



Article

Recent Cases in International Investment Law Involving Local Government on Investment Disputes

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Abstract

An understanding of the importance of regulating investment treaties and implementing measures in accordance with existing rules has been generally understood by States in foreign direct investment. However, the local government where the location of foreign investment activities is carried out has not received sufficient attention. As a result, various cases of international investment disputes have arisen caused by actions taken by local governments. This study discusses how the tribunal views and interprets actions taken by local governments in relation to violations of foreign investor rights. In the span of time over the past eight years, no less than six hundred cases of foreign investment disputes have been investigated. Of these, three available and final cases became the subject of discussion in research and became examples to link them with the legal skills of local government officials in mitigating the occurrence of foreign investment case disputes. The results of this study show that in terms of understanding the rules of international investment law, the government in the country can mitigate or handle the case better with foreign investment disputes.

INTRODUCTION

In the current development of international investment law, international investment treaties have been designed in such a way as to seek a balance in safeguarding investor rights and the sovereignty of a government (Zhu, 2022; Lin, 2019; Brew, 2019; Oktaviandra, 2022a), in addition to efforts to close the gaps that still exist in connection with technological developments (Oktaviandra, 2022b; Chaisse, 2020; Sanabria, 2021). For example, in anticipation of setting Fair and Equitable Treatment (FET) clauses that tend to be interpreted differently (Collins, 2017; Subedi, 2010),¹ The international investment agreement in CETA (Comprehensive Economic Trade Agreement) between Canada and the European Union has included FET arrangements in a more detailed form and closed the possibility of free interpretation. This is done by CETA by containing what requirements can be included in violation of FET clauses rather than simply attributing them to standards in international law.² Meanwhile, in another example clause like the expropriation clause (Vandeveld, 2010), International investment treaties are also constantly evolving. One of them can be seen in the

¹ Collins argues that FETs reflect how laws in a country are properly implemented (due process). Meanwhile, Subedi, argues that FET is a basic protection standard for foreign investors.

² See Article 8.9.2 CETA (*Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union [And Its Member States*, 30 November 2016 (entered into force provisionally 21 September 2017) [CETA]. Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3593>.

Trans Pacific Partnership (TPP) agreement which has stated that some forms of government actions in maintaining public health are declared as exceptions to expropriation actions.³ However, the pattern of relations between local governments and the central government as an integral entity as the host country for investment implementation is still one of the contributing factors to the birth of foreign investment disputes between investors and the government through the ISDS (investor-State Dispute Settlement) scheme.

Some of the previous prominent investment cases such as *Methanex*, *Tecmed* and *Azurix* in the early 21st century have provided insight and learning in understanding and resolving existing disputes. Nevertheless, disputes between foreign investors and the government, particularly those related to local governments, still persist today. Therefore, it takes a continuous analysis in three blocks. First, how an investment agreement or contract transforms over time. Second, how the tribunal responds to disputes that arise on it. Finally, how efforts to mitigate the emergence of foreign investment disputes can be realized into the legal knowledge possessed by government officials, especially at the regional level. Related to the above, this study was conducted in the initial stage by observing several cases of ISDS that are publicly available and accessible in English. Researcher sorted all ISDS cases with the above filters over the last eight-year period (the range of years of tribunal rulings from 2015-2023). Of the more than 600 cases examined according to the filter (final, available to the public and in English), there were only 3 ISDS cases decided by the tribunal according to the filter involving disputes with local governments. The three cases are *Liedercon SL vs Republic of Peru* (2020), *Casinos Austria vs Argentine Republic* (2021) and *Westmoreland vs Government of Canada* (2022). These three cases are the latest cases that have not been discussed comprehensively by legal scholars. This study analyzed the important comment and decisions provided by the tribunal to spot its connection with observations from the field regarding the knowledge of local apparatus in foreign direct investment. The researcher also utilized previous knowledge on several cases involving local governments such as *Methanex*, *Tecmed*, and *Azurix* cases. By analyzing these three cases, it is expected to show several things, especially how the trend of the tribunal in responding to FDI disputes involving local governments in it. Initial hypothesis believed there would certainly be changes in the way the tribunal viewed compared to previous years along with various changes that also existed as part of the development of international investment law in the last two decades.

The understanding gained from learning from the latest case that has been decided by this tribunal and coupled with the understanding of legal knowledge of existing conditions possessed by legal apparatus in local governments can make a real contribution in mitigating foreign investment disputes involving local governments in it. Initial hypotheses, based on field observations, have shown that the local legal apparatus does not have sufficient legal skills and knowledge to take policies against foreign investment. With the understanding of regulations and mitigation of potential foreign investment disputes, it is expected that the initial objective of implementing foreign investment normatively can be achieved, namely the benefits created for all (Dolfzer, [2012](#), p. 5).

RESULT AND DISCUSSION

The enforcement of international investment law depends not only on how the arrangements are created, but also how they are implemented. It is also worth looking at how the existing clauses are interpreted by the parties, namely the state and investors, even more so from the tribunal's decision. The same clause may be applied and interpreted differently by the Tribunal. This is inseparable from the nature of case settlements which are generally based on case by

³ See Appendix 9B 3 b TPP *Trans-Pacific Partnership Agreement*, 4 February 2016 (not in force) [TPP]. Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3573>.

case, especially against clauses that are made do not provide clear criteria so that tribunals employ their respective interpretations.⁴ Therefore, a clear statement of clauses and how the tribunal interprets should receive special attention in understanding international investment law. In this study, the opinion of the tribunal in some recent cases became the object of observation. From 2015-2023, foreign investment cases involving local governments have been selected from a total of no less than 600 cases. The three cases and the tribunal's opinions from these cases are then discussed to see how international investment law applies involving local governments.

Liedercon SL vs Republic of Peru

This first case involved Liedercon SL, a company from Spain with the Republic of Peru which in this case is the Metropolitan Municipality of Lima ("MML").⁵ In 2004, Lidercón, S.L entered into an investment contract with the Metropolitan Municipality of Lima ("MML"). The investment contract contains a commitment to build and operate a motor vehicle inspection center in the MML region.

Lidercón took issue with the failure of Peruvian public authorities to respect the exclusive rights believed to be Liedercon's contractual rights. They also argued that under the contract, their efforts were subject to scrutiny by the MML rather than by the Ministry. Meanwhile, it is unusual when foreign investors from various countries complain about discrimination experienced. In this case, Lidercón argued that the removal of previously claimed exclusivity rights had been influenced by Peruvian state regulations that violated the Bilateral Investment Treaty between Spain and Peru. Furthermore, it was more clearly known that the motor vehicle inspection system in Peru has become an obligation since the enactment of the 1999 *Ley General de Transporte y Tránsito Terrestre* ("1999 Law") especially in Article 16 that the regulation and management of this system will be part of the "*competencias y funciones*" (jurisdiction and powers) of the ministry, which in 2001 passed a regulation *The Reglamento Nacional de Vehículos* ("2001 Regulation") contains a chapter on motor vehicles mainly stipulated in Article 52 (E) that the Ministry has the authority to regulate and supervise the inspection of vehicles in the country. Then, in Article 52(G) it is stated that vehicle owners are free to choose where they will obtain inspection certificates; and in Article 54(A) it is stated that the Ministry can delegate some of its functions to other entities.

The problem became complicated when a few months before the issuance of the 2001 regulation, the ministry had agreed in a *Convenio de Gestión de Revisiones Técnicas de Vehículos en Lima Metropolitana* (Management Agreement for the Technical Inspection of Vehicles in Metropolitan Lima) with MML. The agreement stipulates that MML supervise the capital region. However, the Peruvian government argues that the delegation was never carried out in accordance with its terms, so it is believed that the *Convenio* was never enforced.

This case shows how it is expected for a level of local government to establish commitments and regulate part of foreign investment business activities, it turns out that the power or delegation for it never exists, so the arrangements and decisions that are of concern to foreign investors are regulated by the relevant ministries (central government). The important question that arises here is whether with the above conditions there has been a

⁴ For example, when the FET clause is associated with international law only. The relationship between FETs and international law can also vary. For example, with the provision of 'FET that in no case shall be less than required by International Law' as stated in the agreement US- Argentine BIT (1991) or when the FET is expressed as 'FET in accordance with international law' as in Article 4(1) Spain – Mexico BIT (1996), or 'treatment in accordance with international law, including FET' Like Article 1105 NAFTA.

⁵ ICSID case No. ARB/17/9 award of 2020.

legitimate expectation by investors. In *Tecmed*,⁶ in its deliberations of previous opinions, the tribunal interpreted the terms of the FET clauses to include a 'good faith principle' that protects investors' legitimate expectations and prohibits states from acting in bad faith. The *Tecmed* court blamed the state for violating this legitimate expectation by acting inconsistently in granting permits.⁷ In relation to the *Liedercon* case, it will be interesting to see how the tribunal assesses whether the existing conditions can be equated with those in the previous *Tecmed* case.

The MML relied on the *Ley Orgánica de Municipalidades* issued earlier that year as authorization to grant concessions to inspection centers within its jurisdiction. He found this incoherent with the fact that the Ministry under the Regulations in 2003 was to apply a set of national criteria for those wishing to operate inspection centres, and to issue nationally valid certificates. However, it is actually stated in Article 5 of the 2008 Act (or "*Ley ITV*") which prohibits the granting of exclusive concessions, so as to secure benefits for the public from the emergence of competition, both in terms of service quality and cost.

The Tribunal in the *Liedercon* case preceded its legal considerations in paragraph 28 of the opinion:

Thus, there was tension between the MTC and the MML regarding who had the competence to approve vehicle inspection centers in Lima. Under Peruvian law, where there is a disagreement between two government entities on the scope of their competence, it may be resolved via a constitutional proceeding (proceso competencial) before the Constitutional Tribunal, where the Tribunal interprets the applicable laws and decides which is the competent entity. However, the Constitutional Tribunal has clarified that Congress may also issue laws granting competences to the national government (such as the MTC) to maintain the "unity" of the State. In those cases, via legislation, Congress clarifies which national-level entity has the competence to act.

Which means that the tribunal in analyzing the relationship between the central government and local governments refers to the constitution in force in the Peruvian country. The Tribunal spotted, according to the constitution, under normal conditions, who has the authority to enforce the provisions of the same object. In this case, when the Peruvian constitution gives the central government the authority to govern nationally, the existence of the authority of local governments becomes powerless.

In terms of the linkages and conflicts between international and national law, the tribunal in this case viewed no such condition that gives the tribunal the urgency to explore the elements of international law to be examined and considered as in the event of expropriation. This was stated by the tribunal in paragraphs 273, 274 and 276 as follows:

*273. At any rate, it is not necessary for the present Tribunal to take a position as to *Lidercón's* interesting argument, because in this case the Peruvian adjudications of which *Lidercón* complains were resolved in accordance with Peruvian law, and there is no competing autonomous substantive standard of international law with respect to the claim in question that would trump Peruvian law. (If for instance there were substantial differences between a national law and international law with respect to a matter of expropriation, a BIT tribunal might consider that it has the authority and indeed the duty to ensure that the international requirements are met; that may not be the case in other areas where there is no autonomous standard of international law.)*

⁶ The case appears below the *Agreement on the Promotion and Reciprocal Protection of Investments Between the Kingdom of Spain and the United Mexican States*, 23 June 1995, 1965 UNTS 147 (entered into force 18 December 1996). Retrieved from <https://treaties.un.org/doc/Publication/UNTS/Volume%201965/v1965.pdf>. The case is based on the operation of a hazardous waste landfill. *Tecmed* has been promised long-term investment, but the Mexican government did not issue an extension permit through INE (National Ecology Institute of Mexico) to continue landfill operations.

⁷ *Técnicas Medioambientales Tecmed S.A. vs. Mexico*, ICSID Case No. ARB (AF)/00/2 (Award of 29 May 2003) [*Tecmed*], paragraph. 154.

274. *A State cannot be held liable under international law for the fact that a national legislative assembly comprised of representatives elected from the ranks of a variety of political movements frequently, as a function of the democratic process, raise harsh criticisms of the actions of executive and administrative officials, and by ricochet of private parties who contract with the public sector. No more need be said.*

276. *There is unfinished business between Lidercón and Peruvian government entities that this Award cannot deal with comprehensively. Lidercón has not abandoned its inspection centers, government entities continue to exercise their regulatory and supervisory powers over them and there is ongoing litigation involving the same or similar issues that have been put before this Tribunal. The relations between Lidercón Perú and MML as co-contractants, and between Lidercón Perú and the Ministry as regulator, have been contentious and appear until this moment to be at something of a stalemate. Lidercón has insisted in maintaining a concession contract the terms of which are no longer viable under the current legal framework as interpreted by Peruvian courts. Lidercón and the Ministry have remained unwilling to explore how they might cooperate in rescuing a practical arrangements in the wreckage of the Contract. The Ministry asks that Lidercón simply get in line with other operators ...”*

One of the biggest points that resulted in the tribunal's decision not favoring Lidercon as an investor was the absence of the investor's efforts to find a solution and improve the contract as stated as follows:

277. *The situation is one of considerable disorder. In fact it corresponds to the type of hypotheses envisaged by Clause 19.4 of the Contract (namely that of regulatory changes that impede MML’s performance of the Contract; see Paragraph 72), but Lidercón chose to fight the regulatory regime rather than to avail itself of the contractual solution. Still, given that the Ley ITV allowed pre-existing contracts to endure providing that they conformed to the relevant laws and regulations, Peru cannot ignore the situation of an investor who relied on that general principle if it now seeks adjustments of its modus operandi in cooperation with the regulators. This Tribunal does not, however, have the mission or the mandate to devise practical solutions and will do no more than to discharge its mission to decide the issues presented to it in the ambit of the pleadings.*

This was confirmed by the tribunal in its judgment at paragraph 247:

247. *When one then reads the Contract, one perceives that this initial question falls away, since the terms of the document provide that the Ley Aplicable to it is subject to the comprehensive list of mutations found in Bullet Point 13. Clause 19.4 tells the Concessionaire exactly what it should do if performance of the Contract is impeded by legislation, and Clause 23.2 provides a mechanism for financial adjustment in the event the profitability of the Concession or the concessionaire’s investment or property were to be significantly affected or impaired. That is a complete answer to this part of the claim.*

The Tribunal added to its confidence by giving consideration as set out in paragraph 253 to statements in contracts capable of providing loopholes in the event of problems difficult for local authorities to control. The Tribunal stated:

253. *MML’s drafters were prudent enough, in Clauses 19 and 23, to anticipate such possible impediments to the realization of the contractual stipulations.*

The tribunal's consideration in this case saw that there were sufficient provisions in the contract that maintained the expectations of investors and the solutions provided, including the termination of the contract.

In the next section, the tribunal discusses legitimate expectations. The Tribunal held that with statements in the contract accommodating contract changes, investors' reliance on expectations became more flexible which resulted in the difficulty of claiming breaches of FET clauses. This is explained by the tribunal in paragraphs 195 - 198.

195. In the context of this evolving regulatory framework, Lidercón and MML included in the Concession Contract Bullet Point 13, and Clauses 19.4 and 23.2. Bullet Point 13 explicitly refers to Ley Orgánica de Municipalidades and Ordenanza 506 as normative sources, among others, and then adds those that modify, derogate, complement, replace or interpret all of those sources. All of them encompass significant potential alterations of the contractual regime; even the notion of “complement” would bring in other applicable rules that were not listed, such as Ordenanza 694, or could generate new ones by way of supplying answers in the event of lacunae or ambiguity.

196. Public authorities may fail to accord fair and equitable treatment if they create legitimate expectations that they subsequently fail to meet. To be legitimate, however, an expectation must be of a nature to induce reasonable reliance.

197. Moreover, Lidercón and MML explicitly included equilibrium and “adverse-change” Clauses in the Contrato de Concesión, Clauses 23.2 and 19.4 (see Paragraphs 72-73). These provisions made it explicitly clear that regulatory changes could alter the Concession’s economic and financial equilibrium or prevent MML from complying with its contractual obligations, and provided for appropriate remedies.

198. Clause 19.4 of the Contract in particular provided that Lidercón Perú had the right to terminate the Contract and to attribute fault to MML if an amendment to an applicable law affected the implementation of the Contract or prevented MML from performing its contractual obligations. It seems fair to infer that this provision was designed to prevent MML from insisting that because it was not directly responsible for the new legislation it could require Lidercón Perú to continue performing. The Contract thus treated such new legislation as attracting the liability of MML.

The tribunal's opinion above is in line with the concept of FET clauses made in the TPP agreement which states that the fact when a party fails to act or takes action that may not be consistent with investor expectations, cannot be categorized as a violation of the minimum standard treatment even when it causes losses to investors.⁸

Based on the above considerations, the tribunal's decision was to reject the investor's claim and recommend that the contract be renegotiated between them. This is stated in paragraph 283 as follows:

“... [R]ejects the claims in their entirety in the absence of proof of breach of the Treaty; and Observes that the Concession Contract remains in force, with effects yet to be determined as necessary, preferably by negotiated accommodations rather than renewed dispute.”

Another lesson to be learned from this case is how the original regulations were made and put in place starting in the early 2000s. Then, investors sued in 2016 to ICSID. This means that the complexity or mistake made by the government may not be immediately apparent but can become a boomerang even in the years to come.

Casinos Austria vs Argentine Republic

In the case of Casinos Austria vs Argentine Republic (2021) or abbreviated as 'Casinos Austria,' the parties involved are Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft with the Government of the Argentine Republic which in this case refers to the actions carried out by the Province of Salta.⁹ Following the public tender and various changes in ownership structure, ENJASA is majority-owned and controlled by the Plaintiffs, namely Casinos Austria International GmbH (“CAI”), a limited liability company incorporated under Austrian law, and Casinos Austria Aktiengesellschaft (“CASAG”), a stock company incorporated under Austrian law (collectively, the “Casino” or the “Plaintiff”). In this case, the plaintiffs are operators of casinos and gaming games that exist in various jurisdictions around the world. CAI is a subsidiary of CASAG and the international branch of gaming operations.

⁸ See section 9.6 (4) of the TPP.

⁹ ICSID case No. ARB/14/32 judgment of 2021.

Plaintiff holds majority ownership and exercises control over ENJASA through Leisure & Entertainment S.A. ("L&E"), a stock company under Argentine law, in which Plaintiff is the majority shareholder.

In 1998, the Salta Provincial Executive issued a decree number 2126/98 regulating the need for investment for the sustainable development of the gaming sector and creating ENJASA, a company with limited liability under Argentine law to manage, commercialize, and exploit gaming games in Salta Province.¹⁰ Regional regulation No. 7020 of Salta Province, which came into effect on December 30, 1998, provides the main regulatory framework for the gaming and lottery sector in the Province. This regulation created ENREJA as a regulatory body to oversee the gaming and lottery sector in Salta Province (Article 31 of Regional Regulation No.7020 of Salta Province). This ENREJA Agency is responsible for issuing operating rules and overseeing compliance with applicable laws and regulations (Articles 3, 32, and 33 of Regulation No. 7020).¹¹

The dispute began to arise in 2013 due to the revocation of a 30-year exclusive license granted in 1999 to the Argentine company Entretenimientos y Juegos de Azar S.A. ("ENJASA"). The exclusive license is for the operation of gaming facilities and gaming activities in Salta Province. ENJASA has been established by the Salta Provincial Government as part of the process of privatizing the gaming and lottery sector, and developing tourism in the region.

The plaintiffs in this case argue that the license revocation made against ENJASA, followed by the transfer of gaming operations and personnel to a number of new game operators, was an arbitrary act of the Ente Regulador del Juego de Azar ("ENREJA"), which is the Provincial regulatory authority for the gaming sector. This action is considered politically motivated to benefit local gaming operators and to increase revenue from gaming on the one hand. On the other hand, the action is considered to effectively destroy the investment of the investor in Argentina.

The defendant, namely the Province of Salta, represented by the Argentine Government, on the contrary, claims that the revocation of ENJASA's license in 2013 was part of the legitimate sanctions imposed in accordance with applicable regulations in the Province of Salta. The sanctions were claimed to be imposed by ENREJA with due regard to administrative legal processes, and were motivated by ENJASA's repeated and prolonged non-compliance with the rules to prevent money laundering in the gaming sector. The plaintiff is also claimed to have had ENJASA's involvement with other operators for gaming activities in Salta province without permission from ENREJA as the regulatory authority. ENJASA's conduct, as claimed by the defendant, constitutes a gross and repeated violation of applicable regulations, which justifies the revocation of its exclusive operating license. For the reasons described earlier, the lawsuit rejects any claim for BIT infringement.

By paying attention to this case, it can be observed how claims of termination of permits that are considered unfair with discriminatory purposes are carried out by local government authorities against foreign investors. In analyzing this case, it is necessary to consider how from the beginning, gaming licenses were included in the authority of local governments under the Argentine constitution. This is stated in the tribunal's decision paragraph 64 which states:

In accordance with Articles 75 and 99 of the National Constitution of Argentina, the regulation of games of chance falls outside the scope of competence of the Federal Government. Such regulation is thus the competence of the respective Provinces.

¹⁰ Paragraph 67 Casinos Austria.

¹¹ Paragraph 68 Casinos Austria.

Furthermore, it is also necessary to look at another consideration, namely the existence of Acta Acuerdo which contains an agreement to change the investment contract. This is contained in paragraph 89 of the tribunal's decision as follows:

“...The change in conditions of ENJASA’s gaming license was formalized in the so-called “Acta Acuerdo”, an agreement concluded on 7 May 2008 between ENJASA and UNIREN and ratified by the Government of Salta on 11 August 2008 through Decree No. 3428/08. ...”

Another fact that needs to be observed is that there has been a sanction and investigation process to ENJASA by ENREJA in the period 2005-2013 as stated in paragraphs 93-95 of the tribunal's decision:

Before the conclusion of the Acta Acuerdo, ENJASA was sanctioned for breaching the regulatory framework on two occasions. In 2005, ENREJA fined ENJASA in the amount of ARS 20,000 for implementing unauthorized restrictions on bets in a lottery game. In 2007, ENREJA fined ENJASA in the amount of ARS 10,000 for operating a slot machine without authorization.

In the years between the conclusion of the Acta Acuerdo and the time when ENJASA’s license was revoked, the number of administrative sanctions increased. Between 2007 and August 2013, ENREJA conducted several administrative inquiries into ENJASA’s compliance with the regulatory framework in place and imposed several sanctions.

On 11 December 2012, ENREJA opened three separate investigations into breaches by ENJASA of the regulations governing games of chance in the Province of Salta. One investigation principally concerned charges for breach of the anti-money laundering rules in the administration of a lottery game by ENJASA (Resolution No. 380/12); one concerned charges for breach of anti-money laundering rules in the operation of one of ENJASA’s casinos (Resolution No. 381/12); and one concerned charges for breach of the prohibition to hire operators without ENREJA’s authorization (Resolution No. 384/12).

On the other hand, the tribunal also took into account claims from investors or plaintiffs that in the years, especially since the election of the new governor, there have been attempts to terminate the operations and permits of investors. This is set out in the tribunal's decision in paragraph 137 as follows.

Starting in December 2007, following the takeover of Mr. Urtubey as new governor, Claimants claim, representatives of the Province of Salta and ENREJA began exerting pressure on ENJASA’s operations. To start with, the Province of Salta insisted on renegotiating the conditions of ENJASA’s gaming license, threatening to terminate ENJASA’s license if ENJASA did not accept the modification of the license fee by paying a dynamic canon fee, instead of the previous fixed-fee arrangement. Claimants consider that ENJASA had no choice but to accept the new license fee in the Acta Acuerdo, which was concluded between ENJASA and UNIREN on 7 May 2008 and ratified by the Government of Salta on 11 August 2008.

In its preliminary analysis, the tribunal affirmed the concept that national and international law are separate entities. The tribunal's argument in that regard is set out in paragraph 314 as follows:

“.... A treaty claim, in other words, remains governed by treaty law. As the ICJ has stated in the ELSI case, domestic law and international law, including the BIT, are separate regimes, so that:

[c]ompliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of a treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.

In its ruling, the tribunal first separates which ones include investments and which do not. In this regard, the tribunal emphasised the existence of an investment made into the destination country or the exercise of an investment as set out in paragraph 325 of the tribunal's decision:

The notion of “investments”, which are protected against expropriation under Article 4 of the BIT, in turn, encompasses not only direct investments of an investor from the other Contracting Party, but also investments that are held through a holding company that was incorporated in the host State, as in the present case.

Meanwhile, certain assets, especially exclusive rights in business operation licenses, were emphasized by the tribunal not categorized as investment. The tribunal's findings are set out in paragraph 326 as follows:

By contrast, the Tribunal has found that ENJASA’s assets themselves, including in particular its exclusive operating license, do not qualify under Article 1(1) of the BIT as Claimants’ investments.

The tribunal in this case also sharpened the test of whether or not expropriation occurred. The Tribunal held that to assess the occurrence of expropriation not only scrutinize at the impact that occurs on the loss of investors, but also recognizes the existence of a state's sovereignty and how it is done without the intention of discrimination. The tribunal also referred to the tribunal's decision in the *Saluka* case, in which the state was not necessarily obliged to compensate any investor if his actions were lawfully committed. Paragraph 331 of the tribunal's decision reads:

*However, looking only at the effect of a measure on the investment in question is too limited. As confirmed by a large number of investment treaty tribunals, not only the impact on the investment of the measures in question has to be examined, but also whether the host State took those measures in the exercise of its police powers or its right to regulate, which are, as numerous tribunals have emphasized, a recognized component of State sovereignty, safeguarded under both customary international law and the law of investment treaties. As stated, for example, by the tribunal in *Saluka v Czech Republic*, “[i]t is now established in international law that States are not liable to pay compensation to a foreign investment when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.*

The tribunal's statement remains part of the current controversy as to whether the host country is not obliged to compensate as contained in customary international law and treaties made regarding the terms of valid expropriation. In the past case, it has been very clear, that with any legitimacy, in the event of expropriation, there must be a payment of compensation as in the case of *Metalclad*.¹²

Then, tribunal in this case also sets a high standard in expropriation, that is, there must be government action that permanently and substantially eliminates the rights of investors and in the absence of commitments that are violated. This is set out in paragraph 337 of the tribunal as follows:

Under this framework, measures that do not pass the high threshold of a substantial and permanent deprivation of the investment will not qualify as an expropriation, independently of whether they have been adopted in good faith, are non-discriminatory and proportionate, and respect due process. Furthermore, in the absence of specific commitments or assurances by the host State, both the introduction and administration of new regulatory requirements under its domestic law and the administration of existing regulatory requirements under domestic law will not qualify as an indirect expropriation requiring compensation, provided the regulation in question and its implementation have been made in good faith, are neither arbitrary nor discriminatory, and are otherwise proportionate.

Ultimately, the tribunal closed its finding with a statement the expropriation action that occurred was unlawful and not in accordance with applicable international law. The actions of the local government are carried out arbitrarily and not with the criteria of doing so on the basis

¹²*Metalclad Corp. v. Mexico*, ICSID (Additional Facility) Case No. ARB(AF)/97/1 (Award of 30 August 2000) [*Metalclad*], paragraph 100.

of its legitimate sovereignty. In addition, there is also no compensation that is actually given to investors. This was stated by the tribunal in paragraph 428 by reading:

The Tribunal further finds that this indirect expropriation was unlawful as the revocation of ENJASA's license did not comply with the requirements international law sets for an internationally lawful exercise of the host State's police power. Such a measure does not fulfil the criteria Article 4(2) of the BIT sets up for a lawful expropriation, that is, the existence of a public purpose, the implementation of an expropriation in accordance with due process of law, and the payment of compensation.

Westmoreland vs Government of Canada

In cases involving WESTMORELAND MINING HOLDINGS LLC and the Government of Canada, or especially the Province of Alberta shows the actions of the provincial government in line with central policy.¹³ Westmoreland Coal Company ("WCC") is a company incorporated in Delaware, United States of America. Meanwhile, Sherritt International's ("Sherritt") assets, including Prairie, were acquired in April 2014, by WCC. Prairie itself is a Canadian company, owning several coal mines, including three mines located in the province of Alberta: the Genesee, Sheerness and Paintearth mines (the "Mines"). With the acquisition, Prairie is directly owned by WCHI, an agency in the Province of Alberta, which is owned by WCC. Prairie and WCHI are collectively referred to as Canadian Enterprises.

Furthermore, on November 22, 2015, Alberta announced the Climate Leadership Plan (the "Plan"). This "Plan" introduces a Carbon Competitiveness Incentive Regulation ("CCIR") that replaces the previous rules. This plan has a regulation where the production of emissions and air pollutants caused by coal production will be stopped until 2030. This limit is actually earlier than 25 years compared to federal regulations. Then, on November 24, 2016, Alberta announced the creation of Off-Coal Agreements with every mining company in Alberta (the "Off-Coal Agreements"). This agreement includes payment for the transition.

Three years later, on November 19, 2018, the WCC filed a lawsuit against the Government of Canada on the basis of the NAFTA agreement specifically in Chapter Eleven. The plaintiff claims that there were losses of not less than CAD\$ 470 million. The subject matter of the lawsuit is in relation to the "Plan" made and the Transition Payments policy.

On July 23, 2019, the WCC withdrew its NAFTA claim against Canada and on August 12, 2019 (ninety days after the filing of the aforementioned Notice of Intent), Westmoreland filed a Notice of Arbitration and Statement of Claim against Canada on its own behalf under NAFTA Article 1116 and on behalf of a Canadian Company under Article 1117. The violations identified were firstly Alberta's decision in the Plan to phase out emissions from coal-fired power plants by 2030 in violation of NAFTA Article 1105 and, second, Alberta's decision in 2016 to make Transitional Payments in violation of NAFTA Articles 1102 and 1105 (the "Challenged Measures").

Westmoreland submitted that Canada, through the actions of Alberta, which is its local government, in enacting its actions has breached its obligations to Westmoreland under Part A of NAFTA Chapter Eleven, including but not limited to Sections 1102 and 1105.

In this case, Canada has denied any violation of NAFTA's 1102 provisions, including discrimination. This is stated by the tribunal through the initial series of its analysis as seen in paragraph 96 of the tribunal's decision.

¹³ ICSID Case No. UNCT/20/3, 2022

Canada further asserts that even if the Tribunal had jurisdiction, the allocation of the Transition Payments did not violate Article 1102; no treatment was accorded to Westmoreland as it acquired its investment after the treatment alleged to be in violation of Article 1102. Westmoreland was also not accorded treatment in 'like circumstances' to the Alberta Companies and neither Westmoreland nor its investment was accorded less favourable treatment, in like circumstances, than Canadian investors and their investments.

Furthermore, Canada also denied the allegations of violation of Article 1105 of NAFTA in which the Government of Canada argued that the investment that occurred was an investment by the WCC, not Westmoreland. In addition, the Canadian government claims that there is no arbitrary action from transitional payments because no benefits granted to particular individual or company. The Canadian government also believes that the country is not obliged to meet investor expectations to pay some compensation in order to end emissions and pollution by 2030. These reasons are outlined by the tribunal in paragraph 97:

Canada finally asserts there has been no breach of Article 1105. Firstly, the treatment Westmoreland refers to was not accorded to Westmoreland's investment but to WCC's investment. Secondly, no individual or company received a Transition Payment in relation to an interest in a coal mine and thus there is nothing arbitrary in Canada's actions. Thirdly, a customary international law minimum standard of treatment does not require a State to fulfil an investor's expectation of earning a reasonable return on its investment beyond 2030. Further, Westmoreland could not have reasonably expected the Federal Regulations to provide a "predictable future" for its investment.

In this case, there was no conflict between the provincial government and the federal government. The province's actions are part of its authority in line with the rules of the federal government within a common regulatory framework. Thus, the tribunal did not explore the linkage. However, the tribunal looked at whether there were any losses to investors and whether those losses resulted from government actions against investors. This is mentioned in paragraph 215.

For Westmoreland to be able to bring its claim it must therefore show firstly that the Challenged Measures applied to it and secondly that it itself suffered loss as a result of those Challenged Measures (215).

The Tribunal can only assess an offence if there is a link between a protected investment and an action taken by the government to infringe that investment right. In its findings, the tribunal found that Westmoreland had no protected investments, so claims of investment infringement need no longer be investigated. This is stated by the tribunal in its decision in paragraphs 236 and 237.

Finally, given our finding that Westmoreland did not exist at the time the Challenged Measures were adopted, it is unarguable that the Challenged Measures could not, and did not, relate either to Westmoreland or to its investment; a measure cannot relate to an entity which was not in existence at the time it was allegedly affected or to its investment which had not yet been made (236).

Accordingly, the Tribunal finds that: (i) Westmoreland was not a protected investor at the time of the alleged breaches as required by NAFTA Articles 1101(1), 1116(1) and 1117(1); (ii) Westmoreland has not made out a prima facie damages claim under NAFTA Articles 1116(1) and 1117(1); and (iii) the Challenged Measures do not "relate to" Westmoreland or its investment pursuant to NAFTA Article 1101(1) (237).

Although, in fact the tribunal did not delve deeper into the issue of expropriation claims, in its analysis it has given an idea of the direction of its decision. In paragraph 142, the tribunal underlined that an investor cannot claim damages if in the course of his or her investment activities the investor knew or should have known of the Off Coal Agreements and other environmental regulations regulated by the Canadian government.

“...Westmoreland made its investment in 2019 with full knowledge of the existence of the Off Coal Agreements and the existing regulatory environment and it cannot claim any pending loss as a result. It is without doubt that the losses claimed by Westmoreland are in fact losses suffered by WCC in relation to an investment made by WCC ...”.

In this case, if we draw a line between the protection and legitimate expectations, there is no guarantee that investment will be protected, and compensation is given in connection with the implementation of environmental regulations by the government. This is in line with the tribunal's consideration in the Methanex case which investigated whether any promises were made by the government to investors, although not directly required in the investment treaty.¹⁴

CONCLUSION

The recent cases involving local governments discussed in this paper have shown some developments in international investment law. First, in the event that local government actions conflict with those of central level or arrangements, the tribunal observes the normal nature of the pattern of relations between the two subjects. Local and Central Governments are equally likely to be authorities depending on their constitution and inherent authority. Second, whether or not compensation is awarded to investors has led to recent developments in which the tribunal considers that if government actions can be based on legitimate state sovereignty without discrimination, then the obligation to award compensation can be waived. Third, in the event that investment contracts can provide room for policy changes, especially from the central level, investor expectations can be considered independent of the initial conditions to the extent to which space is given for contract changes in the event of such changes so that investors can still anticipate or minimize if there is a potential loss to their business.

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¹⁴ See *Methanex Corp. vs. USA*. UNCITRAL (Final Award of 3 August 2005). part IV chapter D, paragraph. 4.

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