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KEY DEVELOPMENTS UPDATE

MARCH 2023

Message from Khawar Qureshi KC, Head of McNair International

McNair began the year with its annual review of key developments in our core practice areas of Investment Treaty disputes, Arbitration Act 1996 cases and Public International Law issues before the English Courts. Chaired by Lord Mance, links for the video recording of the very insightful panel discussion and PowerPoint presentation are in this bulletin.

Of particular note are two developments. Challenges to arbitrators are becoming increasingly aggressive and civil claims against States before the English Courts more frequent. These trends are unlikely to diminish.

As we begin to see the first signs of Spring, we look forward to welcoming many of you at our Annual Lecture to be delivered by The Rt. Hon. Sir Geoffrey Vos, the Master of the Rolls, in Lincoln's Inn Old Hall on 19 April 2023. The theme of the lecture "The Future of London as a Pre-eminent Dispute Resolution Centre: opportunities and challenges" is highly relevant and Sir Geoffrey is uniquely well placed to address this subject.

Best wishes on behalf of all of us at McNair.

Should you be interested in any of the headlines below, please click here to see the newsletter in full or visit www.mcnairinternational.com/publications for a full list of our previous publications.

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in order to engage the exception to State immunity. Where a computer in the UK was remotely manipulated from abroad, this was to be regarded as an act within the UK. In addition, psychiatric injury could constitute "personal injury" under the State Immunity Act 1978.

- **Court of Appeal judgment on disclosure of judgment to foreign counsel.** In a decision handed down in *Interdigital Technology Corporation & Ors v Lenovo Group Ltd & Ors* [2023] EWCA Civ 57 (30 January 2023), the Court of Appeal considered the action to be taken in the case of a breach of an embargo on the disclosure of draft judgments. In the circumstances, no action would be taken. This decision is an important reminder of the need to adhere to embargos of draft judgments, and the factors that will be taken into account when consider what sanction, if any, to impose as a result of a breach of an embargo.

- **Once bitten, twice shy: will the new Colombia-Venezuela Bilateral Investment Treaty reset the benchmark for investment treaty drafting?** On 3 February 2023, representatives from Colombia and Venezuela, including the Venezuelan President himself, Nicolas Maduro, concluded the new Colombia-Venezuela BIT, which is notable for its innovative – if not unorthodox – drafting approach. It is clear from the way in which the BIT has been drafted that both contracting states are keen to avoid being bitten by offering investors overly generous standards of investment protection, recognising (at least implicitly) the cost of having done so in other BITs.

- **The Energy Charter Treaty – current status, future outlook.** On 24 June 2022, the contracting state parties to the ECT reached an "Agreement in Principle", according to which the ECT's substantive provisions would be modernised in alignment (at least to some extent) with the contracting state parties' climate change obligations. However, the Agreement in Principle has been accused of falling short in its aim to modernize the ECT, not least because the Agreement in Principle did not envisage excluding fossil fuel investments from the ECT's scope of foreign investment protection, and has led to announcements from some States that they intend to withdraw from the ECT.

MCNAIR INTERNATIONAL – ANNUAL LEGAL REVIEW OF 2022

On 18 January 2023, McNair International hosted its "Annual Legal Review of 2022". The event, chaired by Lord Mance, former Deputy President of the UK Supreme Court, considered key developments in the field of international dispute resolution.

Khawar Qureshi KC, Head of McNair International, delivered a presentation on recent developments under the 1996 Arbitration Act, latest investment treaty awards and public international law questions brought before the English courts.

In relation to the Arbitration Act 1996, key issues covered included the Law Commission's considerations of potential reforms for the Arbitration Act, important decisions on challenges to awards, Section 9 stays, disclosure issues on challenges to arbitrators, and issue estoppel, as well as the ongoing impact of international sanctions.

The presentation also covered key decisions in investment treaty arbitration, including on disqualification challenges, summary dismissal for "manifest lack of legal merit", jurisdictional issues and contributory fault.

Finally, Khawar Qureshi KC considered the approach of the English courts to complex Public International Law issues in disputes involving foreign States and senior officials, including the ongoing harassment dispute between the former King of Spain and his former partner which raised multiple important issues under the State Immunity Act 1978, including 'functional immunity' under Section 14; the Supreme Court's decision in on the "commercial activity" exception to Diplomatic Immunity in *Basfar v Wong*, and the application of the Act of State doctrine in the context of foreign executive acts, and claims advanced by foreign States/State Entities before the English courts.

Following the presentation, a panel discussion took place involving experienced international practitioners, including Alistair Feeney (Partner, Holman Fenwick Willan), Daniel Wilmot (Partner, Stewarts), Dorine Farah (Partner, Baker Botts), Evgeniya Rubinina (Partner, Enyo Law LLP), Iain Mackie (Partner, Macfarlanes) and Robert Volterra (Partner, Volterra Fietta).

The panel provided thoughtful and insightful views on a wide range of issues, including the use and effectiveness of the relatively new summary dismissal procedure introduced under paragraph O8.6 of the Commercial Court Guide, London's status as a leading international arbitration centre, and whether "double hatting" should be prohibited for counsels who also sit as arbitrators. Both panel members and audience considered the impact of international sanctions on litigation and arbitration, and the ways in which the issues of licensing were approached in different jurisdictions. As to public international matters, concern was raised by both panel members and the audience as to the UK Supreme Court's recent expansion of the scope of the "commercial activity" exception to diplomatic immunity arising out of the decision in *Basfar v Wong*, and the wider implications of the decision.

For those unable to attend, we have made available both the PowerPoint slides used in Khawar Qureshi KC's presentation as well as a recording of the full discussion.

For those interested in learning more, Khawar Qureshi KC has written two articles on key cases before the English courts during 2022 under the Arbitration Act 1996 and relating to Public International Law, which will be published in the New Law Journal in the coming weeks.

We have a number of upcoming webinars and in-person seminars. Should you be interested in attending (either remotely or in person), please email office@mcnairinternational.com and we will be delighted to send you further details of events most suitable for your areas of interest and location.

ARBITRATOR DISQUALIFIED TO HEAR UKRAINE-USA BILATERAL INVESTMENT TREATY DISPUTE BECAUSE OF THEIR ADVISORY ROLE TO THE US GOVERNMENT

Optima Ventures LLC, Optima 7171 LLC and Optima 55 Public Square LLC v. United States of America (ICSID Case No. ARB/21/11) (Decision on the Claimant's Proposal to Disqualify an Arbitrator)

Background

The Ukrainian owners of US companies, Optima Ventures, Optima 7171 LLC and Optima 55 Public Square, consolidated their claims under the Ukraine-USA Bilateral Investment Treaty (BIT) to bring a claim against the USA. The underlying dispute relates to asset forfeiture proceedings lodged by the US against several interests of Ukrainian oligarchs, Mr. Igor Kolomoisky and Mr. Gennadiy Bogolyubov in connection with allegations of embezzlement from a Ukrainian bank.

The investors' Notice of Arbitration was submitted on 8 February 2021. It alleged that the USA had breached certain standards of foreign investment protection under the Ukraine-USA BIT, including by unlawfully expropriating the investment.

While a tribunal was constituted to hear the investors' Treaty claim on 6 July 2022, just nine days later the claimants filed a proposal to disqualify the arbitrator appointed by the USA.

Proposal to Disqualify the USA-appointed Arbitrator

The USA-appointed arbitrator was Mr. Michael Chertoff. The claimants' grounds for proposing his disqualification from the arbitral panel were fivefold:

1. Mr. Chertoff had "an extensive career in the US public sector".

2. Mr. Chertoff had an ongoing advisory function in the context of the US Homeland Security Advisory Council (HSAC).

3. Mr. Chertoff had set out his stance in academic writings and pleadings on certain matters of public international law that were pertinent to resolution of the claimants' Treaty claim (namely, the interplay between customary international law and US domestic law).

4. Mr. Chertoff allegedly had access to confidential information concerning individuals with interests in the case.

5. Mr. Chertoff had allegedly acquiesced to "practices contrary to international law" by virtue of his previous role as Assistant Attorney General at the Criminal Division of the US Department of Justice, during which time the US government was interrogating September 11th terrorists in a manner alleged to be contrary international law.

Mr. Chertoff's Disqualified due to his Ongoing Advisory Function to the US Homeland Security Council

Mr. Chertoff's co-arbitrators, Ms. Monica Pinto (the Chair appointed by ICSID's Secretary-General) and Mr. Jan Paulsson (the claimants' appointee), could not reach an agreement on the disqualification proposal. The proposal therefore fell to be decided by Mr. David Malpass, Chair of ICSID's Administrative Council.

Of the five grounds for proposing Mr. Chertoff's disqualification, Mr. Malpass upheld only one – that is, the second ground on account of his ongoing advisory function to the HSAC. However, that ground alone sufficed to have Mr. Chertoff disqualified and replaced by another arbitrator, Mr. David Pawlak.

According to Mr. Malpass, by serving on the arbitration tribunal "while simultaneously acting as an advisor to one of the disputing parties, albeit in different matters, the arbitrator inevitably risks creating an appearance that he lacks impartiality and independence". In Mr. Malpass' view, this appearance of partiality and dependence could not be cured by Mr. Chertoff's offer to withdraw from his HSAC advisory role because what mattered to his decision was "the proven facts and not alternative but-for scenarios".

Dismissing the other grounds for disqualification, Mr. Malpass held that Mr. Chertoff's prior government service was insufficient in and of itself to warrant disqualification; the claimants' allegations that Mr. Chertoff had access to confidential information about them when working for the US, and that he had acquiesced to "practices contrary to international law", were mere speculation and unpersuasive; and Mr. Chertoff's past views on international law were not specific or clear enough to the issues at hand.

ENGLISH HIGH COURT REJECTS BAHRAIN'S CLAIM TO STATE IMMUNITY IN SURVEILLANCE CASE

Shehabi & Anor v Kingdom of Bahrain [2023] EWHC 89 (KB) (08 February 2023)

Introduction

In a decision handed down on 8 February 2023, the English High Court dismissed the Kingdom of Bahrain's claim for immunity pursuant to the State Immunity Act 1978 in respect of claims brought against them by dissidents.

Background

The Claimants, two vocal critics of the Kingdom of Bahrain, sued the Defendant for damages for personal injury in the form of psychiatric injury allegedly suffered as a result of the infection of their laptop computers with spyware by the Defendant, which enabled it to conduct surreptitious surveillance on them.

The Kingdom of Bahrain applied for an order declaring, inter alia, that it was immune from liability pursuant to Section 1(1) of the State Immunity Act 1978 ("SIA 1978"), which provides that a State is immune from the jurisdiction of the courts of the United Kingdom unless one of the specified exceptions set out in sections 2-11 applies.

The relevant exception in the present case is that set out in Section 5, which provides that a State is not immune in respect of proceedings relating to (a) death or personal injury; or (b) damage to or loss of tangible property, caused by an act or omission in the United Kingdom.

The Claimants that persons acting on behalf of the Kingdom of Bahrain had infected their computers with a spyware programme. Bahrain denied the allegations.

As to the claim for State immunity, the Defendant's position was that exception did not apply in the present on the basis that (1) the claims do not relate to an 'act … in the United Kingdom' pursuant to s.5(a) of the SIA 1978; and (2) the psychiatric injury alleged by the Claimants does not amount to 'personal injury' for the purposes of s.5(a) of the SIA 1978.

Decision

The High Court (Mr Justice Julian Knowles) dismissed the application for State immunity.

On (1), the Defendant's position was that (a) as a matter of construction, s5 requires each and every individual tortious act to take place in UK, and so if some of the acts take place outside the UK, the defendant state is immune; (b) for the purposes of s.5, an act such as hacking/infecting a computer located in the UK remotely from abroad is to be considered as an act abroad and not in the UK.

Mr Justice Julian Knowles disagreed on both issues.

As to the first limb, to adopt the Defendant's construction on s.5(a) would render this provision inapplicable in all but the most straightforward of situations. Indeed, "many, if not most, of the cases where a foreign state ought not to be immune will involve some tortious activity outside the UK, and so if the Defendant were right, the foreign state would be immune, no matter how heinous its conduct, or how high up the state's involvement. In fact, the greater the state involvement, the more immune it would be." On a proper interpretation of s.5(a), it was only necessary for a single relevant act or omission more than minimally causative of the death, injury or damage to take place within the UK in order to engage the exception. Where a computer in the UK was remotely manipulated from abroad, this was to be regarded as an act within the UK.

On (2), very cogent reasons would need to be given for construing 'personal injury' in s.5 of the SIA 1978 in a different and narrow way so as to exclude psychiatric injury. There was no basis for such a conclusion. On the balance of probabilities, the Claimants had shown that they suffered psychiatric injury as a consequence of their computers being infected.

Accordingly, the Defendant was not entitled to rely on the immunity set out in SIA 1978.

The full judgment is available here.

COURT OF APPEAL JUDGMENT ON DISCLOSURE OF JUDGMENT TO FOREIGN COUNSEL

Interdigital Technology Corporation & Ors v Lenovo Group Ltd & Ors [2023] EWCA Civ 57 (30 January 2023)

Introduction

In a decision handed down on 30 January 2023, the Court of Appeal considered the action to be taken in the case of a breach of an embargo on the disclosure of draft judgments. In the circumstances, no action would be taken. This decision is an important reminder of the need to adhere to embargos of draft judgments, and the factors that will be taken into account when consider what sanction, if any, to impose as a result of a breach of an embargo.

Background

The judgment at issue in the present case arose from the hearing of an appeal by the Court of Appeal on 14-15 December 2022. On 13 January 2023, the judgment was circulated in draft following the practice set out in Practice Direction 40E (Reserved Judgments). Paragraph 2.4 provides that a copy of the draft judgment may be supplied, in confidence, to the parties provided that (a) neither the draft judgment nor its substance is disclosed to any other person or used in the public domain; and (b) no action is taken (other than internally) in response to the draft judgment, before the judgment is handed down. Paragraph 2.6 provides that where a party is, inter alia, a company, copies may be distributed in confidence within the organisation, provided that all reasonable steps are taken to preserve its confidential nature and the requirements of paragraph 2.4 are adhered to. Any breach of these obligations may be treated as contempt of court.

Initially, the judgment was sent to the parties' Counsel, Counsel's clerks and one representative of each of the solicitors' firms involved. The draft was then passed on to two other solicitors at InterDigital's solicitors, Gowling WLG. In their communications with Interdigital conveying both the content and the draft judgment itself, Gowling's solicitors emphasised the embargoed nature of the judgment and that the recipients must not share the judgment, the outcome, or any details about it with any other person who was not directly involved in the purposes specified in the embargo wording (namely the correction of errors, prepare submissions on consequential matters and draft orders and to prepare themselves for the publication of the judgment".)

Upon receipt of the details of the outcome of the appeal, InterDigital's Deputy General Counsel and Head of Intellectual Property and Litigation shared the outcome (but not the draft judgment) with InterDigital's external US counsel. Once Gowling WLG became aware of this breach of the embargo, they immediately took steps to notify InterDigital that this was a breach of the embargo, establish who had been told, and notified the Court of the breach.

Decision

In the present case, while there had been a breach of the embargo, no action would be taken.

The illegitimate disclosures were relatively limited in content and in terms of the number and identity of recipients, and did not include the draft judgment itself. There was no public disclosure; rather, the disclosure was made to people with a close professional interest in the outcome on express terms as to confidentiality which were adhered to. The facts of the disclosure were investigated and disclosed to the court by the wrongdoer itself without prompting. Any further proceedings would be disproportionate in the circumstances.

Concluding observations

Concern has been raised by the senior judiciary that breaches of embargos on draft judgments are becoming increasingly more frequent. This case is the latest in a series of cases (including *R (on the application of Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181 and *The Duke of Sussex v The Secretary of State for the Home Dept* (in respect of [2022] EWHC 682 (Admin))) which highlight the continuing need to ensure that embargos relating to draft judgments are strictly complied and the permissible purposes for which draft judgments can be used.

The full judgment is available here.

ONCE BITTEN, TWICE SHY: WILL THE NEW COLOMBIA-VENEZUELA BILATERAL INVESTMENT TREATY RESET THE BENCHMARK FOR INVESTMENT TREATY DRAFTING?

An exercise of diplomatic relations can manifest itself in a variety of forms, not least in the conclusion of a bilateral investment treaty ('BIT'). Following a change of administration, Colombia has sought to revive its bilateral relationship with Venezuela, particularly to reinstate reciprocal trade and investment between the two states. On 3 February 2023, representatives from Colombia and Venezuela, including the Venezuelan President himself, Nicolas Maduro, concluded the new Colombia-Venezuela BIT (see **here** for the original Spanish version).

Setting aside the political significance of that event, as well as the fact that the BIT represents the first such treaty between the two states, the Colombia-Venezuela BIT is notable for its innovative – if not unorthodox – drafting approach. It is clear from the way in which the BIT has been drafted that both contracting states are keen to avoid being bitten by offering investors overly generous standards of investment protection, recognising (at least implicitly) the cost of having done so in other BITs. Indeed, between themselves, Venezuela and Colombia have been on the receiving end of at least 77 investor-state arbitration disputes initiated by foreign investors, of which Venezuela has accounted for the lion's share of 57. These figures are based on ICSID's most recent caseload statistics – see below.

It should therefore come as no surprise that the substantive provisions of the Colombia-Venezuela BIT omit several standards of foreign investment protection that are typically offered to foreign investors by host states. Omitted from the BIT, for example, is the 'fair and equitable treatment' standard that protects investors against a range of impugnable measures, such as denials of justice, an absence of transparency, and breaches of their legitimate expectations to a stable regulatory environment or receive a certain profit. The BIT also omits the 'full protection and security' standard that protects investments from physical harm caused by state organs or private citizens of the host state, as well as the 'umbrella clause' standard, which, although controversial, obliges the host state to comply with all of its obligations owed to foreign investors, including obligations under ordinary commercial contracts.

Of the investment protection standards that have survived the drafting process of the Colombia-Venezuela BIT, they have either been drafted restrictively or conditioned upon strict jurisdictional requirements, both of which aim to limit the investment protection rights available to Colombian and Venezuelan investors under the BIT. For example:

- The BIT explicitly requires that the funds used for making the investment do not originate in the host state.

- Individual investors who hold dual Colombia-Venezuela nationality are excluded from the BIT's scope of protection, as are investors in the form of legal entities that are controlled by a national of the host state.

- To qualify for protection, investments must satisfy the express requirement that they contribute to the economic development of the host state.

- The BIT includes categories of investments and investors that do not qualify for protection. The former category includes public debt instruments, portfolio investments, and claims to money deriving exclusively from commercial transactions. The latter category includes financial entities (or funds) that grant credits or loans to an investor who otherwise qualifies under the BIT.

- The BIT emphasises the rights of the host states to regulate in certain ways, including in connection with their financial systems and in furtherance of their environmental commitments, notwithstanding their obligations to foreign investments.

- While the BIT's 'national treatment' standard ensures that domestic investors will not receive preferential treatment unjustifiably in comparison to foreign investors, treatment provided to investors in the context of free trade agreements or real estate acquisitions is excluded from the ambit of that standard.

- The BIT contains a 'denial of benefits' clause that can be invoked at any time, even when an arbitration initiated under the BIT is ongoing, that denies protection to investors who are proved to have no substantive business activities in the host state or have engaged in acts of corruption with respect to the investment.

Many of these BIT provisions are correlative to disputed issues in several investor-state arbitrations to which Colombia and Venezuela are (or were) party. For example, Venezuela has been embroiled in a series of arbitrations initiated by dual nationals, with tribunals often adopting different reasonings (see, for example, Trapote v. Venezuela and García Armas v. Venezuela).

Similarly, Colombia has had its right to regulate in relation to a protected páramo ecosystem overridden by the Eco Oro v. Colombia tribunal. Therefore, it is understandable why the Colombia-Venezuela BIT excludes dual national investors as qualifying investors, on the one hand, and emphasises the contracting states' right to regulate notwithstanding their obligations under the BIT, on the other.

However, whether this this 'once bitten, twice shy' approach is capable of resetting the benchmark for modern BIT drafting, or if it should be confined to a unique exercise in reviving diplomatic relations between two neighbours, will remain to be seen. Perhaps the ultimate benchmark in that respect will be whether, and to what extent, the restrictively drafted Colombia-Venezuela BIT succeeds in its stated aim of increasing and protecting reciprocal investments between the two states.

ICSID CASELOAD STATISTICS – TRENDS

Twice a year, the International Centre for the Settlement of Investment Disputes (ICSID) publishes its updated caseload statistics, including most recently on 30 January 2023 (available here). The statistics are based on cases registered or administrated by ICSID as of 31 December 2022. A number of trends warrant mention.

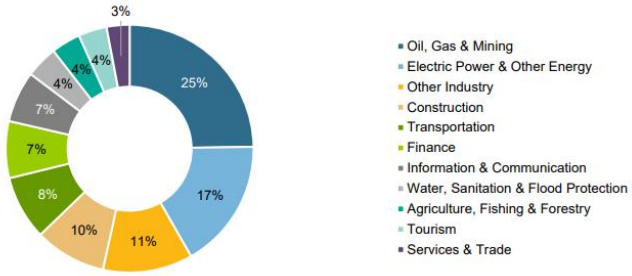
First, a total number of 910 cases have been registered with ICSID. That said, the number of cases registered in 2022 was 41, which represents a decrease from the 66 cases registered the previous year in 2021.

Second, the most popular way of consenting to ICSID arbitration is via a bilateral investment treaty, with such consent forming the basis of 60% of all registered ICSID cases. Thereafter, consent to ICSID arbitration is mainly contained in either multilateral investment treaties (including the Energy Charter Treaty and the North American Free Trade Agreement) or the investment provisions of free trade agreements, which together account for 18% of all registered ICSID cases.

Third, in terms of the distribution of ICSID cases by reference to the geographical location of the respondent host state, a majority of 26% of all ICSID cases have been initiated against Eastern European and Central Asian states. In close second, representing 22% of all ICSID cases, are those initiated against South American states – including Venezuela and Colombia.

Fourth, disputes arising out of investments in the energy sector account for the lion's share of all ICSID registered disputes. As the following chart illustrates, 25% of all cases relate to investments in the oil, gas and mining sector, while a further 17% relate to the electric power (and other energy) sector:

Chart 8: Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules, by Economic Sector

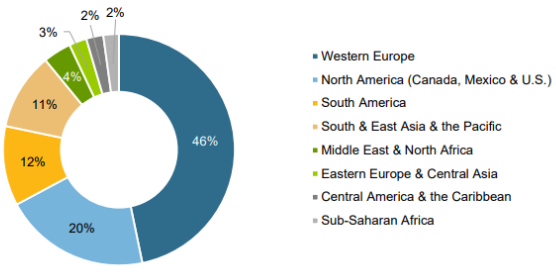


As previously reported by James McGlaughlin, a Senior Associate of McNair International, energy investment disputes will likely continue to rise, not least in light of ongoing geopolitical events and the drive to 'net zero' (see here and here).

Fifth, of the 64% of cases that proceed to be decided by an ICSID tribunal (the other 36% are otherwise settled or discontinued), the majority result in an award upholding the foreign investors' claims in full or in part (31%). However, in 18% and 14% of the decided cases, ICSID tribunals have either dismissed the foreign investors' claims on the merits or jurisdiction, respectively. Moreover, the rate of success in annulment proceedings remains low. In 2021, for example, out of 56 awards rendered, 23 were subject to annulment proceedings and only one of which resulted in the annulment of the award.

Finally, the ICSID tribunals that are appointed to decide cases are comprised of panels mainly consisting of Western European arbitrators (46%). North American arbitrators account for 20% of all ICSID tribunal panels, with their South American counterparts coming in third at 12%. The least represented regions on ICSID tribunal panels are Central American and the Caribbean and Sub-Saharan African (each of which account for only 2%). This heavily European-weighted geographical spread is represented in the following chart:

Chart 13: Arbitrators, Conciliators and *ad hoc* Committee Members Appointed in Cases Registered under the ICSID Convention and Additional Facility Rules – Distribution of Appointments by Geographic Region



THE ENERGY CHARTER TREATY – CURRENT STATUS, FUTURE OUTLOOK

Background

As previously reported by McNair International (available here), the Energy Charter Treaty (ECT) stands between a rock and a hard place.

On the one hand, its contracting state parties reached an "Agreement in Principle" on 24 June 2022, according to which the ECT's substantive provisions would be modernised in alignment (at least to some extent) with the contracting state parties' climate change obligations. To that end, the Agreement in Principle proposed to include, *inter alia*, a new provision in the ECT that affirmed the contracting state parties' right to regulate to achieve legitimate policy objectives, such as combatting climate change.

Yet on the other hand, the Agreement in Principle has been accused of falling short in its aim to modernize the ECT, not least because the Agreement in Principle did not envisage excluding fossil fuel investments from the ECT's scope of foreign investment protection. To recall, those are the types of energy sources that states have committed themselves to phase out in order to achieve the Paris Climate Agreement target of limiting global warming to 1.5°C. The risk is that by retaining fossil fuel investments as qualifying investments, states' phase out measures that adversely affect the value of those investments may breach their obligations under the ECT. Indeed, had Germany not bailed out its domestic energy company, Uniper, the Netherlands would still be facing an ICSID claim for over €1 billion as a result of allegedly having breached Uniper's rights

To Modernise or Withdraw from the ECT?

Finding the Agreement in Principle insufficient to allay concerns about how to progress their climate change agendas without triggering ECT disputes, the ECT contracting state parties have tried to take matters into their own hands. At least seven states (Germany, Slovakia, the Netherlands, France, Spain and Luxembourg) have announced that they intend to withdraw from the ECT. While those announcements by themselves are neither legally nor automatically effective, they may have gathered momentum in light of subsequent developments:

- On **22 November 2022**, during the 33rd Meeting of the Energy Charter Conference to approve the text of the modernised ECT based on the Agreement in Principle, four states (Germany, France, Spain and the Netherlands) abstained from voting, such that the European Commission failed to procure a mandate from EU Member States in favour of the reform.

- On **24 November 2022**, the EU Parliament issued a resolution urging the EU Commission to initiate a coordinated exit of the EU from the ECT.

- On **7 February 2023**, the EU Commission is reported to have issued a guidance "non-paper" to EU Member States regarding their possible coordinated exit from the ECT. The publicly available version of this paper records the EU Commission has having stated that, "in the absence of a position in the [European] Council and given the position of the European Parliament, it appears there is no scenario in which the EU and Euratom could allow the adoption of the modernised ECT, ratify it and remain party to a modern ECT. As a result, a withdrawal of the EU from Euratom from the Energy Charter Treaty appears to be unavoidable."

That said, there has been pushback from the ECT Secretariat. In a Guidance Note dated **3 November 2022**, the Secretariat indicated that EU Member States would only be able to withdraw from the ECT upon fulfilling the requirements of Article 62 of the Vienna Convention on the Law of Treaties, which premises treaty withdrawal on the occurrence of a "fundamental change of circumstances" that was "not foreseen by the parties", and where "the effect of the change is radically to transform the extent of obligations still to be performed under the treaty". In the Secretariat's view, developments in climate change law cannot have been completely unforeseen by the ECT contracting parties.

The ECT Secretariat also issued a reply to the EU Commission on **13 February 2023**, contending that in terms of environmental protection, leaving or denouncing the ECT would be a step back by contrast with adopting the modernised text, since fossil fuels investments would remain protected for a longer period under the treaty's sunset clause in case of withdrawal than under the modernised treaty.

What Next?

Whether the ECT's attempted modernisation will ultimately lead to its downfall will remain to be seen when its contracting state parties come to vote on the Agreement in Principle, a vote that is currently scheduled to take place (at the earliest) in April 2023. Between now and then, McNair International will continue to monitor developments.