THE INVESTMENT TREATY ARBITRATION REVIEW

Seventh Edition

Editor
Barton Legum

THE LAWREVIEWS

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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in the field of investment treaty arbitration.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to those developments and the context behind them.

This seventh edition represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
Honlet Legum Arbitration
Paris
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Part IV

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Chapter 21

FAIR AND EQUITABLE TREATMENT

Andre Yeap SC, Kelvin Poon, Matthew Koh, David Isidore Tan, Daniel Ho, Dennis Saw, Jodi Siah and Timothy James Chong[1]

I INTRODUCTION

The fair and equitable treatment (FET) standard remains one of the key protections on which investors rely in investment disputes. Despite the differences in the wording of the FET provisions across treaties, there appears to be a general consensus on the core content of the FET standard: (1) protection afforded to the legitimate expectations of the investor; (2) protection against arbitrary or discriminatory treatment; and (3) protection against a host state's denial of justice to the investor.

This chapter briefly reviews recent awards that have discussed and applied the FET standard, in which tribunals had to contend and discuss the concepts of legitimate expectations and denial of justice.

II RECENT CASES ON THE PRINCIPLES OF FET

i Silver Ridge Power BV v. Italian Republic

The claimant in this case[2] was a Dutch company that indirectly owned and controlled 10 Italian local development companies, which in turn owned and operated 25 photovoltaic (PV) plants. Pursuant to the European Union's Directive 2001/77/EC[3] and Directive 2009/28/EC,[4] Italy implemented legislation and regulations to encourage and incentivise the production of electricity from PV sources. In particular, Italian legislation provided that once a PV plant qualified for a given feed-in tariff (FIT), the applicable tariff was granted for

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2 *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award (26 Feb. 2021) (*Silver Ridge v. Italy*) (there is a dissent).

3 Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market.

4 Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

20 years. However, the claimant argued that the Italian government's subsequent enactment of legislation constituted violations of the FET standard under Article 10 of the Energy Charter Treaty (ECT). To elaborate:

a the *Spalma-incentivi* Decree[5] caused an immediate reduction in FIT of between 6 per cent and 8 per cent for each of the 25 PV plants, resulting in a loss of €37.5 million in future cash flows and depriving the claimant of a significant part of its projected revenues;

b the adoption of the *Romani* Decree[6] and Fourth Energy Account[7] altered the criteria by which PV plants would be eligible for FIT and negatively affected Project Vega (a PV plant at an advanced stage of development); and

c adoption of the Fifth Energy Account[8] compromised the profitability of the PV plants.

Under Article 10 of the ECT, the tribunal unanimously held that the applicable FET standard was to protect foreign investors from fundamental or radical modifications to the legal framework in which their investment was made. The respondent argued that the FET standard under the ECT should be interpreted 'in accordance with customary international law'.[9] The tribunal rejected this argument, as there is nothing in the Vienna Convention on the Law of Treaties (VCLT) that requires such an approach. Accordingly, having analysed the object and purpose of the ECT pursuant to Article 31 of the VCLT, the tribunal held that the ECT's FET standard was higher than the minimum standard of protection prescribed under customary international law.[10]

In determining whether the respondent had violated the FET standard under Article 10 of the ECT, the tribunal considered three factors: (1) reasonableness (i.e., whether the subsequent modifications were for a public policy purpose); (2) foreseeability (i.e., whether the claimant could have expected the modifications); and (3) proportionality (i.e., whether the modifications exceeded what was necessary).[11]

In relation to all claims, the tribunal held that the Italian legal framework on the incentivisation of PV energy had given rise to specific commitments of the respondent government, thus creating legitimate expectations that the respondent would keep the incentive tariff regime intact in its overall structure.[12] The claimant had further argued that it had legitimate expectations that the respondent would maintain the amount or duration of incentive payments at exactly the same level as originally laid down.[13] Notably, the claimant

5 The *Spalma-incentivi* Decree was enacted on 24 June 2014 and altered the incentive payments under the energy accounts and the feed-in tariff (FIT) regime for photovoltaic (PV) plants with a capacity above 200kW. This measure affected all 25 of the plants subject to the arbitration. See *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award (26 Feb. 2021) (*Silver Ridge v. Italy*) at [138]–[143].

6 The *Romani* Decree was enacted on 3 March 2011 and effectively implemented the Second Renewable Directive of the European Union, which imposed further conditions on the eligibility of PV plants to receive FIT. See *Silver Ridge v. Italy*, at [126]–[128].

7 The Fourth Energy Account was adopted on 5 May 2011. It applied to PV plants entering into operation between 1 June 2011 and 31 December 2016. It differentiated between 'small' and 'large' plants to determine whether a PV plant was eligible for FIT. See *Silver Ridge v. Italy*, at [129]–[132].

8 The Fifth Energy Account was adopted on 5 July 2012. It provided for two different incentive regimes based on PV plants' capacities. See *Silver Ridge v. Italy*, at [133]–[136].

9 *Silver Ridge v. Italy*, at [401].

10 id.

11 ibid., at [446].

12 ibid., at [437].

13 ibid., at [335] and [338].

relied on Article 24(2)(c) of the *Romani* Decree, which stated that the incentives should remain 'constant'. However, the tribunal rejected this argument, as there was nothing in the various pieces of legislation that gave rise to such an inference. In its reasoning, the tribunal noted that the term 'constant' did not mean 'fixed' but simply that 'the monetary value of the incentives will be stable in the sense that it is not subject to updates with inflation rates'.[14]

In relation to point (a), above, the majority held that the adoption of the *Spalma-incentivi* Decree was reasonable for two reasons. First, to strengthen the sustainability of the incentive tariff scheme for renewable energy, the respondent sought to redistribute the economic advantages and disadvantages among all actors participating in the sector, including the producers of PV energy.[15] Second, the modification to the tariff regime was in response to the economic emergency situation prevailing in Italy.[16] The majority held that it was a foreseeable modification, as a prudent investor in the highly regulated electricity market should anticipate change.[17] The majority also held that it was proportionate, as (1) the incentivisation scheme only altered the value of the incentive payments, as opposed to implementing an entirely new scheme,[18] and (2) the extent of reduction turned on the PV plants' capacity, which illustrated the host state's effort to adequately distribute the economic burden of the FIT reduction.[19]

In relation to point (b), above, the *Romani* Decree and Fourth Energy Account had led to a reduction of incentive tariff payments, restrictions for PV plants built on agricultural land and the establishment of the GSE[20] registers for which PV operators had to apply. The claimant argued that these measures marked a radical modification in approach to PV plants' eligibility to FIT, thus giving rise to a breach of the FET standard under the ECT. The majority disagreed. First, it was clear that PV operators (such as the claimant) would not obtain access to FIT before the PV plant in question was completed and connected to the grid.[21] Second, the change was also foreseeable to a prudent investor in the renewable energy market.[22] Third, the Fourth Energy Account contained an exception clause that still made access to the FIT possible, albeit only if the PV plant was connected to the grid by 29 March 2012. Project Vega would have qualified for the exception if the claimant met the deadline.[23] On the basis of this exception clause, the majority held that the measures were not disproportionate.

In relation to point (c), above, the claimant relied on the Fourth Energy Account, which offered FIT of €181 per megawatt hour produced at PV plants,[24] in deciding to invest in the Frosinone plants. However, the subsequent enactment of the Fifth Energy Account compromised the plants' profitability. Although the majority noted that the extent of reduction in FIT caused by the Fifth Energy Account was 'disturbing',[25] the majority held

14 ibid., at [433].
15 ibid., at [450].
16 ibid., at [451].
17 ibid., at [457].
18 ibid., at [461]–[462].
19 ibid., at [446].
20 Gestore dei Servizi Energetici S.p.A. (Management of Electricity Services Company).
21 *Silver Ridge v. Italy*, at [529].
22 id.
23 ibid., at [530].
24 ibid., at [537].
25 ibid., at [606].

that the change to the incentive scheme was overall not 'radical', as circumspect investors would have foreseen the change, and the structure of the Italian incentivisation regime for solar energy was maintained.[26]

In his dissenting opinion, Judge O Thomas Johnson agreed with the majority's analysis and views insofar as they pertain to the applicable FET standard and how legitimate expectations may arise from government laws and regulations,[27] and that the claimant had legitimate expectations arising from the Italian government's laws and regulations.[28] However, he departed from the majority in the application of the law to the facts. He agreed with the claimant's argument that it had a legitimate expectation that the amount and duration of the incentive payments would have remained unchanged. He opined that the majority had mistakenly applied the concept of a contractual stabilisation clause,[29] and that because there was no contractual stabilisation clause, it was therefore open to the respondent to modify the incentive regime. Furthermore, the dissenting arbitrator took issue with the majority's approach of examining the extent of the reduction to the incentive payments, and since they were within a permissible range, these reductions did not frustrate the claimant's legitimate expectations.[30] Johnson J viewed such an approach as arbitrary, and that the correct approach should have been that any reduction would constitute a breach, and 'the magnitude of the reductions goes to damages'.[31]

Despite Johnson J's disagreement with the majority's conclusions, the tribunal members were nevertheless in agreement on the jurisprudence concerning specific commitments and FET.[32]

This award clarifies that legitimate expectations can arise from government laws and regulations, if sufficiently specific regarding their content, object and purpose.[33] The law or regulation from which these expectations arise does not need to be specifically agreed between the host state and the investor.[34]

The award also clarifies that regulatory change that is reasonable, foreseeable and proportionate would not constitute a 'fundamental or radical' change. In determining the foreseeability of such a change, the tribunal also considered the volatility of the industry and conducted the inquiry from the perspective of a 'reasonable and circumspect investor'.[35]

26 ibid., at [606]–[607].

27 *Silver Ridge Power BV v. Italian Republic*, Judge O. Thomas Johnson's Dissenting Opinion, ICSID Case No. ARB/15/37 (26 Feb. 2021) (*Silver Ridge v. Italy*, Johnson J's Dissenting Opinion), [12].

28 ibid., at [8].

29 A clause by which the sovereign explicitly surrenders its sovereign authority to unilaterally modify its contracts under any circumstance in order to shield the foreign investor from political risks: ibid., at [10].

30 *Silver Ridge v. Italy*, Johnson J's Dissenting Opinion, at [11].

31 id.

32 ibid., at [12].

33 *Silver Ridge v. Italy*, Award, at [405], [407] and [408].

34 ibid., at [446].

35 ibid., at [457].

ii Eurus Energy Holdings Corporation v. Kingdom of Spain

For yet another edition of this chapter, there is a claim against Spain alleging that Spain's reform of its renewable energy sector in 2010–2014 fell short of its FET obligations under Article 10(1) of the Energy Charter Treaty (ECT).[36]

The award rendered by the majority (Judge James Crawford, presiding, and Professor Andrea Giardina) held that Spain's rolling back of its incentive regime did not breach its FET obligations under Article 10(1) of the ECT, save for certain claw-backs of subsidies paid before the adoption of the alleged wrongful measures.[37] In contrast, the dissenting arbitrator (Mr Oscar M Garibaldi) held that the measures taken by Spain to reform its renewable energy sector had breached Spain's FET obligations.[38]

Although the conflicting opinions between the majority and the dissenting arbitrator are not unusual per se, what bears mention is the differing legal approaches adopted by the two camps in relation to Spain's FET obligations in two key aspects.

First was the different approaches that the majority and the dissenting arbitrator adopted in relation to certain dicta in *Blusun SA and others v. Italian Republic*, namely that:

> *In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime.*[39]

The majority considered that the *Blusun* dicta was of particular relevance as it involved similar disputes over subsidies and, noting that both the claimant and Spain had endorsed the dicta as a test, similarly adopted and applied the *Blusun* test in its analysis.[40] The majority thus went on to use the *Blusun* considerations set out in the extract above as a framework to analyse the alleged breach of the FET standard in Article 10(1) of the ECT by Spain.[41]

In contrast, the dissenting arbitrator criticised the majority's adoption and application of the *Blusun* test for two reasons: (1) that there is no legal or theoretical justification for applying the *Blusun* test in place of an FET standard set out in Article 10(1) of the ECT, especially without any attempt to show why the *Blusun* test (and its sub-rules, concepts and criteria) are connected to the FET standard; and (2) that the *Blusun* test did not help to define

36 Other similar cases have included, for example, *The PV Investors v. The Kingdom of Spain*, Final Award, PCA Case No. 2012-14 (28 Feb. 2020) (which was covered in last year's edition of this chapter).

37 See *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4 (*Eurus Energy v. Spain*), Decision on Jurisdiction and Liability (17 Mar. 2021), at [390].

38 *Eurus Energy v. Spain*, Partial Dissent (17 Mar. 2021) at [114]–[115].

39 *Blusun SA and others v. Italian Republic*, ICSID Case No. ARB/14/3, Award (27 Dec. 2016) at [319(5)].

40 See *Eurus Energy v. Spain*, Decision on Jurisdiction and Liability, at [315]–[318].

41 See ibid., at [319], considering whether: (1) any specific commitments were made (holding: no); (2) absent any specific commitments, the claimant had a legitimate expectation that subsidies would not be reduced during the lifetime of the project (holding: the claimant had legitimate expectations that subsidies would continue in some substantial form, but not the specific subsidies regime created by Royal Decree 661/2007); (3) the subsidies were lawfully granted (holding: yes); (4) the measures in question were disproportionate (holding: no, save for certain claw-backs of subsidies paid before the adoption of the alleged wrongful measures); and (5) there was due regard to the reasonable reliance interest of the claimant (holding: yes, save for the subsidy claw-back).

the FET standard as its concepts (e.g., 'necessary to modify' and 'due regard') were imprecise and ambiguous.[42] In its place, the dissenting arbitrator sought to interpret the FET standard in Article 10(1) of the ECT pursuant to the 'primary rule of interpretation of the VCLT', namely that it 'must be interpreted in good faith in accordance with the ordinary meaning of the terms used in their context and in the light of the object and purpose of the ECT'.[43]

The second aspect was in the approach to the relevant time for determining an investor's legitimate expectations for the purpose of an alleged breach of the FET standard.

The majority considered that 'as a matter of general principle, a legitimate expectation is a form of reliance interest which must relate to facts or circumstances in existence at the time the investment is made'.[44] As such, for those of the claimant's investments made prior to the incentives introduced by Royal Decree (RD) 661/2007,[45] the claimant could not argue that its legitimate expectations took into account the RD 661/2007 regime, notwithstanding that the claimant may have continued to maintain the investment following RD 661/2007.[46]

Disagreeing with this, the dissenting arbitrator considered that 'it is unrealistic and artificial to limit consideration of the investor's objectively reasonable expectations to those held at the beginning of the process, based on a legal framework that may have long been repealed by the time the questioned measures were imposed'.[47] As such, the dissenting arbitrator instead favoured a view that considered the changing circumstances and the investor's conduct in response to that (e.g., acquiescing to the new regime, contesting it or selling the investment) and 'if the investor decided to keep the investment and to acquiesce in the new regime, it is unrealistic to ignore the expectations created by the new regime and unreasonable to insist that the sole expectations that count are those generated by the previous, no longer applicable regime'.[48]

The foregoing illustrates the very different legal approaches that arbitrators (even those on the same tribunal) can take towards the interpretation and application of the same FET standard in a treaty.

iii Zhongshan Fucheng Industrial Investment Co Ltd v. Federal Republic of Nigeria

The dispute was in respect of the claimant's rights in the Ogun Guangdong Free Trade Zone (the Zone), a substantial area of land in Ogun State in Nigeria.[49] The claimant contended that Ogun State and the Nigerian police had taken a series of measures to evict its personnel from the Zone, allegedly by threatening and mistreating them. According to the claimant, this constituted, inter alia, a breach of the FET standard under Article 3(1) of the China–Nigeria BIT.

Nigeria raised several preliminary objections. Nigeria first argued that the claimant had no valid claim against Nigeria, as none of the actions was carried out by the federal state. The tribunal held that all acts of Ogun State were attributable to Nigeria under customary

42 See *Eurus Energy v. Spain*, Partial Dissent, at [28]–[32].

43 See ibid., at [33].

44 See *Eurus Energy v. Spain*, Decision on Jurisdiction and Liability, at [324]–[325].

45 Royal Decree 661/2007, of 25 May, which regulates the activity of electricity production under the special regime.

46 See *Eurus Energy v. Spain*, Decision on Jurisdiction and Liability, at [324].

47 See *Eurus Energy v. Spain*, Partial Dissent, at [81].

48 See ibid., at [85].

49 *Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria*, Final Award (26 Mar. 2021) (*Zhongshan Fucheng v. Nigeria*).

international law, as it qualified as a 'state organ' under Article 4 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts.[50] The tribunal further observed that it would render investment treaties almost meaningless if they did not apply to actions of local, as opposed to national, government.[51]

Nigeria also contended that the claimant had failed to observe the BIT's pre-arbitration requirements of a six-month cooling-off period and negotiation requirement. The tribunal did not have to decide on this issue, as Nigeria's contention was not made out on the facts. The claimant had sent a notice of dispute 11 months before commencing the proceedings, and no response was received from Nigeria. In these circumstances, the tribunal thought 'it would be contrary to justice if Nigeria could rely on its own failure to take up the invitation to negotiate in order to say that Zhongshan had failed to allow for a sufficient negotiating period'.[52] That said, the tribunal expressed doubt as to whether such a failure to observe the pre-arbitration requirements could result in a lack of jurisdiction.[53]

Another objection Nigeria raised was that Article 9(3) of the BIT precluded the claimant from bringing the arbitration proceedings, given that the claimant's subsidiary, Zhongfu International Investment Co, Ltd (Zhongfu), had opted for court proceedings. The tribunal therefore had to decide on the effect of such a fork-in-the-road clause. Despite the substantial number of decisions on such clauses, the tribunal thought it sufficient to simply refer to *Khan v. Mongolia*,[54] in which the tribunal preferred the 'triple identity test' over the 'fundamental basis test'.[55] The tribunal agreed with this approach and found that Nigeria's contention should be rejected: first, neither of the parties was party to the court proceedings;[56] second, the claims in the court proceedings were based on alleged breaches of Nigerian domestic public law and a joint venture agreement, whereas the claimant's case was squarely based on the BIT;[57] and finally, the relief sought in the court proceedings was declaratory and injunctive relief, whereas the claimant sought compensation. Accordingly, the tribunal found it inappropriate for Nigeria to invoke the court proceedings to justify reliance on Article 9(3).[58]

On the merits, and in particular the claim on breach of FET, the tribunal considered that Ogun State's actions were plainly designed to deprive, and indeed succeeded in depriving, Zhongfu of its rights in circumstances where there were no grounds in domestic law for doing so, and in a way that involved a combination of actual and threatened illegitimate use of the state's power to achieve that end.[59] The conduct of Ogun State and the police displayed a 'wholesale "lack of due process leading to an outcome which offends judicial propriety"'.[60] It

50 ibid., at [72].
51 ibid., at [73].
52 ibid., at [81].
53 ibid., at [80].
54 *Khan Resources Inc, Khan Resources BV and CAUC Holdings Company Ltd v. The Government of Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction (25 Jul. 2012) at [406].
55 *Zhongshan Fucheng v. Nigeria*, at [83].
56 ibid., at [85].
57 ibid., at [86].
58 ibid., at [87].
59 ibid., at [126].
60 ibid., at [130].

found that the threats to the individuals, the peremptory requirements to vacate and the use of police force amounted to 'forms of coercion that may be considered inconsistent with the fair and equitable treatment to be given to international investment'.[61]

Ultimately, the tribunal awarded the claimant US$55 million (plus interest) and US$75,000 in moral damages.

iv Infinito Gold Ltd v. Republic of Costa Rica

In this case,[62] the claimant invested in a gold mining project (Crucitas Project). The claimant argued, in relation to two mining concessions granted in 2002 and 2008, that the respondent state had breached the FET standard by not honouring legitimate expectations, treating it arbitrarily and inconsistently, and also denying it justice. The respondent argued, however, that there was no breach of legitimate expectations as the claimant's expectations were neither legitimate nor reasonable and, in any event, the respondent did not breach any legitimate expectation.

The tribunal first analysed the issue of denial of justice, finding that a denial of justice may be procedural or substantive and occurs when there is a fundamental failure in a state's administration of justice, which is a product of a systemic failure of the state's judiciary taken as a whole.[63] Alternatively, depriving an investor the fair opportunity to plead its case, or access to justice being completely absent, might amount to denial of justice.[64]

The tribunal held that there was no procedural denial of justice on the basis that a 2011 decision of the Administrative Chamber of Costa Rica's courts was inconsistent with previous decisions of the Constitutional Chamber. The tribunal held that these decisions were not in fact inconsistent and, analysing the procedural conduct and reasoning in these decisions, found that they were based on Costa Rican law and not objectionable.[65] The tribunal found that decisions of the Contentious Administrative Tribunal (TCA) and Administrative Chamber could not be said to be a denial of justice, holding that their conduct could not be faulted or found to be unreasonable as they had properly analysed the applicable standards based on prior decisions of the Constitutional Chamber.[66] The tribunal disagreed with the claimant's interpretation of the Constitutional Chamber's decisions, which did not determine that a certain 2002 moratorium did not apply to the Crucitas Project, nor that the claimant's 2002 concession would be reinstated if it passed an environmental impact assessment (EIA) process.[67] The Constitutional Chamber also declined to rule on whether the 2002 concession could be cured if it passed the EIA process since this was something within the jurisdiction of only the administrative courts. As for a 2008 concession, the Constitutional Chamber stated that it was confined to assessing whether government agencies assessed the project in accordance with relevant procedures,[68] and it declined to decide whether the technical requirements of an EIA were actually fulfilled.[69]

61 id.
62 *Infinito Gold Ltd. v. Republic of Costa Rica*, ICISD Case No. ARB/14/5, Award (3 Jun. 2021).
63 ibid., at [445].
64 ibid., at [483].
65 ibid., at [451].
66 ibid., at [457].
67 ibid., at [461] and [462].
68 ibid., at [464].
69 ibid., at [466].

The tribunal dismissed the claimant's argument that the lack of a mechanism in the Costa Rican legal system for resolving alleged inconsistencies between the 2011 Administrative Chamber Decision and the Constitutional Chamber's prior decisions did not amount to denial of justice. The tribunal had already found that these decisions were not inconsistent,[70] and jurisdictional conflicts were unlikely to arise since the Constitutional Chamber has no jurisdiction over the legality of administrative acts.[71] The Costa Rican judicial system contained means for resolving a rare jurisdictional conflict,[72] and the lack of a specific body for resolving conflicts of jurisdiction did not in itself constitute denial of justice.[73]

The tribunal also held that the TCA or Administrative Tribunal did not breach any rule of due process, since the claimant could not prove that the TCA departed from Costa Rican procedural law, or that the claimant was not given the opportunity to be heard.[74]

There was also no substantive denial of justice because the Constitutional Chamber did not definitively decide on the applicability of the 2002 moratorium to the Crucitas Project,[75] and it could not be said that either the TCA or Administrative Chamber applied the law incorrectly.[76] The tribunal also assessed and rejected the claimant's *res judicata* objection as the Constitutional Chamber had expressly stated that the administrative courts were competent to resolve matters of the application of the 2002 moratorium and the conversion of the concession,[77] and therefore the Administrative Chamber did not violate *res judicata* by deciding on them.[78]

As for an argument that the respondent had breached the claimant's legitimate expectations, the tribunal held the Administrative Chamber's decision to annul the 2008 concession was not a breach of obligations to accord FET to the claimant's investments.[79] The claimant could not be said to have legitimate expectations, because there was no specific assurance, commitment or representation that was relied on to make the investment, nor did the government's conduct guarantee that the 2002 moratorium would not apply.[80] The tribunal held that no legitimate expectations of legal stability had been breached.[81]

The tribunal accepted that the claimant may not have known that the 2002 moratorium applied to it.[82] However, the Costa Rican courts did not treat the claimant unfairly. The Administrative Chamber's decisions were premised on local law and reasoned, were not arbitrary or capricious,[83] and were not inconsistent with government conduct, having applied substantive legal criteria from a pre-existing legal framework.[84]

70 ibid., at [471].
71 ibid., at [472].
72 ibid., at [474]–[479].
73 ibid., at [480].
74 ibid., at [487].
75 ibid., at [495].
76 ibid., at [496]–[499].
77 ibid., at [500].
78 ibid., at [502].
79 ibid., at [552].
80 ibid., at [516] and [517].
81 ibid., at [521].
82 ibid., at [541].
83 ibid., at [549].
84 ibid., at [551].

The tribunal found that a certain 2011 legislative mining ban was not unfair and inequitable. However, the tribunal accepted that the application of that ban to the claimant was unfair and inequitable, as it was disproportionate to the public policy pursued.[85] The ban prohibited open-pit mining for an indefinite period, and thus deprived the claimant of an opportunity to reinitiate the Crucitas Project, since after the 2011 Administrative Chamber decision annulled the concession, the claimant was unable to request a new mining concession.[86] The tribunal held that the right of an exploration permit holder to apply for an exploitation concession must survive annulment of that concession when the concession holder acts in good faith, and the claimant ought to have been able to submit a new concession application.[87]

The tribunal also declared that the respondent's reinitiation of certain legal proceedings against the claimant did not breach the FET standard. As the respondent was arguing that it might have to pay damages, the claim was premature as the proceedings were not yet complete.[88]

Although the tribunal found that there was a breach of the FET standard through application of the 2011 mining ban, it found that there was no basis in the record for quantifying the damage caused by this breach.[89] Damages would have followed from the loss of opportunity to reapply for a mining concession, but there was no indication as to when the claimant would otherwise have been able to submit a reapplication.

v Lion Mexico Consolidated LP v. United Mexican States

The decision in this case represents an unprecedented positive finding by a North American Free Trade Agreement (NAFTA)[90] tribunal on a claim of denial of justice.[91]

The claimant had granted three loans totalling US$32.8 million to finance the development of certain luxury properties in the Mexican states of Jalisco and Nayarit, secured by three mortgages.[92] After attempting to foreclose a mortgage to recover the unpaid loans, it discovered that all the mortgages had been cancelled in proceedings commenced by the debtors before the Ninth Commercial Court of the State of Jalisco (Cancellation Proceedings). The judgment rendered in the Cancellation Proceedings was based on a settlement agreement that had been forged (Cancellation Judgment) and was part of a complex judicial fraud scheme by the debtors to avoid the imminent foreclosure of the mortgages.[93] The claimant tried for close to three years to reverse the cancellation of the mortgages before the Mexican courts but met with no success and eventually commenced investment arbitration proceedings against Mexico.[94]

Although the words 'denial of justice' do not appear in NAFTA, the tribunal noted that case law and doctrine support the conclusion that denial of justice is an aspect of the FET

85 ibid., at [556] and [574].
86 ibid., at [565].
87 ibid., at [571] and [573].
88 ibid., at [579]–[580].
89 ibid., at [585].
90 North American Free Trade Agreement, 31 ILM 390 (1992).
91 *Lion Mexico Consolidated LP v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (*Lion v. Mexico*) (20 Sep. 2021).
92 ibid., at [62]–[85].
93 ibid., at [93]–[137].
94 ibid., at [178]–[179].

standard.[95] In this connection, the tribunal engaged in a comprehensive discussion on the content of the concept of denial of justice in relation to the FET standard applicable under Article 1105 of NAFTA, and the threshold for a finding of breach.

One of the issues the tribunal addressed was the dichotomy between substantive and procedural denial of justice. The tribunal concluded that the notion of 'substantive denial of justice' is inapplicable as this would require a tribunal to impermissibly delve into the merits of the decision-making process under national law.[96] Thus, the issue was whether there had been gross procedural breaches. In this regard, the tribunal noted that procedural denial of justice can be classified into three subtypes: the right to access justice; the right to be heard and to present one's case; and the right to obtain a decision without undue delay.[97]

As to the threshold, the FET standard espoused under Article 1105 of NAFTA has been interpreted by the NAFTA Free Trade Commission[98] to not require treatment in addition to or beyond that required by the customary international law minimum standard of treatment of aliens.[99] In this regard, the tribunal followed the standard adopted in *Mondev*[100] (i.e., a high threshold requiring egregious administration of justice that offends a sense of judicial propriety). In its view, denial of justice involves an objective test; it is not necessary that the tribunal find that the state had been engaging in wilful or intentional illicit conduct: 'denial of justice requires a finding of an improper and egregious procedural conduct by the local courts (whether intentional or not), which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety'.[101] The tribunal concluded that the claimant was denied procedural justice in the three following respects.

Denial of access to justice

The claimant was not afforded the opportunity to defend itself in the Cancellation Proceedings as it was not properly served with the relevant process.[102] The judge in the Ninth Commercial Court case had also failed to examine *ex officio* and exhaustibly, whether the service was properly performed, before declaring the claimant to be in default (*en rebeldia*).[103] The omission by the judge was 'especially shocking' because the Cancellation Proceedings was not a minor case, and affected well-known and highly valuable pieces of real estate that could result in the cancellation of multimillion-dollar mortgages.[104] With a minimum of diligence, the judge could have realised that the claimant was a foreign company that needed

95 ibid., at [205].

96 ibid., at [217].

97 ibid., at [220].

98 See Interpretation Note of 31 July 2001, available at http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp (last accessed 29 Apr. 2022).

99 *Lion v. Mexico* , at [205].

100 *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002).

101 *Lion v. Mexico*, at [299].

102 ibid., at [372].

103 ibid. at [412]–[413].

104 ibid., at [414].

to be served internationally.[105] Although not notifying the claimant by itself does not amount to a denial of justice, the Mexican state court did not correct the situation despite numerous requests by the claimant.[106]

Denial of the right to appeal

Once the Cancellation Judgment was rendered, the debtors approached the Ninth Commercial Court (the same court that rendered the Cancellation Judgment) to give *res judicata* effect to the judgment. As a result, the claimant was barred from lodging an appeal.[107] The tribunal held that the closing of an avenue of appeal that was otherwise provided by law, and the state court's failure to follow the procedure in the Commercial Code of Mexico when it granted *res judicata* effect to the Cancellation Judgment, constituted a denial of justice.[108]

Denial of the right to present evidence

The claimant was denied the right to allege and prove forgery of the forged settlement agreement.[109] The Mexican courts had four opportunities to address the question of the forgery of the settlement agreement but failed to do so for reasons that were unclear, contradictory within the same process, or purely formalistic.[110]

The respondent's defence was that in order for the claimant to bring a claim for denial of justice, it needs to first exhaust local remedies. The tribunal accepted the exception that an aggrieved claimant is only required to pursue remedies that are reasonably available and can be expected to be effective. In the circumstances, the claimant was not barred by the requirement to exhaust local remedies.[111]

vi Pawlowski AG and Projekt Sever SRO v. Czech Republic

The two claimants were related entities. Projekt Sever had purchased real estate in Prague for the development of a residential housing project.[112] The land purchased subsequently reverted to its original zoning use as agricultural, forest and recreational land, which prevented the claimants from developing the land for the housing project.[113] The claimants claimed that the Czech Republic had breached its FET obligation under Article 4(2) of the 1991 Czech Republic–Switzerland BIT by adopting unreasonable and discriminatory measures that provided less favourable treatment to the claimants' investments, and by violating the claimants' legitimate expectations.[114] The tribunal granted a declaration that the Czech Republic had violated the FET standard by impairing the claimants' investments through unreasonable measures, but dismissed the argument that the claimants' legitimate expectations were violated.

105 ibid., at [415].
106 ibid., at [373].
107 ibid., at [423].
108 ibid., at [447]–[448].
109 ibid., at [449].
110 ibid., at [508].
111 ibid., at [579].
112 *Pawlowski AG and Projekt Sever S.R.O. v Czech Republic*, Award, ICSID Case No. ARB/17/11 (1 Nov. 2021) at [234].
113 ibid., at [152].
114 ibid., at [285].

The claimants argued that a public official's attempts to extort unjustified payments from the claimants amounted to a violation of the FET standard.[115] The tribunal accepted this. It reasoned that the requests for payments had no support in Czech law and considered that it was not fair that investors should be put in a position where they are requested by a public authority to make payments to secure the progress of their projects, unless the invitations were made within an established and transparent legal and administrative framework.[116] In contrast, the decisions of various public bodies in approving the zoning change did not violate the FET standard, as they were undertaken within the proper legal and administrative framework.[117]

The claimants argued that legitimate expectations could arise from both explicit and implicit representations, irrespective of whether the state actually intended to create reasonable expectations.[118] The tribunal considered that a state can create legitimate expectations regarding a foreign investor in two different contexts: first, the state may make specific representations, assurances or commitments directly to the investor or a narrow class of investors (direct legitimate expectations); and second, an investor may make an investment in reasonable reliance on the stability of a regulatory framework, so that in certain circumstances a reform of the framework may breach the investor's regulatory legitimate expectations.[119] The tribunal determined that direct legitimate expectations – which the claimants in this case relied on – can only result in breach of the FET standard if (1) the state had made specific and unambiguous representations, (2) these representations were made to the investor prior to or at the time of the investment and (3) the expectations created must be reasonable and legitimate in the circumstances.[120] On the facts, however, the tribunal found that neither the Czech Republic nor any of its territorial divisions made any specific and unambiguous representations, assurances or promises to the claimants that the zoning plan change would be authorised or that the development of the project would be successful.[121]

Hence, the tribunal ultimately dismissed the claimants' claim for compensation, owing to a lack of substantiation and the absence of causation.[122]

115 ibid., at [315].
116 ibid., at [372].
117 ibid., at [390].
118 ibid., at [555]–[556].
119 ibid., at [613].
120 ibid. at [627].
121 ibid., at [628].
122 ibid., at [741].

Appendix 1

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