

AKINCI

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CIArb Annual Meeting

# Exasperation in Investment Arbitration

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## Exasperation from the Parties' point of view

Balance of power

Futility

Contract with State entity, contract or investment?

Human rights issues

Third party investor

Multiparty cases

## The Balance of Powers:

Is it not inevitable that the State will have far more resources to fight the arbitration than the investor?

Will the State be able to use its diplomatic power to delay or otherwise influence the outcome?

Will the State be able to justify its actions under its own laws?

## Futility:

There may not be any viable alternatives to arbitration.

## Contract or investment:

A conceptual difference between a contract and an investment exists.

It is a debated point as to whether a contract with a State party qualifies as an investment under the BIT or if a dispute on such a contract is better resolved under commercial arbitration.

*Astaldi v Honduras*

*Gemplus v Mexico*

## Human Rights Issues:

Can a human right claim be made under an investor-State arbitration?

Does the protection of the investment in most BIT's not also afford BIT protection to the investor himself as the basic denomination of the investment?

# The Human Rights or Moral Damages claim:

## ICSID award on *Lemire v. Ukraine*:

Included a 'moral damages' claim against the State for the stress that the investor suffered.

Whilst the Tribunal dismissed the claim, it provisionally accepted the validity of a moral damages claim within the forum of ICSID arbitration.

Gave a test for the 'exceptional circumstances' that would justify compensation:

- The States actions were grave and involved physical threat or similar.
- These actions had a grave affect on the claimant.

A positive step forward, no doubt, but given that arbitral awards are non-binding precedent, the future is still to be decided.

## Third Party investor

Many investor State arbitration are run using funds from third parties but at huge costs to the Claimant's returns.

Third party investors don't take on just any case, they need an expensive expert report which they often won't pay for.

Time delays ensue.



## Multiple Party solution:

It is becoming more usual for Claimants to join forces against a common State for recompense.

The vocabulary is not even pinned down as yet:

**Consolidation**

**Many-Contract  
single BIT**

**Single-Contract  
multiparty**

**Multiparty**

**Many-Contract  
multiparty**

**Joint  
Reference**

**Class Arbitration**

## Joint reference as a possible solution:

Abaclat

Applicable treaties and arbitral rules

Similarity of of claims

## Joint reference as a possible solution:

Ambiente

Same BITs

same type of investment

Same events leading to breach

Same effect of breach

## Joint reference as a possible solution:

Funnekotter

Legislation leading to loss

Encouraging squatters

Protection of civil liability

"The only existing link between the individual claimants and their respective claims was that all of them had suffered the same harm by virtue of the measures adopted by the host State which deprived each one of them of its investment without a just compensation"

## Evolution of the solution:

NAFTA has brought in a new rule for multiparty references other organisations or rules have not yet caught up.

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Thank you for your time and attention.