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Blog of the European Journal of International Law

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A Little Threat from My Friends: An EU-based Company Contemplates Taking War-Torn Ukraine to Investment Arbitration

Written by Javier García Olmedo and Lorenzo Gradoni

On 18 August 2022, the Bureau of Economic Security of Ukraine (ESBU) seized the assets of one of Ukraine's largest fuel retailers, AMIC Ukraine, the local subsidiary of AMIC Energy, an Austrian private equity firm. The Ukrainian authorities acted on charges of tax fraud, money laundering, and – above all – the company's alleged connection with Russia. According to ESBU, AMIC Energy and its local subsidiary have paid "dividends in favor of non-resident companies, the ultimate beneficial owners of which are the Russian Federation and a company from the Russian Federation".

In a confrontational press release issued right after the attachment, AMIC Ukraine dismissed ESBU's charges as "arbitrary", "absurd", a

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published in 2017". It then threatened to take the matter to investment arbitration and the European Court of Human Rights: "if any damage is done to us or to our business reputation, as an Austrian investor we will protect our rights both at the national and international levels, including, if necessary, filing claims to international investment arbitration and the ECHR".

Interestingly, Interfax-Ukraine, an affiliate of the Russian information agency Interfax, relayed the company's press release verbatim, not in the form of a quotation, and under an editorial headline that ridicules Ukrainian authorities: "Lawless actions of Economic (In)Security Bureau of Ukraine". AMIC Ukraine is currently pursuing domestic remedies. On 21 October, the Kyiv Court of Appeal rejected an application to undo the seizure of the company's assets. Again, Interfax reported the company's outraged criticism of the verdict verbatim and without quotation marks. The company is now preparing a new appeal.

This seems to be the first time that a corporation threatens to file an ISDS claim against Ukraine after and despite the ongoing invasion. And the investor has the backing of an EU member.

A warning from Austria

On 15 September, Interfax-Ukraine hosted a dramatic press conference in Kyiv. Sitting at the conference table, side by side, were Mr. Günter Maier, the Managing Director of AMIC Energy, and His Excellency Arad Benkö, the Austrian Ambassador to Ukraine. To the right of Mr. Maier sat Mr. Audrius Stropus, the CEO of AMIC Ukraine. Mr. Maier spoke first, a screen with fluttering Ukrainian and Austrian flags hanging in the background. He began by describing Russia as the "invader" and deplored the damage that its armed forces inflicted on one of the company's facilities, stating that "we will of course also claim compensation from the aggressor as this is possible". Mr. Stropus later explained that the total loss amounted to some USD 20

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were followed by a ringing indictment of the Ukrainian authorities' behaviour: "we strongly reject the false and groundless accusation of the Economic Security Bureau of Ukraine against our company", he said, before confirming that the company contemplates investment arbitration as a last resort. The press conference's most unsettling moment came when Mr. Maier claimed that that the Ukrainian Government is not acting in a manner befitting a candidate to EU membership:

> In connection to what the Ukrainian Prime Minister said last week in Brussel that Ukraine is now trying to fulfil the conditions for starting talks to become member of the European Union, we are of the opinion that legal arbitrariness in a European Union candidate country should no longer happen, and we will not let it happen.

The Austrian Ambassador made the same point more diplomatically:

> The Austrian Embassy is confident that adherence to the democratic principle of the rule of law and to European standards of justice is a key factor for Ukraine's stable economic development and its future European integration aspirations.

It hardly needs recalling that any EU Member can frustrate the ambitions of a candidate State, a status that Ukraine acquired on 23 June 2022, with Austria's consent. In this context, the "Slava Ukraini!" with which Mr. Maier rounded off the press conference may have sounded slightly off kilter. While Ukraine would be legally defenseless against an EU Member State blocking its accession to the EU, there are ways to rebuff AMIC Energy's arbitration threat, which is what Ukraine is trying to do.

By a letter dated 18 August 2022, Ukraine's Minister of Foreign Affairs Dmytro Kuleba notified the Energy Charter Treaty (ECT) Secretary-

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notification fell on the same day. In the following, we discuss the difficulties that – should the matter go to arbitration – Ukraine may face in its attempt to deny treaty benefits to AMIC Energy, a company from a State party to the ECT (Austria) allegedly owned or controlled by investors from a third State (Russia). In fact, the way arbitral tribunals have interpreted and applied the clause invoked by Ukraine has sometimes led to its virtual sterilization and remains contested.

Procedural hurdles

Article 17 of the ECT contains a so-called denial-of-benefits (DOB) clause, stipulating that each Contracting Party may deny treaty benefits to investors from third States who do business through companies having the nationality of a State party. Reliance on the clause is subject to both substantive and procedural requirements. Under Article 17, paragraph 1, a State party may deny benefits to a "legal entity" owned or controlled by "citizens or nationals of a third state" and with "no substantial business activities in the area of the Contracting State in which it is organized". Paragraph 2 – the provision invoked by Ukraine – covers the situation of an investment made by an investor of a third state with which the denying State has no diplomatic relations or against which it maintains economic sanctions. As far we know, this is the first time that a State invokes this provision. In all publicly known cases dealing with the ECT's DOB clause, States have relied on the first paragraph of Article 17.

Regardless of the paragraph invoked, the clause enables a State party to deny the substantive investment protections contained in Part III of the ECT but not the right to initiate investor-State arbitration under Article 26 of the ECT. Accordingly, beginning with the 2005 decision in *Plama v Bulgaria*, arbitral tribunals have consistently ruled that the DOB clause leave consent to arbitration unaffected. Therefore, if AMIC Energy files a claim, determining whether Ukraine is entitled to deny it protection would be a question of merits and not

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host State must affirmatively exercise that right: there is no automatic loss of benefits in the circumstances set forth in Article 17. However, the provision is silent as to the modalities of exercising the right in question. In virtually all cases, States invoked the clause after the commencement of arbitration proceedings, without giving prior notice to the investor. Most tribunals considered such invocation untimely.

In *Plama v Bulgaria*, the defendant State notified the International Centre for Settlement of Investment Disputes (ICSID) that it was denying the benefits to the plaintiff, alleging that the latter was a mailbox company established in Cyprus and controlled by nationals of a third State. The tribunal first found that denial of benefits may not operate retrospectively without frustrating the investor's legitimate expectations (para 162). The tribunal then found that investors are entitled to be "properly" notified "of the potential effect of Article 17(1) […] prior to making [the] investment" (paras 162-164). The tribunal rejected Bulgaria's argument that the existence of Article 17(1) of the ECT is by itself sufficient notice, holding that the latter "is at best only half a notice" and that more is required in terms of publicity, such as "a general declaration in a Contracting State's official gazette […]; a statutory provision in a […] State's investment or other laws; or even an exchange of letters with a particular investor or class of investors" (para 162). The tribunal therefore concluded that Bulgaria's letter to ICSID did not constitute a proper exercise of its right to deny benefits. With a recent exception, subsequent ECT tribunals have followed *Plama*'s lead (see *Khan v Mongolia*; *Liman v Kazakhstan*; *Yukos v Russia*; *Ascom v Kazakhstan*; *Masdar v Spain* and *NextEra v Spain*), raising doubts as to the DOB clause's effectiveness.

In line with this jurisprudential trend, Ukraine invoked the clause before the commencement of any arbitration proceedings. Moreover, as Mr. Kuleba's letter to the ECT Secretary-General makes clear, the denial of benefits would apply prospectively, starting on 15 August 2022. In response, AMIC Energy could argue that Ukraine did not give

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"Russian connection" was most obvious.

In fact, it is not disputed that AMIC Energy acquired the fuel station network from Lukoil, Russia's second-largest oil company, a privately-owned corporation run for decades by Putin's friend Vagit Alekperov, who recently resigned as he came under the fire of sanctions from Australia, Canada and the UK (but not the EU). The transaction, which took place on 26 May 2015 with the approval of Ukrainian authorities, led to the rebranding of the local company Lukoil-Ukraine as AMIC Ukraine. Before an arbitral tribunal, the Austrian parent company may argue that, at the time, relations between Ukraine and Russia were already strained due to the annexation of Crimea and the civil war in Donbass. In support of the argument that the invocation of the DOB clause was untimely, the investor could also cite Mr. Kuleba's letter to the ECT Secretary-General, where it is stated that the denial of benefits inter alia implements a law "on sanctions" dating back to 2014.

A more flexible approach to the DOB clause

In response to such arguments, Ukraine can rely on a recent award which departs from earlier findings on the procedural requirements for the invocation of the DOB clause. In *Littop*, the respondent State – Ukraine itself – invoked the DOB clause six months after the investor submitted the request for arbitration. On 4 February 2021, the tribunal held that that *Plama* and its progeny "provide no definitive or uniform answer" as to the time for validly invoking the clause (*Littop v Ukraine*, para 591). For the tribunal, "the State should do so within a reasonable period of time after the dispute arises and is known to both parties" (para 592). The tribunal considered that resort to the clause "should not come as a surprise or cause legal uncertainty to any ECT investor", but apart from that it should be seen as "an inherent business risk akin to the risk of changes to the laws in the host country" (para 604). The tribunal also ruled that "once Article

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Central America Free Trade Agreement had already taken such a flexible approach (see, eg, *Guaracachi v Bolivia*; *Ulysseas v Ecuador*; *Pac Rim v El Salvador*). Under it, Ukraine would be entitled to deny treaty benefits to AMIC Energy even after the filing of arbitration proceedings.

In support of this contention, Ukraine could also refer to the interlocutory agreement reached by the ECT Contracting Parties on 24 June 2022 regarding th e long-awaited (and still unaccomplished) "modernisation" of the treaty. If such agreement ever come into force, a recast DOB clause would specify that the denial of benefits is to be performed "no later than the date a tribunal or court determines for the submission of arguments on preliminary questions" (here, at 47). The new clause would also provide that a party "may deny such benefits pursuant to this Article without any prior publicity or other additional formality" (*ibid*). Although still subject to final approval, this text is probably among the least controversial elements of the current draft and since there is at least an "agreement in principle" on it, a tribunal should already take it into account as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" under Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT). Since the current ECT is completely silent on procedural requirements and the case law is divided, this novel circumstance could well tip the balance in favour of *Littop* and against *Plama*.

However, since there is no rule of precedent in investment arbitration and the agreement on a recast DOB clause is not final, Ukraine cannot safely rely on either such agreement or *Littop*, and it would therefore be well advised to notify AMIC Energy as soon as possible about the denial of benefits. Making this move could also have the effect of inducing the company to settle the dispute instead of seeking judicial protection of rights that may well turn out to be unavailable.

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would be for it to prove, in particular, that AMIC Ukraine is an "Investment of an Investor of a third state" with which Ukraine "does not maintain a diplomatic relationship" (Article 17(2)(a) of the ECT). It is beyond question that Ukraine severed diplomatic relations with Russia. As Mr. Kuleba's letter to the ECT Secretary-General recalls, Ukraine did so "on February 24, 2022, following the beginning of the unprovoked full-scale war of the Russian Federation against Ukraine". Further, it seems correct to treat Russia as "a third state". As the same letter points out, the Russian Federation just signed the ECT and notified its intention not to ratify it in 2009.

In this connection, AMIC Energy might be tempted to rely on *Yukos v Russian Federation*, where a tribunal ruled in 2009 that Russia, as a signatory of the ECT and subject to its provisional application under Article 45(1), could not be considered a "third state" for the purposes of the DOB clause (paras 544-546). However, Russia's declaration that it would no longer ratify the ECT, which took effect weeks before the award was rendered, arguably changed the situation. It is true that, in principle, a signatory State never relieves itself of such status but only of the obligations attached to it as per Article 18 of the VCLT. By way of example, Russia still appears on the list of signatories to the Statute of the International Criminal Court, even though it has declared that it will not ratify it. But to infer from this that Russia will indefinitely remain something other than a "third state" vis-à-vis the ECT would be a manifest absurdity.

AMIC Energy could retort that Russia will not become a "third state" until 2029, namely the expiry date of a lesser-known sunset clause, which extends the treaty's provisional application for 20 years from the declaration of unwillingness to ratify (Article 45(3)(b) of the ECT). However, here again, the subsequent practice of the States parties, in the absence of a definition of "third state" in the ECT, is likely to be decisive. As Ukraine recalled in its letter to the ECT Secretary-General, the ECT Strategy Group, the intergovernmental body in

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signatory States.

Moreover, the sole effect of not considering Russia a “third state” for the purposes of the DOB clause would be to offer protection to investments owned or controlled by Russian individuals or entities, whereas the *asymmetrical* sunset clause in Art. 45(3)(b) of the ECT affords protection only to investments made in Russia before the latter notified its unwillingness to ratify. Subjection to the sunset clause is therefore fully compatible with “third State” status within the meaning of Article 17 of the ECT.

Probing the depths of ownership and control

The remaining, crucial question is therefore whether AMIC Ukraine is an investment of a Russian investor. Article 17(2) does not set out criteria to determine this issue. It is nonetheless likely that a tribunal, by reference to the substantive condition in Article 17(1), would look at who ultimately “owns or controls” AMIC Ukraine.

The ECT leaves the terms “control” and “ownership” undefined. At any rate, complex and opaque ownership chains across several jurisdictions, frequent changes in the corporate structure, lack of restrictions on share transfers, among other things, make it difficult to determine who is behind a corporation. In *Plama v Bulgaria*, the tribunal interpreted ownership and control broadly:

> “ownership includes indirect and beneficial ownership; and control includes control in fact, including an ability to exercise substantial influence over the legal entity’s management, operation and the selection of members of its board of directors or any other managing body” (para 170).

In *Ulysseas v Ecuador*, decided under the US-Ecuador BIT, the tribunal similarly found that control over an investment can be exercised indirectly through layered corporate structures (para 170).

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owns or controls AMIC Ukraine. In its post-attachment press release, the company claims that "the beneficial owners of AMIC Energy" are three Austrian citizens and one British national. During the press conference hosted by Interfax, Mr. Maier, the company manager, stated that "AMIC is owned by citizens from Austria and Ireland". Tracing payments to Russian subjects would be pointless – he said with a wry smile – because the company, which was hardly ever profitable, never paid out dividends. He then conclusively observed that "even a superficial analysis" of publicly available information "irrevocably refutes all the accusations made by the investigators". The publicly available information we gathered appears less unambiguous, although of course it authorizes no definite conclusion.

What we know is that in 2015-2016 AMIC Energy took over several Lukoil subsidiaries operating in four Eastern European countries – Latvia, Lithuania, Poland and Ukraine – a colossal operation that required colossal funding. As an Austrian newspaper at the time reported, the sale took place against the backdrop of Lukoil's decision to "expand its presence in Vienna and, in the future, bundle its overseas exploration and production activities, worth USD 4.6 billion, under the Vienna-based holding Lukoil International", making of the Austrian capital "the most important hub" for Lukoil's international operations. In 2019, Lukoil appointed to its Board of Directors the former Austrian prime minister Wolfgang Schüssel, who resigned last March because, he declared, "the warlike attack on Ukraine, the brutal attacks on and bombardment of the civilian population have crossed a red line". A company document dated 2015 indicates Mr. Wolfgang Ruttenstorfer, a former State Secretary to the Austrian Federal Ministry of Finance and former CEO of OMV, the Austrian petrochemical giant, as the Chairman of the Supervisory Board of AMIC Energy. The name of Mr. Johannes Klezl-Norberg, originally the owner of 50 per cent of the company and still among AMIC Energy's "beneficial owners", appears in a record of "Russian banks ultimately owned by EU entities or citizens" annexed to a CEPS Policy Insight

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between AMIC Ukraine and the Cypriot company AMIC Finance, wondering if the latter had anything to do with the ultimate beneficiary of the investment. Mr. Meier replied that the Cypriot company "has been 100 per cent owned" by AMIC Energy and that its creation met a temporary need of the seller of Lukoil Ukraine: "it is not part of the AMIC Group anymore so we have just actually sold it empty", he said. However, according to Opencorporates, AMIC Finance has only changed its name and remains incorporated in Cyprus as Kardento Finance Ltd. Its director, Mr. Gillen, is one of the four individuals AMIC Energy currently lists as its "beneficial owners" (the British one). Gillen's predecessor is a Russian national who, before taking up the job at Kardento, was Head of Internal Audit at the Cypriot branch of Promsvyazbank, a private bank formerly owned by Russian oligarchs, bailed out by the Russian Central Bank in 2017 and state-owned since 2018.

If the case goes to arbitration, information concerning the ownership and control of AMIC Energy will have to be fully disclosed. Article 17(2)(b) of the ECT arguably implies this requirement as it provides for the possibility of tying the denial of benefits to the implementation of a sanctions regime – a connection that the Ukrainian Government expressly made in its letter to the ECT Secretary-General. The logic of sanctions – in particular, the need to avoid circumvention by nationality planning and corporate restructuring – seems to demand the application of a test of ownership or control that is neither formal nor shallow.

What if the DOB defence fails?

If an arbitral tribunal concludes that no Russian beneficiary lurks behind AMIC Energy, Ukraine is unlikely to achieve the goal it set itself, i.e., to deny treaty benefits to Russian subjects in order to use the assets as collateral for Russia's payment of war damages. As Ukraine's letter to the ECT Secretary-General makes clear, the invocation of the DOB clause implements not only the 2014 Law "On

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Federation itself is among the ultimate beneficiaries of the investment (as in principle private enemy property could not be taken without compensation: see Dederer, at para 47). In short, if it turns out that AMIC Ukraine is owned or controlled by a non-Russian investor, a core component of Ukraine's defensive strategy would fall apart. However, this does not mean that AMIC Energy will get what it seems to want above all else, namely having the assets back and not getting a windfall out of the expropriation of a company that, by the management's admission, makes no profit and for which the war hardly augurs a bright future. "We will not let our property be expropriated", warned Mr. Maier, who envisions a long-term commitment in Ukraine despite the war (a circumstance reinforcing the view of AMIC Ukraine as more of a geopolitical than an economic asset).

AMIC Energy may not succeed as Ukraine would likely invoke the security exception in Article 24(3) of the ECT, which provides that the treaty "shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary: (a) for the protection of its essential security interests including those (i) relating to the supply of Energy Materials and Products to a military establishment; or (ii) taken in time of war, armed conflict or other emergency in international relations". Ukraine informed the ECT Secretary-General that the war is having "a significant negative impact on the Ukrainian energy sector" as "energy infrastructure facilities are among primary targets for the Russian military […] due to their economic, humanitarian and geopolitical importance". There is little doubt that Ukraine's conduct falls within the scope of the security exception. However, even if the tribunal finds that the taking of AMIC Ukraine was necessary in view of an essential security interest, the company would not be deprived of all protection, since Article 24(1) carves out from the exception Articles 12 and 13, which respectively concern compensation for losses suffered during an armed conflict and expropriation.

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taking was prompted by military necessity (Schreuer, at 14). However, the present case does not seem to fall within the scope of this provision. The seizure of AMIC is not a requisition dictated by military necessity. It is, rather, a measure to generally support the war effort, to implement sanctions against the enemy, and to secure future reparations. It is, in short, an expropriation that rather triggers the application of Article 13.

Under this provision, which is standard, even if Ukraine manages to show that the taking was "in the public interest", "not discriminatory", and "carried out under due process of law", it will still have to pay "prompt, adequate and effective compensation", that is, "the fair market value of the Investment expropriated at the time immediately before the Expropriation". In this regard, Ukraine will be able to rely on the company's statements that it has hardly ever made a profit.

It would be hard for Ukraine to extricate itself from the obligation to compensate by invoking "necessity" within the meaning of Article 25 of the Articles of State Responsibility (ASR) and general international law (here we assume for the argument's sake that the exception in Article 24 of the ECT, because it includes a claw-back clause protecting the investor in case of expropriation, does not preclude a necessity defense). The fact that Ukraine is constantly under attack arguably puts its "essential interests" in a situation of perpetual "grave and imminent peril". However, it is unclear whether expropriating AMIC Energy was "the only way" to protect such interests, especially if a tribunal determines that the company is not controlled by the enemy and if similar measures were not taken against foreign corporations operating in the same sector. In any event, under Article 27 ASR, the invocation of a circumstance precluding wrongfulness might not absolve Ukraine of its obligation to compensate but would at most allow it to postpone its fulfilment.

But Ukraine may have another card up its sleeve: lack of jurisdiction

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company comes before the tribunal with unclean hands. In this regard, Ukraine could once again rely on the recent award in the *Littop* case, according to which "the doctrine of clean hands, just like the concept of good faith, is now a principle of international law" requiring "that a tribunal decline jurisdiction or dismiss the claims of an investor if its investment was acquired, effected or somehow tainted/permeated by bribery and/or corruption, illegality or other internationally unacceptable behaviour" (paras 438, 442). The tribunal eventually did so (para 654).

A BIT more of trouble?

One cannot rule out that cases like this will prompt Ukraine to withdraw from the ECT – while remaining subject to the notorious 20-year sunset clause set forth in Art. 47(3). By doing so, Ukraine would intercept the disillusionment with the ECT that is currently sweeping across the EU. Spain, Poland, the Netherlands and France recently announced their plans to terminate the treaty out of dissatisfaction with the outcome of the never-ending negotiations to make it more climate-friendly. However, leaving the ECT will not solve the problem, as any withdrawing State is also caught in a whole web of investment treaties, most of which have equivalent investor-to-State dispute settlement provisions. Ukraine alone subscribed to 65 such treaties, including a BIT with Austria which provides for a 10-year sunset clause. AMIC Energy may prefer to resort to it in lieu of the faltering ECT, for two reasons.

First, the Austria-Ukraine BIT does not contain a DOB clause. On the face of Article 1 of the BIT, the mere fact that AMIC Energy has "its registered office" on Austrian territory should qualify it as an "investor" protected by the treaty. Second, the BIT – unlike the ECT – contains no exception to the host state's obligations to the investor. However, the BIT, on balance, should offer no better guarantees than the ECT. Unlike the ECT, the BIT does not require the State to grant to the

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Articles 12 and 13 of the ECT, the provisions covered by the claw-back clause in the exception. Finally, the defence of necessity, although hardly a powerful one, would undoubtedly be available against the BIT, precisely because the latter contains no *lex specialis* (exceptions) displacing it.

Concluding Remarks: Should the EU intervene?

The AMIC Ukraine affair may trigger a chain reaction. On 22 August 2022, following ESBU's decision to seize the company's assets, Viada LT, a Lithuanian gas station operator, reportedly announced that it will terminate its contract with AMIC Lietuva, formerly known as Lukoil Baltija, if allegations about the group's ties with Russia are confirmed. More worryingly, the countries where AMIC Energy also operates – all of which are EU members – may follow Ukraine's lead and arrest the local gas stations once owned by Lukoil.

The EU would have every interest in probing this matter and act upon any finding it may make so as to ensure the integrity and effectiveness of the sanctions regime, help war-torn Ukraine to avert costly arbitration proceedings, and clear up the doubts raised by the Austrian Government – through its Ambassador in Kyiv – about Ukraine's credentials as a candidate State. An accelerated accession of Ukraine's to the EU, by making its investment agreements intra-EU, would of course also change its position vis-à-vis the investment arbitration threats hanging over it – threats which may, as the present case shows, come from EU-incorporated companies as well.

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Javier García Olmedo

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Javier García Olmedo is a Postdoctoral Researcher at the University of Luxembourg. He also teaches investment treaty law and arbitration on the distance learning LLM programme of Queen Mary University…

Lorenzo Gradoni

Lorenzo Gradoni is Senior Research Fellow at the Max Planck Institute Luxembourg for Procedural Law.

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