



# Investment Arbitration Newsletter

January 2023, Issue I

## Foreword

We are pleased to present the inaugural issue of the Van Bael & Bellis Investment Arbitration Newsletter, a quarterly publication of the VBB International Arbitration Group designed to round-up recent developments in the field of investment arbitration.

The first issue of our Newsletter is a round-up of global developments in investor-State dispute settlement over the past year, and summarises our key client alerts from 2022.

2022 brought significant developments in the ISDS arena. From more Achmea-related backlash- with the first (and only) tribunal accepting a State's Achmea-based jurisdictional objection – to various withdrawals from the Energy Charter Treaty and the dramatic collapse of the ECT modernisation process, the state of ISDS continues to be in flux globally.

### **This inaugural issue of our Newsletter covers the following developments:**

#### **1. Post-Achmea ISDS developments in the EU**

- An ICSID tribunal declined to revisit its decision in light of the CJEU's judgment in the case of *Republic of Moldova v. Komstroy LLC* in February 2022;
- A Stockholm SCC tribunal declined jurisdiction in an ECT arbitration based on the intra-EU *Achmea* objection in June 2022; and
- A Cologne court diverged from the judgment of a Berlin court on the admissibility of intra-EU ICSID arbitration proceedings in October 2022.

#### **2. ECT-related developments**

- In October 2022, we reported that several EU Member States had withdrawn from the ECT despite progress on its modernisation; and
- In December 2022, we reported again on the modernisation of the ECT and the postponement of the vote on the modernisation process.

#### **3. Russia's invasion of Ukraine**

- We considered the protection of business assets in Russia and Ukraine under international investment law in March 2022.

#### **4. Upheaval in the energy and mining sectors in Mexico**

- An arbitral tribunal awarded USD 6.7 million against Mexico in *PACC Offshore Services Holdings LTD v. United Mexican States* in early 2022;
- The same tribunal then rejected the claimant's request for an additional award in May 2022; and
- The President of Mexico's reforms of the energy sector of Mexico have given rise to consultations under the United States-Mexico-Canada Agreement since July 2022.

#### **5. Other ISDS developments**

- The Brussels Court of First Instance annulled an investment arbitration award allegedly for the first time in February 2022;
- The new ICSID Regulations and Rules entered into force on 1 July 2022. These amendments included changes to the ICSID Arbitration Rules;
- A new cooperation agreement among Benelux arbitration institutions for the promotion of arbitration and alternative dispute resolution was concluded in September 2022;
- In its report of October 2022, the International Centre for Settlement of Investment Disputes reported that it administered a record number of cases in the 2022 fiscal year; and
- The International Bar Association published a report on small value claims in ISDS in October 2022.

The VBB International Arbitration Group continues to follow all of these developments closely and we will continue to report on them, as well as on key ISDS developments in the future. We hope that our Newsletter will become a useful digest of key developments for clients and for the broader International Arbitration community.

*Nick Lawn, Global Head of International Arbitration*



## Post-Achmea ISDS developments in the EU

### ICSID tribunal declines to revisit its decision in light of the CJEU's judgment in *Komstroy*

On 1 February 2022, the tribunal in [\*Infracapital v. Kingdom of Spain\* \(ICSID Case No. ARB/16/18\)](#) dismissed Spain's request to reconsider the tribunal's jurisdiction to hear a dispute under the ECT. In its reconsideration decision, the tribunal examined and rejected Spain's intra-EU jurisdictional objection based on the judgment of the CJEU in Case C-741/19, [\*Republic of Moldova v. Komstroy LLC\* \("Komstroy"\)](#) (see our previous client alert about this case [here](#)). According to the tribunal, the Komstroy judgment was entirely irrelevant to its rulings on jurisdiction and on liability.

Read more [here](#), in our client alert of 23 February 2022.

### Stockholm SCC tribunal declines jurisdiction in ECT arbitration based on intra-EU objection

For the first time ever, on 16 June 2022, an arbitral tribunal in *Green Power Partners K/S SCE and SCE Solar Don Benito APS v The Kingdom of Spain* (SCC Arbitration V (2016/135) ("**Green Power**")) held that it had no jurisdiction to hear the claims of two Danish investors against Spain based upon the intra-EU jurisdictional objection.

Yet, whilst undoubtedly a landmark decision, the Green Power [award](#) turned upon the fact that the arbitration was an SCC arbitration (rather than an ICSID arbitration) seated within an EU Member State. The outcome of this case may well have been different if it had been brought under the ICSID Arbitration Rules.

It is therefore by no means certain that this award in itself marks a decisive turning point in the treatment of the intra-EU jurisdictional objection or that, as a result, intra-EU investment arbitration is finally dead.

Read more in our client alert of 4 July 2022 [here](#).

### Cologne court diverges from Berlin court judgment on the admissibility of intra-EU ICSID arbitration proceedings

In a judgment published in October 2022, the Higher Regional Court of Cologne (Germany) held that ICSID arbitration proceedings based on the ECT and brought by RWE, a German energy company, against an EU Member State ("**intra-EU arbitration**") are inadmissible under section 1032(2) of the German Code of Civil Procedure. The Cologne Court applied the caselaw of the Court of Justice of the European Union in Cases C-284/16 *Achmea*, C-741/19, *Komstroy* and C-109/20 *PL Holdings*, but diverged from an earlier judgment of the Berlin Court of Appeal.

Read more in our client alert of 9 November 2022 [here](#).

## ECT-related developments

### **Several EU Member States to withdraw from the Energy Charter Treaty despite progress on its modernization**

Several EU Member States – Spain, the Netherlands, France, Germany, Luxembourg and Poland – have confirmed that they intend to withdraw from the ECT despite agreement in principle between Contracting Parties on a modernised treaty having been reached in June 2022. The decisions to withdraw were based on the view that the ECT was not in line with commitments under the Paris Agreement and that the ECT hinders the fight against climate change.

It is now reported that, in addition to the EU Member States which have publicly confirmed their withdrawal, the EU itself, as well as a number of other EU Member States are also considering leaving the ECT, reportedly including Austria and Belgium.

Read more in our client alert of 25 October 2022 [here](#).

### **Modernisation of the ECT: championed by the EU, derailed by Member States**

Although the adoption of the modernised text of the ECT was scheduled for 22 November 2022, dissatisfaction among EU Member States has derailed the proposed revision of the treaty.

Not surprisingly, on 18 November 2022, the Council did not receive the required majority support for approval of the modernised text of the ECT and, as a result, at the request of the European Commission, the adoption of the amended ECT was removed from the agenda of the Energy Charter Conference, and rescheduled to April 2023. With the European Parliament now calling for a coordinated exit from the ECT by EU Member States, the future of the revised ECT looks uncertain.

Read more about these developments [here](#), in our client alert of 13 December 2022.

## Russia's invasion of Ukraine

### **The protection of business assets in Russia and Ukraine under international investment law**

Russia's military action in Ukraine together with its announcement of retaliatory measures in response to international sanctions are likely to have significant implications for foreign investors with investments in Russia and/or Ukraine. Following the critical response of the international community to Russia's invasion and the widespread imposition of sanctions, Russia drew up a list of unfriendly countries which could be targeted.

As more multinationals suspended their operations in Russia, Russia has also announced various measures intended to stem the outflow of foreign capital including the possibility that the assets of any such foreign investors seeking to exit operations in Russia could be nationalised without compensation.

Russia still remains bound by the international treaties which it has signed and ratified. Our client alert which considers the protections and remedies which might be available to foreign investors affected by Russian measures under international investment law is available [here](#).



## Upheaval in the energy and mining sectors in Mexico

### **Arbitral tribunal awards USD 6.7 million against Mexico in *PACC Offshore Services Holdings LTD v. United Mexican States***

In its [award](#) (the “**Award**”) in the case of *PACC Offshore Services Holdings LTD v. United Mexican States* (ICSID Case No. UNCT/18/5, Award of 11 January 2022), an arbitral tribunal dismissed the majority of a claimant’s claims against Mexico under the Mexico-Singapore bilateral investment treaty. The tribunal did, however, find that Mexico failed to accord fair and equitable treatment, and awarded the claimant USD 6.7 million.

Read more [here](#) in our client alert of 12 July 2022, which briefly sets out the tribunal’s findings and their relevance in the wider context of ISDS.

### **Arbitral tribunal rejects claimant’s request for an additional award in *PACC Offshore Services Holdings LTD v. United Mexican States***

In the second instalment of our discussion and analysis of the investment dispute brought by PACC Offshore Services Holdings LTD against Mexico, with our [previous client alert](#) having discussed the Award in *PACC Offshore Services Holdings LTD v. United Mexican States* (ICSID Case No. UNCT/18/5) of 11 January 2022 (the “**Award**”), we analysed a subsequent decision in the same case rendered by the Tribunal after the issue of the Award in May 2022.

In the latter decision, the tribunal rejected the claimant’s request for an additional award as to claims presented in the arbitral proceedings, but allegedly not decided by the tribunal.

Read more in our client alert of 10 November 2022 [here](#).

### **Mexico and foreign investment in the energy sector (including relevant USMCA-based consultations)**

We have previously [reported](#) on the effect of recent regulatory developments in the energy sector on foreign investments in Mexico. In November 2022, we provided an update on these developments, and addressed the most recent developments on the ongoing consultation process commenced by the US and Canada under the Dispute Settlement Chapter of the United States-Mexico-Canada Agreement and their potential impact on foreign investors.

Read more in our client alert of 8 November 2022 [here](#).

## Other ISDS developments

### Brussels Court of First Instance annuls investment arbitration award allegedly for the first time

On 18 February 2022, the French-speaking Brussels Court of First Instance handed down a [judgment](#) in which it set aside a USD 10 million UNCITRAL [award](#) that held Poland liable for denial of justice in favor of Manchester Securities Corporation. This judgment allegedly marks the first time that a Belgian court has set aside an investment arbitration award.

Read more [here](#) in our client alert of 9 March 2022.

### New ICSID Arbitration Rules

The new ICSID Regulations and Rules entered into force on 1 July 2022. These amendments included changes to the ICSID Arbitration Rules, which govern the procedure to be followed in arbitrations under the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Read more [here](#) in our client alert of 22 April 2022.

### New cooperation agreement among Benelux arbitration institutions for promotion of arbitration and ADR

On 8 September 2022, the Belgian Centre for Arbitration and Mediation ("CEPANI"), the Netherlands Arbitration Institute ("NAI"), the Dutch Arbitration Association ("DAA"), the Chamber of Commerce of the Grand Duchy of Luxembourg, and the Luxembourg Arbitration Association ("LAA") (together, the "Institutions") concluded a cooperation agreement (the "Agreement") establishing a Benelux Arbitration and ADR Group.

While the Agreement provides that the Institutions will retain their full independence and autonomy, it aims to promote and strengthen arbitration and alternative dispute resolution ("ADR") mechanisms jointly within and outside the Benelux area, as well as to boost their visibility on the international arbitration and ADR scene.

Read more in our client alert of 26 October 2022 [here](#).

### ICSID administers record number of cases in 2022 fiscal year

On 14 October 2022, the International Centre for Settlement of Investment Disputes ("ICSID") published its [annual report](#) ("Annual Report") reviewing the Centre's activities over the past fiscal year from 1 July 2021 to 30 June 2022. Although the most significant development reported in the Annual Report is undoubtedly the adoption of the amended ICSID arbitration rules (see our analysis of the amended ICSID Arbitration Rules [here](#)), the 2022 Annual Report also confirmed that ICSID arbitration is still in high demand with the Centre administering a record number of cases in the 2022 fiscal year.

Read more about the key findings of the Annual Report [here](#) in our client alert of 3 November 2022.

### IBA focuses in on small value claims in investment arbitration

According to UNCTAD, there have been at least 116 investment arbitrations where the claimant has sought compensation in excess of USD 1 billion. These are usually well-known and publicly reported cases. But not all investment arbitrations involve mega-claims, and it is reported that nearly a third of recent investment arbitrations involve claims of less than USD 50 million. It is this phenomenon of the small value investment arbitration claim that the International Bar Association ("IBA") focuses in on in its recent report.

On 25 October 2022, the IBA's Investment Arbitration Subcommittee published its report on the procedural tools available to facilitate the cost-effective resolution of small value investment claims.

Read more about this report in our client alert of 24 November [here](#).

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