze, through arbitral cases, both types of treaty application to see where they lead us (refer to section III).

B. Contract-based protection

For certain jurisdictions, the use of investment treaties can be seen as impractical and capable of causing more harm than good. Given the generic nature of the standard of protections included in BITs, the parties could end up not having the detail of protection needed for particular relationships. In some

countries, for example, it is speculated that one of the causes of the absence of treaties is the continued existence of foreign investments, regardless of the lack of this type of protection.

Rejection of such instruments tend to occur mainly in countries where there is a form of regulatory contracting. As one of the main global examples in this sense, we have the case of Brazil. Brazil operates under civil law jurisdiction, emphasizing a legal framework rooted on contractualization and civilization of practical aspects.

For foreign investments, the context is no different. A large part of contracts with the State or participation of foreigners in the country, not only goes through a strict sieve of restrictions and limitations, but is done in a contractual manner, such as through public service concession contracts, and national and international tenders, among others. In this context, a large part of investments ends up taking place via private contracts between the State and the contractor, especially when the matter concerns issues of public interest or that affect public order, such as health care services, security, etc. So, in truth, there are investment arbitrations in these cases. What there is not, however, are treaty-based arbitrations.

C. Which system should be adopted?

The system to be adopted by each country will be the one that best suits its economic interests, as well as its internal legal regulations and framework. After all, it is not enough for a country to adopt a specific system if this does not serve the purpose of promoting investment. Likewise, it is not enough to follow economic interests if doing so requires adopting an inadequate legal investment system.

Considering most Latin-American countries ratified the ICSID Convention and concluded many BITs,

the answer seems obvious. Yet, the reality in some fields and industries makes us doubt the framework, which could ultimately change as it continues evolving. In our opinion, this is the case of the energy transition and how it has been approached after several arbitration cases. For that reason, we would like to highlight a few.

CASES INTO STUDY

Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru (ICSID Case No. ARB/19/28)

The case was submitted to the ICSID with the purpose of assessing liability due to the impossibility of executing the construction of a hydroelectric dam in the Mamacochoa region of Peru. The parties involved were Latam Hydro LLC and CH Mamacocha S.R.L, which were the Claimants in the arbitration proceeding against the Peruvian State.[16] Although the arbitration award did not recognize a breach of contract by the Peruvian State,[17] the case may illustrate the context of foreign investment in renewable energy development and the dispute resolution mechanisms applicable to such cases.

In 2006, Peru and the United States signed a treaty called the United States – Peru Trade Promotion Agreement, which established the promotion of sustainable economic alternatives as a premise. The agreement came into force in February 2009.[18]

In 2008, the Peruvian government issued the Decree No. 1.002/2008 to promote investment in sustainable energy generation, the preamble of which stated the following:

"*"The Congress of the Republic by means of Law N° 29157 and in accordance with Article 104 of the Political Constitution of Peru has delegated to the Executive Branch the power to legislate on specific matters, in order to facilitate the implementation of the United States – Peru Trade Promotion Agreement and its Protocol of Amendment, (...)"* and

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"*The promotion of renewable energies, eliminating any barrier or obstacle for their development, implies promoting the diversification of the energy matrix, becoming an advance towards an energy security and environmental protection policy, being of public interest to provide a legal framework in which these energies are developed to encourage these investments and amend existing rules and regulations that have not been effective due to the fact that they lack minimum incentives provided for in comparative law.*"[19]

In summary, the purpose of the decree was to "*promote the use of Renewable Energy Resources (RER) in order to improve the quality of life of the population and to protect the environment by promoting investment in electricity production.*"[20]

Later on, regulations on Peruvian renewable energies were developed and improved, and in 2012 a pre-feasibility study began on the construction of a hydroelectric power station in the Mamacocha region, in southern Peru.[21] After completing the procedures, CH Mamococha S.R.L., a subsidiary of Latam Hydro LLC, entered into a contract with the Peruvian government in February 2014 to develop the plant in that region.[22] It was agreed that the hydroelectric plant should be ready for commercial operation by December 31 2018.[23]

To begin the project, the contracted companies had to obtain a series of permits from the authorities.[24] However, this process took a long time and affected the initial construction schedule.[25] From this point on, a series of legal and contractual events unfolded, including the need to sign several amendments,[26] a criminal investigation into the granting of environmental licenses,[27] and the filing of domestic arbitration to address investment issues in the Peruvian State.[28]

by Marianne L. Beyer,[1] Patrick Menin,[2] and Rafael Henrique Reske[3]

As a result, the Claimants sought a declaration from the Tribunal that the contract had been breached and that it should be terminated for the alleged breaches by the Peruvian State. In the end, however, the Tribunal rejected the Claimants' requests and ordered them to reimburse the Peruvian State for the arbitration costs.

In conclusion, for the purposes of this article, with a particular focus on the factual context and without assessing the merits of the dispute, the *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru case* reveals the following:

First, it reveals that the stability intended for foreign investments, even following the conclusion of a bilateral investment promotion agreement, was not realized. The various actions and delays experienced throughout the relationship between the State and private entities, such as delays in license issuance or the initiation of domestic arbitration proceedings, contributed to a sense of instability.

Second, the precedent represents a disadvantage for the investors because the final decision was in favor of the Peruvian State. Ultimately, this undermines and discourages investors' motivation and interests towards celebrating contracts and investments that supports the energy transition.

Charanne B.V. and Construction Investments S.A.R.L. v. Spain (ICSID Case No. 062/2012)

The case was submitted to the ICSID to assess the effects of the special regime applied to photothermal solar energy in Spain, especially concerning the premiums and rates that are used to reward its production. It is worth mentioning that this kind of energy generation comes from renewable resources (a matter which links this case to the present paper).

The Claimants in this case were Charanne B.V. and Construction Investment S.A.R.L., both

shareholders of the Grupo T-Solar Global S.A., a Spanish company that owned 34 photothermal solar energy production installations; and the Respondent was Spain, the country where the investment was performed.

In terms of the case's factual basis, we need to mention that Spain began its special regime regulation within the framework of the Law 54/1997, "*Law that regulates the electrical sector*" ("LSE" in its Spanish version).[29] Article 27.1 (b) LSE defined special regime as the electric energy production activity that is carried out from facilities whose installed power does not exceed 50 MW and that uses any of the renewable energies as primary energy.[30] In turn, article 30.4 determines the reward system of this special regime, which will be complemented by a premium. To determine this premium, it would take into consideration the positive impact on the environment, the saving of primary energy and energy efficiency, among others.[31] Furthermore, in August 2005, the government took more steps into the matter to support the European standards of the renewable energy transition, in particular, what concerned the "Directive on the promotion of electricity produced from renewable energy sources in the internal electricity market" ("Directive 2001/77/CE"). They issued a specific plan ("PER 2005-2010") that disposed "*the implementation of photovoltaic solar energy will help drive a future of technological development that will make this method of electricity generation increasingly competitive compared to other generation methods" and subsequently developed on "a regulation aimed at the development of this type of technology should generate consolidated confidence among promoters in its permanence, leading them to invest in the development of the photovoltaic sector with the legitimate confidence that this trend will continue in the long term.*"[32]

In 2007, the government issued a Royal Decree ("*Real Decreto 661/*

2007") which established the regulation of energy activities under the special regime.[33] However, this decree required the investors to be affiliated with a special registry (*Registro Administrativo de Instalaciones de Produccion en Regimen Especial* "RAIPRE") to follow their regime's premium and remuneration fulfilment and perception.[34] Both Claimants' investments were registered under the RAIPRE and, subsequently, they were adhered to the Royal Decree 661/2007 regime.[35]

The present paper will not recall the case's jurisdiction as it is not related to the matter. However, regarding the case's core merits, the Claimants argued that Spain expropriated the investment under article 13 of the ECT, as the government's acts turned to a deprivation of their stocks and facilities performance;[36] Spain did not comply with the fair and equitable standard under article 10 (1) ECT, since the government failed to maintain a stable and predictable legal and economic regime;[37] and ultimately, Spain breached its obligation to provide effective means to defend the Claimants' rights under article 10 (12) ECT. The latter was because the Respondent implemented an exceptional figure in the regime that restricted their right to obtain the regulated rates according to the Royal Decree 661/2007.[38]

In the first place, the Tribunal found that the Respondent did not expropriate the investment[39] since the Claimants' investments were based on their participation as shareholders of the Grupo T-Solar Global S.A. and the situation did not include the business performance and gain. In fact, the Tribunal concluded that indirect expropriation can be caused by the investment's depreciation, however, in this case, it was not enough to characterize the standard.

Second, the Tribunal determined that Spain did not violate article 10 (1) ECT.[40] Indeed, it supported the fact

that the regime composed by the Royal Decree 661/2007, and subsequently issued rules, did not establish a specific commitment or result in expectation to maintain the legal economic structure. Particularly, the Tribunal stated that the Royal Decree 661/2007 did not mention that the regulated rate would be inalterable.

Third, the Tribunal analyzed the Spanish legal system and concluded that the regulatory process to protect the Claimants' rights was consistent with the principles of due process.[41] In this sense, the Claimants could have accessed the Spanish tribunals through an administrative claim and patrimonial liability action.

To summarize, the Tribunal rejected all the merits issues alleged by the Claimants. We understand the Tribunal's reasoning on the case's facts, yet we believe that the outcome is another demonstration of the energy transition reality. While the ECT's objectives are clear,[42] the execution of the investments' protection is failing in many ways: not removing the barriers to investing in the energy sector, not providing a transparent legal framework for foreign investments[43] for instance and, what could be worse yet, the arbitrators' misconception of the renewable energy investments' protection. Here again, we encounter the two scenarios previously mentioned during the analysis of *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*. However, interestingly enough, we are studying a different case with different circumstances: this case was based in Europe, and the applicable treaty was the ECT.

This situation can be reinforced by several other cases that have encountered different conclusions yet are equally discouraging. One of them, is *Rockhopper v. Italy* (ICSID Case No. ARB/17/14). In this case, the Tribunal ruled in favor of Rockhopper after Italy breached the ECT by revoking oil exploration

permits (following its decision to ban oil and gas activities within 12 miles of its coastline). Nevertheless, even when the ruling underscored the importance of protecting foreign investments after host countries enact environmental policies, the damages and costs that arise from rulings like this (€190 million in compensation) dissuade countries from adopting and implementing their own regulations towards the energy transition, along with their withdrawal from treaties such as the ECT.[44]

CONCLUSION

Law emerges to regulate reality, which also implies that it should evolve in line with modern needs. Our daily lives and our future require the system to contemplate the most urgent driver: climate change. This certainly involves the attraction of new investments to secure the energy transition. Nevertheless, most Latin American countries have opted to protect foreign investments through the treaty-based system. This system, whether through bilateral or multilateral treaties, dissuades investors from concluding and entering into contracts. Particularly, as we have explained, this can be seen as the two sides of a coin: the instability and barriers presented that hinder the successful execution of the investment, and the unfavorable decisions that have not supported the investors' claims.

Of course, we cannot disregard that this adds to the difficult situations and issues Latin American countries face (economic and political instability), together with the fact that the treaties ratified do not contain special energy-related rules. Unfortunately, within this framework, Latin America is insufficiently equipped to follow the lead towards the energy transition. The solutions, regulations, and systems established (and practiced in Europe) are ineffective for that purpose. It is time to reconsider new (or known but not so used) legal frameworks that can

effectively attract and protect investments, such as the contract-based system to promote the much-needed change towards clean energy.

ENDNOTES

1. Argentine lawyer who graduated from the University of Buenos Aires; specialized in Corporate and International Law; teaching assistant of Private International Law; former arbitration moots oralist; member of Young ITA and Young ICCA.
2. Brazilian lawyer specialised in Corporate and M&A; graduated from the Federal University of Rio Grande do Sul, Brazil (UFRGS); holds a post-graduation degree in Corporate Law from Fundação Getúlio Vargas, Brazil; special graduation student of the University of São Paulo, Brazil, on corporate matters; former arbitration moot oralist and former coordinator of UFRGS' arbitration team.
3. Brazilian lawyer with a degree from FAE Business School, specialised in Corporate Law; former oralist in arbitration moots; actively engaged in the Young ITA and Young ICCA Mentoring Program.
4. This project has been carried out during the Young ITA Mentorship Program 2023-2024. We would like to thank Julio C. Rivera (Jr.) and Aracelly Lopez for their guidance.
5. PAUWELYN, Joost, "Rational Design or Accidental Evolution? The Emergence of International Investment Law", *The Foundation of International Investment Law*, DOUGLAS, Zachary; PAULWELYN, Joost; and VINUELAS, Jorge E., Oxford, Oxford University Press, 2014, pp. 11-42, p. 15.
6. VUYSTEKE, Charles, "Foreign Investment Protection and ICSID Arbitration", *Georgia Journal of International and Comparative Law*, Vol. 4, No. 2, 1974, pp. 343-36, p. 344.
7. Barcelona Traction, Light & Power Company, Limited (Belgium v. Spain), 1970, 47.
8. The Calvo doctrine establishes investors shall seek redress to claims exclusively relying upon available local remedies. See CHOLVI FERRER, Irene, *"Calvo Clause"*, JusMundi, May 28, 2025, available at https://jusmundi.com/en/document/publication/en-calvo-clause.
9. See the United Nations Framework Convention on Climate Change and the Paris Agreement.
10. ICC Dispute Resolution Bulletin 2019 No. 3 – 2019 – No. 3, "Resolving Climate Change through Arbitration and ADR", p. 2.
11. REISMAN, W. Michael; and CRAWFOR, James Richard, *et al.* (eds), "Chapter 1: Foreign Investment Disputes", *Foreign Investment Disputes: Cases, Materials and Commentary (Second Edition)*, 2nd edition, Kluwer Law International, 2014, pp. 1-20, p. 11.
12. BLACKABY, Nigel, "Chapter 11: Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)", LEW, Julian D. M., et al. (eds), Pervasive Problems in International Arbitration, International Arbitration Law Library, Volume 15 (© Kluwer Law International; Kluwer Law International 2006), pp. 217-233.
13. RUBINO-SAMMARTANO, Mauro, International Arbitration: Law and Practice, 2nd Edition, The Hague, Kluwer Law International, 2001, pp. 47-56.
14. Art. 2.1 (a) Vienna Convention on the Law of Treaties, May 23, 1969.

15. Art. 54 Convention on Settlement of Investment Disputes between States and Nationals of Other States, October 14, 1966.
16. Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru (ICSID Case No. ARB/19/28), ¶ 4-12.
17. Ibid, ¶ 1412.
18. Ibid, ¶ 72.
19. Ibid, ¶ 73.
20. Ibid, ¶ 74.
21. Ibid, ¶ 82-84.
22. Ibid, ¶ 95.
23. Ibid, ¶ 98.
24. Ibid, ¶ 109.
25. Ibid, ¶ 113
26. Ibid, ¶ 113; 137; 163
27. Ibid, ¶ 148-150; 183-190.
28. Ibid, ¶ 213-216.
29. Charanne B.V. and Construction Investments S.A.R.L. v. Spain (ICSID Case No. 062/2012), ¶82.
30. Ibid, ¶ 84.
31. Ibid, ¶ 88.
32. Ibid, ¶ 96-99.
33. Ibid, ¶ 110-128.
34. Ibid, ¶ 115.
35. Ibid, ¶ 146.
36. Ibid, ¶ 278-290.
37. Ibid, ¶ 291-307.
38. Ibid, ¶ 308-312.
39. Ibid, ¶ 455-467
40. Ibid, ¶ 468-474
41. Ibid, ¶ 475-542.
42. See ECT, Title I: Objectives: "*The signatories are desirous of sustainable energy development, improving energy security and maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety in a manner which would be socially acceptable, economically viable, and environmentally sound.*" [...]
43. See ECT, Title II: Implementation: [...] "4. *Promotion and protection of investments. In order to promote the international flow of investments, the signatories will make every effort to remove all barriers to investment in the energy sector and provide, at national level, for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade*". [...]
44. PIOVANO, Carolina, "Rockhopper v. Italy: the Cost of the Energy Transition", JusMundi, November 13, 2023, available at https://jusmundi.com/en/document/publication/en-rockhopper-v-italy-the-cost-of-the-energy-transition, p. 5.

#YoungITATalks: China

Book Launch Event: Reforming Arbitration Reform: Emerging Voices, New Strategies

On June 28, 2025, Young ITA Asia, in partnership with Peking University School of Transnational Law (STL) hosted a book launch event for "Reforming Arbitration Reform: Emerging Voices, New Strategies and Evolving Values." The event featured the book's co-editors **Professor Crina Mihaela Baltag** from Queen Mary University of London and **Professor Mark Feldman** from Peking University STL, alongside contributing authors **Dr. Kabir Duggal** from Columbia Law School and **Professor Kevin W. Gray** from Peking University STL.

Diversity Challenges and Statistical Realities

Dr. Kabir Duggal addressed multiple forms of diversity challenges, emphasizing intersectionality where practitioners face overlapping barriers including gender, race, sexual orientation, accent, nationality, and professional background. He highlighted the disconnect between stated diversity commitments and actual decision-making, where stakeholders default to traditional choices from New York and London when stakes are high. He

pointed out that even gender diversity progress primarily benefits white European and North American women, while other groups remain marginalized. He encouraged students as future arbitration leaders to drive systemic change.

Professor Mark Feldman referenced ICSID's annual detailed reports on arbitration practice, including appointment statistics by region. He noted that while ICSID presents data for the "Asia-Pacific" region, closer examination reveals that appointments from this region are predominantly from Australia and New Zealand, highlighting how data presentation can obscure rather than illuminate true regional diversity patterns.

Professor Kevin W. Gray discussed intersectionality theory, referencing Kimberly Crenshaw's framework for understanding how people face multiple overlapping identity-based challenges including race, gender, nationality, and disability. He noted that the book excellently addresses diversity questions with intersectionality as a recurring theme, specifically recommending Chapter 2, which examines investment arbitration's effects on race, environmental protection, and indigenous rights.

From left to right: Dr. Kabir Duggal and Professor Mark Feldman

Profess Kevin W. Gray

Professor Crina Mihaela Baltag expanded on these themes using Stockholm Chamber of Commerce ("SCC") data, revealing important qualitative disparities behind quantitative improvements. She noted that while female arbitrator appointments reached 51%, this was partly because the SCC board makes over 40% of appointment decisions, with concerning fee gaps persisting between male and female tribunal chairs. She also noted that arbitral tribunals should accommodate diverse needs regarding venues and scheduling.

Professor Crina Mihaela Baltag

The panel then extensively explored arbitration institutions' role in advancing reform. Representatives from arbitration institutions provided examples of their practices. **Chi Wenhui** from the Shenzhen Court of International Arbitration described their balanced approach to presiding arbitrator appointments, providing parties with curated candidate lists featuring practitioners from different legal traditions and jurisdictions. The Guangzhou Arbitration Commission representative **Chen Chen** discussed their dormant arbitrator program, designed to provide opportunities for newer practitioners by carefully matching case complexity to arbitrator experience levels when the institution serves as appointing authority.

Chris Campbell from Baker Hughes pointed out that encouraging generational trends emerged, with younger decision-makers demonstrating greater openness to diversity considerations. He emphasized that for in-house counsel, it's about more than just fairness; it's a business imperative. They need to show how diverse

arbitrators lead to better outcomes and fresh perspectives, securing management's buy-in. Equally, diverse practitioners must actively market themselves.

Alice Wang from Pinsent Masons shared client-side perspectives, noting that arbitrator appointments involve senior management who tend toward traditional choices for high-stakes matters. However, she observed clients becoming more sophisticated, asking about the strategy for appointing arbitrators. She noted that in China, gender diversity is less problematic than seniority diversity, with younger clients showing greater openness to diverse appointments.

Third-Party Funding Developments

Professor Mark Feldman then shifted the discussion to third-party funding developments in arbitration. Panelists addressed practical implications, noting that respondents naturally consider security for costs when facing funded claimants. The discussion highlighted evolving judicial attitudes, with **Alice Wang** observing that while courts initially showed resistance around 2009-2010, jurisdictions like Singapore and Australia now increasingly recognize third-party funding as legitimate and beneficial for arbitration access.

In brief, the panel emphasized that achieving meaningful arbitration reform requires coordinated action: institutions should continue innovative appointment practices, practitioners must actively build professional visibility and educate clients about diversity benefits, while young professionals should prepare for opportunities and demonstrate specialized expertise to advance meaningful change.

By Tang Luyang (Student at Peking University School of Transnational Law, Shenzhen)

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#YoungITATalks: China

Arbitrating Tomorrow's Tech Disputes in a World of AI, Critical Technology, and Digital Assets

On 16 September 2025, Young ITA, in collaboration with International Centre for Dispute Resolution Young and International (ICDR Y&I), hosted a panel discussion titled "**Arbitrating Tomorrow's Tech Disputes in a World of AI, Critical Technology, and Digital Assets**" at Han Kun Law Offices in Beijing as part of the China Arbitration Week. The event provided a timely and critical examination of the legal landscape shaping cross-border technology investments and contractual disputes between the world's two largest economies.

The session commenced with opening remarks from key institutional leaders, who set the stage by highlighting the growing role of arbitration in this complex field. **Thara Gopalan** (Vice President, AAA-ICDR Asia Case Management Centre, Singapore) underscored the institution's commitment to updating its protocols to handle developments in AI technology. **Zhang Haoliang** (Director of Business Development & International Case Management Division, BAC/BIAC,

Beijing) provided insights into the Chinese perspective on embracing digital economy and managing cross-border data disputes. **Yahan Lu** (Deputy Secretary-General of the Online Dispute Resolution Centre (ODRC), CIETAC, Beijing) detailed several multi-dimensional approaches and initiatives in arbitration to adapt to recent technological innovations.

The session was moderated by **Sam Wong** (Han Kun Law Offices LLP, Hong Kong, and Young ITA China Chair), who briefly outlined the impact of AI, geopolitical shifts and emerging technologies on the resolution of cross-border disputes through international arbitration. The panel then delved into the heart of the discussion, beginning with an analysis of the regulatory frameworks in China and the United States in respect of tech disputes. **David Gu** (Han Kun Law Offices, Beijing) and **Mevelyn Ong** (Sidley Austin LLP, Hong Kong, and Young ITA Vice-Chair) canvassed the recent and divergent regulatory changes in China and the United States concerning digital assets and critical technology. They explained how these shifts create emerging legal issues for Chinese companies expanding internationally and American companies engaging with the Chinese market, and how risks posed by these escalating regulatory shifts may be minimized through contract drafting and investment structuring.

Then panel then discussed strategies for mitigating complex dispute risks. **Hongchuan Zhang-Krogman** (Three Crowns LLP, Washington DC; ICDR Y&I Board Member) highlighted the critical importance of well-drafted termination rights and force majeure clauses for allocating risks. Echoing this focus on drafting, **Mevelyn Ong** emphasized that carefully crafted arbitration clauses are crucial at the contract negotiation phase. In short, the panelists emphasized that companies can navigate the recent uncertainties by embedding strategic de-risking measures into contracts long before a dispute emerges.

The conversation then shifted to the practical integration of AI in international arbitration. **Raojuan Li** (Tahota Law Firm, Beijing; BAC arbitrator) offered a cautious view on implementing AI tools into the daily workflow of practitioners, highlighting potential challenges and risks. **Haiyang Cao** (Legal AI Expert; BAC Arbitrator, Beijing) provided a compelling counterpoint by introducing vivid examples of AI systems in action, demonstrating how they can significantly enhance efficiency in China's international arbitration arena. **Yahan Lu** stressed that arbitration—with its neutrality, flexibility, and enforceability of awards —remains a highly effective means for resolving complex cross-border disputes, and successfully utilizing AI in the process requires both a well-designed mechanism and clear guidelines to prevent misuse.

Finally, the panel considered the critical, yet often overlooked, aspect of cultural differences between parties to an international arbitration. All speakers agreed that for counsel and clients to pre-empt and resolve Sino-US tech disputes successfully, they must be mindful of differing approaches to negotiation, evidence presentation, and concepts of confidentiality. This cultural fluency is

is as essential as legal expertise in navigating these disputes successfully, especially when determining strategy and achieving settlement.

The key takeaway from the panel discussion was that while tech disputes in the modern era are fraught with unique challenges posed by geopolitical and regulatory shifts, a proactive approach combining robust contractual drafting, strategic dispute resolution planning, and deep cultural understanding offers the best path forward for businesses operating in the critical technology sectors in China and the United States.

By Violette Shen

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#YoungITATalks: India

Reclaiming Affordability in Arbitration: An Indian Perspective on Cost, Culture and Capital

Among the many insightful events during early 2025 was the session organized in February 2025 by Young ITA India, in collaboration with the Jindal Global Law School, titled "Costs and Third-Party Funding in Arbitration." The panel brought together leading voices in arbitration to examine the increasingly complex landscape of arbitration costs and the evolving role of third-party funding (TPF).

The session was moderated by **Aayushi Singh** (Young ITA Co-Chair), who set the tone by noting that arbitration—once heralded as a cost-effective alternative to litigation—has become significantly more expensive in practice. The expert panel featured **Mrinal Jain** (Managing Director, Secretariat); **Varuna Bhanrale** (Partner, Dispute Resolution, Trilegal, New Delhi); **Jeevan Panda** (Partner, Dispute Resolution and Employment Law, Khaitan & Co.); and **Anjali Chawla** (Associate Professor and Dean, JGLS). Their insights did more than identify surface-level cost drivers; they illuminated deeper structural and cultural dilemmas. Taken collectively, these observations underscore a broader imperative: arbitration in India must undergo a fundamental rebalancing to ensure that it remains a viable and affordable alternative to litigation.

<u>The Escalating Cost of Control</u>

The rising cost of arbitration in India is not merely a matter of fee inflation or overpaid counsel. It reflects a broader evolution in how disputes are managed and monetised. As arbitration has grown more formalised and commercialised, it has also become more risk-averse and complex. Parties increasingly engage high-profile counsel, retired judges as arbitrators, and multiple expert

witnesses in an effort to 'control' the dispute resolution process. However, as is often the case, control comes at a cost.

Varuna Bhanrale noted during the panel that preliminary applications under Section 9 of the Indian Arbitration and Conciliation Act meant for urgent interim relief often function as de facto litigation before the arbitration even begins. These pre-arbitration skirmishes can drag on for months and rack up enormous costs, with no procedural constraints akin to institutional arbitration timelines. This is not an isolated Indian phenomenon. Globally, interim relief mechanisms have often been exploited as stalling tactics or strategic manoeuvres, particularly in high-stakes infrastructure or shareholder disputes.

Institutional Apathy and Illusion of Predictability

Another important issue is the lack of meaningful cost predictability in arbitration. The Indian Arbitration Act, through its Fourth Schedule, introduced a model fee schedule aimed at controlling arbitrator remuneration in ad hoc proceedings. However, in practice, the schedule is routinely sidestepped. Institutional arbitration, which could provide more transparent cost structures, remains underdeveloped and underutilised.

Prof. Anjali Chawla pointed out that what is missing is a graded fee regime that adjusts in proportion to claim size, complexity, and urgency. International arbitral institutions such as the ICC or SIAC already offer such mechanisms, often publishing detailed cost calculators to help parties make informed decisions. By contrast, most Indian parties walk into arbitration with little visibility on the total financial exposure. This opacity disincentivises small and medium enterprises (SMEs), which might otherwise benefit the most from out-of-court resolution.

Cost predictability is not simply a logistical concern. It is a prerequisite for access to justice, particularly in a

jurisdiction like India where enforcement proceedings are notoriously time-consuming. A business hesitant to pursue litigation due to overloaded courts may also now hesitate to arbitrate, not for lack of trust in the process, but for fear of incurring uncertain costs.

Third-Party Funding and Ethics of External Capital

One potential solution gaining traction globally—but still only tentatively in India—is third-party funding (TPF). In theory, TPF democratises arbitration by allowing claimants without sufficient resources to pursue legitimate claims. However, the Indian legal system's hesitation to fully endorse or regulate TPF creates a grey area that invites both innovation and abuse.

Jeevan Panda highlighted that Indian courts have shown occasional openness to TPF, particularly in insolvency and commercial contract disputes, but the absence of a regulatory framework raises serious ethical concerns. Third-party funding finds some recognition in Indian civil procedure through Order XXV Rule 1 of the Code of Civil Procedure, which empowers courts to impose cost liabilities on funders by making them parties to the suit and determining their responsibility for expenses. More recently, the Supreme Court in In Re GA Senior Advocate clarified that third-party funding arrangements tied to the outcome of a case are not intrinsically unlawful, so long as the funder does not assume the role of a legal practitioner in the proceedings. Without clear guidelines on disclosure, conflict of interest, and funder influence, TPF could become a double-edged sword, offering financial relief while potentially compromising procedural integrity.

To illustrate, consider the Singaporean and Hong Kong models, where TPF is permitted within a robust regulatory scaffold. In Singapore, the Legal Profession (Amendment) Act mandates

disclosure of TPF arrangements and restricts funder involvement in key litigation decisions. These safeguards enable TPF to function as a tool of empowerment rather than manipulation. India's absence of such oversight leaves too much for informal negotiation and subject to institutional discretion.

Mrinal Jain provided useful insight into how funders approach claims in practice. The standard funding-to-claim ratio of 1:10, he noted, necessitates credible damage assessment and enforceability analysis before funding is even considered. This acts as a preliminary quality check on claims, indirectly curbing frivolous filings. But without transparency and institutional endorsement, even the best practices followed by private funders cannot replace regulatory clarity.

Technology: Efficiency Enable or Cost Catalyst?

The increasing integration of artificial intelligence (AI) tools and blockchain-based solutions in arbitration has sparked both optimism and caution. While these technologies can reduce human error and expedite administrative tasks, they often require significant upfront investment in infrastructure, cybersecurity, and training.

Prof. Chawla commented on blockchain's evidentiary value, noting its potential to eliminate authenticity disputes by timestamping contracts and correspondence. Yet this value proposition is meaningful only if the parties and tribunals possess the technological literacy to use it effectively.

Similarly, while AI tools like Ask.Kai (developed in-house by Khaitan & Co.) offer speed and accuracy in legal research and drafting, they do not eliminate the need for experienced judgment. A case in point is the increasing reliance on automated legal analytics in the US to predict case outcomes. While promising, these tools have also raised concerns about the devaluation of nuanced

legal reasoning in favour of probabilistic modelling.

The key lesson here is that technology is not a panacea for cost reduction, but a potential enabler of it, if embedded within a broader culture of procedural efficiency and informed decision-making.

Reimaging Culture, Not just Process

Perhaps the most elusive yet critical factor inflating arbitration costs is cultural. Both **Ms. Bhanrale and Prof. Chawla** lamented the prevailing tendency in India to replicate the courtroom environment within arbitration. This includes overly long pleadings, senior counsel-heavy appearances, and exhaustive oral arguments, all of which betray arbitration's foundational ethos.

India is not alone in this. Even in jurisdictions with mature arbitration cultures, the legal elite's penchant for formality often results in procedural bloat. However, change is possible. The LCIA's updated rules, for instance, now promote concise pleadings and limited witness examination as default positions unless the tribunal directs otherwise. Indian institutions would do well to follow suit.

Panda's call for cost sanctions against frivolous claims further underlines the need for cultural reform. Frivolity is a financial burden on the system. A robust costs regime especially one that imposes penalties for abusive procedural conduct could have a strong deterrent effect.

Conclusion: A call to Rebalance, Not Reinvent

The question of whether arbitration in India can be affordable again does not demand a radical reinvention of the system. Rather, it calls for a rebalancing of incentives, processes, and cultural expectations.

The panel agreed that India must bridge the gap between arbitration's theoretical advantages and its practical shortcomings. This can be done by institutionalising cost controls, legitimising and regulating

third-party funding, embedding technology with caution and purpose, and cultivating a culture that values substance over procedure. Arbitration need not be perfect to be preferable; it just needs to be credible, transparent, and above all, accessible.

The insights shared during the Young ITA India panel serve not only as diagnostics but also as prescriptions. The road to affordability is neither short nor straight, but it is navigable with reform, resolve, and a reorientation of priorities.

By Karan Anand (Jindal Global Law School, India)

REGIONAL UPDATES

Africa

International Arbitration and Corruption Risk in African PPPs

Public-Private Partnerships (PPPs) have become indispensable mechanisms for infrastructure development across Africa. However, these long-term contractual arrangements are increasingly the focus of external anti-corruption enforcement actions, often triggered by investigations in foreign jurisdictions.

A recent example is the controversy surrounding Kenya's planned airport and energy infrastructure concessions involving India's Adani Group. Although the contracts had not reached financial close, the awards were publicly announced and subsequently cancelled in November 2024. This followed intense public scrutiny fueled by the Adani Group's indictment in the United States, over a separate deal in India, despite no proven wrongdoing in Kenya.

A related pattern emerged in Tanzania, where the government terminated the $565 million Bagamoyo Port contract with China Merchants Holdings citing opaque terms and sovereignty concerns, prompting contention over compensation and investment protections. Such terminations, while framed as public interest measures, raise serious questions about predictability, due process, and legal risk for international investors.

In this context, international arbitration emerges as a key tool for balancing state regulatory powers with investor protections. Arbitral tribunals have long held that corruption can invalidate investment

> "In this context, international arbitration emerges as a key tool for balancing state regulatory powers with investor protections."

agreements, as in *World Duty Free Company Limited v Republic of Kenya* (ICSID Case No. ARB/00/7, Award dated 4 October 2006), where the tribunal refused to enforce a contract procured through bribery. Yet, an increasing number of cases now involve indirect terminations driven by reputational contagion from foreign investigations, without a judicial finding of misconduct in the host state.

This tension is particularly pronounced where bilateral investment treaties (BITs) or host government agreements guarantee protections such as fair and equitable treatment (FET), protection from expropriation, and full security. When host states terminate projects on the basis of unresolved or foreign-driven allegations, arbitral tribunals must determine whether such actions are proportionate, non-discriminatory, and in accordance with international law.

The Adani-Kenya situation invites critical scrutiny: Can adverse foreign media or prosecutorial actions justify unilateral cancellation under the guise of public interest? Or do such measures, taken without adjudicated findings, constitute breaches of investor rights?

Looking ahead, continental institutions such as the African Continental Free Trade Area (AfCFTA) Secretariat could play a transformative role by establishing or endorsing a continentally recognised arbitral centre under the AfCFTA framework. Such a centre, rooted in African legal traditions but aligned with global standards, would enhance the credibility and neutrality of dispute resolution on the continent. To reinforce investor confidence, PPP contracts across member states could, by default, provide for arbitration before such a centre. This would send a strong signal to investors that Africa is committed to fair, transparent, and independent mechanisms for resolving disputes, including those involving allegations

of corruption or undue state interference.

Ultimately, international arbitration remains essential to protecting the rule of law in cross-border investments, ensuring that legitimate anti-corruption objectives do not become a pretext for unilateral or politically driven action.

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REGIONAL UPDATES

Middle East

African Continental Free Trade Area Offers New Trade and Investment Framework for Middle Eastern Investors

The African Continental Free Trade Area ("**AfCFTA**"), which recently celebrated the one-year anniversary of entering into its operational phase, represents one of the most significant economic and legal transformations in modern history and one with strategic implications far beyond Africa.

As the world's largest free trade zone by number of participating countries, AfCFTA integrates 54 nations, 1.4 billion people and a combined GDP exceeding USD 3.4 trillion. The Agreement aims to eliminate tariffs on 97% of intra-African trade, unlocking an unprecedented wave of cross-border economic activity. For Middle Eastern investors, sovereign wealth funds and infrastructure developers, this transformation offers a uniquely proximate market—geographically, commercially and historically—given the Middle East's deep trade and investment ties with North Africa, the Horn of Africa and key continental corridors.

As of September 2023, nearly all African nations have signed the AfCFTA Agreement, with 47 out of 54 having ratified it—a ratification rate of 87%. Tariff elimination is paired with strict rules of origin, for a unified free-trade landscape that invites regional manufacturing, assembly and export operations. For Middle Eastern ports, AfCFTA's trade liberalisation amplifies the strategic potential of Red Sea and Gulf shipping routes, linking Arab maritime hubs with a single African market.

The AfCFTA Investment Protocol, adopted on 19 February 2023, unifies the continent's investment regime by replacing national, bilateral and regional intra-African investment treaties with a single framework. It aims to abolish 173 intra-African investment treaties in favour of a

single, unified framework. This consolidation will gradually extend to Africa's external investment architecture: future bilateral investment treaties with non-African states—including GCC members, Turkey, the EU, China and the United States—will increasingly be negotiated on a continental basis. This centralisation alters the negotiating landscape for Middle Eastern investors, who will face a standardised African investment code rather than fragmented national regimes.

"This centralisation alters the negotiating landscape for Middle Eastern investors, who will face a standardised African investment code rather than fragmented national regimes."

The Protocol also signals substantive shifts in investor protections. Article 17 replaces the broad, traditional "fair and equitable treatment" standard with an administrative and judicial treatment standard, narrowing the scope for investor claims while increasing predictability for host states. Chapter 5 introduces detailed investor obligations—compliance with host state laws, respect for labour and environmental standards, prohibition of corrupt practices and a duty to contribute to sustainable development objectives. For Middle Eastern businesses, these obligations align with the ESG compliance requirements increasingly embedded in Gulf sovereign funds' investment policies, ensuring a smoother integration of corporate governance standards between the Middle East and Africa.

The Protocol will enter into force 30 days after the deposit of the 22nd instrument of ratification. The Annex on dispute settlement, still under negotiation, will determine whether investor-state disputes proceed via international arbitration or through a potential African investment court

model. This outcome will directly affect enforcement strategies for Middle Eastern investors with multi-jurisdictional African portfolios. Such structural changes redefine investor protections, dispute resolution mechanisms (which remain to be finalised) and investment obligations across industries, with an explicit emphasis on harmonising economic growth, environmental sustainability and social responsibility. This architecture is particularly relevant to Gulf and Levantine investors already active in African agribusiness, energy, logistics and infrastructure, who must now navigate a new continent-wide investment code.

Another cornerstone of AfCFTA's financial integration is the Pan-African Payment and Settlement System ("PAPSS"), developed by the African Export-Import Bank. Officially launched in 2022, PAPSS enables cross-border trade settlements in local African currencies, reducing reliance on foreign intermediaries, lowering transaction costs and accelerating trade flows. Its reach has already extended beyond Africa: in October 2023, when the eleven Central Banks of the Caribbean formally adopted PAPSS for intra-regional transactions—paving the way for cross-continental settlement corridors. In November 2024, the Central Bank of Egypt joined PAPSS, bringing all Egyptian commercial banks into the system and reinforcing Cairo's role as a financial bridge between Africa and the Arab world. This development holds direct operational value for Middle Eastern institutions with Egypt-based African operations.

AfCFTA's tariff reductions will be phased in over 5 to 13 years depending on each state's level of development. Early entrants—African or foreign—stand to gain long-term market positioning. Between 2020 and 2023, intra-African trade grew by 39%, from USD 67 billion to USD 94 billion, with Egypt, South Africa and Nigeria leading. Yet logistics constraints remain severe: intra-

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Middle East

African rail connectivity stands at only 0.1% and logistics costs account for 30–60% of final product prices. For Middle Eastern construction conglomerates and sovereign-backed infrastructure funds, this points to immediate demand for transport corridors, port expansions and energy connectivity— in which Gulf states have also invested in the past decades.

Historically, Africa's external trade has been dominated by commodities, such as oil, minerals and agricultural products. AfCFTA's legal framework aims to accelerate diversification into value-added industries. This gives opportunities for investors to integrate raw materials into regional manufacturing supply chains, establishing processing hubs in Africa to serve markets under preferential trade regimes. The World Bank projects that AfCFTA will increase Africa's income by USD 450 billion by 2035 and boost intra-African exports by over 81%. For the Middle East, this scale of growth reinforces Africa's role not only as a trade partner but also as a co-investment platform for industrialisation, food security, renewable energy and logistics corridors.

AfCFTA is, therefore, more than a continental trade agreement—it is a legal and economic architecture with direct strategic convergence points with the Middle East. From the Red Sea maritime axis, the framework sets the stage for a new era of Afro-Arab economic alignment underpinned by a unified African trade and investment regime.

By Ibrahim Ati

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Gayatri Balasamy v. ISG Novasoft Technologies: Much-needed Clarity on Courts' Power to Modify Arbitral Awards in India

In April 2025, a five-judge bench of the Indian Supreme Court delivered a landmark ruling in the case of *Gayatri Balasamy v. ISG Novasoft Technologies*, clarifying the scope of the courts' powers to modify arbitral awards under sections 34 and 37 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

Section 34 of the Arbitration Act provides for the courts' powers to set aside arbitral awards, or remand awards to tribunals, on the basis of specific grounds. Section 37 of the Arbitration Act further provides for an appeal from a decision on setting aside under Section 34. Over the years, a controversy emerged as to whether the power to set aside arbitral awards includes a power to modify them.

The controversy was finally put to rest by five-judge bench of the apex court i.e., the Indian Supreme Court. The majority judgment was authored by Justice Sanjiv Khanna and joined by Justice B. R. Gavai, Justice Sanjay Kumar and Justice Augustine George Masih. Justice K.V. Viswanathan penned a minority opinion.

The majority ruled that the courts under Sections 34 and 37 of the Arbitration Act may modify arbitral awards in only two limited scenarios: (a) amending the post award interest and (b) correcting any clerical, computational or typographical errors evident on the face of the arbitral record.

In contrast, Justice Viswanathan took a more restrictive approach, holding that courts lack any inherent power to modify arbitral awards under these sections. Instead, Justice Viswanathan argued that awards should be remanded back to the arbitral tribunal even for modification of post-award interest and the correction of clerical, computational or

typographical errors. As per the minority opinion, the only exceptional circumstance in which a court can modify an arbitral award is in case of a *prima facie* clerical, computational or typographical error when (a) the parties have not applied to the tribunal for correction thereof under Section 33 of the Arbitration Act or (b) even after remanding the award back to the tribunal, the tribunal has been 'obstinate' in not correcting the error.

Despite the differences on modification, both majority and minority aligned on the issue of partial setting aside of arbitral awards. They affirmed that under Sections 34 and 37 of the Arbitration Act, courts can sever and set aside an invalid portion of an award, provided it is clearly separable from the valid portion. The separation must apply to both liability and quantum, with no interdependence between the valid and invalid portions.

Lastly, the court also rejected some key aspects of an earlier decision in *Kinnari Mullick v. Ghanshyam Das Damani*. As per *Kinnari Mullick,* a request for remanding an arbitral award back to the tribunal, has to be made by the parties in writing, prior to the decision in an application for setting aside the award under Section 34(1). The court in the present case held that such a request can also be made orally. Additionally, such a request can be made even during the pendency of an appeal under Section 37 from the order passed under Section 34, as the powers of courts under Sections 34 and 37 are coterminous. Thus, the appellate courts under Section 37 are also empowered to remand the award back to the tribunal under Section 34 (3) of the Arbitration Act.

While the majority's limited approach to modifications aims to minimize judicial interference and expedite resolutions, it may be argued that remanding awards back to the tribunal even for minor issues could introduce unnecessary delays in the arbitration process. Nevertheless,

there is optimism that as Indian arbitration jurisprudence evolves, Justice Viswanathan's minority view may gain traction. This would encourage courts to consistently remand matters to the arbitral tribunal for corrections, including clerical or typographical errors and post-award interest adjustments, thereby preserving the tribunal's primacy and the integrity of the original arbitral intent.

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Western Europe

The case of Klesch Group v. European Union: a paradigm shift for intra-EU investment disputes?

Despite the clear decisions issued by the Court of Justice of the European Union ("**CJEU**") in *République de Moldavie v Komstroy* (CJEU Case C-741/19, "Komstroy") and *Slowakische Republik v Achmea BV* (CJEU Case C-284/16, "Achmea")—which concluded that Article 26 of the Energy Charter Treaty ("**ECT**"), with respect to the settlement of disputes under the ECT, does not apply to claims between an investor from an EU Member State and another EU Member State—, investors have not been entirely discouraged from initiating intra-EU arbitration proceedings. The recent arbitrations lodged by Klesch Group Holdings Limited (United Kingdom), Klesch Refining Denmark A/S (Denmark), Kalundborg Refinery A/S (Denmark) and Raffinerie Heide GmbH (Germany) (the "**Klesch Group**") not only provide an example of investors' perseverance in initiating intra-EU ECT arbitration proceedings, but may also signal a shift of paradigm in these types of investor-State arbitrations.

In particular, the Klesch Group has lodged an arbitration directly against the EU, on the grounds that the adoption and enforcement of EU Council Regulation 2022/1854 constitutes a breach on the EU's part of Articles 10(1), 10(7), 10(3) and 13 of the ECT.

This is not the first time that arbitration proceedings under the ECT are brought directly against the EU, as there is a precedent with the 2019 *Nord Stream 2 v. EU case*, which is still pending before the Permanent Court of Arbitration. In that case, Swiss company Nord Stream 2 AG lodged an arbitration request on the grounds that Directive (EU) 2019/692, amending Directive 2009/73/EC, constituted a breach on the EU's part of Articles 10(1), 10(7) and 13 of the ECT.

The Klesch Group v. EU case, however, introduces two new dimensions to claims initiated against the EU.

Firstly, the Klesch Group has lodged a trio of cases, not only against the EU, but also against two individual Member States (Denmark and Germany) for their implementation of EU Council Regulation 2022/1854 in their domestic legal system — Danish Act No. 502 of 16 May 2023 and Article 40 of the German Annual Tax Act 2022—(the "***Klesch Group Cases***"). Although the three claims are not identical, they are similar enough that the Parties have agreed to coordinate the cases to the extent possible.

Secondly, and unlike in the *Nord Stream 2 v.* EU case, the claimants in the *Klesch Group v. EU* case include intra-EU investors. This is particularly relevant in light of the CJEU's aforementioned ban of intra-EU investment arbitration proceedings. If successful, the cases initiated by intra-EU investors against the EU itself could signify a shift of paradigm, conferring investors a new avenue for their ECT claims.

In the *Klesch Group* Cases, the EU, Denmark and Germany raised four joint preliminary objections regarding their consent to the arbitration:

i) Firstly, the Respondents contended that the EU and its Member States could not (and did not) consent to arbitration in respect of intra-EU investment claims. This should be understood to encompass claims from UK investors, to the extent that the UK was a Member State at the time when Respondents acceded to the ECT, and the UK had not made any offer to arbitrate after it exited the EU.

ii) Secondly, the Respondents objected that, pursuant to Article 1(3) of the ECT, Denmark and Germany are not the proper respondents to these claims, and that only the EU is. The Respondents asserted that this

was to be determined ex post, in accordance with EU law.

iii) Thirdly, the Respondents note that the measures on which the Klesch Group grounds its Article 10 ECT claims are "Taxation Measures" for the purposes of Article 21 ECT. Therefore, they are not within the Arbitral Tribunal's jurisdiction.

iv) Finally, Respondents also contend that the Tribunal lacks jurisdiction over all the claims —except for Article 13 ECT claims— on the grounds of the essential security interests exception of Article 24(3)(a)(ii) ECT.

On 8 April 2025, the Arbitral Tribunal issued a decision, adopted by majority with Professor Jorge E. Viñuales dissenting, in which it declined to bifurcate the proceedings and joined these objections to the merits phase of the proceedings, considering that it had not been sufficiently established that bifurcating the proceedings would materially dispose of a substantial portion of the dispute, or result in significant savings of time and cost. Consequently, the answer to the question of whether this seemingly new avenue for intra-EU investment claims is viable will have to wait until a final decision is reached.

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REGIONAL UPDATES
Central America

Mexico

Honduras' ISDS Exposure Tops $19.4B: EMCO/Palmerola and Ciudad Morazán Add to the Docket

By mid-2025, Honduras faces 16 active investor-State arbitration proceedings with aggregate claims now exceeding USD 19.44 billion-an amount equivalent to more than half of the country's GDP in 2024. The two most recent of these proceedings were filed in May 2025, further intensifying the State's exposure.

The first case was brought under the UNCITRAL Rules by Grupo EMCO Holding, a Honduran-based conglomerate ultimately controlled through a United States holding structure. The dispute, valued at approximately USD 300 million, relates to the concession of Comayagua International Airport, also known as Palmerola International Airport (XPL). EMCO alleges contractual breaches and discriminatory conduct affecting related companies, including Alutech, partially owned by the Honduran Military Pension Institute. The claim invokes protections under DR-CAFTA and the Central America-Panama Free Trade Agreement. EMCO, has argued that it was compelled to initiate arbitration after senior government officials publicly questioned the legitimacy of the concession contract. Grupo EMCO is represented in this arbitration by Greenberg Traurig LLP, while Honduras is represented by the Procuraduría General de la República (PGR), the State Attorney General's Office.

The second filing came from Overseas Real Estate LLC, a United States company, which initiated arbitration under the ICSID Additional Facility. The investor seeks around USD 100 million in relation to its investment in the ZEDE Ciudad Morazán, a special economic zone in Choloma. The company alleges violations of DR-CAFTA and a stability agreement concluded with

the State. According to ICSID records, the case is registered and the constitution of the tribunal is pending. Overseas Real Estate LLC is represented by Hogan Lovells, while Honduras is again represented by the PGR.

Beyond these two proceedings, Honduras continues to face claims across strategic sectors such as renewable energy, infrastructure, and special economic regimes. Civil organizations have emphasized the weight of these disputes: in July 2025, a coalition of local and international groups highlighted that seven of the pending arbitrations involve energy projects, with claims surpassing USD 1.6 billion. These disputes stem largely from reforms adopted since 2022 to renegotiate power purchase agreements and phase out the ZEDE regime.

Together, the Palmerola and Ciudad Morazán filings exemplify the persistent tension between foreign investment protections and national policy reforms. They also confirm investors' continued use of UNCITRAL arbitration and the ICSID Additional Facility, even after Honduras denounced the ICSID Convention in 2024.

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Newsletter Guidelines

The Young ITA Newsletter is the quarterly publication of Young ITA, and has a global readership of students, young practitioners, academics, and professionals from different sectors.

Young ITA welcomes written content covering recent developments, new laws or regulations, recent court cases or arbitral awards in your region, webinar/conference reports or any other material that may be of interest to Young ITA readership.

All content submitted must:

- not have been previously published;
- include the author(s)'s name, email address, firm/affiliation and city/country; and
- be authored by members of Young ITA.

Written content submitted must:

- be between 300-500 words;
- be submitted in MS word format;
- acknowledge all sources, while keeping endnotes to a minimum; and
- include a short abstract of one/two sentences and up to five keywords.

Contributors are encouraged to submit their contributions at least two months prior to the publication month of the next issue (e.g. submissions for the Winter issue should be delivered by the end of November). Factors considered for publication of the respective contribution include, among others, relevance, timeliness, quality, and consistency with these guidelines.

Content should be submitted to the Young ITA Thought Leadership and Internal Communications Co-Chairs.

Young ITA also welcomes volunteers to act as reporters for future Young ITA events. Please contact our External Communications Co-Chairs for more information about, or to register your interest in, acting as a reporter for a future Young ITA event (whether virtual or in-person).

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