



THE UNIVERSITY OF  
SYDNEY

# Sydney Centre for International Law Works in Progress Conference

Program



Thursday 16 February

**Location:** [Sydney Law School](#), Level 4, New Law Building (F10), Eastern Avenue,  
Camperdown



<b>1pm</b>	<b>Welcome and Acknowledgement of Country</b> (Common Room, Level 4)
<b>1.10pm</b>	<p><b>Sessions A and B (concurrent)</b></p> <p><b>Session A – Ukraine</b> (Boardroom, Level 4)</p> <ul style="list-style-type: none"><li>• <b>The Economic Response to Russia</b> – Christine Abely (remote, 45 minutes)</li><li>• <b>The Status of Ukrainian Natural Resources in Territory Occupied by Russia: What does the Hague Convention of 1907 Say and Is It Time for Modernised Rules on the Governance and Exploitation of Public Property in Times of War?</b> – Ahmed Abdel-Hakam (in-person, 45 minutes)</li></ul> <p><b>Session B – ISDS</b> (Common Room, Level 4)</p> <ul style="list-style-type: none"><li>• <b>States as Masters of the Treaties: The Rise of Joint Interpretative Statements</b> – Lucas Clover Alcolea (in-person, 45 minutes)</li><li>• <b>Interpretation of Investment Regulations and South Africa</b> – Elisa Rinaldi (attendance TBA, 45 minutes)</li></ul>
<b>2.40pm</b>	<b>Coffee break</b>
<b>3pm</b>	<p><b>Sessions C and D (concurrent)</b></p> <p><b>Session C – Ukraine</b> <b>SESSION CANCELLED</b></p> <p><b>Session D – ISDS/Ukraine</b> (Common Room, Level 4)</p> <ul style="list-style-type: none"><li>• <b>The Bilateral Investment Treaty, the Free Trade Agreement between Turkey and Ukraine and the Russo-Ukrainian War</b> – Can Eken and Leonid Shmatenko (remote, 45 minutes)</li><li>• <b>Rethinking the “Full Reparation” Standard in Energy Investment Arbitration: How to take climate change into account?</b> – Yawen Zheng (in person, 45 minutes)</li></ul>



**Christine Abely**  
**The Economic Response to Russia**

Chapter 3: The Financial Sanctions and Impact on the Global Financial System

Abstract

This chapter is part of a larger single-authored book, currently under advance contract with Cambridge University Press, examining the sanctions and other economic restrictions imposed in response to Russia's 2022 invasion of Ukraine. The chapter examines in a descriptive manner the financial sanctions imposed by multiple jurisdictions, including the ban of certain Russian banks from the SWIFT messaging platform; correspondent and payable-through account sanctions; and full blocking sanctions, including freezes on the assets of the Russian Central Bank. The chapter details the immediate and potential long-term effects of the financial sanctions. These include, for example, attempts by Russia to rely more heavily on currencies of non-sanctioning powers, as well as the development of alternative financial infrastructure in connection with those efforts. The effects of the financial sanctions on Russia's capital markets and foreign-exchange reserves are also examined.

**About the author**

Christine is currently an Assistant Professor at New England Law in Boston, Massachusetts, where she teaches International Business Transactions, Contracts, and a course in compliance. She has appeared on Boston Public Radio to discuss the sanctions against Russia, and her work on sanctions has been mentioned in *The Wall Street Journal*. She has published opinion pieces on international trade issues in *The Hill*, *Just Security*, and others. Her academic work has been published in the *Virginia Journal of International Law*, the *Georgia Journal of International and Comparative Law*, the *Boston College Law Review E. Supp.*, and others. She has presented to the Coalition of New England Companies for Trade and the Massachusetts Export Center. She is also a licensed customs broker and previously served on the executive board of the Organization of Women in International Trade. Before working in academia, she practiced international trade and sanctions law at a firm. She holds a J.D. from the University of Virginia School of Law and a B.A. with a double major in Economics and French Studies from Dartmouth College.



**Ahmed Abdel-Hakam**

**The Status of Ukrainian Natural Resources in Territory Occupied by Russia: What does the Hague Convention of 1907 Say and Is It Time for Modernised Rules on the Governance and Exploitation of Public Property in Times of War?**

The paper will consider the legal status of natural resources located in an occupied territory under the Hague Convention of 1907 by drawing learned lessons from the existing case law from international courts, arbitral tribunals and mixed commissions.

Building on the existing legal framework, the author will question whether it is time to refresh and modernise a century old treaty by aiming to propose ideas for a modernised set of rules governing the exploitation of natural resources in times of war.

Establishing a modernised rules on this issue will participate in providing answers to the following practical questions:

- i. What is the scope of the occupying power's prerogatives to develop and exploit natural resources in the territory it occupies?
- ii. Does the occupying power have the right to grant commercial concessions for the exploration of such natural resources?
- iii. What is the legal status of licenses/concessions accorded to foreign investors prior to the occupation?
- iv. What is the legal status of concessions accorded to foreign investors during the occupation (and in the event the occupation ends)?

Instances of international litigation involving this particular scenario are rare but not non-existent. The proposed paper will contribute to fill a relative gap in the literature in this field.

**About the author**

Ahmed Abdel-Hakam is a PhD candidate at the University of Geneva and Counsel in the London office of Eversheds Sutherland, specialising in international arbitration and Public International Law. He is a Solicitor-Advocate before the Higher Courts of England & Wales and a French Avocat.

In 2021, Ahmed's book "International Arbitration and Resolving Disputes Arising from Investments in Times of Crisis", was published by the American Bar Association. In 2019, Ahmed has been selected as a Young Leader by the Franco-British Council which, each year, nominates a select group of young French and British individuals under 40, with distinguished careers across a variety of sectors such as sciences, arts, politics, law, finance.



### **Lucas Clover Alcolea**

#### **States as Masters of the Treaties: The Rise of Joint Interpretative Statements**

It is fair to say that the last few years have been turbulent ones for international investment law, withdrawal from international investment agreements (IIA's) has gone from being primarily a Latin American 'problem' to a broader issue for investment law

following the withdrawal of EU states from intra-EU IIA's and the even more recent withdrawal of several states from the Energy Charter Treaty (ECT) despite ongoing attempts to modernise it. Wholesale reform of Investor State Dispute Settlement (ISDS) is also on the cards with UNCITRAL Working Group III being entrusted with the unenviable task and others complaining that its mandate does not go far enough. However, withdrawals from IIAs and reforms of the investment law system are not retroactive consequently existing investments will continue to be protected in the same way as before for years, or even decades. Traditionally States are considered 'masters of the treaties' and thus they have two means of overcoming this problem, the first is to conclude a bilateral or plurilateral agreement terminating or reforming the IIA with immediate effect and the second is to conclude a bilateral or plurilateral interpretative statement. Although interpretative statements cannot terminate the treaty they have the advantage of being retroactive, this is because "An interpretation clarifies the meaning of the original text. Its effect [therefore] reaches back to the entry into force of the original text." Such agreements must be given effect by arbitral tribunals and others interpreting IIAs under Art 31(3) of the Vienna Convention on the Law of Treaties, and interpretative statements are therefore one of the most powerful tools States possess in their investment law 'armoury'. Despite this, until recently interpretative statements were rarely used with regards to IIAs, with the main example being a joint statement regarding confidentiality and Fair and Equitable Treatment under NAFTA. However, the last five years have seen an explosion of such statements with regards to IIAs, EU member states issued one regarding intra-EU bilateral investment treaties, in tandem with their termination, CETA has an interpretative statement, India has made a habit of entering into such agreements with its treaty partners, suggestions have been made that such an agreement could be made vis-à-vis the ECT and the practice has also spread to Latin America with Colombia and France entering into one in 2020. This paper aims to analyse the effect of such interpretative statements, as well as determine if there are any commonalities between them, and establish why, despite always having been theoretically possible, they have only come to the fore in recent years.

#### **About the author**

Lucas Clover Alcolea is a lecturer in the University of Otago School of Law in New Zealand where he teaches a course on wills and trusts and was previously a postdoctoral associate in the Scheinman Institute on Conflict Resolution at Cornell University where he designed and taught a course on alternative dispute resolution. His research interests include international investment law, trusts, property law, dispute resolution and legal theory. Lucas obtained his undergraduate law degree from the University of Aberdeen in 2010, his LLM from Edinburgh University and his doctorate in law from McGill University. Lucas is a contrarian by nature and therefore enjoys challenging orthodoxy in various fields of law. He has published articles in the McGill Journal of Dispute Resolution, the Journal of International Dispute Settlement, the Chinese Journal of International Law, the Pepperdine Dispute Resolution Law Journal, the New Zealand Universities Law Review, the Alberta Law Review, and the Contemporary Asia Arbitration Journal among others. His doctoral thesis was published in Spring 2022 by Edward Elgar Publishing as 'The Arbitration of Trust Disputes'.



**Elisa Rinaldi**

**Interpretation of Investment Regulations and South Africa**

Over the years, many countries have re-evaluated their approach to investor-state dispute settlements. One such country is South Africa who in 2015 promulgated the Protection of Investment Act and effectively opted out of the dispute settlement mechanisms of the International Centre for the Settlement of Investment Disputes (ICSID). One concern centring this decision includes South Africa's regulatory autonomy. The country's regulatory autonomy is considered threatened by the interpretive decisions of international tribunals, of principles such as Most Favoured Nation (MFN) and expropriation clauses. These concerns are also reflected in South Africa's involvement in Amended Annex 1 to the Southern African Development Community's (SADC) Finance and Investment Protocol (FIP). South Africa called for a better balance to be struck between appropriate protection of foreign investors and the right of Host States to regulate and fulfil their domestic obligations. Clearly, there is a clear call to reconsider the legal landscape that constitutes international investment law, with a particular focus on dispute resolutions between host states and investors. Reflecting on the Protection of Investment Act, it is evident that one such approach to be considered is to fall back on domestic forms of regulation. The Act holds that any new investment agreement must be governed by South African law and further does not preclude an investor from approaching a domestic court. Similarly, the SADC FIP displaces the dispute settlement mechanism of the ICSID and replaces it with international arbitration through the use of domestic courts and tribunals.

Accordingly, the primary concern of this paper is the viability of different interpretive decisions arising out of domestic forms of investment regulation. This paper argues that South Africa's commitment to international law, as reflected in the Constitution, and in effect its acquiescence to an established international legal order will undoubtedly impact the possibility conditions for different interpretive decisions arising out of domestic courts and tribunals. In other words, South African courts and tribunals are likely to rely on ICSID decisions and principles of international law. An analysis of the majority judgment in *Brumilla Trust v The President of the Republic of South Africa* is exemplary. As judges pragmatically apply principles arising out of international law, it remains questionable as to whether domestic regulation can fulfil South Africa's desire for regulatory autonomy and a better balance of interests.

**About the author**

Elisa Rinaldi is an assistant lecturer at the University of Pretoria, lecturing in the field of Private Law, specifically the law of succession, private international law and contract law. Their research focuses on aspects of international commercial law and private international law. In 2021, they graduated with an LLM in private international law, at the University of Pretoria, and is currently pursuing a doctorate in international investment and trade law. Since finishing their LLM, Elisa has published several manuscripts as well as edited a monograph on private international law in South Africa, a book included in Kluwer's International Encyclopedia of Laws.



**Can Eken and Leonid Shmatenko**

**The Bilateral Investment Treaty, the Free Trade Agreement between Turkey and Ukraine and the Russo-Ukrainian War**

According to the latest data, Turkey has emerged as one of Ukraine's major investment partners. Before the Russo-Ukrainian war, there were more than 700 Turkish companies operating in Ukraine. The Turkish investment in Ukraine has already exceeded USD 4.1 billion. One of the latest Turkish investments involves the renowned company Baykar which intends not only to build a factory for the production of its famous drones but also a R&D center in Ukraine. The investments are a success of an early FDI policy between the two states. Turkey and Ukraine signed a Bilateral Investment Treaty ("BIT") as early as 1996. The BIT was replaced in 2017 with a newer version, which is still in force. However, Ukraine and Turkey needed more than 15 years to conclude a Free Trade Agreement ("FTA"). Just three weeks shy of the Russian invasion, on 3 February 2022, the parties eventually concluded this important agreement. The FTA provides nine titles and eight annexes. The scope covers both, the trade in goods and services. Furthermore, the FTA includes measures the parties need to take to promote mutual commercial presence, particularly, by simplifying procedures to facilitate business activities, as well as encouraging mutual investment and removing barriers to the use and development of ecommerce. In addition, the FTA provides for WTO-like trade defence mechanisms to protect the domestic industry from Turkish exports, such as anti-dumping, countervailing and safeguard measures. The FTA also provides for dispute settlement. The latter is based on the WTO's dispute settlement procedures with the specifics pertaining to the free trade agreements. For example, the absence of an appellate review stage, the exclusion of trade remedies disputes from the consideration, shorter deadlines for consideration of the dispute, and an own roster of arbitrators. Both, the BIT and the FTA define the territory of Ukraine "in respect of Ukraine: the land territory, internal waters, territorial waters and airspace above them, the exclusive economic zone and continental shelf beyond the territorial waters in respect of which it exercises jurisdiction, sovereign rights in accordance with the applicable national and international law." This article analyzes two issues. First, the effect of the Russian invasion on the definition of territory under international law. To this end, whether Ukraine's Russian-occupied land can still be considered within the scope of the Ukraine-Turkey FTA or not, the literature on this issue is analyzed thoroughly. Second, the article will discuss how to designate the origin of goods and services. Overall, the article provides a thorough analysis of the recent Ukraine-Turkey Free Trade Agreement and the effect of Russia's invasion on the application of this agreement.





## Can Eken and Leonid Shmatenko

### The Bilateral Investment Treaty, the Free Trade Agreement between Turkey and Ukraine and the Russo-Ukrainian War

#### About the authors



**Dr Can Eken** is an assistant professor in commercial law at Durham University. He teaches the international commercial dispute resolution course at Durham Law School. He is a triple-qualified lawyer admitted as a solicitor in England and Wales and an attorney in California, USA, and Turkiye. He is a member of the Durham International Dispute Resolution Institute and a Fellow of the Chartered Institute of Arbitrators. Dr Eken is on the panel of arbitrators at the Thailand Arbitration Centre (THAC) and Shanghai International Arbitration Centre (SHIAC). Prior to Durham, Dr Eken practiced law and worked as a research assistant. Dr Eken studied an LLM degree at the London School of Economics and Political Science, and another LLM degree at Dokuz Eylul University in Turkiye where he also obtained his bachelor's degree in law with high honour degree. He completed his PhD degree at the Faculty of Law of the Chinese University of Hong Kong. Dr Eken was a visiting scholar at Stanford University and the Max Planck Institute in Luxembourg for Procedural Law. He has many publications on international commercial arbitration, investment law, third-party funding, and online dispute resolution. He regularly gives lectures and consultancy on international commercial arbitration, investment law, and third-party funding.



**Leonid Shmatenko** specializes in international commercial and investment arbitration. He has been involved as counsel and secretary in over 30 international arbitration proceedings conducted in German, English, and French encompassing a variety of sectors, such as energy –including oil, gas, and renewables, telecommunication services, and infrastructure. Leonid studied law at Heinrich-Heine-University of Düsseldorf from 2006 to 2011. He passed his First State Examination (Dipl. iur.) in Düsseldorf in 2011 and his Second State examination in 2015. He finishes his doctoral thesis and awaits receiving his doctorate from Heinrich-Heine-University of Düsseldorf. Prior to the Russo-Ukrainian war, he was visiting lecturer on investment arbitration at the National Law University of Ukraine "Yaroslav Mudryi". Prior to joining the firm, he worked with international arbitration practices of leading international law firms in Geneva, Munich, Paris, Düsseldorf, and Sydney. Leonid is admitted to practice in Germany (2016) and Switzerland (2022).





**Yawen Zheng**

**Rethinking the “Full Reparation” Standard in Energy Investment Arbitration:  
How to take climate change into account?**

One necessary step to limit global warming as States have pleaded in the Paris Agreement is to phase out fossil fuel production, the single largest source of global temperature rise. The approaches to phasing out fossil fuels can be generally divided into regulatory and marketbased ones, both can deprive the value of foreign investments and amount to the breach of investment treaties. Investors have begun bringing claims, the number of which is expected to surge with more States taking climate change mitigation measures. Investment treaties are normally silent about the standards of compensation where treaty violations are established. Therefore, tribunals mostly refer to the “full reparation” standard under general international law, which is understood as compensation covering not only the amounts investors have invested, but also the estimated profits that would have been produced over the lifetime of the investment. The approach has resulted in massive amount of compensation in energy investment arbitration cases, which can impose heavy burden on States and discourage them from taking measures to achieve “net-zero”. Since the chance of finding States liable can hardly be diminished, it is important to limit the amount of compensation in investment arbitration triggered by fossil fuel phase-out policies. Based on existing investment arbitration practices, the amount of awarded damage under the “full reparation” standard can be reduced on the following grounds. First, under the principle of contribution in customary international law, the determination of reparation should consider any “wilful or negligent action or omission” that contributes to the injury. Accordingly, compensation can be reduced based on the failure of fossil fuel investors to investigate adequately the risks and consequences of their investments in light of readily available knowledge about the emission generated by fossil fuels and States’ obligation to reduce emissions arising from international environmental law. Second, States’ international environmental obligation itself could also be ground to reduce the amount of compensation, as international rules applicable between State parties, including international environmental conventions, should be considered. Third, the polluter pays principle can be applied to deduct the damage caused by the emission of fossil fuel investments from the amount of compensation. Considering the inconsistent application of these grounds in investment arbitration, it is advisable for States to issue a binding interpretation document that can clarify the meaning of the “full reparation” standard.

**About the author**

Yawen Zheng is a postdoctoral fellow of investment law and policy at the Centre for International Law, National University of Singapore. Her research interests include investment law, energy law, and climate change. Before joining the Centre in Singapore, she was a postdoctoral fellow at the Chinese University of Hong Kong. She obtained her PhD degree from the University of Edinburgh in 2021, an LLM in international law from the University College London in 2015, and an LLB in 2014 from the Sun Yat-sen University, China. Her monograph China’s Foreign Investment Legal Regime will be published by Brill in 2023, and her other work has appeared in journals including the Journal of World Investment and Trade.