Orazul International España Holdings S.L. v Argentine Republic, ICSID Case No. ARB/19/25: A *Rara Avis* of ICSID Arbitration in Argentina

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Introduction

Anton Chekov once posited in his novel '*Rara Avis*' that going into a situation with predetermined expectations based on prejudice will often leave one confounded when the ensuing reality is different. In law and arbitration, departures from established precedent often have the same startling effect. Recently, the International Centre for Settlement of Investment Disputes ("ICSID"), through the Tribunal of Dr. Inka Hanefeld, Dr. Alain Pellet, and David R. Haigh KC ("the Tribunal"), rendered one such unexpected judgement in a Latin American Investor-State arbitration concerning foreign investments in the Argentine Republic's energy industry. The Tribunal determined that the Argentine Republic ("the Respondent") had not breached its obligations under international law to the Spanish-based company Orazul Internacional ("the Claimant") concerning a change to the Argentinian regulatory framework in 2003 following the Argentine Great Depression.

This award, delivered following a plethora of procedural incidents, including a petition to disqualify the president of the Tribunal, represents an unexpected conclusion; the Tribunal agreed with the Respondent State on the lack of a breach. The decision represents an uncommon conclusion, especially considering the usual position of the ICSID Tribunals on energy and natural resource disputes in Latin America, specifically Argentina, throughout the past decade.[1]

Two elements of this case stand out as exceptional: firstly, the Tribunal's rejection of the Claimant's arguments, even though this case greatly resembled two prior successful cases with similar fact patterns. The decision by the Tribunal may indicate that Investors will be subjected to more stringent thresholds of Investor-rights violations to bring successful claims. Secondly, and more fundamentally, is the ostensible divergence of thought between Dr. Hanefeld and Dr. Pellet ("the

[1] To summarise, although the balance in favour of Investors has only been minor in Latin America as a whole (*38% in favour of Investors, 24% settled independently, 30% in favour of Respondent States and 8% Discontinued or No Liability for either Party*), Argentina specifically has a serious imbalance in favour of Investors (*40% in favour of Investors, 36% settled independently, 8% in favour of Respondent States and 16% Discontinued or No Liability for either Party*) - Source: UNCTAD Investment Policy Hub, including ICSID and UNCITRAL Arbitrations.

Majority")[2] with Haigh KC ("the Minority")[3] on the essential issue at the heart of the case. As such, although the case has a balanced approach regarding party rights, these proceedings also underscore the partial vulnerability of modern arbitration procedures, especially arbitrator partiality.

Factual Background[4]

The current dispute is premised on the Argentine Electricity Law enacted in 1991,[5] which was approved in response to the Argentinian hyperinflation crisis of 1989-90. As a result, the energy sector, due to its underperformance in the 80s, was considerably affected. The focal outcome of this was the mass privatisation of the energy field, which led to the acquisition of several energy plants across Argentina. One of these plants, the Alto Valle plant, was sold by the Argentinian Government (90% ownership) to the US-based Dominion Resources Inc for 22 million Argentine Pesos (ARS). Another installation called the Planicie Hydroelectric Power Plant, controlled by State-owned company Cerros Colorados, was acquired by the same company (98% ownership) for 181 million ARS.

In 1999, the Duke Energy Corporation ("Duke"), a US-based utility company, purchased the entirety of Dominion's energy generation assets in several Latin American countries for 405 million USD. After completing this acquisition, Duke transferred the controlling interest of its Argentinian holdings to its Spanish subsidiary, which, following Duke's sale of its Latin American holdings to a US infrastructure fund called I Squared Capital in 2016, was renamed 'Orazul Internacional'.

In the aftermath of the 1998-2002 Argentine depression,[6] the Respondent's Government enacted an Emergency Law[7] to turn around the economy due to the substantial devaluation of the entire economy, mass inflation, and a pronounced loss of asset value. This impacted the energy generation sector as a whole in the country, leading to fewer governmental subsidies and financial assistance as a part of a general modification of the Argentinian regulatory framework on electricity. An

[2] Judgement of the Tribunal, *Orazul International España Holdings S.L. v Argentine Republic*, [2023], ICSID Case No. ARB/19/25, <https://www.italaw.com/sites/default/files/case-documents/180520.pdf> accessed 19 May 2024.
3 Dissenting Opinion of Haigh KC, *Orazul v Argentina.*, <https://www.italaw.com/sites/default/files/case-documents/180545.pdf> accessed 19 May 2024.
[4] *Orazul v Argentina*, [18]-[51].
[5] Regimen De La Energia Electrica, 1991, Ley Nº 24.065 del 19/12/91
[6] While the academic literature has ascribed several causes and issues which arose during the crisis, the Joint Economic Committee United States Congress provides a balanced overview of the several problems which led to the crisis: Joint Economic Committee, *ARGENTINA'S ECONOMIC CRISIS: CAUSES AND CURES* (JOINT ECONOMIC COMMITTEE STUDY, Senator Jim Saxton, 2003) 1-6.
[7] Emergencia Publica y Reforma Del Regimen Cambiario, 2002, Ley 25.561 del 06/01/02.

unexpected upturn in the Respondent's economy during the following year and a significant increase in electric and natural gas demands led to the Government adopting extensive measures to expand the electricity market in Argentina. As such, the Respondent adopted a legal decree in 2004,[8] creating a fund for new investment in constructing energy plants to increase the supply of electrical power in the country (called 'FONINVEMEM'). Despite an original refusal by Duke to participate in this due to what it deemed to be 'forced investments '(FONINVEMEM required an obligatory investment of 65% of outstanding receivables), Duke eventually agreed to participate, stifling its financial benefit to aid the expansion of the Argentinian energy generation sector in 2005.

Several years of investment later, with diminishing returns due to 'artificially lowered' (electricity) prices and 'insufficient remuneration for generators' for austerity purposes, several generators, including the Claimant, filed administrative petitions to increase the remuneration of electrical generators and regularise the transitory framework of the electricity market in Argentina. The Claimant initiated proceedings with ICSID to seek compensation for losses sustained between 2003 and 2021. This action followed government agreements that adjusted payments to electricity generators on the condition that they waived their right to sue CAMMESA, the government-established electricity wholesale company, for any additional payments.

Procedural Background[9]

On 30 August 2019, the Claimant filed its request for arbitration before the ICSID, claiming damages for lost profits due to the Argentinian transitory framework as well as being 'forced' to contribute its receivables to FONINVEMEM. The Tribunal's composition included Dr. Pellet for the Respondent, Haigh KC for the Claimant, and Dr. Hanefeld as President of the Tribunal. During the initial stages of proceedings, the Tribunal rejected a request for the bifurcation of proceedings for preliminary objections and merits.[10] The Parties then presented their memorials to the Tribunal, and several requests for further documentation stayed proceedings considerably. Proceedings were delayed even beyond this due to travel issues, the involvement of large amounts of witnesses and legal experts, and a proposal to disqualify the President of the Tribunal following allegations of improper conduct and prior relations with some of the Claimants.[11] On 14 December 2023, the Tribunal rendered its Final Award.

[8] Fondo Inversiones Necesarias Incrementar Oferta (FONINVEMEM), 2004, Resolución 712 / 2004.
[9] *Orazul v Argentina*, [6]-[17].
[10] Decision on the Respondent's Request for Bifurcation, *Orazul v Argentina*, 2021.
[11] Decision on the Claimant's Proposal to Disqualify Dr. Inka Hanefeld, *Orazul v Argentina*, 2022.

Summary of Claims and Arguments of the Parties[12]

In their memorial, the Claimants submitted that in the course of their dealings with the Argentine Government, they, along with the rest of the power generators in Argentina, were harmed by Government policies. Specifically, they alleged that the 2003-2004 emergency regulatory framework should have been transitory and reversed. As this was not the case, and measures were ongoing, they argued that the Respondent should be held accountable for its alleged breaches.

Specifically, the Claimants first submitted that the Respondent had breached its fair and equitable treatment ("FET") obligations under the Argentina-Spain BIT.[13] Secondly, they submitted that in its unfair and discriminatory treatment of the Claimant, the Respondent had breached its BIT obligations of protection of investment.[14] Thirdly, based on an alleged breach of legal security guarantees, the Tribunal had breached its obligations under the BIT[15] and imported provisions under the Most-Favoured Nation Clause.[16] Furthermore, it claimed that the Government's refusal to pay outstanding receivables and 'forced' investment into FONINVEMEM constituted an unlawful expropriation under the BIT.[17] Finally, it claimed that the breach of the FONINVEMEM remuneration obligations constituted a violation of a general umbrella clause upholding obligations towards investors.[18] The Claimant sought to obtain the sum of 667.3 million USD alongside additional costs.

In their counter-memorial, the Respondent submitted that the measures they have taken were in line with general international investment law. They additionally stated that the claim itself was invalid, as it should have been time-barred considering the 'lengthy' stay of proceedings from the original instance of economic disruption. The Respondent based their submission on the rules of acquiescence, which would limit the claim by the Claimant's acceptance of the situation and estoppel, thereby preventing the Claimant from 'going back on their word.' The Respondent also stated that the time delay in bringing the claim made the claim subject to extinctive prescription.

[12] *Orazul v Argentina,* [52]-[53].
[13] AGREEMENT FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE REPUBLIC OF ARGENTINA AND THE KINGDOM OF SPAIN (henceforth "Spanish BIT"), 1991, Art. IV.
[14] ibid., Art. III.
[15] ibid., Art. IV s.3.
[16] ibid., Art. IV s.4-5.
[17] ibid., Art. V.
[18] ibid., Art. IV s.4-5, MFN Imported Clause under the TREATY BETWEEN UNITED STATES OF AMERICA AND THE ARGENTINE REPUBLIC CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT, 1991, Art.II s.2(c) (henceforth "US BIT").

The Respondent further contended that the submission of the case to ICSID arbitration was improper under Article X of the Spanish BIT on the dispute resolution procedure. The Respondent argued that the Claimant's purchase of the plant in 2016, well after the changes made in 2003, constituted an abuse of party rights. The Respondent claimed that the Claimant was aware of and agreed to the temporary regulatory framework when acquiring a majority stake in the plant. To further this argument, the Argentine Republic cited a lack of jurisdiction *ratione materiae*, as the Claimant had supposedly consented to the 2003 change in regulation. Finally, it rejected in totality the Claimant's proposals on the merits and stated that it should be wholly unencumbered by the Claimant's sought compensation.

Summary of Applicable Law

The Tribunal determined in this case that the correct standard for determining the applicable law was Art. 42(1) of the ICSID Convention.[19] As such, it found that, since the parties to the dispute had indirectly reached an agreement as to applicable law under Art. X(5) of the Spanish BIT, it had the power to consider both international and national law. The generally applicable laws in this case were the Spanish BIT, all BITs implemented through the Most Favoured Nation ("MFN") clause (including the US-Australian[20] BITs with Argentina), the domestic laws and regulatory framework of Argentina, along with the general principles of international law.

The Findings of the Tribunal (Majority Award)

A. Jurisdiction

In its deliberation, the Tribunal first considered the preliminary objections raised by the Respondents. Turning to the issue of acquiescence, the Tribunal established that consistent complaints about the post-2003 regulatory framework made it clear that the Claimant had not conformed to the legal status quo of an initial loss of profit several years after the temporary measures. On the issue of extinctive prescription, the Tribunal cited the ICJ case of *Nauru v Australia*,[21] stating that where a treaty does not set out a specific time limit for the accomplishment of a duty or right, the treaty provision will only be inadmissible if the Tribunal can determine that the passage of time has either prejudiced the

[19] CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, 1996, ICSID.
[20] Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol, 1995 (henceforth "Australian BIT").
[21] *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, Judgment [1992], I.C.J. Reports 1992, 240.

Respondent in any way, or whether it has become inapplicable due to the length of time between the claim and the original provision. As such, there had been no breach.

The Tribunal then contemplated the issue of the exhaustion of the local remedies clause under Article X of the Spanish BIT, which required the Claimants to appear before Argentine courts before proceeding to ICSID arbitration. However, under the MFN rule (MFN, included in the Spain-Argentina BIT), any other BIT which imposed a more favourable treatment of investors would overcome provisions in the main BIT. The Tribunal determined that the Claimant had properly initiated its proceedings because the Australian BIT was more favourable, requiring only that the investor not have previously filed a claim with another tribunal. As a result, the Respondent could not invoke Article X.

On the issue of jurisdiction, the Tribunal first pondered *ratione personae* jurisdiction. The Tribunal noted that it had to determine whether the Claimant company had its actual place of management in Spain. Applying the test in *Tenaris v Venezuela*,[22] it considered the Claimant's 'effective place of management' to be in Spain despite it being a subsidiary of a US-based company. Thus, the Tribunal held that this jurisdiction was admissible. It then turned to the issue of *ratione materiae* investments defined under Art. I(2) of the BIT. Applying the test in *Deutsche Bank v Sri Lanka*,[23] formulated as the allocation of resources for a duration with risk, it determined that Orazul's assets were indeed investments. The Tribunal then decided that the change of parent companies in 2016 did not bar jurisdiction *ratione temporis* either. Finally, after determining that the Claimant's restructurisation of the company for Spanish-based ownership did not represent an abuse of rights,[24] the Tribunal held that it had jurisdiction over the affair.

The Respondent also raised the claim that the Claimants had consented to the Respondent's regulatory measures and that any right to claim had been waived. The claim was based on the acceptance by Cerros Colorados (the Claimant's subsidiaries) of both the FONINVEMEM agreements and the acceptance of the terms under the 2019 Settlement of Receivables. The Tribunal rejected these arguments, stating that since they had been concluded by independent subsidiaries, there was no explicit waiver or promise enforceable by estoppel to not pursue legal action from the Claimant.

[22] *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v Bolivarian Republic of Venezuela*, Award, [2016], ICSID Case No. ARB/11/26.
[23] *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, Award, [2012] ICSID Case No. ARB/09/2.
[24] In this case, in the context of abusing their rights by obtaining BIT protections by changing the State of company domicile.

B. Merits

After determining jurisdiction, the Tribunal considered the Argentine Republic's potential liability. The Tribunal first analysed the merits of the alleged violation of the FET clause. It formulated a tripartite test (based on *Duke Energy v Ecuador*[25]) to determine if the Respondent had violated FET standards. The test assessed, first, whether the Respondent had created legitimate expectations, then, whether these expectations had been relied on, and finally, if there was a breach of these expectations. On application, the Majority determined that the claim was unsubstantiated due to the subjective nature of the Claimant's reliance and the lack of stability clauses or guarantees made by the Respondent. The Tribunal also stated that the adoption of resolutions and agreements on remuneration was fair and equitable, and they did not harm the Claimant disproportionately when compared to other electricity providers. It finally stated that this case was distinguishable from two similar cases in the Argentinian electricity sector (*Total v Argentina*[26] and *El Paso v Argentina*[27]) due to differing times of investment.[28]

The Tribunal further proceeded to the alleged breaches of the Spanish BIT's Art. IV(1), specifically allegations of breaches of due process and transparency. For transparency, the Tribunal applied the 'readily apparent' standard in *Frontier v Czech Republic*,[29] finding that the Respondent's actions were consistent with the regulatory framework. As for due process, the Tribunal applied the high standard of 'obstruction of natural justice' test from *Waste Management v Mexico*.[30] On application, it decided that the mere act of not answering all petitions made by the Claimant did not constitute a violation of due process. Consequently, the Tribunal rejected this ground. The Tribunal then scrutinised the supposed arbitrariness of Argentina's actions. Similar to its earlier determination that the Respondent's actions did not manifestly contravene judicial propriety, the Tribunal ruled that this ground was inadmissible. It also determined that as legislation had affected all investors equally, the Claimant's treatment was not discriminatory. Turning to the alleged abuse of power in forcing the Claimant to enter into the FONINVEMEM agreements, the Tribunal determined that based on the case facts and witness testimony, the Claimant had voluntarily adhered to Government initiatives, despite an original refusal.

[25] *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, Award, [2008], ICSID Case No. ARB/04/19.
[26] *Total S.A. v The Argentine Republic*, Award, [2013], ICSID Case No. ARB/04/01.
[27] *El Paso Energy International Company v The Argentine Republic*, Award, [2011], ICSID Case No. ARB/03/15.
[28] The key defining difference being that in *Total* and *El Paso* the investments were made before the crisis, obtaining guarantees, whereas *Orazul* made investments after the crisis during the recovery period, and consequently their reliance was subjective and/or speculative.
[29] *Frontier Petroleum Services Ltd. v The Czech Republic*, Final Award, [2010], Permanent Court of Arbitration IIC 465.
[30] *Waste Management, Inc. v United Mexican States ("Number 2")*, Award, [2004], ICSID Case No. ARB(AF)/00/3.

On the issue of impairment of Claimant investments, the Tribunal began its analysis of Article III(1) of the Spanish BIT. It determined that while the Respondent did take measures affecting investments, these were permissible in light of the economic situation, and they were neither unreasonable nor discriminatory. While the Claimant further argued that it was owed protection regarding its investments, the Tribunal rebuked this claim, stating that the protection requirement was satisfied if the Respondent guaranteed adequate due process and fair regulation, which the Tribunal had already established as fact.

When considering whether the Respondent's actions amounted to expropriation, the Tribunal found that there had been no 'forcible transfer' of investments and no indirect interference. The Tribunal reasoned that, since Cerros Colorados and Duke had obtained sizeable increases in revenue in the energy generation market in Argentina, it could not be stated that the investment had been interfered with. The Tribunal further considered whether the umbrella clause found in the US BIT was applicable via the MFN clause in the Spanish BIT. The Tribunal considered that the MFN clause was limited by the content of the Spanish BIT and that the MFN clause could only be extended to 'enhance' a standard in the BIT. For these reasons, the Tribunal determined that the Respondent had not breached its obligations, and consequently rejected the entire claim, while stating that the Claimant's success in jurisdiction entitled them to an equal sharing of costs with the defendant.

The Dissent of the Tribunal (Minority Opinion)

While the Award was mostly unanimous, Haigh KC disagreed with the Majority's rejection of the FET claim. Specifically, he argued that the Majority's interpretation of reasonable expectation was flawed, stating that the Claimant did not rely on its expectation of market restoration or the regulatory framework being modified. Haigh KC argued that the Claimant relied on the transitory nature of the 2003 regulations, restated by the consequent resolutions that the Argentinian Republic adopted and that the Argentine Government and Energy Secretary would abide by the Argentine Electricity Law. Specifically, Article 36 of the Electricity Law imposed an obligation to give a "uniform price" for electricity "based on the economic cost of the system," and that any derogation to this rule must revert; the Government would have amended the Law otherwise. On this basis, he stated that the Respondent breached its obligations, especially when considering the repeated use of the word 'transitory' in legislation from 2003 onwards. Haigh KC stated that the Majority had, *inter alia*, made 'a straw-man argument.' Finally, he stated that he disagreed with the Tribunal's determination that both *Total* and *El Paso* should be distinguished, as a mere difference in dates and the economic

climate of investment was purely irrelevant to the alleged breach. As such, Haigh KC would have granted substantial damages to the Claimants.

Comment and Critique

The ICSID Tribunal's decision may be surprising at a time when ICSID proceedings are characterised as favouring investors over states and focusing on the extensive approach to liability rather than the restrictive interpretation of BIT clauses. It further goes against the *ratio* employed in two prior similar cases, distinguishing them in a contestable, interpretative manner. For these reasons, four points of interest merit discussion concerning the satisfaction of legal tests and general observations of arbitration.

A. Development of State-favoured Legal Tests

It should be noted that in deciding this case, the Tribunal chose to endorse several legal tests with State-focused conceptions. They did so by establishing a very light threshold for guaranteeing that a State is observing its FET and due diligence obligations. The Tribunal stressed that as long as investors were not treated in a manifestly inequitable manner when compared to other companies on the market, and the State maintained a status of judicial propriety, the Tribunal would not hold the State accountable. Even if the investor had suffered substantial losses of revenue under the State's administration, the Tribunal held that as long as the State was acting within its legal prerogatives, and failings could be justified against a larger economic backdrop, the State would be free from culpability. This conclusion seems to go against the general *ratio* of ICSID tribunals, which largely favour investor rights in these cases.[31]

On the point of the reasonable expectation doctrine, the Tribunal decided that they would depend on a very high standard of objectiveness rather than subjective standards. However, as the Dissent points out in this case, the Respondent continuously stated that it would endeavour to render any measures adopted for market reinvigoration transitory once economic stability returned. Furthermore, the rationale of different time-frames (investments made post-crisis) to justify that the investor knew what it was getting into seems unsubstantiated, as there is a clear difference between expecting a restoration of prior economic circumstances and expecting transitory measures to be temporary before

[31] See, in example, *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v Bolivarian Republic of Venezuela*, Award, [2010], ICSID Case No. ARB/07/27 Section VII.2, p.86-93 on generally applicable provisions constitution violations of FET standards.

returning to a full-compensation market. This interpretation choice shows that the reasonable expectation doctrine will likely require a more direct and legally binding statement given by a State to induce a reasonable expectation henceforth.

The Tribunal further states that there was no indirect interference with the investment of the Claimant. However, the justification for this deliberation seems quite strange. By stating that the profitability of the power plant and Orazul were apparent, the Tribunal sought to dispel any notions that the Respondent interfered with the financial assets of the Claimant. However, as seen on the facts themselves, it is repeatedly stated that the Claimant had to undertake several reductions of receivables outside of the investment in FONINVEMEM. This 'forced' course of action would constitute an ostensible interference with the total profitability of the company. While these three State-leaning tests may seem contestable, they may indicate a shift in Latin American arbitration (and State-Investor Arbitration in general) as a result of protracted criticism over the past decades of ICSID Tribunals excessively backing investor rights.

B. The Doctrinal Issue of Legal Appointments in Tripartite Arbitral Tribunals

From a doctrinal perspective, this case has highlighted a central problem with arbitration which is becoming increasingly apparent. While divergence of thought between arbitrators may be encouraged to ensure a comprehensive judgement, unilaterally appointed arbitrators tend to serve more of a role as advocates within the Tribunal rather than impartial judges. This 'advocacy' is exemplified by the stark difference of positions between the majority and the minority in this case. However, this should not be understood as a criticism of the arbitrators themselves, for they have shown incredible integrity in the proceedings as can be seen in Dr Pellet's submissions at the end of the Award and Haigh KC's agreement with the majority on most of the points raised. Rather, it is a criticism of how the system has developed where parties decide to appoint arbitrators knowing that they irrefutably process the law in a manner beneficial to them. This veiled preference towards the arguments of one side or another is visible in the actions of both appointed arbitrators. On one hand, the Claimant-appointed arbitrator strongly favours his designator with his dissent. On another, the Respondent-appointed arbitrator indirectly criticises the Claimant regarding the attempt to disqualify the President and the Claimant's supposed inflation of costs.

C. Third-Time's a Charm for the Argentine Republic

As stated previously, one essential point of contention between the diverging opinions was the similarity of this arbitration with the *Paso* and *Total* cases. This discrepancy shows another reason why arbitration can be unpredictable and arbitrary with a lack of judicial coherence despite the ICSID's generally dogmatic employment of precedent in proceedings.[32] While the majority gave its reasons for choosing to distinguish the cases, the reasons for doing this seem counterfactual: indeed, the Argentine Republic's very implication that measures were to be transitory in nature was, in effect, a call for investment in a recovery period, allowing investors to achieve profitability in its entirety after a period of austerity. As with the prior cases, where there was a commitment to maintain regularity of investment rather than a promise of transitory measures, the Government of Argentina, even if it did so tacitly, engaged itself to uphold a certain standard of conduct. A possible justification for this decision may also be that noting the current negotiations between national electricity companies and the Respondent, acceding to the Claimant's request could have led to pandemonium with electricity generating companies attempting to use this case to open the floodgates for liability.

D. A *Rara Avis* within Latin American arbitration

On a separate note, it seems that this decision has positively impacted subsequent cases and heralded a welcome change within the first half of 2024 by balancing investor and state interests. While it is not necessarily the first of its kind, it shows a considerable change in attitude to the balance of parties in arbitration as a whole, especially in Latin America, as evidenced by the differences between the *Total* and *Orazul* arbitrations. On a national level, this case has been the first energy sector and natural resource arbitration out of 20 since 1998 to be decided in favour of the State (Argentina), based on the merits of the case (another case, *Wintershall v Argentina*,[33] was decided in favour of the State but only due to a lack of jurisdiction).

On a Latin American level, the ICSID had recently gained a reputation by the general public for providing a mechanism for companies to extract ludicrous payoffs for breaches of Investor-State agreements (see, for example, *Occidental v Ecuador II*[34]) and many calling this mechanism

[32] See Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) Vol.2 No.1 JoIDS 5, 16.
[33] *Wintershall Aktiengesellschaft v Argentine Republic*, [2008], ICSID Case No. ARB/04/14.
[34] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador (II)*, Award, [2006], ICSID Case No. ARB/06/11.

'exploitative' (US Senator Warren[35] on the Prospera Honduras ICSID Proceedings[36]). The tides, however, may be changing. Since December 2023, five other energy sector and natural resource arbitrations have been litigated.[37] Of these arbitrations, four cases were decided in favour of states, and only one (*Glencore v Colombia II*) was decided in favour of the investor. The decisions in these cases are very indicative of a shift in perspective within arbitrations of the sector towards higher limits for permissible state conduct: only manifest anti-competitive State conduct in the *Glencore v Colombia II* case was enough to satisfy the tests on unlawful state conduct. Also, within the general trends of the protection of states for their actions, the recent case of *Red Eagle v Colombia*[38] has reaffirmed the notion of environmental protection as a public policy ground to justify interferences in environmentally detrimental investments.

When taken together, these proceedings seem to answer public discontent with ICSID and place state integrity as a 'higher principle' compared to prior cases, subject to a simple 'reasonableness' test for the State's actions. However, compared to other cases such as *LARAH v Uruguay* and *Metlife v Argentina*,[39] it seems that investors have not been 'completely overpowered' in these proceedings and that full expropriations of investment retain a high bar for Government justification. In any case, the current status quo seems to balance state's and investor rights well; it remains to be seen whether this *rara avis* will persist in Latin American arbitration.

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[35] Senator Elizabeth Warren, 'Senator Warren, Representative Doggett Call for Elimination of Investor-State Dispute Settlement System, Action on Behalf of Honduran Government' <https://www.warren.senate.gov/oversight/letters/senator-warren-representative-doggett-call-for-elimination-of-investor-state-dispute-settlement-system-action-on-behalf-of-honduran-government> accessed 19 May 2024.

[36] *Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC v Republic of Honduras*, Press Release of the Honduran Finance Secretary, [2023], Case No. ARB/23/2.

[37] *Worley International Services Inc. v Republic of Ecuador*, [2023], PCA Case No. 2019-15 | *Latam Hydro LLC and CH Mamacocha S.R.L. v Republic of Peru*, [2023], ICSID Case No. ARB/19/28 | *Freeport-McMoRan Inc. v Republic of Peru*, [2024], ICSID Case No. ARB/20/8 | *Red Eagle Exploration Limited v Republic of Colombia*, [2024], ICSID Case No. ARB/18/12 | *Glencore International A.G., C. I. Prodeco S.A., and Sociedad Portuaria Puerto Nuevo S.A. v Republic of Colombia (II)*, [2024] ICSID Case No. ARB/19/22.

[38] ICSID Case No. ARB/18/12.

[39] *Latin American Regional Aviation Holding S. de R.L. . Oriental Republic of Uruguay*, Award, [2024] ICSID Case No. ARB/19/16, | *MetLife, Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A. v Argentine Republic*, ICSID, Award, [2024] Case No. ARB/17/17.