

**Investment Treaty Protections**

**Virginie Colaiuta**  
LMS Legal LLP

European Society of Construction Law  
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**Alternative remedies from investment treaties**

**Project in Qatar:**

**QATARI EMPLOYER**

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**ITALIAN MAIN CONTRACTOR** → **State of QATAR**  
**Italy/Qatar Treaty**

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**QATARI SUBCONTRACTOR**

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## Article 2 of the Italy/Qatar BIT

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*“1. Each Contracting Party shall in its territory promote as possible investments made by investors of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord such investments **fair and equitable treatment in accordance with the principles of International Law.***

*2. Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use or enjoyment of investments in its territory of investors of the other Contracting Party.*

*Each Contracting Party shall create and maintain, in its Territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor.*

*3. **After the date when the investment is made, any modifications in laws, regulation acts or measures of economic policies governing directly or indirectly, the investment shall not be applied retroactively and the investments made under this agreement shall thereafter be protected.**”*

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## Article 10.3 of the Italy/Qatar BIT

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*“If this dispute has not been settled within a period of six months from the date of the written application for settlement, the investor at his choice may submit the dispute for settlement to:*

*a) The **competent court** of the Contracting Party in the territory of which the investment has been made;*

*b) The **International Centre for Settlement of Investment Disputes (ICSID)** provided for by the convention on the settlement of Investment Disputes between States and Nationals of other States, done at Washington on March 18, 1965 if this convention is applicable.*

*c) An ad hoc Arbitral Tribunal in compliance with the arbitration regulation of the **UN Commission on the International Trade Law (UNCITRAL)**, the host Contracting Party undertakes hereby to accept the reference to said rules of arbitration.*

***Once the investor has chosen one of the above mentioned ways of settlement of dispute, he can not follow the other two ways.”***

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## Alternative remedies from investment treaties

PPP provides for:

- Business in the Philippines
- Governing laws of the Philippines
- Exclusive jurisdiction of the courts of the Philippines

**STATE ENTITY OF THE PHILIPPINES**



**SWISS COMPANY**

Article X.2 of the Switzerland/Philippines BIT

*“Each Contracting Party **shall observe any obligation** it has assumed with regard to **specific investments** in its territory by investors of the other Contracting Party”*

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## State's conduct frequently challenged by investors

- *Legislative reforms in the renewable energy sector*
- *revocation or denial of licences or permits*
- *Unfair tax assessments or penalties*
- *Invalidation of patents*
- *Illegitimate expropriation*
- *cancellation or violations of contracts or concessions*
- *Measures taken in relation to regulations of exports, bankruptcy proceedings and energy tariffs*
- *Discrimination against foreign investors relative to domestic ones*

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## Substantive Treaty Protections

- Expropriation
- Fair and Equitable Treatment
- Full Protection and Security
- Freedom of Transfers of Funds
- National Treatment
- Most Favoured Nation Clause
- Umbrella Clause

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## Expropriation

“Neither Contracting Party shall take any measures depriving, **directly or indirectly**, investors of the other Contracting Party of their investments unless the following conditions are complied with:

(a) the measures are taken **in the public interest and under due process of law**;

(b) the measures are **not discriminatory or contrary to any undertaking** which the Contracting Party which takes such measures may have given;

(c) the measures are taken against **just compensation**. Such compensation shall represent the **genuine value of the investments** affected, shall **include interest at a normal commercial rate** until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.”

Article 6 of the Netherlands/South Africa Treaty

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## Expropriation

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**Direct Expropriation**= taking of property by the State.

**Indirect Expropriation**= acts or series of acts whose effects are tantamount or equivalent to a formal taking= acts that involve total or near total deprivation of an investment or destruction of its value but without a formal transfer of ownership/title to the State or outright seizure (investors have often filed indirect expropriation claims in relation to negative effects on their investments deriving from **general non-discriminatory regulations**, such as restrictions on certain economic activities, on environmental or public health grounds.)

**Creeping expropriation**= measures that gradually declines the value of the investment

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## Fair and equitable treatment

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### **Article 3(2) of the Netherlands/Ukraine BIT:**

*“Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.”*

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## Fair and equitable treatment

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FET standard may include:

- Due process in court and administrative proceedings
- Transparency (Metalclad v. Mexico)
- Legitimate expectations = “stability of legal and business framework” (Occidental v. Ecuador= reimbursement of VAT on oil exports)
- Non arbitrary treatment
- Non-discriminatory measures

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## Full protection and security

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*“Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party....”*

Article 3(2) of the UK/Egypt BIT

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## Freedom of transfer of funds

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### Article 5 of the Netherlands/Ukraine BIT:

*“The Contracting Parties shall guarantee that payments relating to an investment may be transferred. The transfers shall be made in a freely convertible currency, without undue restriction or delay. Such transfers include in particular though not exclusively:*

*(a) profits, interest, dividends and other current income;...*

*(c) royalties or fees;...*

*(g) the proceeds of sale or partial or total liquidation of the asset”.*

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## National treatment Clause

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### [ADF Group, Inc. v. U.S](#)

Article 1102 of NAFTA: National Treatment

*“Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

*Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments....”*

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## Most Favoured Nation Clause

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### **MTD v Chile** (ICSID Case No ARB/01/7, Award, 25 May 2004)

Claims arising out of the Government's denial of a zoning modification allegedly necessary for the claimant to execute a residential and commercial development project in Chile. Shareholding in an investment vehicle corporation

#### **Article 3(1) of Chile-Malaysia Treaty**

*“Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and **not less favourable** than that accorded to investments made by investors of any third State.”*

MTD argued that Chile had breached the obligation of fair and equitable treatment because it encouraged strong expectations that an investment project could be built in a specific location and subsequently disapproved of the location as a matter of public policy after the claimant had already invested considerable resources in the project.

Chile denied any treaty violations and claimed to have refused to grant the permit in compliance with its own laws.

The MFN clause above was relied upon in order to **import fair and equitable treatment provisions** from the Chile-Croatia Treaty and the Chile-Denmark Treaty.

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## Most Favoured Nation Clause

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### **CME Czech Republic BV (The Netherlands) v Czech Republic** (UNCITRAL, Award, 14 March 2003)

Ownership interest in broadcasting company holding an exclusive broadcasting license

#### **Article 3(5) of the Czech Republic –The Netherlands Treaty**

*“If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.”*

The Tribunal relied on the above MFN clause in order to **import a more favourable definition of “just compensation”** from another investment treaty ratified by the Czech Republic so that it could refer to a fair market value.

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## Who is the investor?

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Article 1(3) of the Lybia/Germany BIT

"3. the term "investors" with regards to either Contracting Party refers to:

(a) Natural persons who:

- in respect of the Federal Republic of Germany are Germans within the meaning of its Basic Law; and
- in respect of the Socialist People's Libyan Arab Jamahiriya are considered to be nationals within the meaning of its applicable laws;

(b) Legal entities, including companies, corporations, business associations and other organizations, either or without legal personality which have their seat in the territory of that Contracting Party, irrespective of whether or not their activities are directed at profit;"

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## Qualifying for treaty protection

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- **Investors: individuals or corporations;**
- **Diversity of nationality;**
- **Wording of the treaty**

Article 1(b) Netherlands-Bangladesh BIT:

" (i) *natural persons having the nationality of that Contracting Party in accordance with its law;*

*(ii) without prejudice to the provisions of (iii) hereafter, legal persons constituted under the law of that Contracting Party;*

*(iii) legal persons, wherever located, controlled directly or indirectly, by nationals of that Contracting Party.*"

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## Who is the investor?

- Parent company might be able to bring a claim:
- Criteria to determine the nationality of the legal entity / investor:
  - Country of organization or incorporation
  - Country of seat
  - Ownership and control

Note: Denial of benefits clause

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## Denial of benefits

Be aware of “**Denial of benefits**” clauses = require substantial business activities in the state of incorporation or ownership or control by a national of the home State

Some treaties do not confer investor status to companies exclusively on the basis of the place of incorporation to discourage “treaty shopping” by virtue of which the investment is channelled through a shell company in a State which has favourable treaty relations with the host State for the sole purpose of gaining investment jurisdiction

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## Who is the investor?

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### Article 10(6) of the Netherlands – Argentina BIT:

*“A legal person which is incorporated or constituted under the law in force in the territory of one Contracting Party and which, before a dispute arises, is controlled by nationals of the other Contracting Party shall, in accordance with article 25 (2) (b) of the Convention be treated for the purposes of the Convention as a national of the other Contracting Party”*

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## Article 25(2)(b) of the ICSID Convention

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*“(2) National of another Contracting State means:*

*(a) any natural person ....*

*(b) “any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties **consented to submit** such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of **foreign control**, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”*

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## Qualifying for treaty protections

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### Vacuum Salt v. Ghana: Foreign control – Qualifying investor

“...‘foreign control’ within the meaning of the second clause of Article 25(2)(b) does not require, or imply, any particular percentage of share ownership. Each case arising under that clause must be viewed in its own particular context, on the basis of all of the facts and circumstances. There is no ‘formula’.”

“A tribunal...may regard any criterion based on management, voting rights, share-holding or any other reasonable theory as being reasonable for the purpose.”

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## Qualifying investment

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Article 1(1) of the Libya/Germany BIT:

“1. For the purposes of this Agreement

The term “investments” comprises every kind of asset, in particular:

- (a) Movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;
- (b) Shares of companies and other kinds of interest in companies;
- (c) Claims to money which has been used to create an economic value or claims to any performance having an economic value;
- (d) Intellectual property, rights, in particular copyrights, patents utility-model patents, industrial designs, trademarks, trade-names, trade and business secrets, technical processes, know-how, and good will;
- (e) Business concessions under public law, including concessions to search for, extract and exploit natural resources;

Any alteration of the form in which assets are invested shall not affect their classification as investment;...”

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## Construction contract: investment?

- Are construction projects considered an “investment” under investment treaties?
- **Salini v Morocco (2001)** –Two Italian contractors filed for ICSID arbitration against Morocco over a dispute arising under a contract for **construction of a highway**. The contract provided for resolution of disputes in domestic courts. Claimants alleged that Morocco’s failure to pay was a violation of the “fair and equitable treatment and protection against indirect expropriation” of the Morocco-Italy BIT. Morocco raised jurisdictional objection that dispute was not an investment under the Morocco-Italy BIT and under Art. 25(1) of the ICSID Convention.
- Held: Contract for construction of a highway is an investment under both the Morocco-Italy BIT and the ICSID Convention. Tribunal upheld jurisdiction over the investors’ claims.

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## Construction contract: investment?

- Decision: The arbitral tribunal assessed its jurisdiction on the basis of four (4) criteria:
  - **The investment must be of a certain duration:** the construction work took 36 months to be achieved.
  - **The investment must exhibit a contribution on the part of the investor:** know-how, equipment, qualified personnel, loans.
  - **The investment must exhibit a contribution to the development of the host state:** the highway in question was to serve the public interest.
  - **The investment must involve some risk taking:** ADM could end the contract, could impose variations without changing the price, cost of labour could increase in case of modification of Moroccan law.

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## Indirect Investment

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The *Siemens A.G. v. Argentina* (ICSID ARB/02/8) Decision on Jurisdiction states that although “*there is no explicit reference to direct or indirect investment as such in the (Germany-Argentina) Treaty. ...*”

*The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company.*

*Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investment”.*

*The Noble Energy Inc v. Ecuador (ICSID ARB/05/12) Decision on Jurisdiction states that “The Tribunal concurs with previous tribunals that have held that an indirect shareholder can bring a claim under the ICSID Convention and under a BIT in respect of a direct and an indirect investment. Failing any contrary wording, the BIT and the ICSID Convention encompass actions of indirect shareholders for their damages”.*

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## When investment protection applies?

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- Did you plan your investment protection?
- Best at the start of a project (M&A deal, acquisition, loan agreement, energy project);
- Treaty protection planning can be done at any time before a dispute is foreseeable

“...the commencement of treaty-based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time **where a dispute was foreseeable**. A dispute is foreseeable when there is a reasonable prospect that a measure that may give rise to a treaty claim will materialize”

*Philip Morris Asia Ltd v. The Commonwealth of Australis, PCA Case No. 2012-12, Award on Jurisdiction, 17 December 2015*

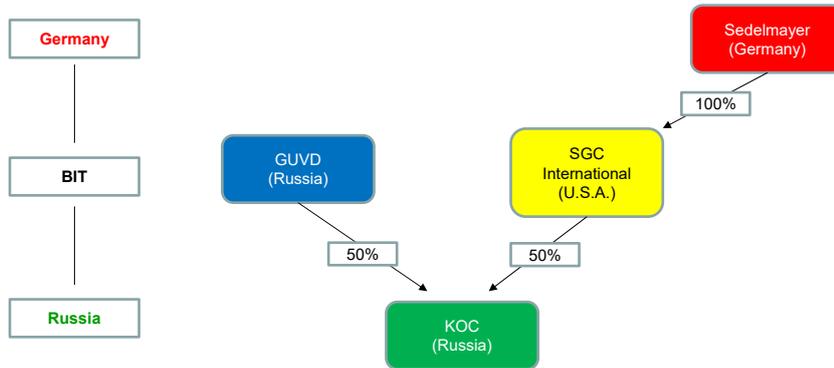
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### Mr Sedelmayer v. Russia

Property rights in joint stock company engaged in the delivery of law enforcement equipment and relevant training. Confiscation of investor's property as a result of directives issued by President Putin ordering transfer of Claimant's assets to a State agency.

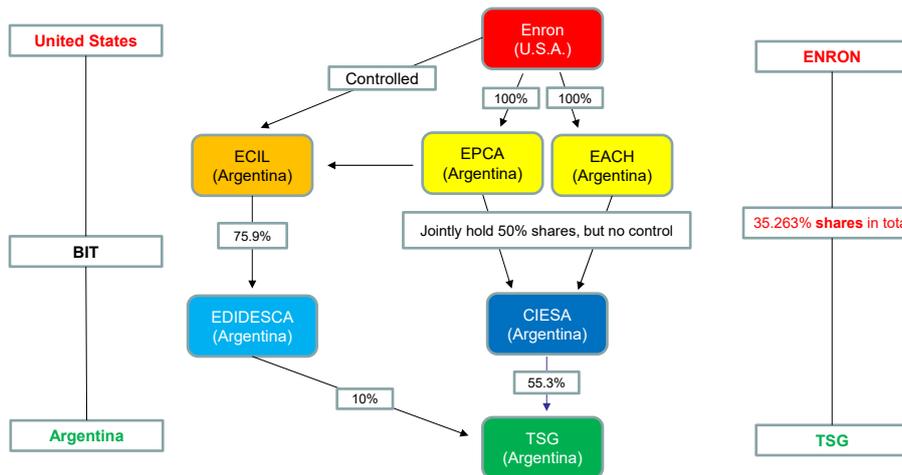


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### Enron v. Argentina

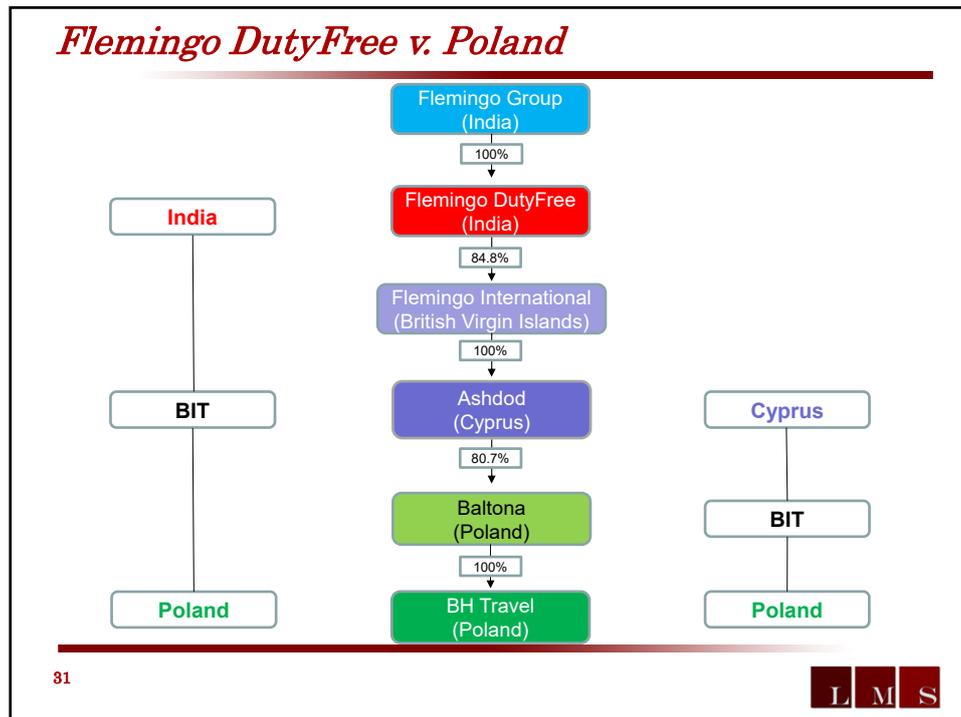


CIESA and TSG could not act as claimants because they were not controlled by Enron. However, Enron had *jus standi* as a minority shareholder. Claims arising out of certain tax assessments allegedly imposed by Argentinean provinces in respect to a gas transportation company.

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***Flemingo DutyFree v. Poland***

Claims arising out of the Polish Airports State Enterprise's termination of lease agreements for retail stores at Warsaw Chopin Airport entered into with BH Travel, a duty-free operator in which the claimant held indirect interests.

In the Flemingo case, the Tribunal stated that: "339. *The circumstance that Ashdod, the wholly-owned subsidiary of Claimant's subsidiary, Flemingo International, also submitted a notice of arbitration, this time under the bilateral investment treaty signed by Cyprus and Poland ("Cyprus-Poland BIT"), does not exclude Claimant from its own protection. **International investment law does not exclude several entities, situated at different levels of an investment structure, from claiming investment protection. Besides, Ashdod has not pursued the arbitration proceedings it initially commenced, so that, in the present circumstances, no parallel investment treaty awards will be rendered.***"

*The possibility of parallel claims, deriving from two indirect investors at different levels of the investment structure, has been confirmed by several awards.*

*No abuse of process = when a shareholder and the controlling shareholder give notice of **separate claims** under different bilateral investment treaties against the same host State for the same subject-matter.*

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## Enforcement of Arbitral Awards

- Awards may be enforced against State's assets held in foreign countries
- States are immune for activities undertaken as sovereign but not for their commercial activities
- Impose enforcement on commercial assets of the State
- Sovereign immunity against suits and enforcement actions
- A research on the whereabouts of the state's commercial assets and whether the local applicable laws would allow their attachment is inevitable
- Enforcement in countries that are known to be execution-friendly (i.e., UK)

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**Virginie Colaiuta**  
[virginie.colaiuta@lmslex.com](mailto:virginie.colaiuta@lmslex.com)  
+44(0)7585996261

LMS Legal LLP  
4 New Street Square  
London EC4A 3EF  
United Kingdom  
[www.lmslex.com](http://www.lmslex.com)

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