



NEW: AIA Afterwork Drinks for the ADR COMMUNITY in BRUSSELS

First date: Thursday 25 June 2015

(June/July/August: 4th thursday of the month at 18.30 at the Michael Collins Irish Pub - Baljuwstraat 1, Brussels) send an [email](#) to let the AIA team know you are coming



UPCOMING EVENTS

- [Mediation Training](#) ([click for more info](#)) ([click for the registration form](#))
- [European Mediation Training for Practitioners of Justice 2015](#) ([click for more info](#)) ([click for the registration form](#))
- [Qualifying Assessment Program approved by the International Mediation Institute 2015](#) ([click for more info](#))

- [Investment Arbitration Master Class](#) ([click for more info](#)) ([click for the registration form](#))
- [Training transformative mediation for current facilitative mediators](#) ([click for more info](#))
- [How to quantify your damage? – preparing for a negotiation/ mediation/ arbitration/ litigation](#) ([click for more info](#)) ([click for the registration form](#))
- [The art of convincing: tools and strategy](#) ([click for more info](#)) or watch this [video](#)
- [AIA Brussels Arbitration School](#) ([click for more info](#)) ([click for the registration form](#)) or watch this [video](#)
- [Negotiation training](#) ([send email for more info](#))

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The annual membership fee is 200 EUR, or 150 EUR for members under 40 years of age (VAT excluded). Fill in our online form at the bottom of our Membership page by clicking the sign up button below.



CONTACT US:

AIA recommends the following upcoming event in the field of mediation:

The KU Leuven University will hold a study day on June 11, 2015 about mediation for and by the government. With this day the KU

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Leuven University wants to create a debate on the future of mediation in our society. The minister of Justice, Mr. Koen Geens, will be present to hold the opening speech of the study day. For more information on the event click [here](#).

AIA recommends the following upcoming event in the field of arbitration:

Studipolis (die Keure's training center) offers you, in cooperation with the Institute of Private International Law (KU Leuven) and Cepani, a seminar on the new arbitration law in Sint-Lambrechts-Woluwe on June 18, 2015.

Different speakers with experience and knowledge of arbitration will present you a summary of the most important aspects and actions of the new Belgian law of arbitration, in force as of September 1, 2013. It reformed the existing Belgian law on arbitration entirely, so we will discuss the changes it brought. The speakers will concentrate on multiple components of the law, with a focus on the practical elements: the arbitration clause, the progress of the arbitration procedure, the reasoning of that procedure and the dispute of arbitration decisions. Arbitration gains more and more importance because of its many advantages, especially for B2B disputes. This will be showcased by Cepani through the use of examples.

If you are active in arbitration and are in need of an update of the new arbitration law, you cannot miss this practical seminar. The registration fee is 235,95 EUR (including a new book on arbitration), and as an **AIA member** you can enjoy a 10% discount. If you want to benefit from this discount, mention the code "AIA10" when registering via mail (studipolis@diekeure.be), or select the discount price on our website.

More information (program, accreditation, location) can be found on our [website](#), where you can also register.

On Thursday 9 June 2015, we offer you the same seminar in French in Louvain-la-Neuve. More information can be found [here](#).

BLOG on future of mediation in Belgium

AIA call for donation - Nepal's Earthquake:

Plan Belgique is a Belgian NGO with the objective to give a better life and equality for children. You can donate with them [here](#).

The **Belgian Red Cross** also calls for donations [here](#). The Red Cross acts to promote healthy living standards as well as provide humanitarian aid.

Oxfam Belgium has also launched a donation platform [here](#). Oxfam acts worldwide to fight poverty and discrimination.

The AIA thanks you for your support and generosity.

The FMB initiative is an initiative that aims to provide a joint communication platform to all mediation stakeholders, thereby offering them the opportunity to contribute to identifying best practices (including legal amendments) and setting out a common action plan for the enhancement and promotion of Mediation in Belgium. The FMB Committee got an assignment of the **Belgian Ministry of Justice** to identify existing initiatives related to mediation. Please fill in the [form](#) and [send](#) it back to the AIA team.

To read the first FMB report [click here](#).

To read the second FMB report [click here](#).

The FMB project was created with the support of AIA IVZW (www.arbitration-adr.org). Click [here](#) for a word of the chairman.

European Mediation Training for Practitioners of Justice (EMPTJ): training for certified cross-border mediators

EMTPJ 2015 Session

Now Open For Registrations



On the 17th-28th of August 2015, the [European Mediation Training for Practitioners of Justice](#) (EMTPJ) session will run for its 6th consecutive year. For more information about the EMTPJ please visit our [website](#).

The European Mediation Training for Practitioners of Justice is an 11-day intensive training course on cross-border mediation in civil and commercial matters. The training is unique because it is tailored to cover both theoretical and practical elements of mediation with a European perspective. Establishing such a training represented an important milestone for mediation as it allows participants to apply for accreditation in many jurisdictions, thereby creating truly '**European Mediators**'.

Don't miss this opportunity and register now! Please, send the AIA team an [email](#) for preliminary registration. Please find the registration form [here](#).

We encourage mediators who can demonstrate 200 hours of mediation experience and 20 mediation cases, to apply for the [AIA's Qualifying Assessment Program \(QAP\)](#) which will take place at the end of the EMTPJ 2015 session on the 30th of August 2015. Please visit our [website](#) for details.



[Master class investment arbitration](#)

The Association for International Arbitration organizes with the Brussels Diplomatic Academy a joint Master Class on investment Arbitration on **7, 8, 14 and 15 September 2015**, from 13.30-17.30h, at the Vrije Universiteit Brussel (VUB University), Room Bruges.

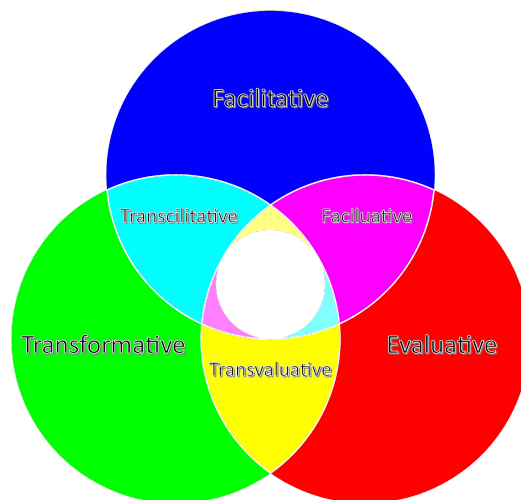
The **4 day master class** is designed to provide its participants with a concentrated and

affordable educational experience in the areas of law on foreign investment protection and investment arbitration. The seminar's unique feature is its international scope. Participants from a broad range of backgrounds will participate in a dynamic learning experience, where the multifaceted aspects of arbitration are considered from a range of comparative perspectives.

Fee: the 4 days seminar fee is 1850 EUR. Members of the Association for International Arbitration IVZW benefit from a discount of 50%. VAT Settlement: exempted from VAT: Art 44 § 2, 4° of the VAT code. Please find more info [here](#).

Transformative mediation

The Association for International Arbitration organizes a training on transformative mediation on **23 – 25 September 2015**, from 10.00-17.00h, at Billiet & Co, Avenue Louize 146, 1050 Brussels.



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Transformative mediation is based on the values of empowerment of each of the parties and recognition of each of the parties' needs, interests, values and points of view. The potential for transformative mediation is that any or all parties or their relationships may be transformed during the mediation. In transformative mediation, the parties structure both the process and the outcome of mediation, and the mediator follows their lead.

Topics include:

- Core purpose and principles of transformative mediation
- Patterns and dynamics of transformative practice

Fee: the seminar fee is 400 EUR excl VAT.

The Art of Convincing

This course is set up to make you more persuasive and convincing in professional situations. Along the 2 day course you build up insight, knowledge en competence on what it take to win over others for a mutual beneficial proposal.

Learning objectives

- The participant knows the cycle of persuasion and is able to use appropriate influencing techniques in the different stages of the process
- The participant is able to stand his ground and defend himself when tactics are being applied by the counterparties
- The participant is able to use personal communication as a positive means of communication to convince the other of an mutual beneficial offer
- The participant has an ethical approach on persuasion and show professional maturity and confidence in debate and mediation

(12 and 13 November 2015)

Click [here](#) for the registration form.

Click [here](#) for the brochure.

. Click [here](#) for a word about the the art of convincing by Jochen Roef (trainer).

DECEMBER EDITION 2015 OF ABAS (AIA Brussels Arbitration School)

5 days intensive arbitration training (7-11 December)

Additional benefits of this training are the following:

- Arbitrator certification (in case of full participation)
- 25 bar points
- Bringing participants in contact with arbitration providers

- Bringing participants in contact with Belgium's leading arbitrators
- Tailor content to the participants profiles
- Possibility to submit questions upfront (allowing the trainers to include these in their presentations)
- Ideal way to update your knowledge on arbitration or to make your entrance in the arbitration 'sector'
- A-Z focus on arbitration

The third ABAS training is open for only a limited number of participants and places will be allocated on *first come first served* basis.

Do not miss this opportunity if you want to become one of the ABAS certified arbitrators in Belgium. Click [here](#) for a word about ABAS by the AIA Manager.

Recommended Article written by AIA Fellows:

"Vattenfall v. Germany (II) and the familiar irony of ISDS: investors before public interest?"

by Ms. Amélie Noilhac (LL.M Public International Law, Universiteit Leiden) is currently undertaking a Master in International Economic Law at the Université de Strasbourg while interning at the Association for International Arbitration. She aims to specialise in investment arbitration in the energy sector. You can contact her [here](#).

ISDS is known to lack transparency, but in the multi-billion euros arbitration that *Vattenfall v. Germany (II)* represents, a review of both parties' most likely arguments appears necessary. Such a case clearly illustrates the paradox of ISDS: a 'chilling effect' for investors that may impair States' regulatory powers. On May 31st 2012, the Swedish energy company Vattenfall registered its claim at the ICSID Secretariat in Washington D.C under the Energy Charter Treaty (ECT), a Multilateral Investment Agreement intended to protect investors in the energy sector.^[1] Vattenfall is suing Germany for adopting a nuclear-phase out legislation, which breaches its contract to let Vattenfall build and operate nuclear power plants. It is reported that Vattenfall claims up to 4 billion euros.^[2]

Background to the dispute

Germany adopted an amendment to its Atomic Energy Act end of July 2011 as a response to the Fukushima disaster in Japan.^[3] Since the entry into force of this amendment, Germany undertook its *Energiewende* - or Energy transition - and pledged to close every nuclear power plant by 2022 ('*Atomausstieg*').^[4] German energy companies such as E.ON, RWE and EnBW were also hit by the *Energiewende* – but as companies of German nationality and controlled by German investors, they cannot sue the German government under the Energy Charter Treaty.^[5]

In 2009, Vattenfall had brought a claim against Germany under the ECT claiming that the Hamburg Environmental Authority had adopted new water regulations that made their

investment to build a coal-fired power plant in the Hamburg district unviable. The precise agreement between both parties is however unknown, although it is recognised that Germany nevertheless provided the licence to Vattenfall.^[6] The 31st of March 2015, it was reported that the EU Commission was about to lodge a complaint against Germany before the European Court of Justice for having decreased its environmental requests *vis-à-vis* Vattenfall, which consequently breached EU requirements.^[7]

I. Vattenfall's (likely) arguments

Although confidential, Vattenfall's argumentation under the ECT probably encompasses a breach of the Fair and Equitable Treatment through the concept of 'legitimate expectations'. It is also likely to prevail from the ECT's 'umbrella clause'^[8] and may claim lack of fair compensation against expropriation of its investment.^[9]

a. Lack of compensation / indirect expropriation

Indirect expropriation may be defined as a situation where the investor is "radically deprived of the economic use and enjoyment of {its} investment, the benefits of which have been neutralised and rendered useless".^[10] This is clearly Vattenfall's situation, as the property of two nuclear power plants becomes worthless without a license authorising their operation. However, expropriation may be legal if taken for a public purpose and on a non-discriminatory fashion, but there is generally a need for compensation to the spoilt investor, as the 'police power' doctrine is rarely upheld.^[11] Thus, it appears that Germany had to compensate Vattenfall.

b. Fair and Equitable Treatment (FET)

This standard protects the investors from arbitrary changes in the legal framework of the State where it made its investment. Most importantly, the concept of 'legitimate expectations'^[12] developed in investment arbitration may be invoked by Vattenfall, that can argue that it had reasons to believe that the 2010 extension of its contract would remain in force.^[13] FET mostly goes against State's regulatory prerogatives, as its interpretation in BITs/MITs takes into account the treaties' object and purpose, usually interpreted as requiring a stable environment for investments.^[14] It has already been considered by Arbitral tribunals that revocation of a license to practice may constitute a violation of the FET, even if taken with public interest objective.^[15]

c. Umbrella clause

An investor may invoke this clause to elevate a contractual violation to the international level and have domestic obligations recognised in international arbitration claims.^[16] Consequently, Vattenfall could argue that the extension agreed by the German government in September 2010 constitutes a commitment to the company. As a result, adopting the nuclear phase-out legislation simply breaches such commitment, which in itself constitutes a violation of the Energy Charter Treaty. Approaches to Umbrella clauses

have differed among Arbitral tribunals and it is not agreed yet whether they should have a broad or a restricted effect.^[17] Thus, if the ICSID tribunal considers the Umbrella clause to be broadly interpreted, then a breach of the contract by Germany directly entails violation of the ECT – which will trigger compensation for Vattenfall.

II. Germany's prerogatives

The German government could invoke specific concepts in order to lower the amount to be paid to Vattenfall as a result of these arguments. As such, it is recognised in investment arbitration that a State may take measures designed to enhance public interest, especially in the fields of health or environment measures.

a. *Counter-argument for indirect expropriation and lack of compensation*

Arbitral tribunals differ in their approach of indirect expropriations: some weight the investor's burden against the public interest of the measure,^[18] others consider only the impact of the measure on the investor ^[19] when some others may consider a measure taken for public interest to not be tantamount to an expropriation.^[20] This 'police power' doctrine may apply for Germany here, as Vattenfall's expropriation is clearly not discriminating and affects every energy company on a similar basis. Moreover, it is undeniable that the phase-out legislation has an environmental impact, thus fulfilling the criterion of public interest.^[21] However such doctrine is rarely upheld and it appears unlikely that the ICSID tribunal would sustain that no compensation has to be provided. However, this can play a role for lowering the compensation to be provided by the German government.

b. *Counter-argument for breach of Fair and Equitable Treatment*

Environmental purposes are explicitly mentioned in the Preamble of the ECT, which means that the ICSID tribunal will have to take into account the environmental impact of the legislation.^[22] Moreover, its article 19 provides for 'sustainable development' and for preventing 'harmful environmental impacts' within State's territories. Thus, the breach of fair and equitable treatment - if upheld - has to be balanced with the environmental standards explicitly mentioned in the Energy Charter Treaty. It can also be argued that 'legitimate expectations' are no barrier to risky business choices. Indeed, Germany had given approval for another 8 to 14 years for Vattenfall, but not a life-long extension.^[23] Some Arbitral tribunals have indeed considered this concept to be interpreted restrictively, as it was providing extreme restrictions for States' sovereignty.^[24]

c. *Counter-argument for the umbrella clause*

Some Arbitral tribunals have upheld a restrictive interpretation of umbrella clauses.^[25] It is true, however, that Germany could have opted out of such a clause but apparently chose not to do so.^[26] Thus, it is likely that it may be found in breach of the ECT's umbrella clause if the restrictive approach is not upheld by the ICSID tribunal.

Conclusions

Vattenfall's claim against the German government remains quite unknown from the German public, while it entails tremendous consequences regarding the regulatory power of the State when it comes to investor's expectations. What is paradoxical is that German companies have sought to sue the government before domestic courts for compensation claiming that their 'freedom of ownership' protected by the German Constitution had been violated.^[27] However, it is likely that the German Constitutional Court will balance such right with the public interest objective behind the nuclear-phase out legislation. Thus, this results in a clearly unfair situation for German energy companies that are similarly affected by the legislation as Vattenfall.

The outcome of this case will probably remain confidential as *Vattenfall v. Germany (I)* was. However, the situation for losing States becomes incredibly delicate if they are also members of the EU, as the European Commission recently considered that payment of Arbitral awards to companies incorporated within the EU could amount to unlawful state-aid and thus trigger an alleged infringement of EU obligations for Germany.^[28]

^[1] *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12), 31 May 2012, Request for Arbitration^[2] *Parlamentarische Anfragen* (parliamentary question), 28 October 2014, accessible at: <http://www.bmwi.de/BMWi/Redaktion/PDF/P-R/Parlamentarische-Anfragen/10-148.property=pdf.bereich=bmwi2012.sprache=de.rwb=true.pdf>^[3] Thirteenth Amendment to the Atomic Energy Act (13. AtGÄndG v. 31.07.2011, BGBl I S. 1704 (No. 43)^[4] *The Economist*, *E.ON and E.Out: a German Power Producer is breaking itself up to face the Future*, 6 December 2014, accessible at: <http://www.economist.com/news/business/21635503-german-power-producer-breaking-itself-up-face-future-eon-and-eout>^[5] Article 1(7) and 26(1), Energy Charter Treaty^[6] N. Bernasconi-Osterwalder & R. T. Hoffmann, *Nuclear Phase-Out put to the test, Background to the new dispute Vattenfall v. Germany (II)*, Transnational Institute, 8 October 2013, accessible at: <http://www.tni.org/briefing/nuclear-phase-out-put-test>^[7] J. Hepburn, *European Commission to pursue Germany under EU law for failing to enforce environmental laws at Vattenfall power plant*, Investment Arbitration Reporter, 31 March 2015, accessible at: http://www.iareporter.com/articles/20150331_1^[8] Article 10(1), Energy Charter Treaty^[9] Article 13(1), Energy Charter Treaty^[10] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, §7.5.34^[11] OECD, *'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law*, OECD Working Papers on International Investment (2004), 2004/04, OECD Publishing, 3 et seq.^[12] See, *inter alia*, *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, §298^[13] World Nuclear Association, *Nuclear Power in Germany* (updated December 2014), accessible at: <http://www.world-nuclear.org/info/Country-Profiles/Countries-G-N/Germany/>^[14] *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 §154; *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Final Award, 11 September 2007, §331^[15] *Tecmed, supra*, §115^[16] *SGS Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case N° ARB/02/6, Decision on Jurisdiction, 29 January 2004, §115^[17] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. the Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, §169–175 compared to *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, §156^[18] *Tecmed, supra*, most probably inspired by ECtHR, *Matos e Silva v. Portugal*, Judgment of 27 August 1996, ECHR 1996-IV, §92^[19] *Fireman's*

Fund Insurance Company v. The United Mexican States, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006, §176[20] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter C. §7[21] World Nuclear Association, *Nuclear Power in Germany*, supra[22] Energy Charter Treaty Preamble, last paragraph[23] World Nuclear Association, *Nuclear Power in Germany*, supra[24] *Saluka Investments B.V v. the Czech Republic*, Partial Award, 17 March 2006, Permanent Court of Arbitration under UNCITRAL rules, §303-305[25] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, supra.[26] Article 26 (3) c), Energy Charter Treaty[27] Article 14, *Grundgesetz für die Bundesrepublik Deutschland* (German Basic Law)[28] Article 258/260, Treaty on the Functioning of the European Union; see also, B. Rigby, *ISDS and state aid: When laws collide*, 18 May 2015, Commercial Dispute Resolution News, accessible at: <http://www.cdr-news.com/categories/arbitration-and-adr/5564-isds-and-state-aid:-when-laws-collide?newslettercmid=c98518e9-2035-e011-9ed0-002219809646>