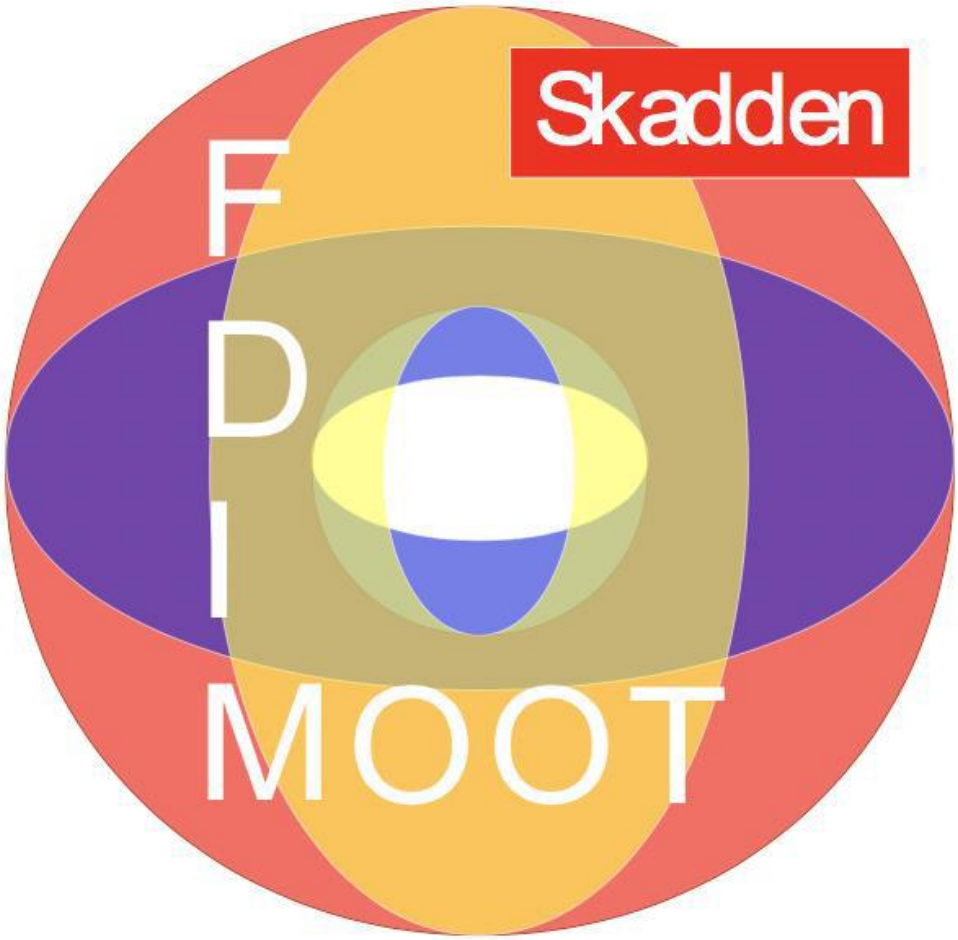
FOREIGN DIRECT INVESTMENT MOOT 2020



PRELIMINARY BENCH MEMORANDUM

– ANALYSIS OF THE PROBLEM FOR THE USE OF ARBITRATORS ONLY –

The 2020 Case and this Preliminary Bench Memorandum were elaborated by the Case Committee consisting of Nikita Kondrashov, Dimitriy Mednikov, Lucas de Medeiros Diniz, and Tim Rauschning under the supervision of the FDI Moot's Review and Advisory Boards.

(This Preliminary Bench Memorandum is a collaborative work product, prepared by the Members of the Case Committee in their personal capacity. The views expressed herein therefore do not necessarily reflect those of individual Members of the Case Committee, their respective law firms or clients.)

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I. INTRODUCTION

1 The purpose of this Bench Memorandum is to provide arbitrators of the 2020 FDI Moot with an outline of the potential arguments that could be raised by the participants in the written memorials and during the oral hearings. To that effect, in this Bench Memorandum you will find a short explanation and the main authorities for the relevant legal issues.

2 This Bench Memorandum is only intended as an aid for arbitrators. Please note that the Bench Memorandum does not offer an exhaustive list of relevant cases and scholarly writings and is not a comprehensive treatise on the legal issues raised in the 2020 FDI Moot Case ("**Case**"). Likewise, given the page and time limitations imposed during the written and oral phase of the competition, teams will have to be selective in the arguments they present.

3 Also, the arbitrators are strongly encouraged to keep in mind that the key purpose of arbitrators is to evaluate the quality of each argument and assess the advocates' knowledge of the Case and the relevant law, as well as the participants' advocacy skills. Thus, arbitrators' personal evaluation of the merits of the Case or the views of the authors of the Bench Memorandum expressed herein should not be confused with the independent assessment of each argument which should be the determining factor in assessment of the teams' performance.

4 Please also note that this Bench Memorial does not provide guidance of the FDI Moot Rules and the criteria typically used for the evaluation of teams, which may be found in separate materials that will be provided by, or may be requested from, the organisers or found on the official FDI Moot website at http://fdimoot.org.

5 The present version is a preliminary Bench Memorandum which is subject to further revision.

II. OVERVIEW OF THE CASE

A. DRAMATIS PERSONAE

6 **CLAIMANT:** Goliath National Bank JSC ("**GNB**" or "**Claimant**"), a joint-stock company incorporated under the laws of the Republic of Mercuria which have been assigned with, throughout the Assignment Agreement, all rights under the Financing Agreement regarding Ticadia-1 LLC, including claims against Mountaintop as well as the rights to claim compensation from Laoc under the ASNEC Energy Investment Treaty ("**ASNEC Energy Investment Treaty**").

7 **RESPONDENT:** The Republic of Laoc ("**Laoc**" or "**Respondent**") is a small-developed state with a large coastal area and many rivers, reaching from the coastal part of the country into virtually all of its inland territories. Laoc is a parliamentary republic, whose government is elected by the Parliament, which in turn, is established via direct elections.

B. EXECUTIVE SUMMARY OF THE CASE

(1) Background

8 Over the last two decades, the economy of Laoc has been steadily growing. Although it is now predominantly based around industrial and agricultural sectors, the mining industry has always played a significant role in the economy of Laoc. Several large deposits of precious and semi-precious metals, as well as smaller deposits of various base metals, have been found on its territory.

9 Because of extensive coal deposits, the coal-mining industry and coal-fired energy generation sectors have always played a considerable role in the economy of Laoc. In fact, many Laocans are employed by businesses directly and indirectly related to the mining of coal and its subsequent use for power generation.

10 Domestic electricity production in Laoc is dominated by coal-fired power plants, which are supplied by locally extracted coal from the more inland lying areas. Many of the Laocan coal-fired power plants were constructed at the end of the 1980s and are nearing the end of their life cycles. Foreign investors own some of Laocan coal-fired power plants.

11 Although there were some voices in Laoc saying that it should switch to cleaner energy sources the Laocan government never gave much attention to such views and kept stimulating coal-fired power generation. In particular, Laoc expected further growth of its domestic economy and, to remain independent from electricity imports and support its local coal industry, it was primarily interested in receiving investments in new coal-fired power plants. Thus, contrary to its neighbouring states, wherein renewable energy sources gradually emerged, Laoc remained exclusively grounded in its traditionally coal-oriented electricity generation sector.

12 Laoc is a member of a regional economic integration organisation called the Association of Sovereign Nations for Economic Cooperation ("**ASNEC**"), created on 3 February 2012. Individual decisions in ASNEC are taken by a majority vote of the ASNEC Council, whose members are appointed by the ASNEC Member States.

13 Like most of the ASNEC Member States, Laoc is a party to numerous bilateral and multilateral investment treaties and, in particular, the ASNEC Energy Investment Treaty, which was

ratified by the Republic of Laoc on 21 June 2012. The ASNEC Energy Investment Treaty contains, inter alia, several investment protection provisions. It also provides for an investor-state dispute settlement mechanism.

(2) The original investor and related entities — Mountaintop Investments LLC and Mercurian First National Bank JSC

14 Mountaintop Investments LLC ("**Mountaintop**") is a company incorporated in the Republic of Mercuria, a country neighbouring Laoc. Like Laoc, Mercuria is a member of ASNEC and has ratified the ASNEC Energy Investment Treaty 28 June 2012.

15 Mountaintop is a sophisticated investor that specialises in long-term investments into conventional power generation installations, such as nuclear, gas and coal-fired power plants. Over the past 15 years, Mountaintop invested in the construction of ten power plants around the globe, six of which are high-efficiency coal-fired power plants. Mountaintop has a good reputation in its sector and uses both its own financial resources and external financing for its projects.

16 In August 2009, Mountaintop engaged in protracted negotiations with several local authorities of Laoc and got an approval for the construction of a high-efficiency 850 MW coal-fired power plant from one of them. As the plant was to be built in the municipality of Ticadia, which had long been relying on the electricity produced by power plants in the neighbouring municipalities, it received the name "Ticadia-1" as the first power plant construed in this municipality. No environmental concerns were raised or discussed at this stage.

17 The projected lifetime of Ticadia-1 is 40 years. The investment into the construction of the power plant is expected to break even after circa 20 years of successful operation, depending on coal prices and operational expenses. Ticadia-1 LLC is expected to pay off the entire amount of funds loaned for the construction by the time the investment breaks even.

18 In late 2010, Mercurian First National Bank JSC ("**MFNB**"), a joint-stock company with a generally high-quality business loans, which had a long-standing relationship with Mountaintop, agreed on providing a significant share of funds — USD 600 million (around 60% of the total cost of construction of Ticadia-1) for the construction of Ticadia-1. The Ticadia-1 loan amounted to 10% of the MFNB debt portfolio. Most major shareholders of MFNB are large institutional investors from Europe and the United States. Given the substantial amount of financing, representatives of MFNB were present at all relevant meetings with the Laocan government.

19 On 1 December 2010, Financing Agreement N° 0940394 ("**Financing Agreement**") was concluded between the subsidiary of Mountaintop — Ticadia-1 LLC — and MFNB itself. The Financing Agreement is secured by a pledge of the shares in Ticadia-1 LLC as well as a pledge of the future power plant building and related assets (e.g., the land, permits, revenue streams, etc.). The Financing Agreement also provides that Mountaintop shall act as its guarantor.

20 On 15 December 2010, Ticadia-1 LLC bought a plot of land, obtained a construction permit, and began building the power plant. To secure the fuel for the plant, Ticadia-1 LLC entered into a long-term agreement with a local coal mining company.

21 Ticadia-1 was commissioned and became fully operational on 25 September 2014.

(3) The decision of ASNEC to phase out all coal-fired power plants and its implementation by Laoc

22 Historically, many natural disasters, such as floods, occurred in most of the ASNEC Member States. However, between 2000 and 2015, the number of floods in the ASNEC countries and their magnitude was unusually high, with the ASNEC countries experiencing in total 14 major floods, 6 of which occurred in Laoc. Over these 15 years, those floods led to the death of 85 thousand people, destroyed more than 50,000 houses in various regions of Laoc and caused significant damage to the local infrastructure.

23 Against that background, the influence of environmental, political movements has been steadily growing in the ASNEC Member States, including Laoc, and pro-environment political parties won a considerable number of elections in virtually all of the ASNEC Member States. Laoc, however, was a notable exception as most of its Parliament delegates came from the Laocan Workers Movement ("**LWM**"), a centrist party, which traditionally advocates for the interests of major industrial businesses, including the coal industry. The LWM held the parliamentary majority in Laoc between 2000 and 2014.

24 By 2015, however, the Laocan Environmental Union ("**LEU**") became the most supported environmental political party in Laoc. In 2015 Laocan elections, environmental parties received 30% of the seats in the Laocan Parliament for the first time in Laocan history. The LEU, together with other parliamentary minorities sharing its environmental agenda, was able to form an environmentalist coalition, which has since then held a majority in the Laocan Parliament. Although it still held at that time around 40% of seats in the Laocan Parliament, for the first time, LWM lost its majority in 15 years.

25 In December 2015, Laoc — against the background of growing internal pressure and under the impression of natural catastrophes occurring in Laoc and surrounding countries — gave in to the pressure from other Member States of ASNEC and signed, together with other Member States and ASNEC itself, the Seoul Agreement on Climate Change ("**Seoul Agreement**"). The Seoul Agreement was ratified by Laoc on 11 January 2016.

26 Moved by this treaty, on 17 February 2016, after a short deliberation, the ASNEC Council adopted, by majority, Directive 2016/87 on the renewable sources of energy ("**Coal Directive**"). Under the Coal Directive, all coal-fired power plants in the ASNEC Member States shall be phased out by 31 December 2028, i.e. in the following 12 years. The Laocan delegate in the ASNEC Council voted against the adoption of the Coal Directive but was outvoted.

27 Although the Coal Directive regulates the phase-out in detail and provides explicitly in Article 7(3) that the ASNEC Member States shall pay no compensation to owners and/or operators of the coal-fired power plants subject to phase-out, it, nevertheless, leaves the Member States of ASNEC with discretion to introduce support schemes to provide incentives for the integration of electricity from renewable sources in the electricity market. According to the law of ASNEC, the Coal Directive is binding upon any of its members States, including Laoc, which would have no other option but to implement it.

28 After some parliamentary debates and despite a wave of country-wide protests from workers in the coal industry and LWM members, on 6 July 2016, the Laocan Parliament implements the Coal Directive by enacting Law 66/2016 "on the Phase-out of Coal Energy on the Territory of the Republic of Laoc" ("**Law 66/2016**") prohibiting coal-fired power plants by 31 December 2028. Laoc decided to set the maximum possible (i.e., 12 years) deadline for phase-out.

(4) Adoption of the Law 72/2016 "On Energy Transition"

29 After the introduction of the Coal Directive, Laoc finds itself in a difficult situation as its domestic electricity generation is dominated by coal-fired power plants. Following the adoption of

Law 66/2016, LEU also finds itself in a difficult position as many of its voters actually think that fast phase-out will hurt Laocan economy and may even result in an electricity shortage. Against that background, LEU devises the so-called "Energy Transition Plan", which envisages massive investments into renewables sector from the Laocan budget. Using its parliamentary majority, on 5 December 2016, LEU adopts Law 72/2016 "on Energy Transition" ("**Law 72/2016**").

30 Law 72/2016 establishes a feed-in tariff scheme designed to bolster private investments into the renewables sector. It also envisages the creation of Laocan Renewables Company ("**LRC**"). In light of the concerns for possible energy shortage, LRC is tasked with headlining the development of the Laocan renewables sector and building a number of large-scale renewable facilities in all regions of Laoc. LRC is to be owned and funded entirely by Laoc. It is to be privatised by 31 December 2028.

31 Law 72/2016 also offers the investors that would be affected by the coal phase-out but decide to invest further into the renewable energy sector an option of entering into a 20-year energy supply contract at prices substantially above market value.

32 MFNB's initial reaction, its dispute with Mountaintop and the subsequent assignment of claims to GNB

33 Following the enactment of the Coal Directive, the market value of the assets that were pledged to MFNB as security under the Financing Agreement dropped significantly. Under the Financing Agreement, this allowed MFNB to seek additional securities (or, in the event they are not provided, repayment of the loan) from Ticadia-1 LLC and Mountaintop. Ticadia-1 LLC, however, did not have sufficient funds and Mountaintop argued that its guarantee obligations did not extend to situations such as an utterly unforeseen change of legislation by Laoc.

34 Despite lengthy negotiations, the parties were unable to reach a compromise. On 6 May 2017, MFNB took Mountaintop to ICC arbitration seeking to enforce the guarantee under the Financing Agreement but MFNB lost this arbitration in 2018.

35 In parallel to these events, in January 2017, unable to enforce Mountaintop's guarantee in a timely fashion, MFNB found itself in a difficult situation caused by the lack of liquidity. It started planning to file an investment arbitration against Laoc under the ASNEC Energy Investment Treaty. However, to avoid insolvency, MFNB decided to sell a part of its credit portfolio to other banks located in the same jurisdiction.

36 Thus, on 1 July 2017, MFNB and Goliath National Bank JSC ("**GNB**") concluded an Assignment Agreement according to which the rights under the Financing Agreement with Ticadia-1 LLC, all claims against Mountaintop as well as the rights to claim compensation from Laoc under the ASNEC Energy Investment Treaty were assigned to GNB in exchange for USD 150,000,000 (i.e. 25% of the original amount of the loan given by MFNB to Ticadia-1 LLC). Much like MFNB, GNB is a joint-stock company. All significant shareholders of GNB are large institutional investors from Europe and the United States. The payment was entirely made at the same time as the assignment. The assignment was made at arm's length and was consistent with the local market practices. Roughly one year later, GNB notified its claims to Laoc and commenced the present arbitral proceeding under the ASNEC Energy Investment Treaty against the Republic of Laoc.

(5) GNB initiates an arbitration against Laoc, Laoc launches a challenge against Claimant's arbitrator

37 Apart from stepping into MFNB's shoes in the ICC arbitration against Mountaintop, on 31 January 2019, GNB sent its Notice of Arbitration to the Republic of Laoc appointing Mr Perry Mason as its arbitrator. The arbitration was registered as KCAB International n° 15503/IS.

38 Due to the fact that some of the ASNEC Member States also relied on coal-powered plants for their energy needs, there is a growing number of investment arbitrations against ASNEC and its Member States. Several months before the hearing and shortly before parties' memorials are due, an award Hewer Plants JSC v. Wellfalcon dealing with factual circumstances similar to this case was issued against another ASNEC Member State. Besides, another investor also nominated the Claimant-appointed arbitrator, Mr Mason, in these proceedings.

39 After becoming aware of Mr Mason' activity in the Hewer Plants case, Respondent's counsel, Mr Greene decided to check Mr Mason's Twitter account and came across with a media article retweeted by Mr Mason. Through that article, Mr Green discovered that, prior to his appointment as an arbitrator in KCAB International arbitration n. 15503/IS, Mr Mason made some general comments about his prior experiences with environmental rights and his general attitude towards environmental protection in an interview to the podcast "The Arbitration Station". Although at the time of the filing such podcast was already available, a junior associate at Greene & Associates LLP, Michael Ross, who ran a background check on the arbitrator, thought Mr Mason's career tips were hardly relevant for his appointment. Initially, Respondent remained unsure on how to react after learning about this situation, but eventually decided to file a challenge against Mr Mason.

C. TIMELINE

DATE	EVENT
2005	Environmentalist Parties start gaining political support in the ASNEC Region (except Loac)
August 09	Mountaintop engages in negotiations with Ticadian authorities
August 09	Representations by the Governor of Ticadia
19/11/2010	MNFB decides to enter into the financing agreement with Mountaintop
01/12/2010	Financing Agreement is executed
15/12/2010	Ticadia-1 buys a plot of land, obtains a construction permit and begins building the power plant
03/02/2012	ASNEC Founding Charter adopted
25/07/2014	T1 License issue date
25/07/2014	T1 commenced operations
06/12/2015	Seoul Agreement concluded
13/12/2015	ASNEC Declaration re Seoul Agreement adopted
17/02/2016	Coal Directive adopted
06/06/2016	Law 66/2016 adopted
05/12/2016	Law 72/2016 adopted
10/01/2017	Notice of failure to Comply with the Conditions of the Financing Agreement and Request for Additional Security
January 17	MFNB decides to sell a part of its credit portfolio
17/02/2017	Mountaintop's reply to the Notice of failure to comply with the Financing Agreement
06/05/2017	MFNB commences ICC arbitration proceedings against Mountaintop under the Financing Agreement
01/07/2017	Assignment Agreement executed
31/01/2019	Notice of Arbitration
28/02/2019	Response to the Notice of Arbitration
28/02/2019	Perry Mason's Statement of Impartiality and Independence
05/03/2019	Letter from the KCAB Secretariat re constitution of the Arbitral Tribunal
12/03/2019	PO 1
01/06/2019	Coal Directive transposition deadline
02/06/2019	IAN Article re Hewer Plants Award
03/06/2019	Perry Mason's Tweet
16/06/2019	Respondent's Challenge of Perry Mason
23/06/2019	Perry Mason's Response to Respondent's challenge
01/07/2019	Claimant's Response to Respondent's challenge
15/07/2019	Procedural conference re Respondent's challenge
30/07/2019	PO 2
31/12/2028	T1 Shutdown Deadline

25/07/2054	T1 License expiry date
25/07/2054	T1 expected economic lifetime ends

III. REQUESTS OF THE PARTIES AND ISSUES IDENTIFIED BY THE TRIBUNAL

A. CLAIMANT

40 In the Notice of Arbitration, the Claimant request the Tribunal to:

- *Declare that Respondent treated the investment unfairly and inequitably and, thereby, breached Article II of the ASNEC Energy Investment Treaty;*
- *Order Respondent to pay to Claimant compensation amounting to no less than USD 450,000,000 (four hundred fifty million dollars) plus interest as of the date of the violation;*
- *Order Respondent to compensate Claimant for all of their costs in this Arbitration and to bear alone the costs of the Tribunal and of KCAB International.*

B. RESPONDENT

41 In its Response to the Notice of Arbitration, Respondent requests the Tribunal to rule, that:

- *It has no jurisdiction to hear the dispute submitted by Claimant under the ASNEC Energy Investment Treaty;*

If the Arbitral Tribunal finds it has jurisdiction to hear the dispute:

- *That the phase-out of coal-fired power generation implemented through Law 66/2016 is not attributable to Respondent under international law;*
- *That Respondent's actions did not, in any event, violate the fair and equitable treatment standard as provided for in Article II of the ASNEC Energy Investment Treaty.*

42 In Respondent's Challenge of Perry Manson, Respondent further requests the Tribunal to:

"In accordance with Clause 8 of Procedural Order 1, Respondent hereby respectfully requests the remaining members of the Arbitral Tribunal to sustain its challenge of Mr Perry Mason."

C. ARBITRAL TRIBUNAL AND ISSUES TO BE CONSIDERED AT THE HEARING

43 The Tribunal in the Case consists of three arbitrators – Ms. Giselle Gwenaelle, Mr. Perry Mason and Mr. Daniel Crane, the President of the Tribunal. As was mentioned above, at some point the Respondent launched an issue conflict challenge against Mr. Mason.

44 In Procedural Orders No. 1 (p. 41 of the Case) and 2 (p. 54 of the Case), the Tribunal established that the following issues should be dealt with during the Main Stage of the proceedings:

Procedural Order No. 1

The Main Stage will address:

- *Whether Claimant has standing in these Proceedings;*
- *Whether the challenged measures are attributable to Respondent;*
- *Whether the challenged measures violates Article II (1) of the Treaty concerning the Encouragement and Reciprocal Protection of Energy Investments in the ASNEC Region ("ASNEC Energy Investment Treaty").*

Procedural Order No. 2

The Main Stage of this Proceeding will comprise, in addition to the issues listed in paragraph 10 of Procedural Order No 1, the question of whether Mr Mason is to be replaced as arbitrator in this Proceeding".

IV. THE ISSUES: ARGUMENTS AND ANALYSIS

A. WHETHER CLAIMANT HAS STANDING IN THE ARBITRAL PROCEEDING

(1) Relevant facts

45 GNB, the Claimant in the Case, argues that it acquired the claim against the Respondent from the original investor – MFNB – by operation of an assignment agreement (line 500 of the Case). Both the assignee and the assignor under the agreement are nationals of the same state – the Republic of Mercuria.

46 The principal provision of the Assignment Agreement is formulated as follows:

> *The Seller hereby assigns and transfers all the rights and claims, whether under domestic or international law, arising from the Financing Agreement to the Purchaser, together with all secondary rights and obligations thereto, including the rights to claim compensation from any third parties. For the avoidance of doubt, this assignment includes any potential claims against Mountaintop Investments LLC and the Republic of Laoc.*

47 The Assignment Agreement was executed after Respondent implemented measures that form the basis of the claim, but prior to the arbitral proceedings against the Respondent have been requested.

48 The Assignment Agreement was subjected to "*the Laws of the Republic of Mercuria as well as, where necessary, relevant rules of international law*". The Assignment Agreement meets all formal prerequisites of the Mercurian law and if a domestic claim would have been assigned under it, the validity of such assignment would have been unquestionable (line 1800 of the Case).

(2) Assignment from the standpoint of international law and the applicable treaty

49 General international law or customary international law contains no prohibition on the assignment of investment claims. Likewise, the applicable treaty in the Case, the ASNEC Energy Investment Treaty, contains no provisions directly addressing the assignment of claims thereunder.

50 The issue of assignment of investment treaty claims appears to be neither resolved nor frequently discussed in textbooks or publications on public international law. Those few articles on the subject that are available, acknowledge the complexity of the issue and do not offer a uniform, universal solution to this issue.[1]

51 From a general standpoint, the cornerstone of the ISDS system is the consent of the contracting states to the jurisdiction of investment tribunals in respect of the claims brought under IIAs. The scope of this consent is limited by the relevant IIAs - the contracting states agree to give the nationals of those states standing to bring claims against them only upon meeting the criteria set out in the applicable IIA. In light of that, the issue of whether claims

[1] See e.g. *Goh,* The Assignment of Investment Treaty Claims: Mapping the Principles, Journal of International Dispute Settlement 10:1 (2019), 23; *Wehland*, The Transfer of Investments and Rights of Investors under International Investment Agreements – Some Unresolved Issues, Arbitration International 30:3 (2014), 565; also, to a limited extent, *Brownlie,* Principles of Public International Law (OUP, 7th ed. 2008), 671.

under investment agreements can be validly assigned without obtaining some form of additional consent from the Respondent state is questionable.

52 In line with the above, Respondent can potentially argue that the rights under an investment claim are person-specific (*intuitu personae*). This would means that unless the provisions of the applicable IAA somehow allow the assignment of claims , said rights cannot be transferred in a way that would allow the assignee to comply with the jurisdictional requirements of the applicable IAA. Respondent can further argue that even if an assignment of a treaty claim is permissible, in case the assignment is made before the institution of arbitral proceedings, the person bringing the claim still has to meet the jurisdictional prerequisites of the applicable IIA.

53 Several provisions of the Treaty can be potentially interpreted both in favor and against the possibility of assignees bringing claims that they purchased from the original investors.

54 From the perspective of jurisdictional pre-requisites of the Treaty, the assigned claim may face several hurdles.

55 The *first* hurdle is that of personal jurisdiction. Claimant would need to demonstrate that it qualifies as an investor holding an investment for purposes of the Treaty. The ASNEC Energy Investment Treaty defines the term 'investor' broadly (see line 1625 of the Case), so it should not be difficult for the Claimant to demonstrate that he at least could be viewed as an 'investor' from the standpoint of the ASNEC Energy Investment Treaty.

56 The hurdles related to material and temporal jurisdiction (see line 1600 of the Case) can arguably also be of relevance. For instance, they can be used by Respondent to argue that the assignment is invalid, as Claimant falls short of the material and temporal criteria of the ASNEC Energy Investment Treaty.

57 Finally, the dispute resolution clause of the ASNEC Energy Investment Treaty is formulated in quite an unusual manner and can arguably be interpreted in a way which would allow Claimant to bring claims acquired from the assignor, provided the assignment of investment claims is legally possible in the first place:

> *Disputes related to Investments, which concern an alleged breach of an obligation of a Contracting Party shall, if possible, be settled amicably.*

58 In addition to the above, Claimant may want to bring an argument that against the backdrop of Article 31 of Vienna Convention on the Law of Treaties of 1969 ("VCLT") permissibility of the assignment of investment claims should be in line with the general purpose of the IAAs.

(3) Assignment of investment claims from the standpoint of arbitral practice

59 Generally speaking, investment treaty tribunals have differing views on the technical possibility of assignment of investment claims. Some have suggested that an investment treaty claims are *intuitu personae* and are not openly transferrable. Others have stated that since the relevant treaty rights vest completely in the claimant the claim is assignable, in principle.

60 The clearest views on this issue were expressed in the *Daimler v Argentina*[2] ("Daimler Case") and *Mihaly v Sri Lanka*[3].

61 The *Daimler* case was brought against Argentina by the German investor, Daimler Financial Services AG. In Daimler, the Tribunal dealt with a situation in which the claimant have transferred its shares in the Argentinian subsidiary, which suffered damages in the result of the actions of the Argentinian government, upstream to its parent company.

62 Because of the specific features of the share transfer agreement, Argentina submitted that the right to bring claims against it was transferred with the shares to the parent company of the claimant and, thus, the claimant lost its standing to bring claims.

63 Argentina also relied on the case law showing that subsequent sale of an investment does not deprive an investor-state tribunal of its jurisdiction to hear the claim. According to Argentina, this meant that where an investment is sold before the commencement of the arbitration, the tribunal will necessarily lack jurisdiction.

64 In paras 144-145 of the *Daimler* Award, the tribunal expressed the following general view on the issue of assignability of investment claims:

> *As the large and thriving global market for distressed debt attests, most jurisdictions allow for legal claims to be either sold along with or reserved separately from the underlying assets from which they are derived. The reason is that such severability greatly facilitates and speeds the productive re-employment of assets in other ventures.*
> *The Respondent has pointed to no rule of general or customary international law which would prohibit a similar result from obtaining for ICSID claims.*
> *Indeed, the rationale for recognizing the severability of a damages claim from the underlying asset may be even stronger in the case of ICSID claims, since a strong argument can be made that the ICSID Convention and many BITs accord standing only to the original investor and not to any subsequent would-be purchasers of the underlying investment.*
> *The better view would seem to be that ICSID claims are at least in principle separable from their underlying investments.*

65 In contrast, the *Mihaly* tribunal followed a more conservative approach to the possibility of the assignment of investor-state claims.

66 In *Mihaly*, a Canadian investor assigned one of its claims against Sri Lanka to a U.S. company, which in turn instituted proceedings against Canada in ICSID.

67 The *Mihaly* tribunal has made the following general observation on the issue of assignability of investment treaty claims:

> *...the sanctity of the privity of international agreements [is] not intended to create rights and obligations for non-parties...a claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action as shares in the stock-exchange market or other types of negotiable instruments*

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[2] Daimler Financial Services AG v The Argentine Republic, ICSID Case No ARB/05/1, Award, 22 August 2012;

[3] *Mihaly International Corporation v Sri Lanka*, ICSID Case No ARB/00/2, Award, 15 March 2002.

68 Importantly, in *Mihaly*, the Canadian entity that assigned the claim to the U.S. entity did not have the standing to bring claims under the ICSID Convention. Therefore, the rationale of the *Mihaly* tribunal was rather simple - *nemo dat quod non habet* – no one can assign more rights that he or she has.

69 The context of both cases needs to be carefully considered. For instance, one can argue that in *Mihaly* the investor seemingly tried to assign the claim to a U.S. entity to get standing to bring claims, which should be clearly distinguished from the situation in *Diamler.* Nonetheless, one can also admit that neither *Diamler* nor *Mihaly* addresses the situation that is directly comparable to the one at the centre of the moot problem.

(4) The effect of the assignment of the claim on quantum of damages

70 It is clear that the assignment can potentially have an impact on the evaluation of quantum in this case. However, quantum related issues lie outside of the scope of the problem.

B. WHETHER THE CHALLENGE AGAINST MR MASON SHOULD BE SUSTAINED

71 On 16 June 2019, Respondent submitted a challenge of Arbitrator Perry Mason, the Claimant-appointed arbitrator.

(1) Relevant facts

72 This challenge is based on the following facts:

73 In addition to present Case, Mr Mason is also the Claimant-appointed arbitrator in *Hewer Plants JSC v. Wellfalcon*.[4] Wellfalcon is also a ASNEC Member State and the measure at issue in the Hewer Plants case is also based on the Coal Directive. Mr Mason had not disclosed this appointment (Exhibit R-7).

74 The *Hewer Plants* case was filed under the ASNEC Energy Investment Treaty on 10 August 2016 (i.e. prior to the Notice of Arbitration in this Case, which was filed on 31 January 2019) in response to Wellfalcon's coal phase-out, requiring all lignite-fired power plants to be closed down by 2028.[5] For Hewer Plants, this meant that will have to cease operating its fully licenced lignite power plant and also close its connected open-cast lignite mine.[6] Its lignite mine cannot be used to supply lignite-fired power plants elsewhere because lignite-fired power plants are usually only able to burn a specific type of lignite. Moreover, transportation costs are high. The early closure of the lignite mine results in additional costs (and, thus, damages) for Hewer Plants in order to nonetheless comply with the legally required renaturation.[7]

75 On 1 May 2019 (i.e. after the constitution of the Tribunal on 5 March 2019), the *Hewer Plants* tribunal issued an award, upholding Hewer Plants' claim for violation of the fair and equitable

[4] Exhibit R-9 (lines 1228-1229); Exhibit R-10.

[5] Procedural Order No. 3, Question 15 (lines 1898-1900).

[6] Procedural Order No. 3, Question 15 (lines 1901-1904).

[7] Procedural Order No. 3, Question 15 (lines 1905-1909).

treatment standard.[8] The tribunal intensively discussed the relationship between Hewer Plants' legitimate expectations and Wellfalcon's right to regulate as well as the potential impact of the Seoul Agreement on the legal relationship between the parties.[9] It however ruled that international responsibility for the coal phase-out should be attributed to ASNEC (not Wellfalcon) insofar as the lignite-fired power plant was concerned (not the open cast mine).[10]

76 Information about this award became public through an online article entitled "Frist tribunal rules on ASNEC climate change measures" published by International Arbitration News (IAN) on 2 June 2019 (Exhibit R-9). On the following day, Mr Mason shared this article in a social media post with the comment: "Proud to have served as arbitrator in this ground-breaking case on #ClimateChange!" (Exhibit R-10).

77 After becoming aware of Mr Mason's involvement in this case (which was not public before) and Mr Mason's social media statement, Respondent also discovered an interview given already a year earlier, namely on 9 May 2018, which Mr Mason had given on the topic of career advice for young arbitration practitioners on the podcast show "The Arbitration Station" (Exhibit R-8). In the course of the interview, the following exchange took place:

> ***Joel Malkovich:*** *Everybody talks about climate change today. Also, in the arbitration world, you hear more and more talk about the so-called "Climate Change Arbitration". Would you consider this a prospective area for the young practitioners to focus on specifically?*
>
> ***Perry Mason:*** *This is a tricky question. Although I am conscious about the environment, it is not hard to imagine scenarios where states will resort to climate change arguments in support of their actions. I have seen this kind of situation: projects are approved and executed; the public opinion shifts and environmental measures are taken.*
>
> *On the other hand, I do not see how climate change adds anything new to the debate in investment law that would make it worthwhile for the next generation to rehearse the police powers arguments again. Also, whether climate change treaties, if they can be considered treaties at all, can come into play as a part of applicable law in investment treaty arbitrations is understandably subject to debate.*
>
> *So, I would suggest, young practitioners should instead broaden their horizons on the economic plane. Understanding a project from the financial side is what helps to find a right solution for a case.*

78 On the basis of these information, Respondent filed its challenge on 16 June 2019, i.e. within 14 days of the publication of the IAN article. In his response to Respondent's challenge, Mr Mason disclosed that he has been appointed as arbitrator by another claimant (C-Energy LLC) in a further arbitration against Wellfalcon concerning the same measures as in Hewer Plants.[11]

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[8] Exhibit R-9 (lines 1207-1215, 1224-1225).

[9] Procedural Order No. 3, Question 16 (lines 1913-1917).

[10] Exhibit R-9 (lines 1226-1227); Procedural Order No. 3, Question 16 (lines 1920-1923).

[11] Mr Mason's response to Respondent's challenge (lines 1250-1253).

Further details on the substance of the dispute are not known. However, a hearing has already taken place and an award is expected in due course.[12]

(2) Applicable standard

79 Respondent's challenge is to be decided based on Articles 11 to 13 of the UNCITRAL Arbitration Rules. The relevant standard is set out in Article 12(1):

> *"Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."* (emphasis added)

80 For Respondent, it may be worthwhile contrasting this standard to the arguably higher standard of "manifest lack" in Article 57 ICSID Convention and try to use this distinction with regard to ICSID decision having rejected that certain fact patterns constitute issue conflicts (see below).

81 Apart from this, teams may discuss that, in its challenge, Respondent refers to "grave", not justifiable, doubts (line 1095). The focus should however rather be on the assessment whether there is indeed an issue conflict giving rise to justifiable doubts about Mr Mason's *impartiality*.[13]

(3) Meaning of "issue conflict"

82 At the outset of the further discussion, teams should first define the notion of an "issue conflict". In his recent recommendation in *Vattenfall v. Germany*, the PCA Secretary-General described an "issue conflict" as follows:

> *"In international arbitral proceedings, an "issue conflict" denotes a situation in which an arbitrator is inappropriately predisposed to favor a particular outcome with respect to the issues at stake in the proceedings. As described in* CC/Devas (Mauritius) Ltd. et al. v. India*, the leading decision on this question relied upon by the Respondent, an issue conflict is "based on a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own previously expressed view."*[14]

(4) Application to the Case

83 Teams should then discuss the different arguments raised by Respondent why an issue conflict allegedly exists and whether this gives rise to justifiable doubts about Mr Mason's independence. Respondent bases its challenge on three grounds:

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[12] Procedural Order No. 3, Question 17 (lines 1926-1932).

[13] The Case is not intended to provide a basis for challenging Mr Mason based on justifiable doubts about his *independence*.

[14] Recommendation by the PCA Secretary-General in the case *Vattenfall AB et al. v. Germany*, ICSID Case No. ARB/12/12, 6 July 2020, para. 112, citing *CC/Devas et al. v. India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013, para. 58. See also Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration, para. 2: *"an allegation that an arbitrator is biased towards a particular view of certain issues or has already prejudged them. The alleged predisposition or prejudgment involves an arbitrator's purported adherence to his or her pre-existing views on legal and factual questions, developed through experience as an arbitrator, as counsel, writing scholarly articles, and giving interviews or other public expressions of views."*

- Mr Mason's participation in the *Hewer Plants* award (**a**);
- His description of this decision as "*ground-breaking*" on social media (**b**); and
- His comments in the interview with the Arbitration Station (**c**).

84 It argues that these "*individually (and even more so taken together)*" (line 1125) show that he has an "issue conflict".

(a) Issue conflict due to participation in the *Hewer Plants* Award

85 Teams will likely focus their argumentation on this first argument. The tribunal in *Tidewater v Venezuela* has put the relevant question to be determined as whether "*two cases are related in such a manner that the arbitrator's determination in one case would manifestly affect the challenged arbitrator's reliability to exercise independent judgment in the other case*".[15]

86 Thus, whether or not a prior decision in another case can give rise to an issue conflict is in many respects very fact-specific. Apart from identifying the general legal arguments for Claimant and Respondent, teams should therefore carefully review and compare the factual and legal matrix in cases relied upon and the situation in the present Case. This Bench Brief will limit itself to identifying the general legal arguments and some relevant case law. With regard to the case law, it will also note some potentially relevant similarities/differences in terms of facts and law but not address them in detail.

(i) Respondent

87 Respondent will likely argue that, as a member of the *Hewer Plants* tribunal, Mr Mason was confronted with similar facts and/or legal issues as in the present Case and has already formed an opinion on central questions of this Case.

88 Accordingly, Respondent could invoke that both cases have at their origin the same measure (namely the Coal Directive) and that the implementing laws require the closure of coal-fired power plants on the same date. Moreover, they are not only to be decided based on the same treaty but also involve the same legal issues. Mr Manson would therefore need to balance the legitimate expectations with the state's right to regulate and the implications of the Seoul Agreement in the same (or at least similar) factual matrix. It would submit that the same is true for the question of attribution between ASNEC and its respective member state.

89 As a further step, Respondent would then argue that Mr Mason's decision on these legal issue in the same/similar factual matrix in *Hewer Plants* gives rise to justifiable doubts as to his impartiality. Respondent could argue that Mr Mason's decision in *Hewer Plants* shows that he is predisposed towards a particular outcome. As the outcome of prior cases on this matter might not be favourable for Respondent,[16] it may need to engage in detail with the reasons for

[15] *Tidewater Inc. et al. v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, 23 December 2010, para. 63.

[16] See e.g. *Suez, Sociedad General de Aguas de Barcelona, S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of Gabrielle Kaufmann-Kohler, 22 October 2007, para. 37; *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014, paras 119; *Participaciones Inversiones*

rejecting an issue conflict in these earlier decisions (e.g. why issues/cases decided were not deemed to be sufficiently similar) and e.g. explain why this is different in the present case. Respondent might also argue that the threshold for a challenge to be successful under the ICSID Convention is arguably higher than under the UNICTRAL Rules since the former require a *"manifest lack"* (Article 57 ICSID Convention) of independence and impartiality while under the latter *"justifiable doubts"* are sufficient.[17]

90 Based on a related line of argument, Respondent could also claim that Mr Mason may be influenced by arguments and evidence which were presented to him in *Hewer Plants*. In support, Respondent could invoke *EnCana v Ecuador*[18] and *Caratube v Kazakhstan*[19], in which challenges based on such an argument were sustained. Both cases relate to repeat appointments of the same arbitrator in two similar cases by the same respondent.

91 A further potential angle for Respondent could be to argue that, in any event, Mr Mason would have been obliged to disclose his appointment in *Hewer Plants*, and that this violation of his disclosure obligation, potentially taken together with the additional circumstances invoked by Respondent, gives rise to justifiable doubts. Such argumentation could be based, e.g., on *Tidewater v. Venezuela* (see also above comment regarding ICSID cases).[20]

(ii) Claimant

Portuarias SARL v. Gabonese Republic, ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify an Arbitrator, 12 November 2009, para. 33.

[17] See, e.g., *Tidewater Inc. et al. v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, 23 December 2010, para. 39: *"The standard of 'likely to give rise to justifiable doubts', referred to in the ICSID Secretariat Note on the new text of Arbitration Rule 6(2)(b), is taken from the standard of disclosure required by the UNCITRAL Arbitration Rules, which is also the standard applicable in those Rules to arbitration challenges. This standard is stricter than the 'manifest lack of qualities' of Article 57 of the ICSID Convention. Article 57 'imposes a relatively heavy burden of proof on the party making the proposal'."*

[18] EnCana Corporation v. Ecuador, LCIA Case No. UN3481, UNCITRAL, Partial Award on Jurisdiction, 27 February 2004, para. 45: "[A]s soon as Dr. Barrera uses information gained from the other Tribunal in relation to the present arbitration, a problem arises with respect to the equality of the parties. Furthermore Dr. Barrera cannot reasonably be asked to maintain a "Chinese wall" in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration. The most he can be asked to do is to disclose facts so derived whenever they appear to be relevant to any issue before this Tribunal."

[19] *Caratube International Oil Company LLP v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr Bruno Boesch, 20 March 2013, paras 75, 89: *"As was observed in* Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela *and* EnCana Corporation v. Republic of Ecuador*, a problem can arise where an arbitrator has obtained documents or information in one arbitration that are relevant to the dispute to be determined in another arbitration. In this situation, the arbitrator 'cannot reasonably be asked to maintain a "Chinese wall" in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration'.* […] *That Mr. Boesch would consider it improper to form any opinion based upon external knowledge is not to be doubted and neither is his intention not to do so: it remains that Mr. Boesch is privy to information that would possibly permit a judgment based on elements not in the record in the present arbitration and hence there is an evident or obvious appearance of lack of impartiality as this concept is understood without any moral appraisal: a reasonable and informed third party observer would hold that Mr. Boesch, even unwittingly, may make a determination in favor of one or as a matter of fact the other party that could be based on such external knowledge."*

[20] *Tidewater Inc. et al. v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, 23 December 2010, para. 40: *"non-disclosure would itself indicate manifest lack of impartiality only if the facts or circumstances surrounding such non-disclosure are of such gravity (whether alone or in combination with other factors) as to call into question the ability of the arbitrator to exercise independent and impartial judgment."*

92 At the outset, Claimant could argue that the factual situation, although similar, is not (or might not be) identical.

- Among other things, it may refer to the circumstances giving to legitimate expectations might be different; the potential relevance of the renewables support measures in the context of the implementing measure in Laoc; and the difference between coal and lignite business.

- To support that such differences may be relevant, Claimant might consider invoking *Electrabel v. Hungary* where Professor Stern was appointed by Hungary in two concurrent arbitrations arising out of similar factual circumstances, the same governmental decree, involving similar power purchase agreements and both submitted under the Energy Charter Treaty. While despite these various factual and legal similarities the challenge was rejected, Claimant may need to compare the stages of the two proceedings in both *Electrabel* and the Case.[21] Additionally, Claimant could invoke and discuss *Suez v Argentina*, *PIP v Gabon*, and *İçkale v Turkmenistan*.[22]

- Additionally, Claimant may seek to argue that under the IBA Guidelines on Conflict of Interest (para. 3.1.5), an issue conflict requires that a similar issues has been decided in an arbitration involving one of the parties (or an affiliate of one of the parties).[23] Claimant might however have to consider how this applies in the context where one party is a member of a regional economic integration organisation.

93 Claimant may also draw attention to the distinction whether an arbitrator is faced with the same facts or merely the same legal issue. Such a distinction was, inter alia, highlighted in *Tidewater v. Argentina*[24] and *İçkale v. Turkmenistan*[25] but Claimant may, of course, need to explain how the reasoning from these decisions can be transferred to the situation in the present case.

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[21] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal, 25 February 2008, paras 37-44, in particular para. 40.

[22] *Suez, Sociedad General de Aguas de Barcelona, S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of Gabrielle Kaufmann-Kohler, 22 October 2007, para. 37; *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014, paras 119; *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify an Arbitrator, 12 November 2009, para. 33.

[23] Also discussed in *Tidewater Inc. et al. v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, 23 December 2010, para. 67.

[24] *Tidewater Inc. et al. v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, 23 December 2010, para. 67: *"In the opinion of the Two Members, the rationale behind the potential for the conflict of interest identified in Section 3.1.5* [of the IBA Guidelines] *relates to cases where, by reason of the close interrelationship between the facts and the parties in the two cases, the arbitrator has in effect prejudged the liability of one of the parties in the context of the specific factual matrix. They agree with the formulation of the French court, cited with approval in Poudret and Besson, that there is* 'neither bias not partiality where the arbitrator is called upon to decide circumstances of fact close to those examined previously, but between different parties, and even less so when he is called upon to determine a question of law upon which he has previously made a decision.'" (emphasis added)

[25] *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014, paras 119: *"[T]here is no overlap of facts relevant to the merits of the earlier (*Kılıç*) arbitration and those relevant to the merits of the present case; the overlap merely concerns facts relevant to the interpretation of Article VII(2) of the BIT and related legal issues such as the scope of application of the MFN clause.* […] *Neither Party however has identified any missing facts* [submitted

94 As a further line of defence, Claimant might invoke that, in any event, a single prior decision on the same or a similar matter is not sufficient. It may refer to the different outcomes of the challenge in *CC/Devas v. India* where the challenge of Professor Orrego Vicuña (who had decided the same issue in three prior cases and even defended his view after these cases had been annulled) was upheld while the challenge of Mr Lalonde (who had decided two of the three prior decisions together with Professor Orrego Vicuña but not defended those decisions afterwards) was rejected.[26] (In a further step, Claimant might then need to explain why Mr Mason's characterisation of the decision as "ground-breaking" should not be considered as reaffirming the decision, and, thus as having prejudged the matter; see below).

95 As regards Respondent's argument that Mr Mason might be influenced by arguments and evidence presented in the *Hewer Plants* case, Claimant might – in addition to the above distinction – consider arguing that this is purely hypothetical as no information on such the arguments and evidence presented in *Hewer Plants* case are mentioned in the Case file.

96 Finally, Claimant may invoke a policy argument, namely that in particular investment arbitration *"would become unworkable if an arbitrator were automatically disqualified on the ground only that he or she was exposed to similar legal or factual issues in concurrent or consecutive arbitrations"*.[27]

(b) Issue conflict based on social media post calling *Hewer Plants* award *"ground-breaking"*

97 **Respondent** may furthermore argue that Mr Mason's characterisation of the *Hewer Plants* award as *"ground-breaking"* in his social media post gives rise to justifiable doubts about his

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to the *Kılıç* tribunal] *that are not available to this Tribunal.* […] *Moreover, even if the interpretation of Article VII(2) of the BIT in the present case will involve review of relevant supporting evidence, the task of the Tribunal will be fundamentally a legal one of interpreting the Treaty; this is the case even when it requires review of the relevant supporting evidence. In the words of the* Caratube *decision, such a task involves the determination of facts that are 'of a general and impersonal character' and not specific to the Parties to this particular case, and is therefore unrelated to facts relevant to the merits. Consequently, Professor Sands' exposure to evidence relevant to the interpretation of Article VII(2) of the BIT cannot constitute a fact indicating a manifest lack of impartiality."* (emphasis added)

[26] *CC/Devas et al. v. India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013, paras 64, 66, respectively. See also *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014, paras 121-122: "*Similarly, unlike* CC/Devas […] *there is no appearance in the present case of 'pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.'* […] *Professor Sands has not been shown to have expressed any views subsequent to the* Kılıç *decision that would raise doubts as to his ability to approach the interpretation of Article VII(2) of the BIT, and the related legal issues, with an open mind.*"

[27] *Tidewater Inc. et al. v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, 23 December 2010, para. 68. See also *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. Arb/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011, para. 83: "*The international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations. As was stated in Suez […], the fact that an arbitrator made a finding of fact or a legal determination in one case does not preclude that arbitrator from deciding the law and the facts impartially in another case.*" Similarly also, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal, 25 February 2008, para. 41.

impartiality because it suggests that he attributes a precedential value/effect to this decision, and, hence, is *"predisposed to favor a particular outcome"*[28].

98 **Claimant** may oppose this, arguing that the relevant standard is whether a reasonable third person would consider that there is an appearance of bias – and that no reasonable person would understand Mr Mason's social media post as suggesting deeper convictions on this issue (but rather pure marketing). Claimants may furthermore point out that even (vigorous) scholarly writings are generally not considered to give rise to an issue conflict.[29] Hence, a one sentence social media post can do so even less.

(c) Issue conflict based on his position in the interview with "The Arbitration Station"

99 With regard to Mr Mason's interview with "The Arbitration Station", two issues may need to be discussed: (i) whether the issue was raised in a timely manner; and (ii) whether Mr Mason's statements give rise to justifiable doubts about his impartiality.

(i) Timeliness of the challenge

100 In its response to Respondent's challenge, Claimant argues that Respondent's challenge is belated because the interview was given already more than one year prior to Respondent's challenge (lines 1286-1289).

101 Pursuant to Article 13(1) UNCITRAL Rules, *"[a] party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party"* (emphasis added).

102 **Respondent** may argue that its challenge is not belated because it only became aware of the interview due to the reference in the IAN article of 2 June 2019 and filed its challenge on 16 June 2019 (i.e. within 14 days). Based on the wording of Article 13(1), Respondent may further submit that the 15-day deadline starts to run only once the relevant circumstance (i.e. the interview) *"became known to [Respondent]"*. It could contrast this wording with that of other rules, such as Article 15.1 SIAC Rules, using the formulation *"became known or should have reasonably been known to that party"*.

103 **Claimant** may reply that Respondent's understanding of Article 13(1) as providing for a purely subjective standard must be rejected. It could argue that if the time limit would only be initiated in case of positive knowledge by the relevant party, this would render the time limit largely ineffective since the opposing party typically has no means to prove at what time the challenging party had become aware of the relevant circumstances.

(ii) Justifiable doubts

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[28] Recommendation by the PCA Secretary-General in the case *Vattenfall AB et al. v. Germany*, ICSID Case No. ARB/12/12, 6 July 2020, para. 112, citing *CC/Devas et al. v. India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013, para. 58. See also Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration, para. 2.

[29] See, e.g., *Urbaser S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, 12 August 2010, para. 44.

104 **Respondent** would argue that Mr Mason's statements would also give rise to justifiable doubts about his impartiality. In particular, Respondent may refer to the passage from the interview in which Mr Mason states that he does not consider it *"hard to imagine scenarios where states will resort to climate change arguments"* when, after public opinion has shifted, taking environmental measures affecting approved investments (lines 1192-1195). To support its argument, Respondent may invoke *Perenco v Ecuador*. There, Respondent had successfully challenged Judge Brower for the following statement made in an interview (while already being a member of the *Perenco* tribunal):

> *"**Editor:** Tell us what you see as the most pressing issues in international arbitration.*
>
> ***Brower:** There is an issue of acceptance and the willingness to continue participating in it, as exemplified by what Bolivia has done and what Ecuador is doing. Ecuador currently is expressly declining to comply with the orders of two ICSID tribunals with very stiff interim provisional measures, but they just say they have to enforce their national law and the orders don't make any difference. But when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya, start bringing hot oil litigation and chasing cargos, doing detective work looking for people who will invoke cross-default clauses in loan agreements, etc., the politics may change. After a certain point, no one will invest without having something to rely on."*[30]

105 The Secretary-General of the PCA, deciding this challenge, considered that these statements created the appearance that Judge Brower had prejudged the issue of expropriation.[31]

106 **Claimant** would likely highlight the exceptional nature of the *Perenco* decision and try to distinguish Mr Mason's statements from those of Judge Brower.

(d) Cumulative effect of the aforementioned circumstances

107 In its challenge, Respondent invokes that, if not already individually, the above circumstances at least taken together amount to an issue conflict.

108 **Respondent** may in particular emphasise the close connection between Mr Mason's participation in the *Hewer Plants* award and its social media post, in order to argue that, unlike in *İçkale v. Turkmenistan*,[32] Mr Mason's decision in *Hewer Plants* is not only a decision in a specific case but is reflective of a more general thinking.

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[30] *Perenco Ecuador Limited v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Challenge of Charles N. Brower, 8 December 2009, para. 27.

[31] *Perenco Ecuador Limited v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Challenge of Charles N. Brower, 8 December 2009, para. 57: "The mention of different types of enforcement actions (hot oil litigation, chasing cargoes, detective work, invoking loan agreements, etc.) in the context of the remarks about Ecuador would lead a reasonable third party observer to have justifiable doubts about Judge Brower's prejudgment on the question of expropriation and also Ecuador's likely conduct in relation to Claimant's future attempts to enforce any award for expropriation."

[32] *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014, paras 121-122: *"Similarly, unlike* CC/Devas*,* […] *there is no appearance in the present case of 'pre-judgment of an issue likely to be relevant to the dispute on which the*

109 **Claimant** may argue that, unlike in *CC/Devas v. India*,[33] Mr Mason did not reaffirm his position after it had been criticised/annulled. Moreover, the reaffirmation (if any) occurred immediately after the decision and not after a longer period of reflection.

110 In this context, and against the background of the following statement in *Electrabel v Hungary*, the **teams** may critically discuss whether a combination of factors is at all possible:

> *"On the established facts of this case, we consider that the combination of factors (a), (b), (d), (e), (f) and (g) do not impugn the independent judgment to be exercised by Professor Stern. Nor do we consider, in this case, that it can make any difference when the Claimant packages all these factors together. In our view, the Claimant's own methodology brings about its own demise: 0[7] remains 0 and not 7. Two or more factors which do not satisfy the test required under Article 57 cannot, by mere "combination," meet that test."*[34] (emphasis added)

C. WHETHER THE CHALLENGED MEASURE IS ATTRIBUTABLE TO RESPONDENT

(1) Relevant facts

111 The Respondent argues that the enactment of the 66/2016, providing that all coal-fired power plants in Laoc shall be phased out by 31 December 2018, is attributable not to Laoc but to the ASNEC.

112 Law 66/2016 was adopted pursuant to the mandatory Coal Directive, adopted by the ASNEC Council on 17 February 2016. The Laocan delegate in the ASNEC Council voted against the adoption of the Coal Directive but was outvoted.

113 The relevant provisions of the Coal Directive are as follows:

Article 2
Binding overall Association target for 2030
In order to achieve the [goal of promoting renewable forms of energy under Article 75(1) of the ASNEC Charter], ASNEC Member States shall collectively ensure that the share of energy from renewable sources in the Association's gross final consumption of energy in 2030 is at least 75%
Article 7

parties have a reasonable expectation of an open mind.' […] *Professor Sands has not been shown to have expressed any views subsequent to the* Kılıç *decision that would raise doubts as to his ability to approach the interpretation of Article VII(2) of the BIT, and the related legal issues, with an open mind."* (emphasis added)

[33] *CC/Devas et al. v. India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013, para. 64.

[34] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal, 25 February 2008, para. 39.

Restriction of the consumption of energy produced by coal-fired power plants
1. In order to reach or exceed the Association target set in Article 2, each Member State shall reduce the percentage of its final gross production of energy from coal-fired power plants to 0 by 31 December 2028.
2. The Member States, considering their specific circumstances, are encouraged to gradually reduce 350 their final gross production of energy from coal-fired power plants before 31 December 2028.
3. The Member States shall pay no compensation to owners and/or operators of coal-fired power plants subject to measures adopted by the Member States under Article 7(1).
4. Notwithstanding Article 7(3), Member States may apply support schemes to provide incentives for the integration of electricity from renewable sources in the electricity market
Article 18
Transposition
The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 3 and 7 by 1 June 2019.

114 As a member of the ASNEC, Laoc is required to enforce or implement all legal acts of the ASNEC in accordance with the Founding Charter of the Association of Sovereign Nations for Economic Cooperation (ASNEC) ("**ASNEC Charter**").

115 The relevant provisions of the ASNEC Charter States are as follows:

Article 115
1. To exercise the Association's competences, the Council shall adopt regulations, directives, decisions, recommendations, and opinions. It takes its decision by a majority of three fourths of its members.
[…]
3. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
Article 120
The Association enforces or implements its legal acts through the organs of its Member States. When the Member States enforce or implement any legal acts of the Association, the attribution of conduct, as between the Member States and the Association, shall be governed, in particular, by Articles 6 and 7 of the Articles on the Responsibility of International Organizations, mutatis mutandis*.*

116 Furthermore, Article 124 of the ASNEC Charter provides a mechanism for imposing sanctions on the ASNEC Member States for a serious breach of the ASNEC Charter, including the suspension of certain rights of the Member States derived from the latter, including voting rights, as well as financial sanctions.

(2) The relevant rules on attribution of internationally wrongful acts to international organisations

117 It is not in dispute that the challenged measure — Law 66/2016 — was enacted by the Parliament of Laoc or that the Parliament would qualify as an "organ of a State" under Article 4 of the Articles of Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**"). The principal question rather is whether the enactment of Law 66/2016 should be attributed to the ASNEC instead.

118 The International Law Commission ("**ILC**") finished its work on the responsibility of international organisations by 2011 and the Draft Articles on Responsibility of International Organisations ("**DARIO**") were adopted by the UN General Assembly in the same year. The customary status of the DARIO is debatable at best,[35] especially given the limited practice available on the subject.[36]

119 However, Article 120 of the ASNEC Charter explicitly refers, in particular, to Articles 6 and 7 of the DARIO as governing the attribution of conduct as between the ASNEC and its Member States when the latter enforce or implement the former's legal acts, thereby making these provisions generally applicable.

120 Article 120 of the ASNEC Charter also specifies that Articles 6 and 7 of the DARIO apply "*mutatis mutandis*" since the ILC Special Rapporteur has expressly decided not to include a special attribution rule for situations where Member States implement binding REIO decisions.[37]

121 It is important to note that Article 120 of the ASNEC Charter does not exclude the application of other rules on attribution, *i.e.* those not covered by Articles 6 and 7 of the DARIO. On the contrary, it strongly implies the opposite by including the words "*in particular*". Therefore, good teams would be expected to put forward and develop other "less conventional" arguments, such as those relating to the division of competences and normative control (see subsection (iii) below).

(i) Whether the Parliament of Laoc acted as an organ or an agent of the ASNEC within the meaning of Article 6 of the DARIO when it adopted Law 66/2016

122 Article 6 of the DARIO states as follows:

> ***Conduct of organs or agents of an international organization***
>
> *1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.*
>
> *2. The rules of the organization apply in the determination of the functions of its organs and agents.*

123 According to Article 2 of DARIO, an "organ" is "any person or entity which has that status in accordance with the rules of the organization", and an "agent" is "an official or other person or

[35] See Sean Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, 2013, 29–40.

[36] DARIO Commentary, General Commentary, para. 5.

[37] Georgio Gaja, Second Report on Responsibility of International Organisations, A/CN.4/541, 2004, para. 11.

entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts".

124 The Respondent may argue that as the ASNEC has to rely upon its Member States' organs for implementation of its legal acts under Article 120 of the ASNEC, the latter act in such instances, in essence, as organs or agents of the international organisation. Thus, when the Laocan Parliament was adopted Law 66/2016 in order to implement the binding Coal Directive, it acted as a de facto organ of the ASNEC.

125 This argument appears to find support in the reasoning of several WTO panels. In particular, the WTO panel in *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*

> accepted the European Communities' explanation of what amounts to its sui generis domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, "act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general".[38]

126 On the other hand, the Claimant would argue that neither the ASNEC Member States nor their organs can be deemed as organs of the ASNEC, given that they lack such a status under the ASNEC Charter.

127 Furthermore, the Claimant would likely dispute that either Laoc or its Parliament acted as an agent of the ASNEC. Even though the Coal Directive was adopted by the ASNEC Council, both Article 120 of the ASNEC Charter and Article 18 of the Coal Directive place its implementation upon the ASNEC Member States, including Laoc. In this case, the authorities of Laoc continue to act as state organs and agents rather than those of the ASNEC, but Laoc simply retains the overall responsibility to the ASNEC.

128 The Claimant may refer to the *travaux préparatoires* to the DARIO to support its argument. In particular, the ILC Special Rapporteur recognised that an international organisation may incur international responsibility for an act that is attributable to its member state:

> Responsibility of an organization does not necessarily have to rest on attribution of conduct to that organization. It may well be that an organization undertakes an obligation in circumstances in which compliance depends on the conduct of its member States. Should member States fail to conduct themselves in the expected manner, the obligation would be infringed and the organization would be responsible. However, attribution of conduct need not be implied. Although generally the organization's responsibility depends on attribution of conduct … this does not necessarily occur in all circumstances.[39]

(ii) Whether the Parliament of Laoc was placed at the disposal of the ASNEC within the meaning of Article 7 of the DARIO when it adopted Law 66/2016

129 Article 7 of the DARIO states as follows:

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[38] WTO, report of the Panel, European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS174/R, 20 April 2005, para. 7.725. See also WTO, report the Panel, European Communities—Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R and Corr.1, WT/DS292/R and Corr.1 and WT/DS293/R and Corr.1, 21 November 2006, para. 7.101.

[39] Georgio Gaja, Second Report on Responsibility of International Organisations, A/CN.4/541, 2004, para. 11.

> ***Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization***
>
> *The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.*

130 The commentary to the DARIO further expands on the concept of "effective control":

> *The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based, according to article 7, on the factual control that is exercised over the specifc conduct taken by the organ or agent placed at the receiving organization's disposal. As was noted in a comment by one State, account needs to be taken of the "full factual circumstances and particular context"*[40]

131 The commentary further gives several examples of applying the Article 7 rules in the context of joint (military) operations, such as the United Nations Operation in Somalia II (UNOSOM), United Nations Assistance Mission for Rwanda (UNAMIR) or the United Nations Interim Administration Mission in Kosovo (UNMIK).[41] The commentary also draws heavily upon the jurisprudence of the European Court of Human Rights ("**ECtHR**") with respect to the UN and NATO military operations.[42]

132 However, this is not to say that Article 7 has been intended to apply exclusively in the context of peacekeeping operations, although the commentary does say that "practice relating to peacekeeping forces in particularly significant".[43] Indeed the commentary also refers to the situations where one international organisation places its organs at the disposal of another:

> An example is provided by the Pan American Sanitary Conference, which, as a result of an agreement between WHO and the Pan American Health Organization, serves "respectively as the Regional Committee and the Regional Offce of the World Health Organization for the Western Hemisphere, within the provisions of the Constitution of the World Health Organization". The Legal Counsel of WHO noted that
>
> > [o]n the basis of that arrangement, acts of [the Pan American Health Organization] and of its staff could engage the responsibility of WHO.[44]

133 The parties are, therefore, expected to elaborate on how the criterion of effective control manifests itself in the context of implementation of a binding decision of an international organisation by its member state.

134 In particular, the Respondent would likely rely on the dicta in *Electrabel S.A. v. Republic of Hungary*, where the tribunal applied Article 6 of the ARSIWA, which is an equivalent to Article

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[40] DARIO Commentary, Article 7, para. 4.

[41] DARIO Commentary, Article 7, para. 4.

[42] DARIO Commentary, Article 7, para. 7.

[43] DARIO Commentary, Article 7, paras. 10–14.

[44] DARIO Commentary, Article 7, para. 16.

7 of the DARIO, by analogy to the implementation of the European Commission's Final Decision of 4 June 2008 by Hungary:

> 6.74 […] *Hence, the United Kingdom is not responsible for its Privy Council sitting as the final court of appeal for independent states within the Commonwealth, as explained in the Commentary to the* [*ARSIWA*] *(pages 103-105). Whilst the European Union is not a State under international law, in the Tribunal's view, it may yet by analogy be so regarded as a Contracting Party to the ECT, for the purpose of applying Article 6 of the* [*ARSIWA*] *in the present case.*
>
> *6.75 In its letter dated 1 August 2011, Hungary cited to like effect the work of Professor F. Hoffmeister, "Litigating against the European Union and its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?" Professor Hoffmeister there concluded that the conduct of a State that executes the law or acts under the normative control of an REIO (i.e. a Regional Economic Integration Organization as defined in Article 1 ECT) may be considered an act of that organisation under international law, taking account of the nature of the organisation's external competence and its international obligations in the field where the conduct occurred; and, specifically in regard to the ECT, Professor Hoffmeister expressed the view that "liability would normally fall upon the EU if Member States' organs were simply implementing EU law."*
>
> *6.76 For these reasons, the Tribunal decides that if and to the extent that the European Commission's Final Decision required Hungary, under EU law, prematurely to terminate Dunamenti's PPA, that act by the Commission cannot give rise to liability for Hungary under the ECT's FET standard*. […][45]

135 In response, the Claimant may argue that the decision of the *Electrabel* tribunal need not be followed in the present case given the tribunal's rather scant reasoning. It may also explore the drafting history and commentary to Article 7 of the DARIO to demonstrate that it has been applied primarily in the context of peacekeeping operations. Finally, the Claimant may argue that the requisite threshold of "effective control" has not been met in the present case, especially when compared to the level of control and command exercised by the international organisations in the context of peacekeeping operations.

(iii) Whether the Parliament of the Republic of Laoc acted under the "normative control" of the ASNEC when it adopted Law 66/2016

136 As mentioned above, the DARIO were not intended to contain a rule on attribution specifically tailed for situations where a binding decision of an international organisation is implemented by its member state.

137 However, Article 64 of the DARIO contains a rule on *lex specialis*:

> These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

[45] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, paras. 6.70–6.76.

138 One of examples in respect of which the ILC envisaged the possible existence of a special rule was:

> *that of the attribution to the European Community (now European Union) of conduct of States members of the Community when they implement binding acts of the Community. According to the European Commission, that conduct would have to be attributed to the Community; the same would apply to "other potentially similar organizations".*

139 DARIO Commentary, Article 64, para. 4: *"This approach implies admitting the existence of a special rule on attribution, to the effect that, in the case of a European Community act binding a member State, State authorities would be considered as acting as organs of the Community."*

140 The strongest proponent of the normative control rule of attribution has been the European Union. To summarise the position of the European Commission, there exists a special rule of attribution according to which the conduct of the EU Member States implementing binding acts of the EU is attributable to the EU itself, not the Member States who are "exonerated from any responsibility".[46]

141 As explained in more detail by Professor Frank Hoffmeister:

> *When it is established that Union law governs both the substantive legality of and the available remedies for a measure, then the Union exercises normative control over it. In such a situation, it would also only be the Union which could modify or allow the modification of such measure in order to bring it into line with an international norm. In other words, the internal regulatory competence of the Union for matters falling within the scope of the Treaty is necessarily translated into a criterion of establishing the Union's international responsibility for measures taken under its normative authority.*[47]

142 The European Commission consistently argued in favour of the normative control rule in the course of the ILC work on responsibility of international organisations. In particular, in its comments and observations submitted in 2011, the European Commission stated as follows:

> European Union Member States have transferred competences (and therefore decision-making authority) on a range of subject matters to the European Union. … [The Member States] are obliged to carry out binding decisions and policies adopted by the European Union according to the European Union's internal rules. This requires special rules of attribution and responsibility in cases where European Union Member States are in fact only implementing a binding rule of the international organization. In other words, the European Union exercises normative control of the Member States who then act as Union agents rather than on their own account when implementing Union law.[48]

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[46] Christina Contartese, "Competence-Based Approach, Normative Control, and the International Responsibility of the EU and Its Member States: What Does Recent Practice add to the Debate?", 17 International Organisations Law Review 418 (2020), 429.

[47] Hoffmeister, "Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?", 21(3) The European Journal of International Law 723 (2010), 742–743.

[48] "Comments and observations received from international organizations" in "Report of the International Law Commission on the Work of its Sixty-third session", II (1) Yearbook of the International Law Commission (2011), paras 37–38.

143 The normative control argument is also supported the reasoning of several WTO panels. In particular, the WTO panel in *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*

> accepted the European Communities' explanation of what amounts to its sui generis domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, "act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general".[49]

144 In *Electrabel S.A. v. Republic of Hungary*, the tribunal also appears to have adopted the normative control argument (in addition to applying Article 7 of the DARIO as discussed above):

> *Where Hungary is required to act in compliance with a legally binding decision of an EU institution, recognised as such under the ECT, it cannot (by itself) entail international responsibility for Hungary. Under international law, Hungary can be responsible only for its own wrongful acts. The Tribunal considers that it would be absurd if Hungary could be liable under the ECT for doing precisely that which it was ordered to do by a supranational authority whose decisions the ECT itself recognises as legally binding on Hungary.*[50]

145 On the other hand, the normative control argument has been rejected both by the European Commission of Human Rights ("ECommHR") and then by the ECtHR.

146 In particular, in *M. & Co. v. Federal Republic of Germany* the ECommHR found as follows:

> [*t*]*he Commission first recalls that it is in fact not competent ratione personae to examine proceedings before or decisions of organs of the European Communities … This does not mean, however, that by granting executory power to a judgment of the European Court of Justice the competent German authorities acted quasi as Community organs and are to that extent beyond the scope of control exercised by the Convention organs.*[51]

147 Most famously, in its 2012 judgment in the case of *Nada v. Switzerland*, the ECtHR held as follows:

> *168. According to established case-law, a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure*

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[49] WTO, report of the Panel, European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS174/R, 20 April 2005, para. 7.725. See also WTO, report the Panel, European Communities—Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R and Corr.1, WT/DS292/R and Corr.1 and WT/DS293/R and Corr.1, 21 November 2006, para. 7.101.

[50] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, paras. 6.72.

[51] ECommHR, *M. & Co. v. Federal Republic of Germany*, Application 13258/87, Decision, 9 February 1990.

concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention.[52]

148 The teams would be expected to establish whether the normative control rule is applicable in the present case. The Respondent may argue that it has now attained customary status, although this may be a somewhat difficult argument for it to sustain given the limited amount of practice on the subject. In the alternative, the Respondent may seek to demonstrate that Article 120 of the ASNEC Charter should be interpreted in the light of the above-mention practice as implying the rule of normative control. The teams should be able to elaborate on upon both the similarities and differences between the ASNEC and the EU, on whose practice they would most likely rely. In any event, all teams should be strongly encouraged to explain the rationale of the arguments on both sides of the debate.

149 The next step for the teams would be to establish the requisite criteria for the application of the normative control rule and to demonstrate whether they have been fulfilled. Given the lack of settled practice, the teams may draw upon the existing scholarly opinions. For instance, Professor Frank Hoffmeister concluded that the organisation law should govern "both the substantive legality and the available remedies for the measure".[53] The measure of discretion enjoyed by the member state when implementing a binding act of the international organisation is also relevant.[54]

D. WHETHER THE RESPONDENT TREATED MFNB UNFAIRLY AND INEQUITABLY

(1) The FET clause of the ASNEC Energy Investment Treaty

150 The FET clause of the ASNEC Energy Investment Treaty is contained in Article 2 thereof.

ARTICLE II — TREATMENT OF INVESTMENTS

(1) Each Contracting Party shall accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. The Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.

151 As follows from the above, the ASNEC Energy Investment Treaty contains a free-standing FET clause. Because of that, in the context of the application of the FET clause, the core of the dispute between the parties would likely revolve around the content and scope of the obligation to provide fair and equitable treatment to protected investors and their investments.

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[52] ECtHR, *Nada v. Switzerland*, Application no. 10593/08, Judgment, 12 September 2012, para. 168. See also ECtHR, *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. The Netherlands*, Application no. 13645/05, Decision, 20 January 2009.

[53] Hoffmeister, "Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?", 21(3) The European Journal of International Law 723 (2010), 742–743.

[54] Csaba Kovács, Attribution in International Investment Law (2018), 326.

(2) Potential legal approaches to the case and the related facts

152 Claimant may pursue several approaches to the application of the FET clause of the Treaty Concerning the Encouragement and Reciprocal Protection of Investments in the ASNEC Region in this case.

153 One possible strategy can be based on the assumption that the Respondent has made specific representations to Mountaintop and MFNB at the time when the investment into Ticaida-1 was made and frustrated the expectations based on the said representations by implementing the Coal Directive. In that context, Claimant is expected to convince the Tribunal that expectations based on the representations made to Mountaintop and MFNB were legitimate and are thereby protected by the FET clause of the ASNEC Energy Investment Treaty.

154 The other strategy could be based around the proposition that irrespective of whether or not the Respondent actually made any specific representations directed at MFNB or Mountaintop, by implementing the coal directive the Respondent fundamentally altered the legal environment in which MFNB made its investment thereby breaching FET. From that standpoint, the Respondent could suggest that regardless of any representations made to Mountaintop or MFNB, both could have reasonably expected that the Respondent would not implement a measure so dramatic, that it would effectively shut down an entire sector of economy.

155 When it comes to free standing FET clauses, like the one contained in the ASNEC Energy Investment Treaty, academic writings routinely acknowledge the protection of legitimate expectations as an element of FET without any reservations as to wording of a particular FET provision.

156 McLachlan, Shore and Weiniger summarize the criteria required for invocation of the protection of legitimate expectations under the FET standard as follows:

> *(a) The existence of a promise or assurance attributable to a competent organ or representative of the State, which may be explicit or implicit;*
>
> *(b) Reliance by the claimants as a matter of fact; and*
>
> *(c) Reasonableness of the reliance-this cannot be separated from (a) in particular where the promise is not contained in a contract or otherwise stated explicitly.*[55]

157 In that context and against the background of the case, the main challenge for the Claimant would be to show that the Respondent made a promise or assurance to either MFNB or Mountaintop.

158 On the first criteria offered by McLachlan, Shore and Weiniger, the case law and legal doctrine that address the issue of legitimate expectations is not uniform an do not offer a boilerplate set of criteria that can be used to identify a promise or a representation capable of creating an expectation that would be protected under FET. The teams would be expected to find relevant case law (an especially, recent cases), qualifying various types of state conduct as a basis for

[55] *McLachlan, Shore & Weiniger*, International Investment Arbitration – Substantive Principles (OUP, 2nd ed. 2017), para. 7.184.

invocation of the concept of legitimate expectations and compare it to the facts of this year's problem.

159 From a more general point of view, in order to argue that Respondent made a representation to the Claimant, the Claimant would need to consider and show the existence of such criteria as e.g. Respondent's intent to make a representation, the specificity of the representation and the form of the representation.

160 Arbitral tribunals have – to a varying degree of uniformity – ruled that licenses, contracts, official statements and regulatory frameworks can generate legitimate expectations.[56]

161 When it comes to the second and the third criteria listed by McLachlan, Shore and Weiniger, it is widely acknowledged that legitimate expectations can arise only when investor relied on a representation and such reliance was reasonable.[57]

162 The reliance is, to a large extent, considered a binary criterion. It is normally satisfied if the claimant (or in our case the original investor – MFNB) can prove that it made the investment relying on the particular conduct of the respondent state.[58]

163 The reasonability of reliance, on the other hand, is a far more complex issue. In a considerable number of contemporary FET cases the reasonability of reliance is assessed objectively – i.e. by identification of the expectation that could have been objectively generated by the underlying representation at the time of the investment and light of all the relevant circumstances.[59]

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[56] *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras 85-99; *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 160; MTD Equity et al v. Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras 107-167; Continental Casualty v. Argentina, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 261; EDF et al. v. Argentina, ICSID Case No. ARB/03/23, Award, 11 June 2012, paras 50 et seq.; *Southern Pacific v. Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, paras 82-83; CMS v. Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 269; Sempra v. Argentina, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 303; Enron et al. v. Argentina, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 264.

[57] *Salacuse,* The Law of Investment Treaties (Oxford University Press, 2nd ed. 2015), p. 255; *Dolzer & Schreuer,* Principles of International Investment Law (Oxford University Press, 2nd ed. 2012), p. 148; *McLachlan, Shore & Weiniger,* International Investment Arbitration – Substantive Principles (Oxford University Press, 2nd ed. 2017), para. 7.166; *Ioan Micula et al. v. Romania [I]*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paras 668-672; *Ulysseas, v. Ecuador*, UNCITRAL, Final Award, 12 June 2012, paras 248-249; *AES Summit et al. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.8.; *Glamis Gold v. U.S.*, UNCITRAL, Award, 8 June 2009, para. 799.

[58] See e.g. *Jürgen Wirtgen et al. v. Czech Republic,* PCA Case No. 2014-03, Final Award, 11 October 2017, paras 409-411; *Allard v. Barbados*, PCA Case No. 2012-06, Award, 27 June 2016, paras 217-218; *Ioan Micula et al. v. Romania [I],* ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 672; *Isolux v. Spain*, SCC Case No. V2013/153, Award, 12 July 2016, para. 775.

[59] See *McLachlan, Shore & Weiniger,* International Investment Arbitration – Substantive Principles (Oxford University Press, 2nd ed. 2017), para. 7.190; *Salacuse,* The Law of Investment Treaties (Oxford University Press, 2nd ed. 2015), p. 255; *Jürgen Wirtgen et al. v. Czech Republic,* PCA Case No. 2014-03, Final Award, 11 October 2017, para. 421; *In- vesmart, v. Czech Republic,* UNCITRAL, Award (Redacted), 26 June 2009, paras 250 *et seq.*; *Bayindir v. Pakistan,* ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 192; *Electrabel v. Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras 7.73.-7.79.; *Charanne et al. v. Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 495; *Ulysseas, v. Ecuador*, UNCITRAL, Final Award, 12 June 2012, paras 247-249; *Electrabel v. of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras 7.77.-7.78.; *Arif v. of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paras 5.31.-5.35.; *ECE et al. v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, paras 4.764.- 4.765.; *Murphy v. Ecuador*

164 On exceptional occasions, rare tribunals acknowledged that legitimate expectations of fair and equitable treatment can exist even without a properly formulated assurance or comparable form of state conduct in case of fundamental regulatory changes. Such approach, however, has to be considered extremely rare and exceptional.[60] Still, the Claimant might still be interested in presenting arguments on such unconventional application of FET in light of the dramatic character of the Coal Directive and the implementing law.

165 Both approaches can be potentially be complimented by arguments on ancillary breaches of FET such as e.g. prohibition of arbitrary and discriminatory treatment and or failure to provide sufficient transparency to the foreign investors.[61]

166 In the context of the above, the Claimant can base its submissions e.g. on the following facts of the case and potential arguments:

- Respondent has historically relied on the coal industry.
- After many years of profiting from the coal industry (see **Exhibit C-1**) and soliciting the investment into the construction of Ticadia-1 (see **Exhibits C-2 and C-5**), Respondent fundamentally altered the legal framework under which the investment in T1 had been made, thereby breaching FET.
- Respondent's officials welcomed the construction of the power plant. The governor of Ticadia, Mr Ji-Yeong made specific representations and assurances to MFNB and Mountaintop during the meeting between Ticadian Municipal Government, MFNB and Mountaintop on 19 August 2009 (see e.g. **Exhibit C-2 and Exhibit C-5**).
- By adopting Law 66/2016, the Respondent forced Ticadia-1 to shut down 26 years before the end of its expected 40-year lifetime (see **Exhibit C-8**). Notably, the license issued by Mr. Ji-Yeong provided that the operating lifetime of Ticadia-1 will expire on 25 September 2054 (see e.g. **Exhibit R-1**).
- The Law 66/2016 was completely unproportionate to its declared regulatory purpose – protection of the environment. There is no proven causal link between floods in Laoc and the emissions the Laocan coal plants.

[II], PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, paras 248-249; *Cervin et al. v. Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017, para. 509; *UAB v. Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, para. 835; *Toto v. Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, para. 165.

[60] *Saluka v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 329; *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 70; *Parkerings v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 331; *Jacob & Schill,* Fair and Equitable Treatment: Content, Practice, Method, in: Bungenberg, Griebel, Hobe & Reinisch (eds), International Investment Law: A Handbook (Beck, Nomos & Hart, 2015), p. 700, para. 58; Cf. *McLachlan, Shore & Weiniger,* International Investment Arbitration – Substantive Principles (Oxford University Press, 2017), para. 7.187; *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 551.

[61] On those prohibition of arbitrary and discriminatory treatment and transparency as specific types of conduct required under FET see e.g. *Dolzer & Schreuer,* Principles of International Investment Law (Oxford University Press, 2nd ed. 2012), pp. 149 *et seq.*, 191-197.

- By enacting the Law 72/2016 (**Exhibit C-9**), the Respondent created the Laocan Renewables Company, which is owned and funded by the government. This can be viewed as an attempt to nationalise the market share of the coal plants in the domestic energy supply as well as an arbitrary treatment of the coal plants.

- It can potentially be argued that the Respondent failed to provide sufficient transparency to MFNB and Mountaintoup. Particularly since the Republic of Laoc dismissed the industry stakeholders' opinion at the time Law 66/2016 and Law 72/2016 were considered (see **Clarification n. 10, PO 3**).

167 The Respondent, on the other hand, would of course be interested in contesting Claimant's arguments on making of any representations to MFNB or existence of prerequisites required for invocation of the concept of legitimate expectations. In this sense, the Respondent is expected to invoke e.g. the following facts of the case and potential arguments:

- Mr Ji-Yeong has never made any specific representations or commitments to Mountaintop or MFNB. Mr Ji-Yeong did not provide any explicit written commitment to either MFNB or Mountaintop. Mr Ji-Yeong's statements cannot serve as a proper basis for legitimate expectation.

- As there is no express stabilization commitment towards MFNB or Mountaintop, the Respondent retains its sovereign right to regulate and does not incur liability under the FET standard for the damage caused to the operators of the coal plants.

- At the time of the investment it was publicly known that the Laocan have been suffering from annual floods that the most probable explanations for that was the greenhouse emissions made by numerous coal plants operated in Laoc (**Exhibit R-2**). When the license for the commercial operation of Ticadia-1 was granted, Respondent emphasized the importance of Ticadia-1 compliance with environmental regulation (**Exhibit R-1**). The Claimant should have reasonably expected that a regulatory change that would such regulation was possible.

- No reasonable investor could expect Laoc to not reform its legal framework when faced with such a threat to its population and its territory, mainly coming from a state, Mercuria, who closely followed the discussion held on ASNEC Parliament regarding the dangers posed by the coal-energy.

- Laoc consulted relevant stakeholders in the energy industry as well as its internal advisors prior to enacting Law 66/2016 and Law 72/2016 (**PO 3, line 1850**).

- MFNB's regulatory due diligence carried out at the time of the investment was not sufficient to properly consider the regulatory risks related to the investment in Ticadia-1 (**Exhibit C-3**).

- The Law 72/2016 (**Exhibit C-9**) was enacted aiming at offering the coal investors the opportunity to invest further into the renewable energy sector an option entering into a 20-year energy supply contract at prices substantially above market value. Therefore, Respondent actually presented a measure that would allow the Claimant to recoup at least part of its losses.

168 In sum, in support of its arguments on this strategy, both the Claimant and the Respondent are expected to quote from a range of arbitral awards and academic articles addressing the broad

issue of the application of the FET-standard, as well as more narrow issues related to the application of sub-categories of FET. The parties are expected to address the following legal issues:

- The interpretation of autonomous FET clauses;
- The elements of the FET standard;
- The prerequisites for invocation of the concept of legitimate expectations;
- The prospects of liability for fundamental regulatory changes under the FET standard; and
- Liability for arbitrary treatment, discrimination and the failure to provide transparent legal environment under the FET standard.