THE GUIDE TO **INVESTMENT TREATY PROTECTION AND ENFORCEMENT**

Editors
Mark Mangan and Noah Rubins QC

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Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Investment Treaty Protection and Enforcement*.

For newcomers, GAR is the online home for international arbitration specialists. We tell them all they need to know about everything that matters.

We are perhaps best known for our news. But we also have a growing range of in-depth content, including books such as this one; retrospective regional reviews; conferences with a bit of flair; and time-saving workflow tools. Do visit www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, we sometimes spot gaps in the literature before others. Recently it dawned on us that, despite the number of books on investment law, there was nothing focused resolutely on the practical side of those disputes. So we decided to make one.

The book you are reading – *The Guide to Investment Treaty Protection and Enforcement* – is the result. It follows the concept of investment protection through its whole life cycle – from treaty negotiation to conclusion of a dispute. It aims to tell the reader what to do, or think about, at every stage along the way, with an emphasis, for readers who counsel or clients in investment matters, on what 'works'.

We trust you will find it useful. If you do, you may be interested in the other books in the GAR Guides series. They cover energy, construction, IP disputes, mining, M&A, challenging and enforcing awards, and evidence in the same practical way. We also have a book on the advocacy in arbitration and how to become better at thinking about damages – as well as a handy citation manual (*Universal Citation in International Arbitration*).

We are delighted to have worked with so many leading firms and individuals in creating this book. Thank you, all – especially the various arbitrators who supplied boxes for us at short notice. We are in your debt.

And last, special thanks to our two editors – Mark Mangan and Noah Rubins – who went above and beyond, somehow finding time in their busy lives not only to devise the original concept with us but also to shape it with detailed chapter outlines and personal review of chapters as they were submitted, and to my Law Business Research colleagues in production for creating such a polished work.

David Samuels
Publisher, GAR
December 2021

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List of Abbreviations

AAA	American Arbitration Association
ADCCAC	Abu Dhabi Commercial Conciliation and Arbitration Centre
ADR	alternative dispute resolution
AFA	Association Française d'Arbitrage / Association For Arbitration
ASEAN	Association of Southeast Asian Nations
ASIPI	Inter-American Association of Intellectual Property
BIICL	British Institute of International and Comparative Law
BIT	bilateral investment treaty
CAFTA	Dominican Republic–Central American Free Trade Agreement (also known as DR–CAFTA)
CETA	Comprehensive Economic and Trade Agreement between the European Union and Canada
CIETAC	China International Economic and Trade Arbitration Commission
CIArb	Chartered Institute of Arbitrators
CJEU	Court of Justice of the European Union
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRCICA	Cairo Regional Centre for International Commercial Arbitration
DCF	discounted cash flow
DIAC	Dubai International Arbitration Centre
DIS	German Arbitration Institute
DPP	dispute prevention policy
DR	dispute resolution
ECT	Energy Charter Treaty
FDI	foreign direct investment
FET	fair and equitable treatment
FMV	fair market value
FSIA	Foreign Sovereign Immunities Act

FTA	free trade agreement
GATS	General Agreement on Trade in Services
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA	international investment agreement
IID	international investment dispute
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILC	International Law Commission
IPCC	Intergovernmental Panel on Climate Change
ISDS	investor–state dispute settlement
KCAB	Korean Commercial Arbitration Board
LCIA	London Court of International Arbitration
LIE	locally incorporated entity
MFN	most-favoured nation
MIT	multilateral investment treaty
MST	minimum standard of treatment
NDA	non-disclosure agreement
NAFTA	North American Free Trade Agreement
OCHCR	Office of the High Commissioner for Human Rights
OECD	Organisation for Economic Co-operation and Development
OIC	Organization for Islamic Cooperation
PACER Plus	Pacific Agreement on Closer Economic Relations Plus
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PTIA	preferential trade and investment agreement
REAL	Racial Equality for Arbitration Lawyers
SADC	Southern African Development Community
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
SOE	state-owned enterprise
TLB	Trade Law Bureau of Global Affairs of Canada
TWAIL	Third World Approaches to International Law

UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USMCA	United States–Mexico–Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
VIAC	Vienna International Arbitral Centre
WTO	World Trade Organization

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Introduction

Mark Mangan and Noah Rubins QC[1]

Although the precise date is debatable, it has been about 20 years since investment treaty arbitration became a real subject of professional practice. Investment protection treaties have been around substantially longer – the first was signed by Pakistan and Germany in 1959. And the possibility of mandatory investor–state arbitration arrived about 10 years later, first in French treaty practice and then elsewhere. But then there was silence, perhaps unsurprisingly given the lack of fanfare with which these novel international legal instruments began slowly to proliferate around the world.

One might say that the specialism was born in 1987, with the launch of the first arbitral procedure based on an investment treaty, *AAPL v. Sri Lanka*.[2] But that case, which arose out of overzealous government raids on suspected Tamil Tiger hideouts, seemed at the time like a fascinating but isolated point of trivia. There was no doubt, however, that this was revolutionary: a private investor advancing claims in its own name against a host state for the breach of enumerated substantive standards of treatment. In *AAPL*, the Sri Lankan government's indiscriminate destruction of private property in the name of national security was found to have violated its international obligation to protect and secure qualifying investments. The arbitration also cast light on the International Centre for the Settlement of Investment Disputes (ICSID), an institution founded on a multilateral convention within the World Bank framework specifically to resolve investor–state disputes. But the institution had been a mere footnote in arbitration throughout the 1970s and 1980s, used only occasionally in the state contracts

1 Mark Mangan is a partner at Dechert LLP and Noah Rubins QC is a partner at Freshfields Bruckhaus Deringer LLP.

2 *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3.

that had served until 1987 as the sole basis for ICSID jurisdiction. Six years passed after the start of the *AAPL* case without a single investment treaty arbitration. Incidentally, the second bilateral investment treaty arbitration, *AMT v. Zaire*,[3] also dealt with harm wrought on private property by government forces in times of civil conflict. This too may have contributed to the sense that investment treaty arbitration was only a narrow (and perhaps temporary) deviation from the norm of contractual and state-to-state procedures.

Only a handful of arbitrations were initiated each year based on investment treaties throughout the 1990s. The subject matter was broad, the geography scattered. Because the procedures were lengthy, very few awards were rendered in that decade, and the literature on the subject was sparse and largely theoretical. Even then there were the beginnings of a policy debate about the tension between public interest and private rights. The *Loewen v. United States*[4] and *Methanex v. United States*[5] cases focused US public attention on the investment chapter of the North American Free Trade Agreement, which, until the US was sued, had been seen as a trade treaty for the benefit of US interests. Now journalists and lawmakers raised the alarm: 'secret' tribunals set up at the behest of foreign companies were going to second-guess US court decisions and environmental regulations. This was a 'brave new world' indeed!

It was probably the Argentine financial crisis of 2001 that gave rise to investment treaty arbitration as a true practice specialty for lawyers. Dozens of cases were brought against Argentina for 'pesification' and other remedial measures implemented to revitalise an economy in total meltdown, measures that effectively shifted value from foreign infrastructure and utility owners to locally owned industry and agriculture. And in almost all these disputes, arbitral tribunals held the state to have fallen short of its promises in applicable investment treaties, whether by unfair treatment, de facto expropriation without compensation or otherwise. Hundreds of millions of dollars were awarded against Argentina, proving the efficacy of these instruments to obtain real compensation from a sovereign state. It was in these disputes that many of the first generation of future specialists learned their trade (mostly on the claimant side, as Argentina did not hire outside counsel), inventing the practice as they went along as much as learning it, given the dearth of authority and established custom. These pioneering lawyers went

3 *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1.

4 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3.

5 *Methanex Corporation v. United States of America*, UNCITRAL.

on to advise other clients (now both private and public) in other countries with other problems. Then came successive waves of new claims: the Yukos debacle in Russia, energy nationalism in Bolivia and Peru, nationalisations in Venezuela, and protectionism and arbitrary regulation in Eastern Europe. Troublesome situations like these had arisen before, but never had they resulted in such a direct and visible response from private investors, in the form of binding arbitration against the relevant states.

At the beginning of the 2000s, the very existence of investment protection treaties was known only to a very select few. By the end of the first decade of the 21st century, they had become part of the international lawyer's standard toolkit. Tax optimisation advice for structuring transactions in high-risk jurisdictions now came paired with arbitration specialists' views on the best investment vehicles to attract treaty protection against political risk. An expertise that had previously been the bailiwick of a few elite law firms, primarily based in London and Paris, spread quickly to firms across the world, to individual practitioners and scholars. And while even today the absolute number of investor–state arbitration cases remains miniscule when compared to the tens of thousands of commercial arbitrations launched each year, in relative terms the growth has been striking, and the cases, unlike in commercial arbitration, have usually played out in the public domain, thus drawing additional scrutiny. Now ICSID alone often registers more than 50 cases a year and saw a record 58 new cases in 2020. That number probably rises to 100 or more when considering ad hoc, International Chamber of Commerce, Stockholm Chamber of Commerce and Singapore International Arbitration Centre investor–state cases.

For the practitioner, each of those new cases is a world unto itself, with unique facts, economic realities, arbitrator and counsel combinations, historical and political background, and legal problems. Taken together, the solutions that parties, lawyers and arbitrators together forge in these diverse situations gradually create a legal practice. This is not a world of theory, nor of normative judgement. It is simply the particular (and at times, peculiar) way things are done in this once-obscure realm at the crossroads of private and public international law.

Over the past two decades, a thick literature has sprung up in this field, with exceptional volumes by remarkable commentators. But no comprehensive attempt has yet been made to describe the practice of investment treaty arbitration – from start to finish, from the moment an investment treaty is negotiated, or an investor structures an investment to bring it within its reach, all the way to when an investor (or funder) seeks to collect on its award, and with a glance to the future. That is what we and our contributors have sought to do in this volume. Building on the approach and format of the other Global Arbitration Review

Guides, we have selected representatives of the main stakeholders to create a practical handbook on investment treaty protection and enforcement. Investors, states, counsel, arbitrators, experts and litigation funders – each has its own point of view and lived experience, which together we now rightly call the practice of investment treaty arbitration.

This practical guide to the life cycle of investment treaty protection and enforcement begins with the state's perspective because the origin of treaties lies inevitably in government hands. The authors canvass the negotiation of treaties and the balancing of regulatory discretion and investment stability in the negotiation calculus. The debate continues with respect to the real motivation of government actors in concluding these agreements, considering the extent to which that has evolved in recent years. The questions as to when and how in practice states modify and even terminate investment protection treaties in response to changing circumstances and political expediency are also addressed.

The next part covers the pre-dispute stage of the investment life cycle, which businesses and governments alike hope will be the only stage. Successful strategies for structuring investments to gain the protection of investment treaties are explained, as are useful practices to build the foundations for a solid claim should the state adopt adverse measures. Also covered is the financing of investor–state arbitrations, with a focus on third-party funding from both the investor and state perspectives. The constitution of the tribunal closes out this second section.

The largest part of the volume is dedicated to the actual conduct of arbitration in terms of procedure, jurisdiction, substantive standards of protection and the quantification of damages. Our contributors have sought to bring a balanced view of these wide-ranging topics with a practical focus. The idea is not to present a comprehensive analysis of prior decisions, but to shed some light on the way arbitrators in these cases approach the issues and adjudicate in reality. Within this part we have included an extensive chapter assessing the ways in which investor–state arbitration is dealing with societal challenges such as climate change and human rights, and how this is impacting private and public parties in investment disputes today. The book concludes with several chapters on the role of national courts in the investment arbitration process, and the end-game through annulment and enforcement proceedings.

We have gathered for this project a roster of contributors that is as diverse as it is accomplished. Our book benefits from the views of government lawyers, financial experts, financiers and private counsel from Asia, Africa and South America, as well as from Europe and North America. This is the future of arbitration. In the meantime, the perspectives of a diverse range of backgrounds and cultures will make this volume richer and more useful to its readers. The book

also benefits enormously from commentary provided by some 13 senior arbitrators and commentators, who have provided their own insights into the practice of investor–state arbitration today, which have been incorporated into the relevant chapters.

Lastly, we would like to thank the staff of Global Arbitration Review, starting with David Samuels with whom we first collaborated in the development of the GAR Investment Treaty Know-How series in 2012 and who inspired us earlier this year to develop a practical and authoritative guide to investment treaty arbitration. Our gratitude must also be expressed to the GAR management and editorial staff, including Mahnaz Arta, Hannah Higgins, Jack Levy, Grace Middleton and Georgia Goldberg, whose dedication and persistence helped us realise our collective ambition within a period of only 12 months from its inception to publication, which is quite remarkable in the circumstances. We would also like to thank our law firm colleagues, especially Ananya Mitra and Sharon Tang of Dechert LLP's Singapore arbitration team, who assisted with the development and management of the book.

This has been a rewarding project for us, and we hope that the final product will assist our colleagues already ensconced in the practice of investment treaty arbitration, and guide those just starting their careers in this ever-changing, challenging and ultimately fascinating area of law.

CHAPTER 1

Negotiation, Compliance and Termination of Investment Treaties: The State's Perspective

Kristi How and Emily Choo[1]

The aim of this chapter is to examine investment treaties from a state's perspective. The chapter first analyses why states agree to investment treaties and the various considerations during treaty negotiations. It then turns to issues relating to compliance with investment treaties, and finally discusses how and why states modify or terminate their investment treaties.

The notion that foreign investments could receive certain assurances from the host state's government is not new.[2] In more recent times, however, there has been a huge proliferation of investment treaties, cumulating in approximately 2,270 bilateral investment treaties (BITs) and 324 treaties with investment provisions, globally, at the time of writing.[3]

To add further complexity to the matter, it is not uncommon for states to have in force between themselves, BITs and other treaties with investment provisions. For example, on the multilateral level, among the members of the Association of Southeast Asian Nations (ASEAN), there is the ASEAN Comprehensive

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1 Kristi How and Emily Choo are state counsel at the Attorney-General's Chambers of Singapore.

2 See Jeswald W Salacuse, *The Law of Investment Treaties*, Third edition (Oxford University Press, 2021) for a more complete discussion on the historical background of the development of investment law treaties.

3 United Nations Conference on Trade and Development (UNCTAD), *International Investment Agreements Navigator*, https://investmentpolicy.unctad.org/international-investment-agreements (last accessed 29 June 2021).

Investment Agreement, an intra-ASEAN agreement. The ASEAN states have also entered into free trade agreements (FTAs) that contain investment provisions with Japan,[4] Korea,[5] Australia and New Zealand,[6] India[7] and China[8] (collectively, the ASEAN dialogue partners). On the bilateral level, some of these states also have BITs or other FTAs that contain investment provisions with each other. For instance, Singapore has various FTAs or BITs with each of the ASEAN dialogue partners and some ASEAN states.[9]

These overlapping treaty obligations create a mesh of protections for foreign investors and their investments, but may also lead to increased complexity in a state's policymaking because of the need to consider the full breadth of its treaty obligations before undertaking new measures.

Why states agree to enter into investment treaties

Promoting foreign direct investment and economic development

States hope that investment treaties will attract foreign investment inflows so that they can enjoy economic benefits such as an increased level of economic activity, technology transfer to enhance the productivity or competitiveness of local firms, and better employment opportunities.[10] These reasons are particularly compelling for developing states, which tend to be capital importing. Capital-exporting states also hope to reap economic benefits with their investors able to expand into foreign markets under the protection of an investment treaty.

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4 Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan.

5 Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea.

6 Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area.

7 Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India.

8 Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China.

9 By way of illustrative example, as between Singapore and Japan, there is also the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and the Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership. Among ASEAN Member States, Brunei, Malaysia and Vietnam are also signatories to the CPTPP.

10 Deborah L Swenson, 'Why do Developing Countries Sign BITs?', in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press, 2009).

These objectives are expressly reflected in many investment treaties, often in the preamble. For instance, the preamble of the BIT between the United States and Bolivia recognises 'that agreement upon the treatment to be accorded to such investment will stimulate the flow of private capital and the economic development of the Parties'.[11]

Creating an investment-friendly climate

Investment treaties may attract foreign direct investment by ensuring that the host state maintains a regulatory regime that is friendly to foreign investment. From the perspective of capital-exporting countries, this aspect affords important safeguards to investors and their investments, and can help to manage some of the regulatory risks associated with investing in a foreign country. To this end, investment treaties generally contain a combination of commitments that are intended to create stability and predictability for foreign investors. These commitments relate to minimum standard of treatment, expropriation, transfers, treatment in case of armed conflict or civil strife, performance requirements, national treatment and most-favoured nation (MFN) treatment.

Providing investors with recourse to neutral third-party arbitration

Finally, states may enter into investment treaties with provisions on investor–state dispute settlement (ISDS). The establishment of an ISDS mechanism allows investors to submit investment disputes to a neutral third-party arbitrator. This helps to depoliticise the investment dispute and may reduce the level of uncertainty perceived by an investor when it seeks to enforce the investment treaties' commitments against the host state.

Considerations during treaty negotiation

Should states enter into a BIT or an FTA?

There are two main forms of treaty with investment-related provisions: BITs and FTAs. There are a multitude of factors that states may consider when deciding whether to enter into a BIT or an FTA. Most obviously, for states whose primary objective is attracting investment, a BIT, with its focus on affording safeguards to investors and their investments, may be sufficient to achieve this outcome.

11 Treaty between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment.

Where states wish to strengthen their overall economic ties, an FTA that covers trade in goods, services, investment and disciplines relating to electronic commerce, competition and intellectual property, may be more appropriate. To this end, other chapters in an FTA can also contribute to the development of an investment-friendly climate, thereby attracting foreign investment. For instance, a chapter on intellectual property can assist an investor in better protecting and enforcing their intellectual property rights. A trade facilitation chapter can benefit investments in goods by providing for more streamlined processes to transport goods across the borders of the treaty parties.

The importance of treaty language

The general counsel of a prominent multinational with whom I worked early in my career had framed on the wall in his office a piece of paper that simply said: 'What does the contract say?'. He explained to me that he had been through multiple disputes where the contract language (or sometimes, absence of language) had been critical.

In the investment treaty world, that question becomes: 'What does the treaty say?'. States, not private parties, negotiate and enter into treaties and therefore have the power to control what they say. Some of the concerns voiced today about the ISDS system arise, in my view, because a significant number of treaties – often, but not always, older treaties – are very general and imprecise with respect to the rights they confer and the prerequisites to investment protection. But even newer treaties can give rise to significant interpretive questions, through inconsistencies, errors, lack of clarity or silence.

This does not have to be so. While there is obviously a balance to be sought, investment treaties *can* clarify issues such as a margin of regulatory discretion, the corporate responsibility to be exercised by investors, and the like, in reasonable and appropriate ways. Improving treaty language may not be the only way forward, but it could be an important element of improving the current system.

– Lucinda A Low, Steptoe & Johnson LLP

Considerations when negotiating a BIT

States generally adopt two approaches when negotiating a BIT. Where the state has a model BIT text, it may decide to negotiate from this text. The model BIT could be formally developed by the state and made publicly available,[12] or could be of a more informal nature for the state's internal reference. In the absence of a model BIT, states may draw reference from their treaty practice, particularly where the negotiating parties already have agreements between them on similar subject matter. In either case, these approaches allow states to engage in negotiations more efficiently by drawing on past practice as opposed to negotiating a draft treaty from scratch. They also help states to draft text that is consistent with their existing obligations and their overall investment policy.[13]

Considerations when negotiating FTAs with an investment chapter

FTA negotiations require a different approach from that of negotiating a BIT. These agreements are complex in nature and cover many facets of the state's economic and regulatory regime, and negotiators will need to consider the many linkages between the investment chapter and other chapters of the agreement. For example, while investment chapters in FTAs generally contain similar provisions to BITs on investment protection, the negotiating parties will also need to decide on the nature of the interaction between the investment chapter and the trade in services chapter, and may expressly state this in either one or both chapters.

In some agreements, there is limited interaction between the two chapters. The investment chapter applies to all investments in both goods and services, whereas the services chapter applies to the modes of service identified in Article 1 of the General Agreement on Trade in Services, except for services supplied through commercial presence (commonly referred to as 'mode 3', where a service supplier establishes a local entity in the host state's territory to supply services). The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is an example of such an agreement. Article 10.1 of the CPTPP's 'Cross-Border Trade in Services' chapter defines 'cross-border trade in services' or 'cross-border supply of services' as, among other things, excluding 'the supply of a service in the territory of a Party by a covered investment'. This definition excludes such services from the scope of the chapter.

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12 Some states with publicly available model BITs include the United States, Canada, Colombia and India.

13 See, e.g., Chester Brown, 'Introduction: The Development and Importance of the Model Bilateral Investment Treaty', in *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013), on the role that model BITs play in BIT negotiations.

In other agreements, the services chapter may govern the liberalisation of all supplies of service, including services supplied through commercial presence while the investment chapter may contain provisions regarding the protection of investments, and may specify the extent of its application to investments in service sectors. An example of this type of agreement is found in Article 38(2) and (3) of the agreement between the European Free Trade Association States and Singapore, which clarifies that the national treatment and MFN obligations in the investment chapter do not apply to measures affecting trade in services, and to investors of a party in service sectors and their investments in such sectors.

When considering the level and the nature of the interaction between the investment and services chapters, the negotiating parties may consider their past treaty practice, their existing level of liberalisation and their intended pace of future liberalisation. In either case, the negotiating parties will also engage in negotiations on their schedule of non-conforming measures (also commonly referred to as the schedule of reservations). This provides the host state with the policy flexibility to exclude certain sectors, sub-sectors or measures from the treaty's obligations. By way of illustrative example, Article 9.12 of the CPTPP permits a party to schedule reservations against obligations regarding: (1) national treatment; (2) MFN; (3) performance requirements; and (4) senior management and board of directors, with respect to an existing non-conforming measure or any measure a party adopts or maintains with respect to specified sectors, sub-sectors or activities. To this end, Annex II of the Schedule of Singapore (which sets out Singapore's reservations for future non-conforming measures under the CPTPP) states that 'Singapore reserves the right to adopt or maintain any measure affecting the arms and explosives sector'. In other words, Singapore is permitted to implement measures affecting the arms and explosives sector that may otherwise be inconsistent with four of Singapore's obligations as described above.

Negotiations on the investment chapter and its schedules can be very protracted, especially in the case of a multilateral agreement with many parties. In fact, it is not uncommon for the investment chapter to be one of the last chapters to be concluded in a negotiation. This is generally because investment is a highly sensitive area for many states. Particularly in the case of capital-importing states, this sensitivity may be compounded by the perceived higher risk of a dispute arising under an investment chapter, especially where the treaty contains provisions on ISDS.

An investment treaty or chapter negotiator will therefore need to have a good understanding of its state's existing investment-related laws and regulations, plans for future liberalisation, areas of sensitivity, the needs of investors that want to invest in the treaty partner, and any existing investment agreements between the

parties. Knowledge of all these areas is no small feat and a negotiator may also have to carry out a fair degree of crystal ball gazing to assess whether the future needs of its state will likely be met by the FTA. Such considerations will have to be balanced with the treaty partner's interests.

Compliance with investment treaties when dealing with competing stakeholders

Compliance with investment treaties starts with ensuring that the text of the treaty is consistent with the state's interests and the degree of protection it can provide to foreign investors. It is essential that government agencies are aware of the commitments that have been made by the state to a treaty partner, that the necessary policy space is preserved and that the state has not made commitments it cannot fulfil. Lack of careful consideration of what the state is truly prepared to commit to will cause greater difficulties with compliance.

Therefore, in an ideal scenario, a state negotiating an investment treaty would have considered its overall approach towards foreign direct investments, reflecting the balance that has been struck with respect to all of its relevant interests and that of any interested stakeholders. Further, a state would also have considered its specific approach to each investment treaty being negotiated and how this treaty would fit within its existing investment framework and approach. This would involve coordination between agencies, each of which would have to consider their respective portfolios and evaluate their policy approaches including whether they will be able to fulfil commitments that the state will ultimately make to its treaty partner. As investment treaties encompass many sectors and interests, this intra-government coordination could involve a wide plethora of agencies, such as those that deal with the economy and trade, telecommunications and technology, and intellectual property, as well as monetary authorities. Some states, such as Canada, [14] conduct public consultations for specific investment treaties. Public consultations might also be held in the course of reviewing and updating a state's model investment treaty. As explained by Global Affairs Canada, for its 2018–2019 Foreign Investment Promotion and Protection Agreement review, in addition to its own technical review, public consultations were held, which 'sought ideas on how to update the treaty to reflect the innovations of the large FTAs,

14 Global Affairs Canada, 'Consulting Canadians on a possible comprehensive economic partnership agreement with Indonesia', www.international.gc.ca/trade-commerce/consultations/consulting-indonesia-consultation-indonesie.aspx?lang=eng (last accessed on 28 July 2021).

while also seeking input on incorporating provisions to ensure that all Canadians, including women, Indigenous peoples and small and medium-sized enterprise owners, benefit more from Canada's investment agreements'.[15]

Nonetheless, as noted above, investment treaties will necessarily reflect the balance struck between the varied and sometimes competing interests of the treaty partners. In reality, the interests of the state may not be perfectly preserved, at least from the perspective of an agency that may have found that more policy space has been ceded than desired. Other times, new areas of regulation may not be foreseen and so not pre-emptively preserved in a negotiated investment treaty. Furthermore, the sheer scale of intra-government coordination required means that agencies, local governments or organs within a state may not be fully apprised of the existence and scope of the obligations to which the state has committed. This may remain the case even after the investment treaty has been signed and made publicly available. Additionally, these entities may not be aware of the full implications of, for example, the international legal dimension to domestic or local measures or processes, and the potential international and monetary liability of the state as a result of these measures.[16]

Another layer of complexity for states is the fact that many states have a network of investment treaties in place. Some states may have entered into investment treaties with treaty partners with whom they also have BITs or other FTAs with overlapping scopes but possibly differing obligations. A number of these treaties also have MFN clauses, which require the host state to accord foreign investors of one treaty partner the best treatment that it accords to foreign investors from

15 Global Affairs Canada, '2019 Consultation report and FIPA review', www.international.gc.ca/trade-commerce/consultations/fipa-apie/report-rapport.aspx?lang=eng (last accessed on 25 July 2021).

16 See, e.g., *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, relating to the trial court's failure to intervene against the jury trial strategy appealing to local favouritism against the foreign investor as well as the trial court's decision not to relax the local civil procedural requirement to post bond to appeal the jury verdict. The claim was ultimately dismissed on jurisdictional grounds, although the tribunal did record its criticisms in its award; *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, relating to the nine-year delay to the foreign investor's attempt to enforce a commercial arbitral award in India, which was met by its opposing party's application to set aside the award. India's defence was that its judicial system 'is and has always been notoriously slow' (Paragraph 5.2.10), and the setting aside proceedings could not be easily disposed of as it was a hotly debated point of Indian arbitration law whether the Indian courts had jurisdiction to set aside an award that was not made in India (Paragraph 5.2.14). The tribunal concluded that India had failed to provide 'effective means of asserting claims and enforcing rights'.

any other treaty partner under its network of investment obligations. This further creates interlinkages between BITs and FTAs that had been separately negotiated, often at different times or even when different policy approaches existed. This means that, for most states, consideration of investment obligations for any measure often involves a complex and multi-dimensional analysis.

This points to the importance of capacity building across all levels of government. For example, post *SGS v. Pakistan*,[17] Pakistan had in place an 'education process' where foreign experts would be brought in to speak to government stakeholders about the consequences of signing BITs.[18] In 2006, Peru created the State Coordination and Response System for International Investment Disputes, which required continuous training for all relevant agency officials at all levels of government on its investment commitments.[19] In Singapore, the Ministry of Trade and Industry Trade Academy helps build up capacity and expertise within the government.[20] There are also various resources available to states, such as the United Nations Conference on Trade and Development's investment advisory series, the Asia-Pacific Economic Cooperation Handbook on Obligations in International Investment Treaties, and the National University of Singapore Centre for International Law's Singapore International Arbitration Academy.

In addition to raising awareness and expertise, states also have to ensure that their agencies have access to the full range of relevant information when formulating policies or measures affecting foreign investments. This could entail a multifaceted approach, which may include the following.

- Agencies should have easy access to treaties and negotiating records so that the full range of obligations can be considered. This may be achieved through an inter-agency coordination mechanism or through the maintenance of a central treaty depositary.

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17 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13.

18 Lauge Skovgaard Poulsen and Damon Vis-Dunbar, 'Reflections on Pakistan's investment-treaty program after 50 years: an interview with the former Attorney General of Pakistan, Mahkdoom Ali Khan', *Investment Treaty News* (16 March 2009), www.iisd.org/itn/en/2009/03/16/pakistans-standstill-in-investment-treaty-making-an-interview-with-the-former-attorney-general-of-pakistan-makhdoom-ali-khan/ (last accessed on 19 July 2021).

19 UNCTAD, 'Best Practices in Investment for Development – How to prevent and manage investor-State disputes: Lessons from Peru', Investment Advisory Series, Series B, Number 10 (UNCTAD/WEB/DIAE/PCB/2011/9), pp. 21–22.

20 Singapore Ministry of Trade and Industry, 'People at MTI', www.mti.gov.sg/About-US/People-at-MTI (last accessed on 28 July 2021).

- States may have in place a formal or informal inter-agency coordination mechanism for consultation and coordination.[21] This allows the agency in charge of developing and implementing new policies or measures to first seek input from other government agencies.
- States may obtain advice from their government's legal adviser on the state's investment (as well as other relevant international) obligations. Legal advice is especially important for states that have a complex network of investment treaties and obligations.
- Public consultations may be held to ensure that measures are formulated in a well-considered fashion.[22] Some states also require that regulatory impact statements are prepared to ensure that agencies have conducted a full cost-benefit analysis in a transparent fashion when formulating and implementing new policies and measures.[23]
- States may have in place some form of internal notification system so that investment agreements entered into directly with investors are notified (as these could also implicate treaty obligations) or potential disputes may be notified and then resolved (e.g., by the correction of measures that may have been taken in a manner that is inconsistent with the state's investment treaty obligations).

How and why states modify or terminate investment treaties

A large number of BITs are earlier generation investment treaties. This means that the minimum standard of treatment, national treatment, full protection and security, and other investment protection obligations contained therein, are typically broadly formulated and vague. A number of these BITs contain very few

21 See footnote 19 for the details of Peru's coordination mechanism; see also Office of the United States Trade Representative, 'Organization, Overview of the Functional Responsibilities of our Offices', www.ustr.gov/about-us/organization, (last accessed on 25 July 2021), describing its offices' role in developing and coordinating trade and investment policies.

22 e.g., Singapore conducts public consultations through, among other avenues, an online feedback portal. Singapore REACH, www.reach.gov.sg (last accessed 28 July 2021). See also, Australian Treasury, 'Major reforms to the Foreign Investment Review Framework', https://treasury.gov.au/consultation/c2020-99761, (last accessed 28 July 2021), seeking stakeholder views on the exposure draft of the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020.

23 Some FTAs encourage regulatory impact statements as part of good regulatory practices; see, e.g., Chapter 25 (Regulatory Coherence) of the CPTPP.

provisions, or their existing provisions do not sufficiently safeguard the host state's interests. These BITs were often concluded with little negotiation, minimal consideration of the treaty partner's own interests or without proper negotiation records.

Given the broad formulations in earlier BITs, ISDS tribunals have been left to interpret and apply these obligations to the specific factual scenarios of the disputes before them. Often these tribunals do not have access to the negotiating records to clarify the treaty parties' intentions. Respondent states typically do not provide these records because: (1) records often do not exist as the early BITs tended to not have been extensively negotiated, as described above; or (2) negotiating records were not kept or were otherwise lost over time. Further, most home states did not (and still generally do not) intervene as third parties in ISDS proceedings to confirm or deny the respondent state's assertions on the mutual understanding of a particular treaty, even if it has been negotiated. Nonetheless, ISDS tribunals have had to give effect to these broadly formulated and vague obligations, which lent themselves to multiple interpretations. This has resulted in some level of unpredictability and divergence in approaches by tribunals. Thus, especially in the earlier days of ISDS, states (both the host state being sued and the home state of the investor) found that some tribunal interpretations were inconsistent with what they thought they had signed up to or what they thought the treaty had stated with sufficient clarity.[24]

The shortfalls or unanticipated consequences stemming from BITs have become increasingly apparent with the rise in ISDS cases. This has been accompanied by a backlash against ISDS and criticism of foreign investors receiving enhanced protection under BITs.[25] At the same time, it has also been noted that countries increasingly favour a regional approach over a bilateral one, and wish to recalibrate the balance struck between the protection of investors' rights and the right of the state to regulate in the light of, for example, sustainable developmental elements or other considerations that may not have been articulated in these earlier

24 See, e.g., *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2. In addition to damages for the losses suffered by the claimant's investment in Mexico, the tribunal also awarded damages for 'up-stream losses' suffered by the claimant's US subsidiary, which was engaged in cross-border sales into Mexico. Mexico applied to the Canadian courts to set aside the award on the basis that the tribunal had failed to give effect to limits imposed under the North American Free Trade Agreement (NAFTA) investment chapter on the scope of damages that the tribunal could award for breach of the investment chapter. Both the US and Canada intervened during court proceedings to confirm that Mexico's position reflected the common understanding and interpretation of the NAFTA parties.

25 See, e.g., Anthony Depalma, 'Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say', *New York Times* (11 March 2001).

investment treaties.[26] By 2013, approximately 1,300 BITs had reached their 'any time termination phase' (i.e., where a treaty partner can opt to unilaterally terminate the treaty), which opened a window of opportunity to address these issues.[27]

Thoughts to help those who negotiate treaties

Treaties are negotiated and drafted by very sophisticated individuals. As a result, it may seem presumptuous to give them advice on how they should negotiate or draft treaties. However, the following is not so much advice to negotiators on how to do their job. Rather, it aims to identify certain issues that could be clarified in the results. The goal is to avoid situations in which the parties, and sometimes, but more rarely, the arbitrators, seek to bend the language of the treaty when that language is not necessarily in accordance with the outcome they desire.

To the extent possible, negotiators should avoid any possibility of escaping the plain language of the treaty. Under the Vienna Convention, the starting point of treaty interpretation is the language of the treaty. As a result, particular attention should be given to the use of specific words; the same word should be used throughout the treaty when its meaning is the same throughout. This may sound obvious, but it is not always the case in practice.

A complicating factor arises when the treaty is drafted in more than one language. Perfect translations (with perfectly corresponding terms) are rarely feasible, and it is not uncommon to have two versions of the treaty with slightly different meanings (not to mention treaties that have authentic versions in multiple languages, such as the ECT). There is no avoiding discrepancies. One way to limit the risk of inconsistent interpretations is to use a defined term in order to convey the meaning that the parties want to achieve.

Four points of difficulty can be identified

Be clear on any conditions to jurisdiction

First, it is important to distinguish clearly conditions to the jurisdiction of the tribunal, which are generally found in the arbitration agreement itself, from other conditions that affect the substantive protection of the investment. There is currently a case pending before the French Supreme Court that will decide whether the temporal protection of investment falls within the jurisdiction of the tribunal, as one party contends, or the substantive protection of the investment, as the other party contends. The underlying treaty question *does* include a provision on the retroactive,

26 UNCTAD, 'World Investment Report 2013', https://unctad.org/system/files/official-document/wir2013_en.pdf (last accessed on 23 July 2021).

27 UNCTAD, 'International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal', IIA Issues Note, No. 4, June 2013, p. 4, https://unctad.org/system/files/official-document/webdiaepcb2013d9_en.pdf.

temporal protection of the investment, which is not found in the arbitration agreement, but it is drafted in an ambiguous manner. It would therefore be helpful for treaty negotiators to indicate clearly that those conditions that govern the jurisdiction of the tribunal are found in the provision devoted to the arbitration agreement itself as opposed to other provisions of the treaty.

Can an investment just 'arise'?

Another notorious difficulty is the definition of investment and the notion of the making of an investment. To the extent possible, negotiators should clarify whether the fact that an investment is merely 'held' passively, as opposed to actively 'made' as the result of a transfer of monies, is sufficient to qualify for the definition of protected investment. Some treaties indicate that the mere holding of an investment is sufficient, but most do not. This gives rise to endless disputes, both before arbitral tribunals and before the courts. A clarification on this aspect would be welcome

What does MFN cover?

Similarly, it would be helpful to clarify systematically whether the most-favoured nation provision does or does not extend beyond substantive protections to procedural aspects, such as jurisdiction. Again, some treaties do just that, but most do not.

Dual nationality

Another hotly debated topic is dual nationality outside of the ICSID system. A clarification would once again be welcome, one way or another to avoid unnecessary discussions.

These are a few issues among many that arise relatively frequently where the content of the treaty could usefully be clarified to avoid money being spent on litigating them over and over again.

– Philippe Pinsolle, Quinn Emanuel Urquhart & Sullivan LLP

Modification of investment treaties

The amendment of an investment treaty will need to comply with any provisions within the treaty regulating amendment, otherwise the general rules of the Vienna Convention on the Law of Treaties (VCLT) will apply.[28] Amendments may be appropriate where, for instance, the states wish to address specific issues in an investment treaty, but retain its general architecture. It may also be easier or

28 Part IV, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, Vol. 1155 (VCLT).

more advantageous for states to reach agreement on a few amendments to introduce new provisions or amend existing ones, rather than engage in renegotiation of the treaty as a whole.

Thus, some of the perceived shortcomings of BITs have been addressed by modifying investment treaties. For example, the Czech Republic–Guatemala, Bulgaria–Israel and Lithuania–Kuwait BITs were amended to introduce balance-of-payments exceptions to provisions on the free transfer of funds.[29] Other amendments have introduced exceptions to MFN clauses for regional economic integration organisations or inserted exceptions for national security reasons.[30] States may also need to amend their BITs to address new developments. For example, in the European Union context, a number of Eastern European states had to amend their BITs to align them with EU law, in the context of their accession to the EU.[31]

Some states have also addressed shortcomings through issuing authoritative joint interpretations to clarify ambiguity. The use of joint interpretations allows the treaty parties to clarify specific aspects of a treaty without engaging in the comparatively more intensive process of negotiating an amendment to the text or renegotiating a treaty, as no ratification is required to give effect to an interpretation. For example, the North American Free Trade Agreement (NAFTA) Free Trade Commission's Notes of Interpretation of Certain Chapter 11 Provisions contains 'interpretations' to 'clarify and reaffirm the meaning' of, among other things, Article 1105(1) of the NAFTA regarding the minimum standard of treatment in accordance with international law. In respect of the India–Bangladesh BIT, there are joint interpretative notes signed between India and Bangladesh to 'resolve certain questions regarding, and affirm their understanding of, the scope and meaning of several of the Agreement's provisions'.[32]

As for the effect of joint interpretations, some treaties may state that joint interpretative statements are binding on a tribunal.[33] Even if the treaty does not contain such a provision, as a general rule of interpretation, the VCLT provides

29 UNCTAD, 'Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties', IIA Issues Note, Issue 2, June 2017, Paragraph 16, https://unctad.org/system/files/official-document/diaepcb2017d3_en.pdf (last accessed: 24 July 2021).

30 ibid.

31 ibid.

32 Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments signed on 4 October 2017.

33 For example, NAFTA Article 1131(2): 'An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.'

that there shall be taken into account, together with the context, '[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.[34] Nonetheless, it should be noted that there has been debate as to whether joint interpretations should constitute a clarification of the treaty obligation or an amendment of the treaty, and there have also been issues with tribunals or courts applying joint interpretations that have been issued after the alleged breach has occurred or in the course of proceedings.[35]

Terminating investment treaties

Most BITs contain termination clauses that govern the circumstances and mode by which they can be terminated. The most common type of termination clause provides that, after the expiry of a certain period of time, either party may elect to terminate the treaty by giving notice to the other party. The treaty will then terminate after a specified period of time after notification, such as one year. Even where an investment treaty is terminated, most BITs contain 'survival' clauses, which provide that the BIT will, for a fixed period of time, such as 10, 15 or 20 years, continue to apply to investments established before its termination.

Some states, such as South Africa, have systematically terminated or renegotiated all of their BITs that they perceive to be no longer compatible with the government's objectives.[36] Termination may indeed be an appropriate tool where the states wish to fundamentally change the obligations they are willing to commit to under an investment treaty. Ecuador, for instance, established an investment treaties audit commission, CAITISA, to audit all its BITs and its foreign investment plan. In 2017, CAITISA recommended that Ecuador terminate its

34 Article 31(3)(a), VCLT.

35 See Lukasz Gorywoda, 'How States Manage Their Obligations Under Bilateral Investment Treaties: Opportunistically Changing the Rules of the Game or Legitimately Exercising Their Sovereign Rights? (Part I)', *Kluwer Arbitration Blog* (28 August 2017); in particular, the discussion on whether joint interpretations are interpretation or amendments. See also comments by China's Foreign Spokesperson Hua Chunying on 21 October 2016 regarding the Singapore Court of Appeal's decision in *Sanum Investments v. The Government of the Lao People's Democratic Republic* [2016] SGCA 57, www.italaw.com/sites/default/files/case-documents/italaw7687.pdf. Laos had adduced notes verbales exchanged between Laos and China, which the Singapore Court of Appeal did not accept as evidence of an understanding that the Laos–China BIT was not to apply to Macau.

36 David Price, 'Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?', *Asian Journal of International Law* 7 (2017), p. 125.

remaining 16 BITs and negotiate new instruments.[37] States may also decide to terminate investment treaties where they have treaties with the same partners that overlap in terms of their coverage of investments. For example, Australia exchanged side letters with some CPTPP parties, in which they agreed to terminate the BITs between them upon the entry into force of the CPTPP.[38] Some states have also terminated their investment treaties due to legal challenges or impediments. In the EU context, in 2020 EU Member States agreed to terminate intra-EU BITs via a termination agreement. The termination agreement implements a March 2018 European Court of Justice decision that investor–state arbitration clauses within intra-EU BITs were incompatible with the Treaty on the Functioning of the European Union.[39]

As states continue to review their BITs, and in view of the ongoing reform and review efforts (for example, the discussions on ISDS reform undertaken under the auspices of the United Nations Commission on International Trade Law's Working Group III), there will likely be new developments and innovative approaches to investment treaties moving forward.

37 See Transnational Institute, 'Audit Commission President praises Ecuador's termination of treaties' (9 May 2017), www.tni.org/en/article/audit-commission-president-praises-ecuadors-termination-of-treaties (last accessed on 25 July 2021). Prior to the establishment of CAITISA, Ecuador had started the process of terminating its BITs and terminated six BITs in 2008.

38 These side letters were exchanged between Australia on the one hand and Mexico, Vietnam and Peru on the other. A list of the relevant side letters exchanged with Australia is set out in Australia Department of Foreign Affairs and Trade, 'CPTPP text and associated documents', www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents (last accessed 24 July 2021).

39 European Commission, 'EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties' (5 May 2020), https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en (last accessed on 23 July 2021).

CHAPTER 2

Accessing Investment Treaty Protection: The Investor's Perspective

Alvin Yeo, Chou Sean Yu and Koh Swee Yen[1]

Investment treaty planning

Prior to making an investment in a foreign country, it is important for an investor to ensure that the investment receives the best protections available. It is therefore not uncommon for investors to engage in 'investment treaty planning', which involves a concerted effort by the investor to structure its investment so as to enjoy the benefits under an international investment agreement (IIA) that the investor deems appropriate.[2] To unlock the protections available under an IIA, an investor would need to consider all the jurisdictional requirements as well as important substantive provisions under the IIAs.

Jurisdictional requirements

Investors must first ensure that all of the jurisdictional requirements under the applicable IIAs are met. For IIAs that provide for International Centre for Settlement of Investment Disputes (ICSID) arbitration as a dispute resolution mechanism, investors must also satisfy the jurisdictional requirements under the

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2 Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1208.

ICSID Convention. In summary, there are three main jurisdictional requirements that investors must satisfy to qualify for protection under an IIA: *ratione personae*, *ratione materiae* and *ratione temporis*.

Ratione personae

The nationality of the investor is one of the fundamental requirements that defines the *ratione personae* scope of application of IIAs.[3] Generally, most bilateral investment treaties (BITs) and multilateral investment treaties specify criteria to establish who is a protected 'investor'. Because the ICSID Convention does not contain a definition of 'nationality',[4] ICSID tribunals usually defer to IIAs and domestic law to define nationality.[5]

For natural persons, IIAs generally define nationality based on the domestic law of the contracting state parties. For instance, in *Soufraki v. United Arab Emirates*, the tribunal referred to Article 1(3) of the Italy–UAE BIT, which defines an 'investor of the other Contracting State' as a 'natural person holding the nationality of that State in accordance with its law'.[6] In some other IIAs, the nationality of an investor is defined in a more limited way by requiring minimum residency. An example is in *Sedelmayer v. Russia*,[7] where the tribunal adopted the nationality requirement under Article 1(1)(c) of the Germany–USSR BIT, which defines an investor as 'a natural person that has the permanent residence, or a legal entity that has its seat in the respective territories to which the Treaty applies, and that has the right to make investments'.

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3 Roland Ziadé and Lorenzo Melchionda, 'Structuring and Restructuring of Investment in Investment Treaty Arbitration', in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Volume 8, 1 January 2015, pp. 370–399, at p. 373.

4 Article 25(1) and 2(a) of the ICSID Convention simply require that a person be 'a national of another Contracting State' on the date on which the parties consented to submit the dispute conciliation or arbitration as well as the date on which the request was registered pursuant to Paragraph (3) of Article 28 or Paragraph (3) of Article 36, but excludes any person who on either date also had the nationality of the contracting state party to the dispute.

5 Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1213.

6 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Jurisdiction, 7 July 2004, Paragraph 55.

7 *Mr Franz Sedelmayer v. The Russian Federation*, SCC, Award, 7 July 1998.

With respect to juridical persons, many IIAs only require a company to be validly incorporated in its home state (i.e., a 'pure incorporation test'). On the other hand, certain IIAs require a company to have its seat in its home state, alternatively or cumulatively with the incorporation. Some other treaties combine the incorporation and the seat requirements with the requirement of existence of real business activities in the place of incorporation.[8]

In investment treaty planning, investors may wish to opt for IIAs that provide for a pure incorporation test. As seen in various ICSID arbitrations, it is easier for investors to attract protections under IIAs with a pure incorporation test. These IIAs only require investors to be incorporated under the law of a contracting party to the IIAs (not the host state), without the need to prove that they have an actual office with real business activities there.[9] Conversely, IIAs containing other *ratione personae* jurisdictional requirements, such as existence of real business activities, are less flexible and more burdensome for investors when structuring their investment.[10]

Further, it is generally accepted that both direct and indirect investments are protected under an IIA absent language to the contrary, which means that it is possible for an investor to structure its investment through intermediate companies incorporated outside the host country.[11]

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8 Roland Ziadé and Lorenzo Melchionda, 'Structuring and Restructuring of Investment in Investment Treaty Arbitration', in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Volume 8, 1 January 2015, pp. 370–399, at p. 373.

9 See, e.g., *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, Paragraph 38, where the tribunal considered that 'under the terms of the Ukraine–Lithuania BIT, interpreted according to their ordinary meaning, in their context, and in light of the object and purpose of the Treaty, the only relevant consideration is whether the Claimant is established under the laws of Lithuania. We find that it is. Thus, the Claimant is an investor of Lithuania under Article 1(2)(b) of the BIT.' See also *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, Paragraphs 97–101; *Saluka Investments bv (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Paragraphs 127–130; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, Paragraph 326.

10 Roland Ziadé and Lorenzo Melchionda, 'Structuring and Restructuring of Investment in Investment Treaty Arbitration', in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Volume 8, 1 January 2015, pp. 370–399, at p. 374.

11 See, e.g., *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, Paragraph 137; *Venezuela Holdings, B.V., et al. (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian*

It also bears mentioning that in addition to permitting claims by foreign incorporated companies, Article 25(2)(b) of the ICSID Convention also provides qualified jurisdiction for foreign-controlled locally incorporated entities (LIEs).[12] A foreign incorporated company is defined as 'any juridical person which had the nationality of a Contracting State other than the State party to the dispute'.

On the other hand, a LIE can only file a claim under Article 25(2)(b) if two conditions are met.

First, protections for LIEs under Article 25(2)(b) require consent by the host state through a contract, an IIA or a national law. This consent includes acknowledgement, either explicit or implicit, that the state extends protections to foreign investors controlling its domestic entities.[13]

Second, there must be foreign control over the LIE. Various ICSID tribunals have determined 'control' in terms of legal capacity and percentage of ownership. For example, in *Aguas del Tunari v. Bolivia*, the tribunal considered that 'one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity' and that 'such legal capacity is to be ascertained with reference to the percentage of shares held'. The tribunal concluded that such 'control' exists where an entity 'has both majority shareholdings and ownership of a majority of the voting rights'.[14] In terms of percentage ownership, tribunals have considered an

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Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, Paragraph 165; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, Paragraphs 282–286; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, Paragraphs 123–124.

12 Article 25(2)(b) of the ICSID Convention reads:
(2) 'National of another Contracting State' means:
. . . (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

13 See, e.g., *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, Paragraph 50, where the tribunal stated that 'ICSID jurisprudence also confirms that the second clause of Article 25(2)(b) should not be used to determine the nationality of juridical entities in the absence of an agreement between the parties'.

14 *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, Paragraph 264.

entity having control over another entity if it owns more than 50 per cent of that entity,[15] whereas control is not constituted with less than 20 per cent ownership.[16]

Ratione materiae

Investors must also ensure that their investment falls within the definition of 'investment' and is thus protected under the selected IIAs. There are various IIAs that define investment as any kind of asset 'invested by the investor in the territory of the other Contracting Party', followed by a non-exhaustive list of covered asset categories.[17] The definition of the investment that is covered under an IIA is a critical consideration in treaty planning, and the broader the definition, the easier it would be for investors to avail themselves of the protections under the IIA.

One example is *Saluka v. Czech Republic*, where the state contended that Saluka's investment only consisted of the short-term holding of shares of a privatised Czech bank with a view of making a quick profit from the sale of the bank's major assets and thus did not fall within the definition of investment under Article 1(1) of the Czech Republic–Netherlands BIT.[18] However, the tribunal rejected the respondent's contentions, and reasoned that 'nothing in Article 1 makes the investor's motivation part of the definition of an "investment"' and that 'nothing in that Article has the effect of importing into the definition of "investment" the meaning which that term might bear as an economic process, in the sense of making a substantial contribution to the local economy or to the wellbeing of a company operating within it'.[19]

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15 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Award, 21 October 1983, Paragraph 76. See also Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1227.

16 *Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994, Paragraphs 53–54.

17 See, e.g., Article 1 of the Cuba–UK BIT (1995); Article 1(1) of the Korea–UAE BIT (2002); Article 1(2) of the Mauritius–Romania BIT (2000); Article 1(1) of the Italy–Russia BIT (1996); Article 1(2) of the Spain–Costa Rica BIT (1997).

18 Article 1(1) of the Czech Republic–Netherlands BIT provides that the term 'investment' 'shall comprise every kind of asset invested either directly or through an investor of a third State'.

19 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Paragraphs 209 and 211.

In contrast, some IIAs set forth an exhaustive list of covered assets and adopt more limited definitions of investment.[20] For instance, Article 1139 of the North American Free Trade Agreement (NAFTA) uses the words 'investment means' rather than 'investment includes'. It also contains an exhaustive list of covered investments, which extend to foreign direct investment (an enterprise), portfolio investment (equity securities), partnership and other interests that give the owner a right to share in profits or liquidated assets, and tangible and intangible property acquired in the expectation of, or used for the purpose of, economic benefit. NAFTA also covers loan financing where funds flow within a business group or debt with original maturity of least three years. NAFTA complements its exhaustive list of investment categories with a negative definition establishing certain kinds of property that are not considered investments under the treaty.

Investors ought to be cautious in dealing with treaties that adopt a narrow definition of investment and ensure that their investments are appropriately structured so that they do not fall outside the coverage of the applicable IIAs.

If the applicable IIA provides for ICSID arbitration, the investor will have to satisfy not only the *ratione materiae* requirements under the applicable IIA but also those under Article 25 of the ICSID Convention.[21]

Although the ICSID Convention does not contain a definition of 'investment', academic discussions and arbitral decisions have suggested that an investment under Article 25(1) has certain inherent characteristics.[22] These characteristics are established in *Salini v. Morocco* (commonly referred to as the *Salini* test), and include: (1) a certain duration; (2) generation of regular profits and returns; (3) participation of both parties in risk; (4) substantial commitment of

20 See, e.g., Article G-40 of the Canada–Chile Free Trade Agreement; Article 11.28 of the US–Korea Free Trade Agreement (2012).

21 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, Paragraph 44.

22 See Christoph H Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary*, Second edition (Cambridge University Press, 2009), Article 25, Paragraphs 152–174; see also *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, Paragraph 43; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, Paragraphs 90–96; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, Paragraph 116; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 May 2007, Paragraphs 98–100.

capital; and (5) contribution to the economic development of the host state.[23] To bring a claim under ICSID arbitration, an investor would have to ensure that the investment in question bears the characteristics required under the *Salini* test.

Ratione temporis

The last main jurisdictional requirement is temporal requirements (*ratione temporis*). IIAs generally impose temporal limitations on jurisdiction. In *Phoenix v. Czech Republic*, the tribunal clarified that the IIA must be applicable at the 'relevant time'.[24] Subsequent tribunals have understood 'relevant time' to mean that the IIA must have been applicable to both the state and the investor when the violation occurred.[25]

IIAs typically cover investments made after the enactment of the treaty. Importantly, an IIA only comes into effect after being ratified and not after the signing.[26] Depending on the precise wording of the IIA, an investor who made investment before the IIA's effective date may not necessarily be protected by the IIA. Some IIAs expressly provide for protection of investments made before the IIAs' effective date. For example, the tribunal in *Ioannis Kardassopoulos v.*

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23 See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, Paragraphs 52–58. See also 'X. Notion of Investment', in Borzu Sabahi, Noah Rubins, et al., *Investor-State Arbitration*, Second Edition (Oxford University Press, 2019), pp. 335–366, at Paragraph 10.28; several tribunals, however, have questioned whether the contribution to economic development is a useful factor and some have dismissed it. Overall, most tribunals agree that elements of contribution, duration and risk should be present in an economic activity for it to qualify as an investment. See, e.g., *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Paragraph 5.43; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, Paragraph 285; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, Paragraphs 294–296.

24 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, Paragraph 57.

25 See, e.g., *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, Paragraph 105 ('the treaty violation falling under the Tribunal's jurisdiction must have occurred after the entry into force of the Treaty and the investor became its beneficiary as an eligible national of the relevant Contracting Party.').

26 Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1240.

Georgia made reference to Article 12 of the applicable Georgia–Greece BIT, which provides that '[t]his Agreement shall also apply to investments made prior to its entry into force by investors of either Contracting Party in the territory of the other Contracting Party, consistent with the latter's legislation'.[27] Another example is Article 45 of the Energy Charter Treaty (ECT), which provides for provisional application as of December 1994, when the parties signed the treaty, although the ECT only came into effect in April 1998.

Therefore, investors should be mindful that if they wish to seek protection under a signed but unratified IIA, the IIA in question must provide for protection of investments made prior to that IIA's effective date and the investor should be reasonably certain that the treaty will eventually be ratified. Investors should nevertheless note the following.

Substantive provisions

Most-favoured nation clause

A most-favoured nation (MFN) clause enables an investor to access more favourable protections in other IIAs to which the host state is a party. In treaty planning, the investor should check whether an IIA contains an MFN clause, which may expand the array of available protections.

In theory, an investor may rely on an MFN clause to import better substantive protections from another IIA into the applicable IIA and (potentially) obtain access to the dispute resolution clauses in the other IIA. In some cases, the tribunals have found that MFN clauses permit investors to benefit from better jurisdictional clauses in other treaties, therefore getting jurisdiction where their own treaty prevents it. For example, in *Maffezini v. Spain*, the tribunal held that the MFN clause included in the Argentina–Spain BIT 'embraces the dispute settlement provisions' and therefore the investor may rely 'on the more favorable arrangements contained in the Chile-Spain BIT'.[28]

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27 *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, Paragraphs 49, 232–238; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, Paragraph 167; *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, Paragraph 68; *Salini Costruttori SpA and Italstrade SpA v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, Paragraph 177.

28 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, Paragraph 64; conversely, the tribunal in *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, Paragraphs 190–227 considered that MFN

The language of the MFN clause is of critical importance, and the investors should consider whether the wording of the MFN clause enables them to import the substantive protections or procedural rights in other IIAs generally or whether the MFN clauses are limited to only certain protections. For example, in *Renta v. Russia*, the tribunal found that the MFN clause in the applicable Russia–Spain BIT is limited to only fair and equitable treatment (FET).[29]

Fair and equitable treatment standard

The FET standard is found in an overwhelming majority of IIAs. In practice, FET has become the substantive protection that investors most frequently invoke in investment arbitration.[30] Traditionally, FET provisions are worded broadly.[31] While investors generally seek to apply FET provisions literally and broadly, respondent states often attempt to narrow the scope of protection as much as possible.[32]

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clauses could not provide investors access to dispute settlement options in other treaties unless there is a clear consent by state parties.

29 See *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009. In this case, Article 5 of the BIT provided that '(1) Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party, (2) The treatment referred to in paragraph 1 above shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of any third State . . .'. The tribunal considered that Article 5(2) is limited to the substantive protections provided in Article 5(1) because it referred exclusively to the 'treatment referred to in paragraph (1)'. Paragraph (1) guaranteed fair and equitable treatment to the investor. The tribunal found that 'the Spanish BIT does not contain an MFN clause entitling investors to avail themselves in generic terms of more favourable conditions found "in all matters covered" by other treaties. Instead it establishes the right to enjoy a no less favorable FET'.

30 Borzu Sabahi, Noah Rubins, et al., *Investor-State Arbitration*, Second Edition (Oxford University Press, 2019), Paragraph 19.03.

31 A typical example of the traditional BIT is Article 3.1 of the terminated BIT between the Netherlands and Poland (1992), which simply provides that: 'Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.' See also, e.g., Article 3.1 of the Czech Republic–Netherlands BIT (1991), Article III of the Lithuania–Norway BIT (1992) and Article 2(2) of the Argentina–United Kingdom BIT (1990).

32 Borzu Sabahi, Noah Rubins, et al., *Investor-State Arbitration*, Second Edition (Oxford University Press, 2019), Paragraph 19.03.

Due to the uncertainties surrounding the application of the FET standard in investment treaties, in recent years various states have attempted to redraft the FET standard to limit the scope of FET provisions, in particular, by ascribing specific content to the FET standard.[33] This will often include a list of measures that constitute a breach of the FET obligation. For example, in May 2018, the Netherlands published a new draft investment treaty, which seeks to circumscribe the scope of the FET standard with a much more granular definition of the FET obligation.[34] This new model BIT was adopted by the Dutch government on 19 October 2018.[35] The same approach has also been adopted in other significant IIAs, such as the Comprehensive Economic and Trade Agreement between the EU and Canada,[36] the EU–Singapore Investment Protection Agreement[37] and the EU–Vietnam Investment Protection Agreement.[38]

From the investors' perspective, IIAs containing broad FET provisions are more favourable than those that ascribe specific and limited content to the FET definition, which will constrain an arbitral tribunal's ability to adopt a wide interpretation of the substantive obligation.

However, even for the IIAs with a more limited FET definition, investors may still rely on the MFN clause to access 'better' FET protection than under other IIAs as long as the MFN clause is sufficiently broad and does not provide any limitation in terms of the FET. This has been accepted by arbitral tribunals in investment arbitration practice.[39]

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33 Christophe Bondy, 'Fair and Equitable Treatment – Ten Years On', in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Series, Volume 20 (International Council for Commercial Arbitration/Kluwer Law International, 2019), pp. 198–225, at p. 218.

34 See Article 9.2 of the Netherlands new Model Investment Agreement, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download.

35 See https://riskandcompliance.freshfields.com/post/102f5tp/dutch-government-adopts-new-model-bilateral-investment-treaty.

36 See Chapter 8: 'Investment', Article 8.10(2) of the EU–Canada Comprehensive Economic and Trade Agreement, available at https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.

37 See Article 2.4 of the EU–Singapore Investment Protection Agreement (2018), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download.

38 See Article 2.5 of the EU–Vietnam Investment Protection Agreement (2019), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download.

39 See, e.g., *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, Paragraphs 100–104; *Sergei Paushok, CJSC Golden*

Denial of benefits clause

Some IIAs contain a 'denial of benefits clause', which allows the host state to reserve the right to deny the benefits of the applicable IIA to companies if, inter alia, they are owned or controlled by non-protected investors and have no substantial business activities in the country of incorporation.[40] Investors ought to look out for denial of benefits clauses when considering IIAs to avoid the risk of being deprived of treaty protection.

It would appear that one way of avoiding the risk of being deprived of treaty protection as a result of a denial of benefits clause is to show 'substantial business activity' in the country of incorporation. Previous tribunals had considered that pure holding companies (i.e., shell companies that merely hold shares of other companies) cannot satisfy this requirement.[41]

However, in *Pac Rim v. El Salvador*, the tribunal held that a holding company may be considered to have substantial business activities if it holds and manages shares in other companies and has a continuous and substantial physical presence in the country of incorporation, a functioning board of directors and a bank account. A purely passive, nominal holder of shares with no real physical presence in the place of incorporation does not possess these features and thus cannot be deemed to have substantial business activities.[42] In *Amto v. Ukraine*, however, the tribunal found that 'substantial' in this context does not mean 'large' but 'of substance, and not merely of form', and 'the materiality not the magnitude of the business activity is the decisive question'. Therefore, the tribunal was satisfied that the investor had substantial business activity on the basis of its investment-related activities conducted from a real office with a small but permanent staff.[43]

East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, Paragraphs 570–572.

40 See, e.g., Article 17 of the ECT; Article 17 of the 2012 US Model BIT. Investment treaties entered into by the United States routinely contain a denial of benefits clause.

41 Roland Ziadé and Lorenzo Melchionda, 'Structuring and Restructuring of Investment in Investment Treaty Arbitration', in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Volume 8, 1 January 2015, pp. 370–399, at p. 398.

42 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, Paragraphs 4.72–4.75.

43 *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, Paragraph 69.

Preserving protection when investing

The need to avoid abuses of process in restructuring investments

To ensure protection under the IIAs, treaty planning should be carried out ahead of making the investment so that the investment can be appropriately structured from the outset. Sometimes, an investor may 'restructure' the investment after it is made, and this may take place through the reorganisation of the ownership structure of the investment; for example, by inserting an intermediate company that is protected by one of the host state's IIAs.[44]

While it is generally accepted that investors are entitled to structure their investment to maximise treaty protection,[45] it is less straightforward in cases where an investor seeks to achieve this through a restructuring of the investment. Whether or not the restructuring is considered effective under an IIA depends on various factors, including the timing of the restructuring. In carrying out treaty planning, investors ought to be mindful of conduct that may be deemed as destructive or disruptive, which is sometimes described as 'treaty shopping'.[46]

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44 Roland Ziadé and Lorenzo Melchionda, 'Structuring and Restructuring of Investment in Investment Treaty Arbitration', in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Volume 8, 1 January 2015, pp. 370–399, at p. 370.

45 See, e.g., *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, Paragraph 330(d) ('it is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT'); *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 Decision on Jurisdiction, 7 July 2004, Paragraph 83; *HICEE B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award, 23 May 2011, Paragraph 103.

46 See, e.g., *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, Paragraph 63 ('a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand'); *Saluka Investments bv (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Paragraphs 127–130 ('The Tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of "treaty shopping" which can share many of the disadvantages of the widely criticised practice of forum shopping.').

It is generally accepted that a restructuring of an investment in order to access investment treaty protection is legitimate when done prior to the onset of those facts giving rise to the damages and the dispute.[47] This underscores the importance of early treaty planning. In *Phoenix v. Czech Republic*, the tribunal noted that 'an international investor cannot modify downstream the protection granted to its investment by the host state, once the acts which the investor considers are causing damages to its investment have already been committed'.[48] The tribunal further held that:

> *The ICSID Convention/BIT system is not deemed to protect economic transactions undertaken and performed with the sole purpose of taking advantage of the rights contained in such instruments, without any significant economic activity, which is the fundamental prerequisite of any investor's protection. Such transactions must be considered as an abuse of the system.*[49]

The restructuring of an investment prior to the dispute is usually acceptable unless the applicable treaty provides otherwise. Hence, if an investor from a non-party state to the IIA plans to access the protection under that IIA through an intermediate entity incorporated in a protected state, he or she should (1) ensure that the IIA does not explicitly require the investor to have 'substantial business activities' in the place of incorporation (or, if it does, that the requirement can be satisfied); (2) not engage in fraud or other egregious violations of local or international law; and (3) avoid signalling that the structure was purely to take advantage of the treaty.[50]

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47 Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1249.

48 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, Paragraph 95.

49 id. at Paragraph 93.

50 Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1250.

If an investor seeks to gain the protection of an investment treaty through the restructuring of an investment after the host state's breach occurs, the tribunal may conclude that the investor does not qualify for protection.[51] Additionally, the tribunal may not accept jurisdiction over a dispute arising before the investor was a treaty beneficiary.[52]

Assignment of treaty claims

Assignment of treaty claims can be considered as a form of restructuring. An assignment may occur in various situations; for instance, where an original investor intends to divest its stake in the investment to an arm's-length buyer while having a claim against the host state. Other scenarios include where a liquidator sells and assigns a potential treaty claim to increase the asset pool for creditors of the estate, to raise funds for the estate or to obtain funding to pursue a meritorious claim.[53] A company may also assign a claim to its affiliate as part of a group restructuring that may involve a succession and merger. In the case of a merger – for example, where a claimant party is extinguished by the operation of that merger – the successor company may have been protected if the initial claimant had satisfied the jurisdictional requirements at the time of the consent.[54]

A number of tribunals and legal scholars have considered that treaty claims are assignable. In *Daimler v. Argentina*, the tribunal accepted that 'most jurisdictions allow for legal claims to be either sold along with or reserved separately from the underlying assets from which they are derived' and 'no rule of general or customary international law . . . would prohibit a similar result from obtaining for

51 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, Paragraph 588.

52 Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1251.

53 See, e.g., *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5; *WNC Factoring Limited v. The Czech Republic*, PCA Case No. 2014-34. See also Nelson Goh, 'The Assignment of Investment Treaty Claims: Mapping the Principles', *Journal of International Dispute Settlement*, Volume 10, Issue 1, March 2019, pp. 23–41, at p. 24.

54 See, e.g., *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No ARB/02/3; *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3. See also Nelson Goh, 'The Assignment of Investment Treaty Claims: Mapping the Principles', *Journal of International Dispute Settlement*, Volume 10, Issue 1, March 2019, pp. 23–41, at p. 24.

ICSID claims'.[55] When the host state breaches a private investor's rights under an investment treaty, the separate right to recover damages for that breach is really a property right vested in the claimant, which is plainly assignable.[56]

A treaty claim, however, cannot be created from an assignment. For example, a non-protected investor cannot create a claim by transferring its rights to a protected entity on the ground that *nemo dat quod non habet* (i.e., no one could give what he or she does not have).[57] Indeed, the original investor is not in a position to assign a treaty claim that it does not possess to begin with. However, the assignment of the claim can be made from a protected investor to another equally protected investor.[58]

Maintaining investment treaty protection in terminations

Forms of termination of investment treaties

An investment treaty can be terminated in two ways: unilateral termination and termination by mutual consent.

Unilateral termination

In general, a BIT can be unilaterally terminated by one contracting party without the consent of the other party through a tacit renewal clause or a fixed-term clause.

A tacit renewal termination clause is typically contained in a BIT that has a specified effective term, and at the end of that term, the BIT is automatically renewed for an additional term, unless either party terminates the BIT within the limited window of time provided under the clause (often six months) before

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55 *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, Paragraph 144; see also *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, Paragraphs 29–32.

56 Matthew S Duchesne, 'The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes', 36 *George Washington International Law Review* (2004), pp. 783–815, at p. 808, cited footnote in Patrick Dumberry, *A Guide to State Succession in International Investment Law* (Elgar Publications, 2018).

57 *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, Paragraph 24.

58 See, e.g., *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo*, ICSID Case No. ARB/05/21, Award on objections to jurisdiction and admissibility, 29 July 2008. See also Roland Ziadé and Lorenzo Melchionda, 'Structuring and Restructuring of Investment in Investment Treaty Arbitration', in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Volume 8, 1 January 2015, pp. 370–399, at p. 373.

the first term expires. Once the BIT is renewed, it cannot be terminated before the second term expires. Accordingly, the BIT is successively and periodically renewed unless either party terminates the treaty within the limited window of time provided before the end of each term.[59]

On the other hand, a fixed-term termination clause is usually found in a BIT that enters into force for an agreed period of time, and after the expiry of that term, either party can terminate the BIT at any time by giving notice to the other party. Termination under a fixed-term clause does not take effect immediately upon notification, but only after a certain period of time has elapsed from the notification (usually one year).[60]

Termination by mutual consent

A treaty may be terminated by mutual consent in accordance with Article 54 of the Vienna Convention on the Law of Treaties (VCLT), which provides that:

> *The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States.*

59 A typical example of a tacit renewal termination clause is Article 26.2 of the 2019 Dutch Model BIT: 'Unless notice of termination has been given by either Contracting Party at least six months before the date of its expiry, the present Agreement shall be extended tacitly for periods of five years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.'

60 A typical example of a tacit renewal termination clause is Article 22 of the US Model BIT:

1. *This Treaty shall enter into force thirty days after the date the Parties exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.*
2. *A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.*

The states' consent to termination may be expressed through a subsequent international treaty. For instance, in early 2019, Australia negotiated new BITs with Hong Kong[61] and Uruguay,[62] both of which terminated and replaced older BITs from 1993 and 2001, respectively.

Mutual termination of BITs with a new replacement treaty also takes place in some instances where the states involved negotiate trade agreements containing investment chapters. The new agreement may serve as the instrument of termination, or the termination may take place through a separate process. For example, Australia exchanged side letters with Mexico,[63] Peru[64] and Vietnam[65] in which the parties agreed to terminate the BITs between them upon the entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

State parties to a BIT may also agree to terminate that BIT without entering into a new treaty to replace it. On 29 August 2020, a multilateral treaty concluded by a majority of EU Member States to terminate the intra-EU BITs concluded between them entered into force for the first time. To date, 23 EU Member States[66] have signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union. The Agreement

61 See Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China, available at www.dfat.gov.au/trade/agreements/in-force/a-hkfta/Pages/the-investment-agreement-text.

62 See Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments, available at https://www.dfat.gov.au/sites/default/files/agreement-between-australia-and-uruguay-on-the-promotion-and-protection-of-investments.pdf.

63 See Letter from Andrew Robb, Minister for Trade and Investment of Australia to Ildefonso Guajardo Villarreal, Minister of Economy of Mexico, available at www.bilaterals.org/IMG/pdf/86.pdf.

64 See Letter from Andrew Robb, Minister for Trade and Investment of Australia to Ana María Sánchez de Ríos, Minister of Foreign Affairs of Peru, available at www.bilaterals.org/IMG/pdf/108.pdf.

65 See Letter from Andrew Robb, Minister for Trade and Investment of Australia to Dr Vu Huy Hoang, Minister of Industry and Trade of Vietnam, available at www.dfat.gov.au/sites/default/files/australia-vietnam-termination-of-investment-promotion-and-protection-agreement.PDF.

66 All current EU Member States, except Austria, Finland, Sweden and Ireland (which are not party to any active BITs), have signed the Agreement.

followed the Court of Justice of the European Union's 2018 *Achmea* judgment, which had found the arbitration provision of the Netherlands–Slovakia BIT to be incompatible with EU law.[67]

Protections of investor rights

Unilateral terminations

In the case of unilateral termination where a contracting state exercises its right under a tacit renewal or fixed-term termination clauses to terminate the BIT, the investors may still rely on 'survival clauses', which preserve protections of their rights. These types of clauses are a unique BIT feature, allowing for the BIT to continue to have legal effects for a specified period of time after it has been terminated. Thus, 'even though a State may terminate a BIT, it will often still remain bound by its provisions vis-à-vis investments made prior to the treaty's termination'.[68] An example of the survival clause is Article 26.3 of the 2019 Dutch Model BIT:[69]

> *In respect of investments made before the date of the termination of the present Agreement, this Agreement shall continue to be in effect for a further period of fifteen years from that date.*

The survival clause serves to ensure a degree of stability and legal certainty for investors that entered into an investment with the knowledge that certain protections existed at the international level. It also ensures that those protections cannot be peremptorily revoked.[70] Most importantly, the survival clause applies to both substantive provisions and dispute settlement clauses of IIAs. Therefore, an investor would be able to bring a claim under a BIT even after its termination.

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67 *Slovak Republic v. Achmea B.V.*, Case C-284/16, at https://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=404057.

68 United Nations Conference on Trade and Development, Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims, at p. 3, available at https://unctad.org/system/files/official-document/webdiaeia20106_en.pdf.

69 See also Article 22.3 of the 2004/2012 US Model BIT; Article 47(3) of the ECT.

70 James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties', *The Journal of World Investment & Trade* (2012), Volume 13, Issue 6, pp. 928–950, at p. 935.

However, investors should note that the legal effects of this clause will typically only apply to investments established in the host state before the IIA was terminated. The BIT does not protect investors that make investments in the host state after the BIT is terminated.

Terminations by mutual consent

The situation is more complicated in the case of termination by consent. Some commentators take the view that termination by mutual consent pursuant to Article 54(b) of the VCLT would not be limited by the terms of the minimum period of application provided in many BITs or the terms of a survival clause. In other words, the parties to a BIT may agree to terminate the treaty with immediate effect. Accordingly, investors will not be able to preserve any protection after the mutual termination.[71]

However, looking at the nature and terms of BITs or IIAs in general, investors may still rely on certain features to argue that the IIAs are intended to limit the ability of states to revoke the rights of investors, even in the case of termination by consent.

First, the general nature of IIAs supports the proposition that the drafters intended to establish a stable legal framework for investors that could not be peremptorily revoked through termination either unilaterally or by mutual consent. The objective of promoting 'favourable conditions' found in most IIAs can be seen as demonstrating the acknowledgement of states of the need for a certain degree of legal stability for investors that make their investment with an expectation that protection will be in place at the international level. In contrast, if states are allowed to completely withdraw investors' rights through mutual agreement without notice, it would not promote favourable conditions for investors, thus seriously undermining the IIAs' object and purpose. When the preamble to the IIAs expressly refers to a stable investment environment, this argument is further reinforced.[72]

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71 id. at pp. 942–943.

72 See, e.g., Agreement between Japan and the Republic of Uzbekistan for the Liberalization, Promotion and Protection of Investment (Japan–Uzbekistan BIT), 15 August 2008 preamble: 'Intending to further create stable, equitable, favorable and transparent conditions for greater investment by investors of one country in the Area of the other country.'

Second, the language of various IIAs also suggests that investors' rights under the IIAs cannot be withdrawn immediately without notice. For instance, the language of some survival clauses prima facie makes them applicable to both unilateral termination and termination by mutual consent. A good example is the survival clause in the UK–Korea BIT, which stipulates that:

> *Provided that in respect of investments made whilst the Agreements is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.*
>
> *Such broad language may be considered to support the view that the parties intended there to be some limits to their ability to terminate the treaty, even by mutual consent.*[73]

That said, these are only tentative arguments that investors may put forward and, to succeed, an investor must demonstrate that the state parties' intent in drafting the relevant IIA was to limit the states' ability to terminate the IIAs even by mutual consent. The determination of the states' intent in this regard can only be undertaken on a treaty-by-treaty basis. If the tribunal accepts these arguments, however, the investor would be in the same position as unilateral termination and may similarly gain benefit from survival clauses.

73 James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties', *The Journal of World Investment & Trade* (2012), Volume 13, Issue 6, pp. 928–950, at p. 947.

CHAPTER 3

Initial Stages of a Dispute: The Investor's Perspective

Stanley U Nweke-Eze[1]

The relevance of arbitration in the settlement of investor–state disputes has grown over the years. This chapter addresses the considerations that investors should bear in mind before commencing arbitration proceedings. Recommendations are made as to what steps an investor should take to determine whether resorting to arbitration is the optimal strategy and, if it is, how an investor can adequately prepare for formal arbitral proceedings under applicable laws and procedures.

Pre-action preparations

Having determined that there is a dispute to be resolved between the investor and the host state, the investor should conduct a holistic and detailed assessment of the actions that underpin the dispute, to determine its logical next steps. In conducting this assessment, it is important for the investor to carry out the following procedures.

- Analyse and streamline the factual background. This is typically done by collating evidence and interviewing fact witnesses to develop a clear chronology of how the dispute arose and its circumstances. With specific reference to witness testimony, it is important to bear in mind that all relevant fact witnesses may not be readily available during the arbitration hearing. Hence, it is vital to put appropriate plans in place to secure their attendance or consider an alternative plan.

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- Establish the relevant instrument that protects its foreign investment (i.e., an investment treaty,[2] investment contract or national legislation). In some instances, for example, there may be more than one applicable instrument, and they may contain varying substantive and procedural provisions. This process will, therefore, help an investor to determine which instrument contains the most favourable provisions in the circumstances.
- Calculate the investor's chance of success, with the aid of lawyers, by assessing the strengths and weaknesses of the proposed claim. This is usually determined by investigating whether the relevant jurisdictional standards for an arbitral tribunal have been met and whether the conduct of the host state in relation to the investor's foreign investment indeed breaches the substantive obligations owed to the investor under the relevant instrument or customary international law. In assessing whether the relevant jurisdictional standards have been met, it is crucial to confirm whether the host state has consented to arbitration under an investment treaty, a local investment statute or an investment contract between the investor and the host state.[3] Also, consideration should be given to whether the host state has consented to arbitration in relation to the covered investor and investment.[4] In addition, it is vital to confirm that there are valid legal grounds upon which the investor can base its claim against the host state under the relevant instrument or customary

2 It is advisable for the investor to understand the entire network of the host state's investment treaties given that one treaty may incorporate the provisions of others through the application of the principle of a most-favoured nation (MFN) clause. The MFN clause generally seeks to provide equal treatment granted to the investors of one state in a treaty to the investors of another nation in a different treaty. See, for example, Article 3 of the Albania–United Kingdom BIT (1996).

3 This is not limited to contracts involving the government of the host state. It can, in certain circumstances, extend to contracts in which a government agency is a party. See B M Cremades and D J A Cairnes, 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes', in N Horn and S Kroll (eds), *Arbitrating Foreign Investment Disputes* (Kluwer Law International, 2004), 326.

4 If the dispute is brought under the aegis of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention), it is essential to determine that the requirements for consent have been met and whether the investor and foreign investment qualify as such under the ICSID Convention. See Article 25 of the ICSID Convention.

international law. These legal grounds, which are discussed in further detail in the following chapters, include denials of fair and equitable treatment, unlawful expropriation and discriminatory treatment.[5]

At the end of this phase, it is important to clearly frame the investor's claim and determine the applicable instrument, procedure and strategy.

Satisfying applicable conditions precedent

Having undertaken the pre-action preparations, the investor should consider whether the investment treaty, investment contract or national investment legislation provides for certain procedures that an investor must adhere to before instituting a formal arbitration claim. An example is the requirement to comply with a 'cooling-off' period. This requirement is aimed at encouraging amicable settlement between the parties before they initiate formal arbitration proceedings.[6] Most investment treaties mandate this step and specify a time frame, usually between three to six months, for these amicable discussions or consultations. To the extent that an investment treaty contains this requirement, the investor should ideally wait for that period to elapse because a failure to satisfy the condition could result in the dismissal of its claim as inadmissible by the tribunal, even if there is a basis for jurisdiction.[7] With that said, a treaty's most-favoured nation (MFN) clause may provide a means of evading a prescribed cooling-off period as discussed in the chapter on MFN clauses.

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5 A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer, 2009).

6 See, for example, Article 13 of the China–Singapore BIT (1986); Article 12 of the Australia–Vietnam BIT (1991); Article 10(2-3) of the Argentina–Germany BIT (1996).

7 Tribunals' decisions differ on whether failure to comply strictly with a waiting period set out in an investment treaty is a bar to jurisdiction or whether the waiting period is a procedural requirement that may be dispensed with where appropriate. While some tribunals have declined jurisdiction to entertain an investor's claim for failure to comply with the waiting period required by the applicable investment treaty (see, for example, *Murphy Exploration and Production Company International v. Republic of Ecuador*, Decision on Jurisdiction, 15 December 2010, Paragraphs 90–157; *Goetz v. Burundi*, Award, 10 February 1999, Paragraphs 90–93 and *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, Decision on Jurisdiction, 14 January 2004, Paragraphs 82–88), other tribunals have found that provisions on waiting periods in investment treaties are merely procedural in nature and failure to comply with them will not rob an arbitral tribunal of the jurisdiction to entertain an investment dispute commenced under the relevant investment treaty (see, for example, *Ethyl Corp. v. Canada*, Decision on Jurisdiction, 24 June 1998, Paragraphs 77, 84–88; *Azurix v. Argentina*, Decision on Jurisdiction, 8 December 2003, Paragraph 55).

Strategic considerations for investors

The strategy in investment disputes varies considerably depending on whether you are on the side of the state or that of the investor. Here are some suggestions for those representing the investor.

For investors, the situation is very different to that of the state. By definition, investors are claimants and, at worst, they will be in the same position if the case is lost, although they may have to pay the state's costs, which can be significant.

The most important strategic approach an investor can take is to remain lucid about the case. In particular, great attention should be devoted to whether there is actually an investment under the treaty in question. Most investors ignore the specific definition of an investment in the treaty, and they frequently fail at the jurisdictional stage because they do not satisfy the requirements of the treaty.

Another important consideration is the ability to prove damages in due course. It is one thing to have a great case on the merits (for example, where there is an obviously expropriated asset). It is quite another to obtain a significant indemnification from an arbitral tribunal. This is particularly the case when the expropriated asset is a company that has no track record of profit or activity. Consulting good experts on quantum very early on is absolutely key in that respect.

Another essential consideration for investors is the collectability of any future award. Claims are a class of assets that can be financed, but awards are also assets, and they are, in principle, more liquid than claims. They can be traded on the secondary market. As such, they can provide the investor with immediate resources without going through the painful process of enforcement. This, however, presupposes there is a genuine possibility of collecting on the award. This means that the respondent state should have seizable assets of a commercial nature (assuming that there is no waiver from immunity of execution).

These three considerations are key for any investor that proposes to embark in investment arbitration.

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Resolving potential claims amicably

Although an investor may have a justifiable basis to institute formal arbitration proceedings against the host state, it is often advisable for investors to explore amicable settlement first. This usually involves the representatives of the investor and the host state engaging in constructive discussions among themselves (i.e., negotiation) or with the aid of a third party (i.e., mediation or conciliation) with the goal of an amicable, workable outcome.[8]

8 Some investment treaties expressly require the parties to explore these amicable mechanisms before resorting to arbitration. See footnote 6.

Taking this path before commencing the formal process of settling disputes has some advantages. First, it tends to minimise negative publicity of the dispute by the host state. The second advantage is that an amicable resolution can help preserve working relationships between the parties after the resolution of the dispute. This is particularly vital where the investor has long-term investment plans in the host state. Third, these mechanisms are usually faster and more cost-effective than investment arbitrations. Lastly, informal dispute resolution offers the parties the flexibility to use a fluid, creative process, unlike formal arbitration proceedings that involve comparatively strict procedural rules.

However, adopting amicable processes in the settlement of investment disputes is not free of shortcomings. For example, an arbitral award is more easily enforced around the world than a written settlement agreement between the parties.[9] The exercise could be a waste of time and costs where the process does not result in a workable solution between the parties. Further, they may not be suitable for all types of disputes and circumstances (for example, disputes that relate to public interest issues) or where the relationship between the parties has severely broken down or the matter is urgent.

While these amicable mechanisms could take various forms, the popular options are negotiation, mediation and conciliation.

Negotiation

Negotiation involves direct discussions between the representatives of the investor and the host state without the aid of a third party. The parties try to utilise their relationship to find a solution to their dispute. Negotiation is often required in investment treaties in the form of a mandatory cooling-off period between the filing of a dispute and the formal commencement of the arbitration procedures,[10] but can also extend beyond that time if doing so is likely to yield a fruitful outcome.

9 There are instances where it could be incorporated into an award or judgment. See, for example, Rule 43(2) of the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules.

10 See footnote 6.

Mediation

Mediation involves the assistance of a third party, known as a mediator, in the settlement of a dispute. The mediator aims to assist the parties in reaching their own amicable settlement to a dispute, with the exact role and involvement of the mediator varying, depending on the parties' preferences.[11]

Conciliation

This method involves a conciliator who is a neutral, impartial expert, and aims to assist the parties in resolving the issues between them. The exact role of the conciliator depends on the parties' consent.[12] The major difference between conciliation and mediation primarily lies in the degree of control that the parties have in the settlement process. While the parties give the conciliator greater control over the dispute and its processes (which, sometimes, entails the formal collation of evidence, the use of pleadings and the issuance of written recommendations by the conciliator in resolving the dispute), a mediator works towards encouraging the parties to reach a solution themselves, including through focusing on their shared interests.[13] Any agreement that is achieved through conciliation is usually memorialised in writing and can be binding or non-binding, depending on the parties' preferences.[14]

Overall, these amicable strategies for dispute resolution will often be worth exploring before commencing formal arbitral proceedings (although, sometimes, time will be of the essence, and immediate action would be required to preserve rights).[15] They can be explored without prejudice to the right of the parties to resort to other forms of dispute resolution.

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11 S Franck, 'Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements', in K Sauvant and M Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008), 143–192.

12 U Onwuamaegbu, 'The Role of ADR in Investor–State Dispute Settlement: The ICSID experience', *News from ICSID* (2005), 22 (2), 12–15.

13 L C Reif, 'Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes', *Fordham International Law Journal*, 1991, 14, 578–638.

14 J W Salacuse, 'Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution', *Fordham International Law Journal*, 2007, 13(1), 138–185. See, for example, the ICSID Rules of Procedure for Conciliation Proceedings.

15 There are instances where parties prefer to (or re-attempt to) settle their differences after the exchange of pleadings, which could help them to clearly identify the issues for determination and underlying legal arguments.

Other strategic choices for an investor – choice of forum, choice of arbitration rules, choice of arbitrator

If a claim must be presented formally, an investor may have some strategic decisions to make regarding the appropriate forum, arbitration rules and arbitrators.

Choice of forum

The investor may have a choice of forums in which to pursue its claim against the host state. For example, some investment treaties give investors a choice between pursuing their claims against the host state in the host state's national courts or in an arbitral forum. In relation to arbitral forums, there could be a choice as to whether the investor can pursue its claim through institutional arbitration rules (e.g., under the International Centre for Settlement of Investment Disputes (ICSID) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)) or under ad hoc arbitration rules (e.g., the Arbitration Rules of the UN Commission on International Trade Law (UNCITRAL)).

In relation to the choice between national courts and arbitration, investors will often prefer investment arbitration so as to access a neutral, qualified tribunal, instead of relying on domestic courts where the relevant judges may not be experienced in the subject matter of the dispute or may be biased in favour of the host state. There is also a perception that arbitration could be a cheaper and more flexible option for the parties[16] (including through the avoidance of potentially endless court appeals) and allows the parties to exercise greater control over the dispute resolution procedure (by appointing the arbitrators, choosing the arbitral rules and agreeing to the relevant timelines). More so, and as noted above, the relative ease of enforcement of arbitral awards is an attractive element of international arbitration.

It is worth bearing in mind that some investment treaties contain a jurisdictional provision that binds an investor or a host state to its first choice of dispute resolution procedure (i.e., domestic court proceedings or arbitration proceedings). This is referred to as a 'fork-in-the-road' provision. Hence, if the

16 This may not be the case in practical reality because investors have decried the system as being excessively costly and the time frame for the settlement of disputes has increased over the years.

investor chooses to pursue its claim in the domestic courts of the host state, it may be prevented from later commencing arbitral proceedings, thereby preventing the duplication of procedures and claims.[17]

Choice of arbitration rules

Many investment treaties allow the investor to choose which arbitration rules will govern the arbitration proceedings.[18] The most common – which is the focus of this chapter – are the Rules of the ICSID Convention[19] and the UNCITRAL Rules.[20] Some major differences between the ICSID and UNCITRAL options are as follows.

- Cost: arbitration proceedings under the ICSID Convention may be less expensive when compared with ad hoc arbitration under the UNCITRAL Rules because the ICSID Rules provide a fee schedule that establishes hourly fees for arbitrators, which are usually less than the typical market rates.[21] The UNCITRAL Rules, on the other hand, give arbitrators the discretion to determine their fees so long as they are reasonable.[22] In addition, and with regard to procedural expenses, the services provided by the ICSID Secretariat are at minimum cost. Arbitration proceedings under the UNCITRAL Rules, by contrast, are ad hoc in nature and not administered by an institution by default.[23] While this enables the parties to avoid having to pay an institutional fee, it can also lead to inefficiency and, ultimately, increased costs.

17 Article 9(3) of the China–Nigeria BIT (2001); Article 10(2) of the Albania–Greece BIT (1991); Article 6(2) of the Ecuador–USA BIT (1993).

18 See, for example, Article 10(4) of the Argentina–Germany BIT (1996); Article 6(3) of the Ecuador–USA BIT (1993).

19 If one of the contracting parties to an investment treaty is not a party to the ICSID Convention, an investment treaty will typically not give the parties the choice of instituting arbitration proceedings under the ICSID Convention. It will, instead, state that the Rules of the ICSID Convention will apply only when both parties become parties to the ICSID Convention or go with the Rules of the ICSID Additional Facility, the UNCITRAL Rules or other institutional rules (such as the Rules of the International Chamber of Commerce).

20 Some investment treaties provide for other arbitral rules including the Rules of the Stockholm Chamber of Commerce and the Rules of the International Chamber of Commerce. See, for example, Article 12(3) of the Russia–Madagascar BIT (2005).

21 Regulation 14 (Schedule of Fees), ICSID Administrative and Financial Regulations, 2013.

22 Article 41 of the UNCITRAL Rules.

23 The parties may agree to have UNCITRAL arbitration proceedings administered by an institution, for instance by the Permanent Court of Arbitration.

- Jurisdiction: under the terms of the ICSID Convention, an investor must satisfy the jurisdictional requirements of the relevant investment instrument and the additional requirements in the ICSID Convention.[24] Bear in mind that the interpretation of 'investment' in the ICSID Convention is unsettled. Hence, the additional layer of jurisdictional requirements imposed therein can, in some cases, add to the complexity of the arbitral proceedings and could ultimately result in the dismissal of the claim.[25] On the other hand, the UNCITRAL Rules impose no additional requirements for jurisdiction. An arbitral tribunal constituted under those Rules will, therefore, have jurisdiction over any claim meeting the requirements of the relevant investment instrument.
- Enforcement and review mechanisms: the ICSID Convention provides a unique system for the review and enforcement of arbitral awards. A party to an ICSID award may file an application for the annulment of an award and it will be decided by an ICSID ad hoc committee.[26] However, awards rendered under the ICSID Convention are not subject to appeal or review by another forum, including national courts.[27] Instead, the ICSID Convention requires national courts to enforce the award as though it is a judgment of a court of last instance.[28] This represents an advantage for the investor. On the other hand, awards rendered pursuant to the UNCITRAL Rules could be subject to set-aside proceedings in the national courts of the place of the arbitration. UNCITRAL awards cannot be enforced as the final judgment of the court of last instance. Thus, the successful party must obtain an order of

24 Article 25(1) of the ICSID Convention provides: 'The jurisdiction of the [ICSID] shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.'

25 S Manciaux, 'The Notion of Investment: New Controversies', *Journal of World Investment & Trade*, 2008, 9, 1–6.

26 Articles 50–52 of the ICSID Convention. Article 52(1) specifically provides a list of grounds for annulment, which include: where the tribunal was not properly constituted, the tribunal has manifestly exceeded its powers, corruption on the part of one of the members of the tribunal, there has been a fundamental departure from the rules of procedure and where the award fails to state the basis for which it is based.

27 Article 53(1) of the ICSID Convention.

28 id. at Article 54(1).

enforcement from the national courts of each jurisdiction where enforcement is being sought, typically based on the 1958 New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards.[29]

Choice of arbitrator

An arbitral tribunal in investor–state disputes usually composes three arbitrators. In some instances, the method of the arbitrators' appointment is stated in the applicable investment instrument. In other instances, arbitrator appointment is made by reference to the arbitration rules selected by the parties. The investor typically names the first arbitrator in the originating process (i.e., a request for arbitration or notice of arbitration), following which the host state names the second arbitrator. The presiding arbitrator is then appointed either upon the agreement of the two parties or the two arbitrators.[30]

If the arbitrators are to be appointed by the parties, there are certain factors that the investor must consider when choosing who to appoint as an arbitrator. For example, it is important to appoint an independent and impartial arbitrator to ensure a fair hearing during the proceedings. To ensure that the independence and impartiality of the arbitrator appointed are not impugned, the investor must disclose any information or previous relationship with the arbitrator.[31] Another factor to consider is the experience and expertise of the arbitrator. He or she must be someone with sufficient experience to decide the dispute to ensure a smooth and efficient hearing of the dispute by the tribunal. The availability of the proposed arbitrator is also important to ensure that he or she will invest the required time and effort throughout the proceedings.

The ICSID Rules provide certain restrictions regarding the arbitrators' nationality. In a three-person ICSID tribunal, a national of the state party to the dispute or of the state whose national is a party to the dispute may not be appointed as an arbitrator without the agreement of the other party.[32] The UNCITRAL Rules do not provide for any nationality restrictions but the nationalities of the parties to the dispute are considered in practice by the appointing authority in the event of the parties' failure to appoint the tribunal.[33]

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29 See, for example, Article 10(4) of the Germany–Russia BIT (1989).

30 See Article 37(2) of the ICSID Convention; Articles 7–9 of the UNCITRAL Rules.

31 Rule 6 of the ICSID Arbitration Rules.

32 id. at Rule 1(3).

33 Article 6(7) of the UNCITRAL Rules.

The originating process

In commencing arbitration proceedings for investment disputes, it is fundamental that certain procedures be followed to ensure that the arbitral tribunal has the competence to decide the issues.

Notice of dispute or notice of intention to submit the dispute to arbitration

As discussed above, parties are mandated to take steps towards settling their differences amicably in most investment treaties. The notice of dispute or notice of intention to submit the dispute to arbitration typically triggers the waiting period. There are usually no formal requirements for this notice. In practice, however, it takes the form of a written notification (for example, a letter), directly from the investor or its legal representatives, and addressed to the head of state or to the relevant ministry charged with the regulation of that investment, or both, identifying the investor's investment in the host state, the disputed measures adopted by the host state that negatively affect the investment, the legal principles that confirm that those measures are contrary to the provisions of the relevant investment instrument, and an offer to engage in amicable discussions.

Request for arbitration or notice of arbitration

Investment arbitration proceedings are formally commenced by the sending of a notification known as a request for arbitration (in relation to ICSID proceedings)[34] or a notice of arbitration (under the UNCITRAL proceedings).[35]

This document is not a complete statement of the investor's claims. Instead, it provides some basic information about the claims, the parties and the basis for arbitral jurisdiction, including: (1) the names and contact details of the investor and counsel; (2) the identification of and, where possible, a copy of, the arbitration agreement under which the dispute is to be settled; (3) identification of any contract, other legal instrument or relationship out of or in relation to which the dispute arises; (4) a brief description of the nature and circumstances giving rise to the claims; (5) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims; and (6) the claimant's observations or proposals as to the number of arbitrators, the language, the seat of arbitration and the law or rules

34 Article 36 of the ICSID Convention.

35 Article 3 of the UNCITRAL Rules.

of law applicable to the substance of the dispute.[36] This document does not aim to set out the claimant's claim in full (which is typically set out subsequently in the statement of claim or the claimant's memorial).[37]

The request or notice facilitates the commencement of arbitral proceedings when it has been delivered to the host state (in relation to UNCITRAL proceedings)[38] or the registration of the request for arbitration by the ICSID Secretariat (in relation to ICSID proceedings).[39]

In UNCITRAL arbitration proceedings, the host state may file a response to the notice within 30 days of its receipt.[40] This response usually contains a high-level response to the notice and not a complete statement of defence. The request/notice and response allow the tribunal to prepare for the first session because the documents will delineate the key issues in dispute. Failure to submit the response does not prevent the arbitration from kicking off.[41]

There is no similar document to a response to the request for arbitration under the ICSID procedure.

Conclusion

There is little doubt that instituting a claim against a host state relating to foreign investment can be an expensive endeavour. The initial phases of the dispute settlement process are essential because several important decisions are made at this stage of the proceedings. These decisions range from choice of forum and arbitrators to arbitration rules and so on. It is therefore essential that parties devote sufficient time and resources towards strategising and complying with relevant procedural requirements. It is also crucial to note that, at the initial stage, alternative mechanisms should be taken into consideration when seeking to resolve investment disputes. This helps to reduce the after-effects of conflicts, including the heavy costs that are involved in advancing an arbitration claim.

36 Article 3(3) of the UNCITRAL Rules; Rule 2 of the ICSID Institution Rules.
37 Rule 31(1) and (3) of the ICSID Rules; Article 18 of the UNCITRAL Rules.
38 Article 3(2) of the UNCITRAL Rules.
39 Rule 6(2) of the ICSID Institutional Rules.
40 Article 4 of the UNCITRAL Rules.
41 Article 4(3) of the UNCITRAL Rules.

CHAPTER 4

Initial Stages of a Dispute: The State's Perspective

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Introduction

Twenty or 30 years ago, if a state received a notice of dispute or request for arbitration from a foreign investor claiming the state had violated an international treaty, civil servants might understandably have been perplexed. It might well have been the first time that the state had ever dealt with such a claim.

In these circumstances, states lost opportunities to resolve disputes quickly and relatively inexpensively. Through simple inaction, they could even damage their prospects of defending the claims in arbitration.

Now, states are more aware of investor–state dispute settlement (ISDS) through their own experience or through news of cases against neighbouring states. They are more sophisticated respondents than they were a generation ago. Many have developed in-house expertise and have lawyers in the relevant ministries who can handle some or all aspects of a dispute with an investor, especially in the pre-arbitration phase. For states with less internal legal support, non-governmental organisations conduct education and training. States have also become more savvy clients when it comes to seeking external legal representation, both in deciding when to do so and in assessing potential representatives.

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Today, if a state responds passively to a notice of dispute, that will likely be a conscious decision, taking into account all relevant strategic considerations. More often, however, today's state officials will see opportunities to benefit the state through active management of a dispute from the outset.

Responding to a notice of dispute or request for arbitration must be approached in the same way as any other important state business. There must be clear allocation of responsibility: who is accountable for handling the dispute? With accountability must come the necessary authority, for example, to enable those in charge of the matter to gather information from other ministries and to engage external consultants as necessary. And, of course, there must be adequate funding from the state budget. With those elements in place, states will find that they can take advantage of opportunities to resolve disputes early and cheaply where appropriate, reject claims with confidence when that is the right course, and defend themselves rigorously in arbitration.

Against this background, this chapter aims to shed light on the initial stages of investment arbitration, with a focus on responding to two key milestones in most investor–state disputes: the claimant's notice of dispute and the claimant's request for arbitration. Starting by elucidating the conceptual framework of ISDS, this chapter highlights the importance of dispute prevention and of alternative dispute resolution (ADR) such as mediation and conciliation, also describing other procedural avenues open to states during the course of investment arbitration, including the possibility of advancing counterclaims and the strategy behind the preparation of the response to the notice of arbitration. The chapter concludes by urging states to start preparing on all fronts as quickly as possible and to proactively use all means available to avoid and manage disputes before an arbitral tribunal adjudicates an investor's claims.

The state as a respondent in ISDS

While, in principle, states and state entities could initiate arbitral proceedings against investors, they tend to act as a respondent in virtually all cases.[2] Therefore, states are often in the position of having to react to a formal or informal notice of dispute or a request for arbitration. To do so, states need to be aware of who they are dealing with and what ministries may have to be involved with the response.

Investors present a range of profiles. An Organisation for Economic Co-operation and Development (OECD) study conducted in 2012 showed that

2 G Laborde, 'The Case of Host State Claims in Investment Arbitration', *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), p. 97.

22 per cent of ISDS claimants were either individuals or very small corporations with limited foreign operations, 50 per cent were medium or large multinational enterprises, and 8 per cent were extremely large multinationals.[3]

In relation to the distribution of cases by economic sector, the International Centre for Settlement of Investment Disputes (ICSID) Caseload Statistics show that the most active sectors in terms of investment disputes are those of oil, gas and mining (25 per cent), electric power and other energy (17 per cent), and construction (9 per cent), with transportation, finance, information and communication, water, sanitation and flood protection, agriculture, fishing and forestry, tourism, and services and trade coming next.[4] Therefore, states should be aware that ISDS cases could arise from mining operations regulated by the ministry of mining, power plants overseen by the energy ministry, hotels regulated by the tourism ministry, and so on. They may also arise from general regulations issued by those ministries as well as environmental or public health regulations originating with ministries that do not ordinarily deal directly with foreign investors or consider investment and economic development to be within their remit. They may come from specific regulatory actions directed at a particular investment; for example, issuance or cancellation of a construction permit or prosecution of a tax case against a foreign-owned business. And they often may come from an alleged breach of an agreement with the specific investor, such as a mineral concession or a contract with the highway agency to build a road or bridge.

In short, while certain ministries are more likely than others to be involved in an investor–state dispute, claims can arise from the actions of almost any branch of the government, not to mention parastatals, specialised agencies, state-owned corporations, and other persons and entities for whose actions an investor might claim the state is internationally responsible. Further, disputes can be triggered by the actions of local authorities, even though it will usually be central state organs that are in charge of defending against the claim, and those local authorities may have independent power bases and agendas at cross-purposes with central

3 'Investor-State Dispute Settlement' (OECD Working Papers on International Investment 2012/03), pp. 17–18; very small corporations with limited foreign operations are defined as those with one or two foreign projects, medium and large multinational enterprises are defined as those with several hundred employees to tens of thousands of employees and extremely large multinationals are defined as those appearing on the United Nations Conference on Trade and Development (UNCTAD) top 100 multinational enterprises.

4 'The ICSID Caseload – Statistics', Issue 2021-2, p. 12, available at https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The%20ICSID%20Caseload%20Statistics%202021-2%20Edition%20ENG.pdf.

authorities; for example, elected mayors might use their planning authority to stop construction of a 'dirty' power plant in their city, even though the central energy ministry has granted permission and genuinely wants the plant to be built. In a federal state, local units may be controlled by political parties opposed to the party running the federal government, with similar tensions in how willing they are to help the state avoid or defend against international claims.

If that were not complex enough, the state's judiciary may be involved, with investors claiming that court decisions (or failures to decide) breached the state's treaty obligations. In these cases, the executive ministries and agencies dealing with the international claim may be frustrated that the courts' independence makes it difficult or impossible to control what they do or to get much cooperation from them in defending the case.

So those managing the state's response to a claim often have a formidable task.

But the state has no choice. It must defend itself, and that includes early action to head off or resolve disputes. Even if one puts aside unquantifiable state interests, such as maintaining a reputation as a law-abiding, investment-friendly jurisdiction and not damaging bilateral relations with the claimant's home state, there is a huge amount of money at stake. The average amount awarded to a successful investor has risen from US$110.9 million in June 2017 to US$315.5 million in May 2020, which represents a 184 per cent increase in only three years.[5] One important factor that is not unique to investor–state arbitration but is associated with international arbitration in general, is the cost of the proceedings. This is an important factor for the state to take into consideration during the initial stages of the dispute as it can have a dissuasive effect. These costs have skyrocketed in

5 British Institute of International and Comparative Law (BIICL), 'Empirical Study: Costs, Damages and Duration in Investor-State Arbitration', 2021, p. 28: '[e]xcluding the effect of *Yukos (Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, awarding the investor damages in the amount of US$39.97 billion and costs in the amount of €3,388,197 and US$47.9 million; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, awarding the investor damages in the amount of US$1.846 billion and costs in the amount of €156,476 and US$2.2 million; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA228, Final Award, 18 July 2014, awarding the investor damages in the amount of US$8.2 billion and costs in the amount of €697,327 and US$9.84 million) on the mean amount of pre-June 2017 awards'.

Strategic considerations for states

The strategy in investment disputes varies considerably depending on whether you are on the side of the state or that of the investor. Here are some suggestions for those representing the state.

States are always respondent in investment disputes. For them, a crucial question is whether it is worth objecting to jurisdiction when the objection to jurisdiction is not obvious, or is weak.

Very often, states do not prevail on their objections to jurisdiction, but they do prevail on the merits. States, however, have a tendency to systematically object to jurisdiction because it delays the process and may ultimately push responsibility onto a subsequent government (if, for example, delay is substantial enough).

State actors are often guided by a political agenda. It follows that their strategic decisions are not always based on strict technical considerations. There is a case, however, for not objecting to jurisdiction when the objections are weak or non-existent and focusing on the merits. This would save time and money, for both sides and for the tribunal, and this may result in the dispute being disposed of in a relatively efficient manner. In addition, if the arbitration is successful, the existing government make take the credit for it.

Of course, it is a very difficult decision to make for any civil servant or minister not to object to jurisdiction. Not objecting to jurisdiction will subsequently be criticised if the case is lost on the merits, even though the objection was devoid of any chance of success. Similarly, there is no easy way to convince a state to settle a case when there is no prospect of prevailing on the merits. Very often, state representatives prefer an award against the state rather than the risk of subsequent criticism for having taken the decision to cut the investor a cheque.

In summary, the most important strategic consideration for states is perhaps to strike the right balance between unavoidable political imperatives and the necessary technical analysis of the case.

– Philippe Pinsolle, Quinn Emanuel Urquhart & Sullivan LLP

recent years,[6] with the average cost for parties now at over US$8 million and costs exceeding US$30 million in some cases.[7]

On top of these important costs, states are wary of the flexible rules on the allocation of costs, as they can be perceived as a source of uncertainty. The

6 UNCTAD, 'Investor-State Disputes: Prevention and Alternatives to Arbitration' (2010), pp. 16–18.

7 'Investor-State Dispute Settlement' (OECD Working Papers on International Investment 2012/03), p. 19.

'traditional' position until relatively recently was that each party bore its own cost.[8] This has changed over the years. In June 2017, a British Institute of International and Comparative Law study found that both ICSID and United Nations Commission on International Trade Law tribunals have awarded adjusted costs to follow the 'loser pays' principle in around 75 per cent of cases under both sets of arbitration rules.[9] That means there is even more at stake in winning the case, as the state may recoup some of its expenses if it does so, while it may be on the hook for millions – or tens of millions – of dollars of costs run up by claimants if it loses.

Steps following notice of dispute – internal case management and preparation

Time is the most valuable asset to a state in investment arbitration, meaning that preparation is key.[10] To ensure the best possible outcome, states, just like investors, should start preparing as soon as possible and, in any case, as soon as they receive a formal or informal notice of dispute.[11] To do what many states appear to have done in bygone decades – ignoring a notice of dispute and doing nothing until a request for arbitration is received – is not a sensible policy. Even if there seems to be little hope of settling the dispute short of arbitration, the state needs to engage with the claim immediately, so that when the request for arbitration arrives, it is ready to respond in a timely fashion and does not, for example, lose its right to participate in the formation of the arbitral tribunal while it belatedly tries to retain external legal advisers.

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8 BIICL, 'Empirical Study' (footnote 5, p. 16) found that, prior to 2013, 56 per cent of costs orders were unadjusted (i.e., each party had to bear its own costs). The proportion of unadjusted costs orders fell to 36 per cent by May 2017. Since June 2017, tribunals have continued to favour issuing adjusted costs orders. Between June 2017 and May 2020, less than 23 per cent of tribunals ordered parties to bear their own costs.

9 BIICL (footnote 5), p. 19: 'individually, 75% of ICSID tribunals and 77% of UNCITRAL tribunals have made adjusted costs orders'.

10 Paolo Di Rosa, 'Challenges for Counsel in the Representation of States and State-Owned Entities in International Arbitration: A Practitioner's Perspective', in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Series, Volume 20 (International Council for Commercial Arbitration/Kluwer Law International, 2019), p. 608.

11 Preparation could commence at an earlier stage with dispute resolution strategies. These are analysed below.

Lead agency within the state

Internal preparation often entails the involvement of all state entities, authorities and sub-divisions that are either directly or indirectly associated with the dispute, thus adopting the 'whole government approach'.[12] States that work to identify all relevant entities and in turn identify people within them capable of assisting – both managerially and substantively – in the handling of potential ISDS claims will have the best chance of successfully resolving the dispute in hand. An internal team, once in place, will need to develop a strategy, often with legal counsel, covering all aspects of the dispute, including gathering evidence, identifying potential fact witnesses and experts, devising a case theory and handling the political and media issues.[13]

Legal representation

Some large states that have participated in a large number of cases, such as the United States and Canada, have specialised in-house legal teams that deal solely with investment arbitration. This, however, is not the case for all states. For states with little to no investment arbitration experience, the guidance of external counsel from the initial stages of the dispute is invaluable. When considering instructing external counsel, states may either use counsel they have previous experience with or call for tenders from different law firms. It is also possible for states to use a combination of in-house and outside counsel.

States may resist retaining external counsel at the notice of dispute stage because of the cost. This may be a mistake in many instances. If a state has internal ISDS expertise – in the justice ministry or attorney general's chambers, for example – external advice may not be necessary. Some disputes may appear to be easily resolvable without a significant prospect of going to arbitration. Finally, those in charge of responding to the notice of dispute may find that there is no budget that can be used for external counsel. But if the dispute does eventually go to arbitration, the state will be better off having engaged external counsel early. It will be in a better position to respond in a timely manner to the early stages of arbitration. If there is no budget available when the notice of dispute arrives, it will often be advisable to start the sometimes lengthy process of requesting funding immediately, as it will be too late to do so after an arbitration has begun.

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12 See, for example, Guatemalan Ad Hoc Decree No. 128-2009 of 5 May 2009, by virtue of which Guatemala put in place an Inter-Institutional Commission with the objective of handling two investment arbitrations the state was facing.

13 See, on this topic, Meg Kinnear and Aïssatou Diop, 'Use of the Media by Counsel in Investor–State Arbitration' (ICCA Congress Series No. 13, 2006) (November 2012).

Evidence and document collection

Documents are an essential component of ISDS as they help support and establish a state's defence strategy and counterclaim (if any), while also playing an important role during the document production stage. Loss or destruction of documents, after the investor has given notice of a claim, may not only mean the state has lost evidence that could have been used in defence, it can also become the basis for a tribunal to draw inferences against the state, in which it is assumed that the lost or destroyed documents would have helped the investor's case. Early document collection enables the state to have a clear picture of the dispute, assess the risk of escalation, monitor time constraints and undertake the steps and procedures set out in the investment treaty, the contract or the legislation.[14] Therefore, it is of the utmost importance that states prioritise document compilation and preservation at an early stage, irrespective of whether they plan to try to settle the dispute or not.

Document collection and preservation is commonly a lengthy and complicated exercise for states to undertake. States often face obstacles, given that documents relevant to their defence can be spread among different state entities and offices. In addition, the degree of file keeping will vary widely in the different relevant state entities, and some ministries may have little desire to go to the effort of gathering documents or may even be secretive and unwilling to share their information with civil servants from other state organs that are responsible for defending against the claim.

To avoid delays in collecting evidence and information, certain states have put in place inter-institutional arrangements or systems within the host government. For example, Peru has created a Commission and Colombia has a system in place to ensure an efficient flow of information for arbitrations.[15]

Funding

To meet costs without delay and to organise a proper defence, safeguarding a source of funding and the accessibility of funds must be ensured by the state. Special requests for the necessary budget may need to be made. A budget should be prepared in advance of commencing the proceedings based on the expected costs. It is important that the budget has some leeway for unexpected matters but also that it is updated as the proceedings advance to ensure the state manages costs in an efficient manner.

14 'Investor-State Disputes: Prevention and Alternatives to Arbitration – UNCTAD Series on International Investment Policies for Development', 2010, p. 113 et seq.

15 id., p. 86.

Dispute prevention, consultations and ADR

The dramatic increase of ISDS claims, coupled with the significantly high compensation awarded to successful claimants, has made it critical for states to devise strategies to settle potential claims before disputes are brought before and become adjudicated by arbitral tribunals. To this end, this section analyses how states may rely on and take advantage of the existing variety of dispute prevention and ADR processes.

Dispute prevention policies

Dispute prevention is a means 'to improve the business environment, to retain investments and to resolve investors' grievances swiftly'.[16] The purpose of dispute prevention policies (DPPs) is, inter alia, to timely alert government authorities as to the existence of emerging conflicts and disputes with investors. DPPs may include measures taken at the national level through the utilisation of institutional mechanisms within the host state for the prevention of the emergence and escalation of disagreements, thereby ensuring that investors' grievances do not culminate into disputes. These measures may include, without limitation: (1) the assignment of a lead agency that would serve as a one-stop shop[17] with the task of establishing a communication channel with investors and the governments of the contracting state parties; (2) the systematic compilation and evaluation of investment contracts, treaties and cases, and making these available to the public; (3) the identification of sensitive sectors (i.e., sectors where investment disputes are more likely to arise) and the provision of 'investment aftercare' to support investors engaging in these sectors; and (4) the establishment of an early grievance-detection mechanism that will allow the state to conduct early settlement discussions with the affected investor.[18] Additionally, DPPs may also include measures taken at the international level. These measures may include, inter alia, state-to-state cooperation through institutionalised dialogue, and capacity-building and training with the purpose of narrowing the knowledge gap between states in relation to the identification and management of ISDS.[19]

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16 UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Possible Reform of Investor-State Dispute Settlement (ISDS), Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution, Note by the Secretariat, A/CN.9/WG.III/WP.190, Paragraph 5, available at https://undocs.org/en/A/CN.9/WG.III/WP.190.

17 'Investor-State Disputes: Prevention and Alternatives to Arbitration – UNCTAD Series on International Investment Policies for Development', 2010.

18 UNCITRAL Working Group III (footnote 17), Paragraphs 11–23.

19 id., Paragraphs 8 and 24–26.

The extra challenges presented when your client is a state

Claims in investor–state arbitration proceedings frequently discuss measures adopted by organs of the different branches of government, both at the central and regional level. The number of entities implicated and the differing levels of availability of written evidence, as well as internal administrative processes to obtain information and documents, all serve to create an added level of complexity for external counsel.

While some states rely on their own state-employed lawyers for advice and representation in investor–state disputes (e.g., Canada, Spain and the United States), other states, particularly those in Eastern Europe, Africa, Latin America and the Middle East, prefer to retain a law firm as external counsel. In these cases, the state normally relies on a state agency (for example, the Special Commission in Peru, the State Attorney General's Office in Ecuador and the National Agency for Legal Defence of the State in Colombia), which instructs and is the main point of contact of the state with counsel.

These agencies typically also act as a liaison between the different state entities affected by the dispute and the law firm, and they are in charge of gathering, filtering and centralising the information provided by those entities. They also provide assistance in identifying and contacting the potential fact witnesses, as well as participating in the retention of expert witnesses and the appointment of arbitrators. In some instances, state-employed attorneys may also participate in the drafting of submissions and the development of strategy.

Tips/challenges

Gathering evidence and internal information from the state organs implicated in a dispute is a unique challenge. In particular, in cases where the facts at issue date back several years or even decades, the relevant evidence and information may be located within the archives of public entities that are, at best, not fully digitalised, and at worst, poorly maintained or non-existent.

The retrieval of evidence might also be subject to extensive administrative processes and authorisations from public agencies. Accordingly, external counsel should plan to obtain the relevant documents well in advance, bearing in mind that the relevant entities might take weeks or even months to obtain the information, and may be subject to delays. Further, external counsel should prepare detailed and specific lists of documents to minimise the risk (and resulting delays) of obtaining incomplete or incorrect documentation.

Identifying and selecting fact witnesses has similar complexities. The personnel who were actors in the events giving rise to the claims may no longer be part of the government or may be reticent to participate in the proceedings for fear of engaging their own personal responsibility. Therefore, it is the task of the law firm to educate interviewees and potential witnesses with sufficient detail on the scope and potential personal implications of appearing as witnesses in an investor–state arbitration.

> The preparation of written submissions also requires significant coordination between the state attorneys and external counsel. External counsel should discuss with the state attorneys the structure, scope and content of pleadings well in advance to avoid last-minute substantial changes or delays. It is also important to consider whether a translation of the draft pleadings into the language of the state is necessary or appropriate, and to plan accordingly. In this regard, the procedural calendar should provide a buffer for the translations and should take into account local holidays as well as elections and political events that may affect the availability of the relevant contacts in the state.
>
> In short, organisation and efficient communication between state attorneys, government entities and external counsel are of the essence for a successful representation of a state.
>
> – Fernando Mantilla-Serrano, Latham & Watkins

Juxtaposed with ADR, which attempts to settle conflicts that have climaxed into disputes, DPPs endeavour to prevent the emergence of disputes in the first place. DPPs may also be useful where an investor serves the respondent state with a notice of dispute before commencing an arbitration. The notice of dispute usually apprises the host state of how a certain policy or measure has adversely affected the investor's rights under an investment treaty or other legal instrument. The existence of robust and proactive DPPs would enable the state to direct the investor's notice to the relevant government officials so that they may examine the investor's claims and find means to resolve them without resorting to arbitration.

Recently, Egypt has attempted to create a similar framework through amendments to its Investment Law No. 8/1997. Given the fact that at least 14 claims have been brought against Egypt since 2011, the amendment intends to reduce Egypt's exposure to international investment arbitration. As a result, a new Chapter 7 titled 'Investment Disputes Settlement' has been added to the country's arbitration law. The Chapter has established a three-pronged approach to preclude conflicts from culminating into an arbitration: first, it creates a Complaint Committee to consider challenges against administrative decisions and regulations issued by the General Authority for Investment with respect to the implementation of investment law; second, it envisages a Ministerial Committee for the Resolution of Investment Disputes to consider disputes arising between investors and a government body with respect to the implementation of the Investment Law; and third, it also establishes a Committee for the Settlement of Investor Contract Disputes

for the purpose of settling disputes between investors and government bodies arising out of investment contracts.[20]

On that basis, it becomes evident that the existence of effective DPPs allows states to avoid the risk of an unfavourable arbitral award, which may also embolden other investors to challenge the same or similar measures and policies. Moreover, protracted arbitrations between a state and investors affect the state's credibility as a safe destination for investments, thereby hurting its ability to attract other investors. Effective DPPs are, thus, the *sine qua non* towards precluding conflicts from escalating into disputes and are critical, especially given that the state's role and regulatory sphere have expanded in the aftermath of covid-19.

ADR methods

While DPPs may be useful to preclude the emergence of disputes, ADR methods such as mediation and conciliation may also assist in the settlement of conflicts that have ripened into disputes. Aiming to replace the escalation to both ISDS and national courts, ADR methods represent a less time- and cost-consuming alternative that offers a high degree of flexibility to the disputing parties, allows the preservation of long-term relationships and succeeds in 'averting disputes and avoiding the intensification of conflicts'.[21]

Cooling-off periods

Almost 90 per cent of all international investment agreements (IIAs) envisage a cooling-off period between the submission of a claim and the commencement of an arbitration, ranging from three to 18 months, during which the investor shall abstain from initiating arbitration, thus enabling the disputing parties to attempt the amicable settlement of the dispute through ADR processes such as consultations and negotiations, mediation and conciliation. Notwithstanding the existence of these two-tier dispute settlement clauses, data from arbitral institutions indicates that the first tier of dispute settlement is seldom used.[22] This

20 Fatma Salah, 'Egypt: New Investment Law – ADR for Investor-State Disputes', *Kluwer Arbitration Blog*, 2015.

21 UNCITRAL Working Group III (footnote 17), Paragraph 30.

22 ICSID statistics indicate that about 35 per cent of ICSID cases were settled or otherwise discontinued, which might indicate the use of ADR by the parties to some extent (see 'The ICSID Caseload – Statistics', p. 11). To date, ICSID has registered 13 conciliation cases, including two additional facility conciliation cases, and no cases under the ICSID Fact-Finding Additional Facility Rules. The Permanent Court of Arbitration has not yet administered mediation proceedings based on a treaty, nor have the Energy Charter Secretariat or the Stockholm Chamber of Commerce (SCC) administered any investor–state mediation.

is arguably due to the fact that the majority of IIAs merely provide a generic instruction to the disputing parties to attempt to resolve their disputes 'amicably' during the cooling-off period, without elucidating the manner and procedure through which the amicable settlement may take place.[23]

Conciliation

Conciliation is a process whereby a third person (the conciliator) provides a non-binding, independent and impartial evaluation of the rights and obligations of the disputing parties, and proposes non-binding recommendations on the appropriate settlement of the dispute. The conciliation procedure is often governed by a pre-established set of rules that, contrary to arbitration rules, give conciliators flexibility to interact with the parties – for example, to communicate confidentially with one party on an *ex parte* basis – to facilitate the achievement of a fair settlement.

Mediation

Mediation is a process whereby a third person (the mediator) assists the disputing parties in reaching an amicable settlement of their dispute. As a form of assisted negotiation, mediation is appropriate at all stages of the 'investment life cycle', both before and after the official commencement of arbitration.[24]

Keeping in mind the fact that both conciliation and mediation may be difficult in the absence of an investment treaty expressly providing for these processes, parties should consider incorporating a detailed conciliation or mediation clause, or both, in their investment treaties, and respondent states should be open to the possibility of suggesting the settlement of investment claims through these ADR processes. This approach could shed light on, among other things, the manner

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23 See, for example, Peru–UK BIT (1993), Article 10 ('Any legal dispute arising between one Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former shall, as far as possible, be settled amicably between the two parties concerned. If any such dispute cannot be settled within three months between the parties to the dispute through amicable settlement, pursuit of local remedies or otherwise, each Contracting Party hereby consents to submit it to [ICSID] for settlement by conciliation or arbitration . . .'. Other examples are found in the Hungary–UK BIT (1987), Article 8, the Indonesia–Netherlands BIT (1994), Article 9 and the Georgia–Israel BIT (1995), Article 8.

24 UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 'Possible Reform of Investor-State Dispute Settlement (ISDS): Mediation and Other Forms of Alternative Dispute Settlement', Note by the Secretariat, Draft Guidelines, Article 2, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_guidelines_on_mediation.pdf.

in which a party may invoke ADR mechanisms and whether parties would be allowed to invoke other forms of dispute resolution while they attempt to either conciliate or mediate their disputes, and the time frame to address disputes via conciliation or mediation, or both, before resorting to other means.

With states attempting to revive their economies in the aftermath of covid-19, it is imperative that they create an environment that is conducive to foreign investments. Critical for these investments is the existence of a mechanism whereby states endeavour to, first, address investors' grievances before they culminate, and second, ensure the resolution of these grievances amicably and in good faith if they escalate into conflicts. In the absence of these mechanisms, states and investors both continue to grapple with uncertainty.

The originating process – responding to the notice of arbitration

If the investor does start an arbitration, the state must be prepared to respond promptly. Tribunals can be sympathetic to the fact that states need more time than commercial parties to make decisions and put together written submissions. But there are limits. If a state received notice of the dispute many months before the request for arbitration, the tribunal might reasonably expect it to have worked out its defences. Even before the dispute gets before a tribunal, the state may be severely prejudiced if it misses deadlines for participating in the appointment of the tribunal. Further, an investor may seek emergency relief by way of interim or provisional measures, and the state must have a legal team in place to deal with any such requests. States can harm themselves if the claimant obtains a measure more or less by default, and then state organs – which may not even know the measure is in place – may violate the measure, painting the state as 'rogue', fairly or not, from the outset.

Initial steps

Depending on the applicable IIA and arbitration rules, the notice of (or request for) arbitration will identify the disputing parties, the investment, the nature of the dispute, the applicable legal instruments and the manner in which the parties consented to arbitration. At this stage of the procedure, the investor needs to develop in detail its factual and legal arguments.[25] However, if the state has actively

25 ICSID, 'Practice Notes for Respondents in ICSID Arbitration' (2015), available at https://icsid.worldbank.org/sites/default/files/publications/Practice%20Notes%20for%20Respondents%20-%20Final.pdf.

managed the dispute resolution process since receiving the notice of dispute, it should have a reasonable idea of the underlying facts, even if the claimant's legal theories may be as yet obscure.

Once the arbitration proceedings have commenced, the respondent state will have a relatively short period of time available to file a response to the notice of arbitration. Under most arbitration rules, this period of time is set at 30 days, with short extensions often being granted upon a reasoned request.[26] States should be careful to make such a request if necessary, rather than simply failing to respond. Again, while an administering institution or eventual tribunal may sympathise with the state's need for extra time, apparent disregard for the process is rarely helpful, and defaults might result in irreversible actions such as the appointment of an arbitrator on the state's behalf.

Although the state's response may be the first opportunity to give the state's version of events, it can be at least equally important for its procedural content, such as the state's proposals concerning the number and method of appointment of arbitrators, the actual nomination of an arbitrator, comments on the applicable law and the language of the proceedings, and its position on the seat of arbitration.

At this stage, the state will want to consult its legal advisers (internal or external) about important procedural matters, such as whether to seek bifurcation of jurisdictional objections. It will also need to consult with all stakeholders – through lines of communication that, ideally, will already be in place from the pre-arbitration phase – to determine a realistic procedural timetable that it can propose.

Counterclaims

Like any respondent, a state can raise counterclaims. These counterclaims may seek damages for environmental harms caused by the investment,[27] the investor's failure to comply with tax laws[28] or the investor's failure to provide the necessary

26 See, e.g., ICSID Convention and ICSID Arbitration Rules, ICSID Additional Facility, UNCITRAL Arbitration Rules (as adopted in 2013), Article 4, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (in force as of 1 January 2017), Article 9, available at https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf.

27 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017, Paragraph 62.

28 *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/06/11, Award, 21 June 2012, Paragraph 265.

level of investment.[29] When available, counterclaims can be highly beneficial: they can increase procedural efficiency, mitigate the asymmetrical nature of the international investment regime and provide the state settlement leverage.

Generally, a tribunal's jurisdiction over a counterclaim depends on the scope of the parties' consent, the dispute settlement clause of the IIA and the relationship of the counterclaim with the primary claim or claims.[30]

In relation to the parties' consent, where the dispute settlement clause permits any and all disputes to be submitted to arbitration, tribunals tend to admit jurisdiction over the state's counterclaim.[31] In contrast, where the dispute settlement clause is restrictive, tribunals tend to dismiss the counterclaim.[32]

In addition to the requirement of consent, for a counterclaim to be admitted by an arbitral tribunal it should have a sufficiently close connection with the primary claim or claims. Arbitral tribunals have adopted different approaches as to whether the test for establishing connectivity is a legal or a factual one. The tribunal in

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29 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, Paragraph 1187.

30 Shahrizal M Zin, 'Chapter 11: Reappraising Access to Justice in ISDS: A Critical Review on State Recourse to Counterclaim', in Alan M Anderson and Ben Beaumont (eds), *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?* (Kluwer Law International, 2020), p. 227. See also *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, Paragraph 61; *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, Paragraph 118; *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, Paragraph 713.

31 See, e.g., *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, Paragraph 39; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Award, 1 March 2012, Paragraph 432; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, Paragraph 410; *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Final Award, 15 December 2014, Paragraph 661; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, Paragraph 1187.

32 *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, Paragraph 869; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, Paragraph 333; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, Paragraph 627; *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019, Paragraphs 526–530; *Iberdrola Energía, S.A. v. Republic of Guatemala (II)*, PCA Case No. 2017-41, Final Award, 24 August 2020, Paragraphs 385–392.

Saluka v. Czech Republic found that a legal connection was required, ruling that the counterclaim must have the same legal basis as the primary claim,[33] while other tribunals have admitted counterclaims that arise out of the same subject matter.[34]

When it is not possible to bring counterclaims in the proceeding initiated by the investor, a state many consider raising its claims against the investor in separate proceedings. These may be before a local court, administrative body or arbitral tribunal that has jurisdiction over the state's claim. Often, the parties may not be precisely the same as in a case commenced against the state; for example, the claimant may be the state-owned corporation that entered into a contract with the investor, rather than the state itself; and the respondent might be a locally incorporated investment vehicle, rather than the foreign shareholder that is party to the first proceeding. Whether to commence a separate proceeding is one of the strategic decisions the state must make at the earliest stage, as it may be possible to persuade the ISDS tribunal to defer to the other court or tribunal's findings – though, in practice, this is rare unless the separate case proceeds quickly. Similarly, if there are state judicial or administrative regulatory proceedings because of the investor's possible violation of tax or environmental regulations, for example, the state will want to ensure that these proceedings do not prejudice the ISDS defence and that the ISDS tribunal respects the state's right to continue with its normal processes, as the claimant may seek provisional measures to stop these proceedings.

Conclusion

While arbitration is an effective means of dispute resolution, states will save time and cost if investor disputes can be avoided altogether or resolved through negotiations or other non-contentious means. Moreover, a state may harm its reputation as a place for foreign investments if it faces multiple arbitrations from different investors. It is therefore critical to develop practices that reduce the state's exposure to investor disputes, such as those implemented in Egypt. Nonetheless, where strategic interests, investors' intransigence or other factors render recourse to arbitration necessary, it is imperative that states start preparing as soon as they receive notice of the dispute so as to be in control of all aspects of the arbitral process.

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33 *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, Paragraphs 62–77.

34 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, Paragraph 1151; *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Final Award, 15 December 2014, Paragraphs 667–668.

CHAPTER 5

Managing Counsel

Ana María Ordoñez Puentes, Elizabeth Prado López, Giovanny Vega-Barbosa and Yadira Castillo Meneses[1]

This chapter addresses the main challenges typically faced by states working alongside external counsel in investor–state arbitration. In particular, it provides insights and recommendations concerning: (1) the selection of in-house and external counsel; (2) the coordination between local teams and external counsel; and (3) the coordination between government departments and external counsel. The overall theme of the chapter is that a mixed model of legal defence can result in short- and long-term benefits, only when it is genuinely and patiently approached by both external and in-house counsel as a source of capacity building for the in-house team. This means that in-house counsel should behave in the mixed model as co-counsel of the external counsel in a reciprocal relationship that aims to exchange the valuable knowledge, skills, perspectives, experiences and information available to in-house and external counsel.

Selection of counsel by states

Here we posit that the selection of counsel should be premised first and foremost on considerations of merit and absence of conflicts of interest. However, we also argue that other – less obvious - criteria should be applied, particularly when seeking to maximise the benefits of a mixed model of legal defence.[2]

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2 In mixed or hybrid models, the state represents itself and acts as counsel but is assisted by external counsel. The major benefit of this model is that control is retained over the most important decisions in the arbitral procedure, while at the same time access is gained to valuable knowledge on technique and tactics from highly qualified practitioners.

Selection of counsel: a question of merit and absence of conflict of interest

It is not the general rule for states to have a permanent body of qualified practitioners with expertise in the law and practice of international tribunals. The selection of external counsel is recommended so as to ensure that the highest interests of the states are defended by the most fitting counsel in the area until the necessary internal capacity is built. Engaging external counsel also makes sense in obtaining an objective assessment of the dispute.[3] The selection of the in-house team is also relevant. A skilled and competent internal legal team is essential for the successful management of an arbitration.

The first set of considerations in choosing counsel is – and should be – the proven ability of and experience in successfully handling complex disputes and the absence of conflicts of interest.

Competence and ability

The relevant criteria usually considered when choosing external counsel include the following:

- successful experience as counsel in complex international investment disputes, preferably defending states in the region;
- experience in the particular subject matter or sector of the dispute;
- proven knowledge of the domestic law regime within members of the team, preferably by having members of the nationality of the respondent state;
- experience of partners and associates who will be working on the case;
- fluency in the relevant languages by the members of the team that will be working on the case;
- in certain cases, the necessary institutional capacity to accommodate the needs of complex large-scale disputes;
- propensity of members of the counsel team to also act as arbitrators;
- fees;
- proposal for capacity building of the in-house team; and
- strength and quality of the initial jurisdictional and merits analysis (normally included in the offer of legal services).

3 Sir Arthur Watts, 'Preparation for International Litigation', in Tafshir Malick Ndiaye and Rudiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Brill Nijhoff, 2007), p. 331.

A holistic assessment is recommended, but the balance can tilt towards favouring one or other factor depending on the characteristics of the dispute.

One commentator has recommended that a 'State that has not already retained counsel for its international disputes must do so as soon as possible after receiving indication that a claim is being or has been filed'.[4] We clarify that 'as soon as possible' depends on each case. Almost every set of rules of procedure allow states time to properly analyse the case. Experienced in-house teams will often have the ability to identify potentially fatal defects in the application that need to be invoked within certain time frames. This means that limited resources in the early stages of the arbitration proceedings should not be destined solely to selecting counsel, but also to analysing the merits of the dispute, and indeed both objectives are complementary.

Once the case is sufficiently understood, decision makers normally turn to the legal industry to establish who are the top arbitration practitioners in a certain matter or sector. The first filter comes as a result of the inability of certain lawyers to demonstrate previous experience and therefore expertise in the particular subject matter. While specialising in the defence of states is not necessarily decisive as to which counsel to choose, practice shows that benefits usually derive from counsel's previous knowledge about the complexities and challenges associated with defending a state.[5]

Some may say that selecting counsel is nowadays an easy endeavour given the variety of resources allowing practitioners to rapidly find the relevant information and carry out automated and reliable conflict checking. We strongly oppose this view. State officials should always undertake counsel selection as a serious and complex task, and one that can benefit from, but should never be limited to, the inclusion and comparison of names in specialised data bases and platforms. In-house teams should approach counsel selection on a case-by-case basis, considering all relevant factors, including information of an intimate character only available in state archives or to public officials. This should apply identically to relatively small and complex large-scale disputes.

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4 Jeremy K Sharp, 'Representing a Respondent State in Investment Arbitration', in Chiara Giorgetti (ed.), *Litigating International Investment Disputes: A Practitioners Guide* (Brill Nijhoff, 2014), p. 45.

5 On this matter, see id., pp. 41–79.

The tasks referred to above can be better performed by competent in-house teams. Accordingly, states should be prudent and wise in the selection of legal professionals dealing with this task.[6]

Identification of conflicts of interest

Once competence and ability are properly established, the list of eligible external counsel can and should be further narrowed down based on potential or actual conflicts of interest.

State officials should first look carefully at previous cases defended by counsel in the search for instances of conflict. This is a delicate endeavour but can certainly be performed by the in-house team on the basis of public information and their knowledge of the dispute.

Moreover, together with following general guidelines on party representation,[7] states may go as far as is necessary to prevent conflicts of interest. For these purposes, some states indicate in their requests for proposals that the law firm is not eligible if it has acted against the state or any governmental department for a number of years, or require an express commitment that the law firm will not do so for a number of years in the future, or at least in cases in the same field or against state entities concerned with the dispute, during the term of the contract. In any event, problems can arise from non-disclosure by counsel, or simply by supervening and unexpected circumstances triggering a potential conflict of interest of party representatives in relation to members of the tribunal, or the other party.[8]

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6 Sir Arthur Watts, 'Preparation for International Litigation', in Tafshir Malick Ndiaye and Rudiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Brill Nijhoff, 2007), pp. 331–332.

7 For guidelines on the expected conduct of counsel and party representatives in international arbitration, see 'IBA Guidelines on Party Representation in International Arbitration: adopted by a resolution of the IBA Council', 25 May 2013 (the IBA Guidelines), available at: https://iaa-network.com/wp-content/uploads/2021/03/IBA-Guidelines-on-Party-Representation-in-Int-Arbitration-2013.pdf.

8 Recently, it was reported that the Canadian Federal Court knew of a request by a claimant in a North American Free Trade Agreement arbitration to review a decision by the Trade Law Bureau of Global Affairs of Canada (TLB), by which it refused to remove a member of the counsel team representing Canada in that arbitration, on the basis that such member had been previously employed by the third-party funder, thereby having access to privileged information. By failing to establish a sufficiently close connection between the TLB and characterising the composition of counsel for the purposes of international representation as a private matter, the Court was able to avoid pronouncing on the core of the matter. This is an important question. See Fahira Brodlija, 'Counsel Ethics in International Arbitration: The Glass Slipper Still Does Not Fit', *Kluwer Arbitration Blog*,

One of the few known examples of challenges against a member of the respondent's counsel team is *Hrvatska Elektroprivreda dd v. Slovenia*.[9] This case illustrates the inconveniences deriving from poor reasoning in counsel selection and serves as a reminder that caution should be exercised not only at the early stages, but throughout the arbitral proceedings.[10]

Importantly, absent universally accepted rules,[11] uncertainty about a tribunal's power to rule on challenges to counsel,[12] and the paucity of arbitral practice in this regard,[13] states should see themselves as the only real guardians of their interests.

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2 July 2021, available at: http://arbitrationblog.kluwerarbitration.com/2021/07/02/counsel-ethics-in-international-arbitration-the-glass-slipper-still-does-not-fit/.

9 *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel, 6 May 2008. See also *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, 14 January 2010; *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Application for Disqualification of Counsel, 18 September 2008.

10 The tribunal expressly noted, that '[t]he last three matters were errors of judgment on the Respondent's part and have created an atmosphere of apprehension and mistrust which it is important to dispel'. *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel, 6 May 2008, Paragraph 31.

11 As noted in the preamble of the IBA Guidelines, '[u]nlike in domestic judicial settings, in which counsel are familiar with, and subject, to a single set of professional conduct rules, party representatives in international arbitration may be subject to diverse and potentially conflicting bodies of domestic rules and norms.' The IBA's study shows that the high degree of uncertainty regarding rules governing party representation in international arbitration is exacerbated by confusion deriving from the inclusion of individual counsel from massive global law firms (which could give rise to a range of potential conflicts). In any event, the IBA Guidelines are just one of the products of association concerned with the absence of clear guidance for counsel.

12 Commenting on uncertainty over the enforcement of ethical rules and the recognised limited competence – to protect the integrity of the proceedings – of investment tribunals in this regard, see Carolyn B Lamn, et al., 'Has the Time Come for an ICSID Code of Ethics for Counsel?', in Karl Sauvant (ed.), *Yearbook on International Investment Law & Policy 2009–2010* (Oxford University Press, 2010), p. 277. See also *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, 14 January 2010, Paragraph 16; *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Application for Disqualification of Counsel, 18 September 2008.

13 Indicating that challenges to counsel are understandably rare; see Cesare Romano, et al. (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014), p. 645.

Moreover, given the multiplicity and variety of first-class counsel in the global market, there is simply no need or excuse for states to engage those who may put them in difficult positions once any instance of conflict is identified.

As a final remark, choosing the right counsel and one free from conflicts of any kind is also important for certain systemic reasons. State officials should bear in mind that every claim in investor–state arbitration proceedings will inevitably become part of the state's practice in public international law.[14] This means pleadings should genuinely represent states' views on questions of treaty interpretation, the status of customary international law and the scope and extent of certain primary rules.[15]

14 See the broad and comprehensive approach to state practice endorsed by Sir Michael Wood, the Special Rapporteur on the identification of customary international law, and by the International Law Commission itself. ILC, 'Draft conclusions on identification of customary international law', *Yearbook of the International Law Commission*, 2018, Volume II, Part Two, Conclusion 5. According to Sir Michael Wood, 'every act of State is potentially a legislative act. Such acts may comprise both physical and verbal (written and oral) conduct: views to the contrary, according to which "claims themselves, although they may articulate a legal norm, cannot constitute the material component of custom, are too restrictive"'. 'Second report on identification of customary international law', Michael Wood, Special Rapporteur, Geneva, 5 May to 6 June and 7 July to 8 August 2014, A/CN.4/672, Paragraph 37. Even under the more restrictive view, authors have considered that state claims in arbitral proceedings amount to state practice. 'The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiations and international arbitration.' *Fisheries*, Judgment of 18 December 1951, *I.C.J. Reports*, 1951, p. 116, at Paragraph 191, Dissenting Opinion of Judge J E Read.

15 'State pleadings, moreover, may constitute evidence of State practice for purposes of developing customary international law. State counsel thus must ensure that State pleadings are carefully vetted, not only for persuasiveness in any particular case, but also for compatibility with the State's long-term interests in the development of international law. States also must ensure that their legal arguments are consistent with their broader policy interests. The respondent State in an investment arbitration is not simply "a commercial entity"; it "is a sovereign State, responsible for the well-being of its people". Counsel for the State thus represent, and must vigorously protect, the interests of the people.' Jeremy K Sharp, 'Representing a Respondent State in Investment Arbitration', in Chiara Giorgetti (ed.), *Litigating International Investment Disputes: A Practitioners Guide*, (Brill Nijhoff, 2014), p. 42.

Other important factors allowing the benefits of a mixed model of legal defence to be maximised

Contractual arrangements

A key factor in managing external counsel efficiently is avoiding, as much as possible, billing structures requiring approval of specific costs and billable hours. This approach is not just time-consuming but also creates a high risk of uncertainty as to the public funds required for the defence of a particular dispute. The interests involved are better served through fixed-fee proposals, payable upon satisfactory receipt of certain products related to key documents in the arbitration. This is also a source of efficiencies as it allows in-house teams to focus on substantial activities. Therefore, the recommended approach is to request a fixed fee.

Benefiting from different resources, litigation styles and perspectives

For states facing more than one investor–state arbitration, which is often the case,[16] the selection of counsel may also be influenced by the interest of accessing and learning from various arbitration styles and perspectives. This means not remaining exclusive to a single legal services provider, but rather interacting with as many as possible.

In the experience of the authors, the most important benefit deriving from this approach to counsel selection is that in-house teams enjoy real time access to (and are allowed to draw comparisons between what world-class counsel consider) the best possible tactics and techniques in each stage of the arbitration proceedings. For example, the home team can benefit greatly from contrasting – including in terms of results – an aggressive approach to document production with one that is more conservative and concerned with avoiding any perception of lack of cooperation by the tribunal. Especially relevant is the experience and knowledge that can be gained from comparing the performance of high-level litigators in oral proceedings.[17]

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16 Noting that states are repeat players in international arbitration, see Jeremy K Sharp, 'Representing a Respondent State in Investment Arbitration', in Chiara Giorgetti (ed.), *Litigating International Investment Disputes: A Practitioners Guide* (Brill Nijhoff, 2014), pp. 41–79.

17 Whether this approach to counsel selection is more favourable to the aspirations of in-house teams to progressively overcome the need for external assistance is a difficult question that requires further study. It is also true that the question may have more importance for in-house teams interested in transitioning towards a completely in-house practice. Positive results in a mixed model may lead to the conclusion that there is no need for this, or that it is simply not convenient to abandon the assistance of external counsel in the short term.

For the members of in-house teams following this plan, the mindset should be oriented not only towards increasing knowledge over the procedural and substantive applicable law, but also – and arguably more importantly – towards discerning the type of methodologies applied at each stage of the arbitration proceedings. Experience shows this is a long-term effort that may require a drastic transformation of, and increase in, in-house teams' hard and soft skills. Needless to say, an exhaustive review of the case file, a strong counter-memorial or a successful cross-examination, are, to a great extent, the results of high-level managerial competencies to which in-house counsel may not always pay sufficient attention.

Finally, it must also be stressed that maximising the benefits of the mixed model of defence is necessarily dependent on the measure to which external counsel is willing to share information and involve in-house teams in their practices and processes. States have attempted to secure a minimum level of instruction by incorporating capacity-building clauses in the relevant contracts. The obligations of external counsel in this regard can vary from conferences and talks on contemporary legal debates, to fellowships that allow in-house lawyers to acquire a first-hand insight of law firms' dynamics. To put it bluntly, this is not enough. There is simply no match for continuous learning throughout the arbitral process. As shown below, while global law firms are always free to decide on their methods, state officials should include a law firm's willingness to implement a genuine knowledge-sharing policy as a factor when deciding whether or not to instruct a specific external counsel in future arbitration proceedings.

Repeat appointments

Retaining the same counsel makes sense both from a cost and strategic perspective when multiple arbitrations arise out of a similar set of state measures. That said, we are of the view that retaining the same counsel should not be considered the automatic choice. The reason is that retaining the same counsel, while positive and advisable in certain contexts, always comes at the expense of benefiting from learning from different litigation approaches. Accordingly, the decision to preserve counsel should be supported by strong public policy reasons. Because capacity building should be at the core of the long-term programme of any in-house counsel team representing the state, preserving external counsel is the right option when the immediate experience shows that knowledge has been genuinely, freely and effectively transmitted throughout the different stages of the arbitration proceedings.

Good practice in the coordination between in-house counsel and external counsel

In our view, coordination between in-house counsel and external counsel should be premised on the need to maximise the comparative advantages of all team members. Indeed, while law firms are engaged based on their resources, knowledge and experience in complex arbitration scenarios, a properly constituted in-house team should be at the forefront in terms of knowledge of domestic law, international treaties entered into by the relevant state, and positions taken in ongoing or previous cases, and the local language, as well as the language of the arbitration procedure, among others. In-house counsel should also be involved in the development of the legal strategy. Conversely, the external counsel should be sympathetic to the domestic dynamics within the state's in-house team. Thus, having an in-house team with the proper level of knowledge of the relevant substantive and procedural international and domestic law applicable to the case is just as important as having external counsel who are experts in arbitration and the relevant subject matter. What this means in practice is that, with limited time and resources, each party should devote its attention to that which it can perform more efficiently and with more added value.

In light of the above, the following paragraphs discuss what the authors consider good practice in the field.

Clear identification of roles

The lead counsel, which in a hybrid model is normally a partner of the law firm engaged for the case, has the final decision on the strategy. In turn, the strategy should be built with the input of the local team. Particularly during the early stages, this input is crucial as it is often the in-house team that engages in negotiations with the counterpart during the cooling-off period or even before that, having a good understanding of the underlying facts.

That said, it is the duty of local teams to draw red lines to external counsel to, inter alia, avoid contradictory positions among ongoing or past cases; avoid unnecessary statements that although useful for the narrative of the case, may create internal problems regarding a specific policy; and state preferences regarding the presentation of certain complex internal issues.

Moreover, all members of the team should be able to take the initiative regarding the type of evidence that should be collected. At the beginning, local teams should rapidly furnish external counsel with the evidence at their disposal and inform them of the names of the competent government officials who may

have relevant information. During the second stage, external counsel should narrow down the search and ask for specific pieces of outstanding necessary evidence to advance and support the legal strategy.

Clear identification of roles is especially relevant when it comes to memorial writing. Although this is a task primarily led by external counsel, memorials should not be written before the outline, content and overall strategy is discussed with the in-house team. Importantly, external counsel should share the first draft as early as possible to enable the local team to make suggestions, corrections, additions or deletions in terms of both form and content.

Practice shows that in-house teams can contribute greatly to preparation for hearings. While this is also a process primarily controlled by external counsel, in-house counsel can provide a fresh look and unique perspectives. External counsel should therefore be ready to accommodate concerns and suggestions raised by the local team and quickly implement changes as necessary.

Communication

Communication between the local team and external counsel should be as fluid as possible, through secure channels. It is also important to promptly identify the relevant points of contact and the government officials who will be included in the distribution list for the arbitration. The recommendation is to only include officials with a substantive bearing in the arbitration process. Finally, the legal team should agree on those with the power to communicate with the secretary, members of the tribunal and counsel of the other party. When this task is assigned to certain members of external counsel, no communication should be sent without prior consultation with the in-house team. The legal team should also decide whether the in-house team should be copied on all communications with external counsel. Where the in-house team acts as co-counsel, this should be the case.

Compliance with deadlines

A third good practice is to set and comply with internal deadlines well in advance of those established in the procedural rules. This helps facilitate the efficient use of limited resources. It also positively impacts the quality of the final product by providing sufficient room for corrections to be made and to react in the case of last-minute contingencies.

Coordination between government departments and external counsel

Coordination between government departments and external counsel should rest on one fundamental aspiration: to obtain the best possible evidence through the establishment of efficient and reliable communication channels controlled by the local team. Naturally this comes with important challenges for both in-house and external counsel.

Balancing the principle of state unity under international law with respect for internal divisions and autonomy

One of the main challenges faced by the local team is reconciling the principle of state unity for the purposes of state responsibility with the organic independence and autonomy of the entities at the core of the dispute.

For most states, division of power and checks and balances principles are essential attributes of the rule of law, which means that those in charge of the legal representation of the state before international tribunals have no power or authority over those whose conduct has triggered the dispute. Despite that lack of authority, the harmonic collaboration among branches of the state and its agencies should be sufficient to expect cooperation in the process of securing the best evidence for the case. However, complex internal divisions usually create important evidentiary hurdles for both the substantiation of state arguments and for responses to the demands of investors in the document production stage. For external counsel, the challenge is to understand that defending a state requires these complexities to be overcome.

Securing the best possible evidence: the advantages of having a stable local point

Collecting evidence is a burdensome task that requires the collaboration of multiple state actors often unfamiliar with the dynamics of international disputes. It also requires constant communication with domestic actors to inform them about the demands of the arbitration, as well as the possibilities enshrined in treaties and procedural rules for the protection of confidential information. The best possible way to ensure the effective collection of evidence, while also building internal capacity in the process, is to have the local team act as the sole point of contact between the state and international firms.

This is certainly advantageous as the local team is in a better position to perform this task due to its cultural background, knowledge of internal dynamics and proximity and internal status within the government. Most importantly, the in-house team is better positioned to achieve efficient intergovernmental

articulation and overcome challenges, as well as to foment internally a culture of appropriately documenting public decisions. As seen in the following paragraphs, this is positive beyond the specific international dispute.

Overcoming challenges

Here, we provide some final recommendations on the best way to overcome the recurrent hurdles and difficulties in securing the best possible evidence.

First, the internal defence team should aim to establish itself as a reliable point of contact among different state entities. This should be the result of not only favourable awards but also, most importantly, of the perception that the in-house team is a permanent body that clearly and convincingly answers formal and substantial questions, and properly addresses the concerns of all those with interest in the arbitration. This sense of reliability is especially relevant when it comes to the production of sensitive information or documentation. As mentioned above, in these cases the in-house team is constantly required to inform local decision makers about the safeguards enshrined in treaties and procedural rules for the protection of confidential information. This means in-house teams should be very careful when dealing with the current demands of transparency. Notwithstanding this important trend in investment arbitration, the local team should vindicate the confidence entrusted in them by properly informing external counsel about the required redactions.

Second, securing the best possible evidence usually comes with challenges associated with poor document management procedures or simply the regular mobility of public officials. In practice, complying with the demands of external counsel or those of the investors in the document production stage requires resolution, creativity and resourcefulness from the local team. The best way to meet these demands is by making sure the in-house team is properly equipped with personnel that is equally resolute, creative and resourceful.

Finally, in-house teams should aim to use the experience gained in the litigation process to impact the long-term policies and practices of the state, including for the prevention of disputes and the improvement of the state's position in future arbitrations. One of the best ways to meet both of these objectives is to make clear calls to improve the techniques and systems of data collection. Public officials need to accept that access to information should not depend on individuals and accordingly that institutional documentation should be properly recorded. This should not be limited to the archive of documents related to potential contemporary disputes, but also to documents going back various decades.

Conclusions

In light of the aforementioned, we reach the following conclusions.

- Managing counsel is at the core of the mixed model of a state's legal defence in international investment disputes. Therefore, successful counsel management practices should be implemented at the earliest stages of counsel selection.
- Counsel selection also concerns working methods. Clear guidelines should be established and discussed from the beginning of the working relationship.
- An effective strategy requires coordinating the working methods of both in-house and external counsel. This results in guaranteeing the best possible defence while allowing for an efficient transmission of knowledge and good practice.
- A mixed model of legal defence allows for a reasonable departure from the need to outsource certain arbitral stages; however, this requires a skilled, competent and stable internal legal team.
- The experience gained by the local team through coordinated work and cooperation with external counsel allows it to gradually develop and strengthen skills to undertake crucial stages of the proceedings. In the short term, this includes the handling of disputes in their early stages or cooling-off period; the constitution of the tribunal; or even exercising direct representation of the state in jurisdictional phases.
- Maximising the benefits of the mixed model of defence is necessarily dependent on the measures that external counsel is willing to take to establish a genuine team with local counsel.
- The establishment of cooperative managing counsel practices between in-house and external counsel also guarantees coherence in the state's practice at international and domestic levels. This also enhances the credibility of the state in arbitral proceedings.
- A strong and reliable capacity-building model of legal defence creates confidence among domestic decision makers at all levels, as well as among taxpayers. This translates into additional gains in terms of efficiency and cost savings.

CHAPTER 6

Financing a Claim or Defence

Deborah Ruff, Julia Kalinina Belcher, Charles Golsong and Jenna Lim[1]

How to minimise costs in investor–state dispute settlement

Investor–state disputes are not cheap. Recent studies on investor–state dispute settlement (ISDS) cost trends reveal that the mean party costs incurred in ISDS proceedings for respondent state entities are approximately US$4.7 million. For investors, the mean costs exceed US$6.4 million. Trends show that investor costs have reduced slightly from 2017, but that they are still undoubtedly high in comparison to other areas of dispute resolution.[2]

Treaty planning

The first step for minimising costs in the resolution of an investor–state dispute is to ensure that the necessary protections are in place and effective before a dispute arises. This will help minimise satellite disputes over whether the investor qualifies for protection, which, in turn, could delay the resolution of the merits of the dispute.

Thus, a foreign investor wishing to rely on investment treaty protection should structure its investment in a way that ensures that it is covered by one or more bilateral or multilateral investment treaties (including, most importantly, in respect of nationality) and cannot be excluded by 'denial of benefit' provisions. It is too late to seek to restructure an investment after a dispute has arisen.

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2 Hodgson, M, Kryvoi, Y, Hrcka, D, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration', British Institute of International and Comparative Law (BIICL), June 2021. Costs are taken to include legal, witness and expert fees and expenses, as well as travel and other disbursements, but not the fees and expenses of the tribunal or any administrative costs paid to arbitration institutions.

Potential investors should also consider whether their position can be improved by identifying a suitable most-favoured nation clause, which they can rely on to import more favourable conditions offered by the host state to investors of another nationality.

Contract planning

In addition (or, if no bilateral investment treaty (BIT) is available, alternatively), an investor could potentially bargain for protections directly from the host state. For those seeking to rely on an investment contract that incorporates a right to bring a claim against a state or state-owned entity, it is never too early to think about minimising the costs of a potential dispute. At the drafting stage, the investor should get advice from disputes as well as transactional lawyers and do everything possible to pre-empt the most frequently employed defences by respondent states, seeking to agree drafting that will minimise potential jurisdictional challenges (e.g., well-drafted waivers of sovereign immunity) or merits defences (e.g., clear drafting of warranties, 'grandfathering' arrangements, requirements with regards to investments, permits and approvals processes, audit processes, clear allocation of responsibility under the contract between state entities, clarity as to which state entity is being contracted with).

Furthermore, the investor should consider enforcement issues before signing an investment contract. This means not only ensuring that the appropriate drafting is included to provide for waivers of sovereign immunity for enforcement as well as suit, but also consideration should be given to the location of accessible substantial state commercial assets.

The pre-proceedings stage

Once a dispute is in prospect, the investor should first consider whether what will inevitably be a lengthy and costly process, particularly once enforcement is taken into account, can be avoided by an amicable settlement, whether procured through direct negotiation or a more structured format, such as mediation.[3] Where mediation is used, however, it should be a relatively short and simple process, rather than a 'mini litigation' because, if unsuccessful, it will merely add an additional layer of costs.

3 See, for example, the Mediation Rules of the International Chamber of Commerce (ICC), https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/, and of the Stockholm Chamber of Commerce, https://sccinstitute.com/media/49819/medlingsregler_eng_web.pdf.

Before taking any irrevocable steps, the investor must ensure that any 'fork in the road' provisions have been considered, and that it has complied with all relevant requirements before launching the arbitration – costs will be wasted if, for example, there is a challenge on the basis that mandatory cooling-off periods have not been complied with.

Both investors and states can also help themselves by ensuring that they have created a suitable 'paper trail' as the investment progresses and before any dispute arises. An investor would be wise to keep good records of both the cost and the expected return on its investment at all stages, which will help quantify the loss in any future dispute and minimise the cost of quantum expert reports, which can be expensive. The investor should ascertain what inputs to the financial models an expert would likely require before the dispute starts. Backups for data should be kept in case of lock-outs by the state (physical or electronic).

It goes without saying that all correspondence and meeting notes should be retained and organised, employees encouraged to take notes of all meetings and conversations with state representatives, and provision made in employee contracts for outgoing employees to provide ongoing assistance as witnesses if so required. It will also be easier to obtain potentially helpful documentation from the state before a dispute arises rather than after. Similar considerations apply to states, which should document any breaches by the investor of its investment obligations, any environmental damage caused and any audit violations. Given that a change of government may mean that many of those involved in structuring and administering the investment are no longer in post, effective record-keeping is particularly important, and state organs should bear in mind that these records are of no assistance if they cannot be located.

Parties should make all possible enquiries about the potential arbitrators – challenges are costly and, even if successful, will result in delay and additional costs. States may want to ensure that arbitrators do not have links to third-party funders involved in the case, as further addressed below, and investors may wish to check whether arbitrators have expressed strong published views on particular aspects of ISDS disputes that arise most frequently.

Before embarking on a potential dispute, both states and investors will be well advised to bear in mind, and keep under review, various considerations affecting the costs involved in a potential dispute, some of which are set out below.

Duration of proceedings

While investor–state disputes may sometimes be resolved in 12 months to two years (including through negotiations), the average length of proceedings is five and a half years,[4] excluding the time involved in pursuing enforcement of an award. A protracted dispute may therefore place significant strain on both states and investors alike. This has led to a massive rise in the popularity of third-party funding as a means for parties (usually the investor) successfully to undertake arbitration and enforcement proceedings without having to forego the right strategies due to the limitations imposed by a tight budget. As further discussed below, funding naturally comes at a price. However, it has been increasingly used not only by impecunious investors but also by parties wishing to take the cost of the dispute off their books. Indeed, anecdotal evidence suggests that the covid-19 pandemic has led to a surge in interest in and demand for third-party funding. The UK litigation funding market alone was thought to be worth £2 billion as at September 2021.[5]

Investor–state arbitration proceedings are typically much lengthier than commercial arbitrations, and cost minimisation considerations should also include measures aimed at reducing the duration of the proceedings. Recent studies show that the length of proceedings in which the investor ultimately prevails averages 1,677 days (4.6 years), while cases in which states succeed run for an average of 1,530 days (4.2 years).[6] These figures reflect the likely impact of respondent states' objections to jurisdiction in bifurcated proceedings.

Jurisdictional challenges

The method of resolving jurisdictional challenges is a choice that parties and tribunals are required to make in the early stages of an arbitration proceeding, and one that has significant implications for the overall costs of the dispute. A respondent state may petition the tribunal to determine jurisdiction as a preliminary issue for clear strategic reasons – if the challenge were successful, the investor will need to bring its claim in a different forum, often the courts of the respondent state, which is a clear disincentive for the investor to pursue the dispute and may lead it to abandon its claims.

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4 Hodgson, M, Kryvoi, Y, Hrcka, D, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration', BIICL, June 2021.

5 'Litigation funding needs better oversight', *Financial Times*, 9 September 2021, www.ft.com/content/663a9a96-759e-4225-87e9-c351549ecb1c.

6 Hodgson, M, Kryvoi, Y, Hrcka, D, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration', BIICL, June 2021.

There may be potential cost benefits for an investor in agreeing to address jurisdiction as a preliminary issue as a means of potentially avoiding pursuing fruitless arbitration proceedings. Indeed, some third-party funders may insist on jurisdiction being determined as a preliminary issue as a condition of funding so as to limit their exposure. Moreover, if jurisdiction is determined in favour of the investor, the chances of an early settlement may increase. On the other hand, the bifurcation of proceedings can also increase costs.

Between 2017 and 2020, only 25 per cent of jurisdiction challenges in investor–state disputes succeeded.[7] This may reflect attempts by respondent states to discourage investors by mounting unmeritorious jurisdiction challenges to stretch out proceedings.

By requiring investors to provide proof of an arbitration agreement at the request-filing stage, the rules of most arbitration institutions already seek to prevent disputes that have an obvious lack of jurisdictional merit from proceeding. Certain arbitral institutions, such as the International Centre for Settlement of Investment Disputes (ICSID), have stringent screening processes, under which the registration of a request for arbitration of a claim where jurisdiction is plainly lacking will be refused.

Bifurcation

There is evidence that, overall, bifurcation[8] substantially increases the costs of arbitration. In a recently published study, investors indicated that bifurcated proceedings led to mean party costs some 85 per cent higher than non-bifurcated proceedings. Respondent states indicated that they faced an estimated 79 per cent higher costs.[9] These higher costs, coupled with the low percentage chance of a successful jurisdiction challenge, should, therefore, be considered by parties when deciding whether to request bifurcation.

Bifurcation (or trifurcation) strategies can include separating the merits and quantum phases of the arbitration, which may allow the investor to source funding on favourable terms after succeeding on the merits but before a potentially costly quantum stage and may result in a settlement. That said, breaking up the proceedings this way can lead to an additional hearing and could result in higher, rather than lower, overall costs.

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7 ibid.

8 That is, splitting an arbitration into two separate phases, such as merits and quantum or jurisdiction and merits.

9 Hodgson, M, Kryvoi, Y, Hrcka, D, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration', BIICL, June 2021.

Composition of the tribunal

Nominating and appointing the right arbitrators is also an important step and consideration for parties, which may have a considerable impact on overall costs. Arbitrator fees are estimated to account for about 16 per cent of the overall costs of an ISDS arbitration.[10] Inevitably, the lack of availability of tribunal members will have an impact on the length and, therefore, cost of the arbitration proceedings.

While most arbitral institutions specify in their rules that the award is to be finalised within a stipulated time limit, extensions to the deadline are commonly granted in practice. Under the ICSID Rules, for instance, while the award must be signed within 120 days of the end of proceedings, tribunals frequently avail themselves of a further 60 days.[11] Therefore, along with the many other considerations in nominating an arbitrator, both the investor and the state should make detailed inquiries into the availability of nominated arbitrators or may seek to agree limitations on the number of appointments that the arbitrators may accept. Methods suggested have included requesting that arbitrators provide a calendar of their availability for the next 12 to 18 months or longer, or asking for an arbitrator candidate's records of the length of time between the final hearing and the issue of an award in their past cases.[12]

Consolidation of multiple claims

Where an investor is bringing more than one claim against a state entity, and provided that these claims are sufficiently related, attempts could be made to consolidate multiple claims into a single arbitration.[13] The ICSID Rules (and additional facility rules) do not expressly provide for consolidation, although some have argued that tribunals are already empowered under Article 44 of the

10 Nottage, L and Ubilava, A, 'Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry', The University of Sydney Law School Legal Studies Research Paper Series No. 18/46, August 2018.

11 Rule 46, ICSID Arbitration.

12 Reed, L and Marigo, N, 'Availability of Arbitrators: What About the Other Objective Data?', *Kluwer Arbitration Blog*, 11 May 2010.

13 In a world first, Argentina, as the respondent to separate ICSID and United Nations Commission on International Trade Law (UNCITRAL) proceedings, agreed to consolidate these into a single set of hearings – a copy of the award is available here: www.italaw.com/sites/default/files/case-documents/italaw4365.pdf. The tribunal in its award ruled that the parties would bear their own costs of both the UNCITRAL and ICSID proceedings.

ICSID Convention and Rule 19 of the ICSID Rules to order consolidation.[14] However, proposals for an amendment to the ICSID Rules to include consolidation were recently (June 2021) put forward.[15] Proposed Arbitration Rule 46, if adopted, would allow for voluntary consolidation, subject to the parties' consent.

Disclosure

Document disclosure is invariably an expensive stage of investor–state arbitrations. Both investor and state parties should tailor disclosure requests carefully to what is crucial to the case. If the dispute is very document-heavy, numerous ways of reducing costs exist, including, but not limited to: (1) having juniors carry out a first-level review; (2) outsourcing document review to contract lawyers; and (3) employing the latest technology to ensure the most efficient review process.

Case management 'tools'

Parties may also use other case management techniques, such as limiting the number of experts appointed in the proceedings to core issues. In ISDS proceedings in particular, the cost of expert evidence can be high.

Generally, the higher the amount in dispute, the higher the costs. A recent study showed that successful claimant investors claimed a mean amount of US$1.5 billion in damages, but the mean amount of awarded damages averaged US$438 million.[16] Investors being more realistic as to the quantum of claimed damages could help reduce costs and promote concise and efficient dispute resolution.

Clarifying/rectifying the award

Once the award is rendered, the parties should consider it very carefully, as even minor errors or lack of clarity can result in lengthy and costly challenges at the enforcement stage or in annulment proceedings. Both the ICSID Convention and the ICSID Rules provide that tribunals may decide any questions that they have omitted to decide in the award and rectify any clerical, arithmetical or

14 Vanhonnaeker, L, 'The Consolidation of Proceedings and Mass Claims in International Investment Law and Arbitration', in *Shareholders' Claims for Reflective Loss in International Investment Law* (Cambridge University Press, 2020).

15 https://icsid.worldbank.org/sites/default/files/publications/WP%205-Volume1-ENG-FINAL.pdf.

16 Hodgson, M, Kryvoi, Y, Hrcka, D, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration', BIICL, June 2021.

similar errors that the requesting party seeks to have rectified.[17] Both the ICSID Convention and the ICSID Rules provide that any requests for clarification or correction must be made within 45 days of the date on which the award was rendered. Likewise, the United Nations Commission on International Trade Law (UNCITRAL) Rules 2010 provide that a party may,[18] within 30 days of receipt of the award, 'request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature'. Should the tribunal consider a request justified, the UNCITRAL Rules provide that the tribunal 'shall make the correction within 45 days of receipt of the request'. Having these matters clarified early by a tribunal can help avoid potentially expensive and time-consuming annulment proceedings, which have only increased in recent years.[19]

Third-party funding for investors

Third-party funding is essentially the provision of direct or indirect funding or other support to a party to a dispute by a legal person that is not a party to the dispute, usually in return for remuneration dependent on the outcome of the proceedings. Such funding can be achieved via a variety of mechanisms and provided directly or indirectly to an affiliate of the disputing party. The 'non-recourse' aspect of third-party funding is attractive to claimants: if the claimant does not recover, it has no obligation to repay the funding. It is open to impecunious claimants and those well resourced that seek to spread their risk.

As noted by UNCITRAL in its 2019 working group paper on possible reform of ISDS funding,[20] remuneration to the funder can take many forms. Common practices include a multiple of the funding, a percentage of the proceeds, a fixed sum or a combination of the above. Third-party funding usually covers all or part of the cost of the proceedings, such as legal fees, as well as fees of experts, arbitrators and arbitral institutions, and the costs associated with subsequent enforcement actions or appeals. Third-party funding may be structured around a single claim or a portfolio of claims.

17 Article 49(2), ICSID Convention; Rule 49, ICSID Arbitration Rules.

18 Article 38, UNCITRAL Rules 2010.

19 Hodgson, M, Kryvoi, Y, Hrcka, D, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration', BIICL, June 2021. ibid. The study found that over 75 per cent of ICSID annulment proceedings have been initiated since 2009, outpacing the growth in ICSID arbitration.

20 See https://undocs.org/en/A/CN.9/WG.III/WP.157.

What is involved in obtaining third-party funding?

An initial discussion with the claimant or its proposed legal team, or both, to assess suitability will usually be the first step in the funding process. However, the scope of this initial discussion will be necessarily limited as it is not protected by confidentiality and does not attract privilege. Assuming the initial meeting is successful, a confidentiality agreement/non-disclosure agreement (NDA) (typically on the funder's standard terms) will be entered into to protect future communications. Thereafter, substantive confidential and sensitive information and discussions about the claim and potential funding arrangements may take place. Once the funder is in possession of substantive details about the potential claim, it will carry out due diligence to gain understanding of the claim, often including an independent opinion from a neutral law firm or senior lawyer or Queen's Counsel. If all this is favourable, negotiations over the structure of the financing will start.

The precise scope of due diligence will differ between funders but will likely include the following elements:[21]

- a funder will investigate the claimant and its financial position or resources to understand its litigation appetite and impetus for seeking funding;
- a funder will conduct its own assessment of the merits of a potential claim and evidence, as well as potential defences and counterclaims;
- the relevant experience and reputation of the claimant's proposed legal team will be considered, alongside the firm's engagement terms with the claimant;
- the proposed legal budget will also be carefully studied and may be capped; and
- the expected amount of recovery will be relevant because it must be large enough to both provide a return commensurate to the investment risk and cover the funder's internal costs – funders will have various tools to evaluate an acceptable ratio between a realistic recovery and the capital investment.

Funders are increasingly likely to investigate the backgrounds of claimants, as their reputations and solvency, as well as the value and merits of the claim, may affect the decision of whether or not to fund or on what terms, as well as investigating the assets of the respondent that are likely to be accessible, and will estimate the likely costs of enforcement.

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21 'A Practical Guide to Litigation Funding', Woodsford Litigation Funding Insight, https://woodsfordlitigationfunding.com/us/wp-content/uploads/sites/3/2021/01/Woodford-White-Paper-A-Practical-Guide-Lit-Fund-NLogo.pdf.

These details will likely be sought by the funder as soon as the NDA has been entered into, which, if the negotiation is successful, will then be recast into a term sheet setting out the key terms of the funding proposal.

Funders will usually push for a short exclusivity period (which could potentially be waived if there is sufficient competition for the right to fund a claim) following the execution of the term sheet to allow the funder to seek further information from the claimant and its legal team to conduct more in-depth due diligence, accompanied by meetings and calls to address any 'gaps' in the funder's understanding. If in-depth due diligence concludes to the funder's satisfaction, the process will conclude with the funder preparing a detailed funding agreement for the claimant to consider and agree. However, investors may wish to seek to negotiate for the exclusivity period to be waived, either if there is or they expect competition among funders or because, if funders are approached consecutively, the investor may be quizzed about whether or not a claim has already been rejected by one or more funders.

The process is rigorous and demanding, and anecdotal evidence suggests that fewer than 10 per cent of initial approaches to funders result in funding being offered. However, claimants and their counsel can do much to anticipate the needs of funders and package the case materials from the outset in a way that pre-empts their concerns, demonstrates the strength of the case and the capabilities of the legal team, and thereby maximises the chances of obtaining funding. One can also seek to create a 'market' for a claim by speaking to multiple funders simultaneously, including through opening a data room for inspection by funders and inviting bids as to what commercial terms they propose or considering the use of a claim broker.

How flexible a funder is prepared to be in creating 'made-to-measure' funding arrangements for a claimant will often depend on whether the funder is self-financed or has institutional capital backers that may have preferred structures for the funder to follow.

Potential restrictions imposed by third-party funders

As set out below, investors should also be aware of potential restrictions that a funder may impose as a condition of funding the case, including control of choice of counsel and influence on strategy. Further, subject to any provisions in the funding agreement, the funder may participate in the settlement process: at a minimum, the agreement will provide for the funder to be kept updated about the discussions; in other cases, the agreement may restrict settlement to within a pre-negotiated range. Investors should seek to agree from the outset which responsibilities and control lie with the funder and which lie with the investor.

Third-party funding agreements should clearly set out who retains what degree of control over the conduct of the proceedings, and of settlement negotiations, what degree of control the claimant and the funder have over the decision to settle, and what information the funder has relied on in reaching its decision to fund.[22]

The level of involvement in the dispute itself will depend on the funding regime in a given jurisdiction (as well as the terms of the funding agreement). However, for a large number of investors, the benefits outweigh the disadvantages.

Third-party funding regimes vary between different jurisdictions

While third-party funding was an uncommon concept only a couple of decades ago, it is one that is now almost universally accepted and that has been incorporated both into the rules of leading arbitral institutions and arbitration-friendly jurisdictions and is now commonplace in ISDS proceedings. It is estimated that over half of all ISDS disputes now involve the participation of third-party funders in some way. A recent innovation that can make third-party funding particularly attractive to claimants is the potential in some cases to obtain advances on the expected recovery from the funder.

Third-party funding began in the context of domestic litigation and arbitration before being used in international commercial and investment arbitration. Some jurisdictions (e.g., Australia, the UK and the US) have established a legal dispute funding framework. Singapore and Hong Kong went further by introducing legislation expressly permitting third-party funding in international arbitration.[23] However, third-party funding in international litigation and arbitration is unregulated in many jurisdictions and there is not, at the time of writing, an effective international set of rules on funding. Debate is now ongoing

22 In *Suez, Sociedad General De Aguas De Barcelona, S.A. and Vivendi Universal S.A. v. Argentina Republic*, ICSID Case No. ARB/03/19, the state challenged the appointment of the claimants' arbitrator in the belief that her position as a board member of UBS violated the requirement of neutrality. See www.italaw.com/sites/default/files/case-documents/ita0824.pdf. In another case *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, a challenge was brought against the appointment of an arbitrator not because of a potential conflict of interest, but rather because of the strong language he had employed in respect of claimants funded by third parties. See www.iareporter.com/articles/investor-moves-to-disqualify-arbitrator-on-the-basis-of-recent-comments-on-third-party-funding-of-arbitration-claims/.

23 Singapore Civil Law Amendment Act and Civil Law (Third-Party) Regulations 2017. Notably, the Singapore Institute of Arbitrators has issued guidelines for third-party funding. In February 2019, in Hong Kong, the Arbitration Ordinance (Cap 609) was amended to recognise third-party funding in arbitration (both domestic and international).

about whether and to what extent third-party funding should be permitted or regulated. Different jurisdictions take differing attitudes towards the concept of third-party funding.[24]

Third-party funding is widely used and accepted by arbitral tribunals

Although many jurisdictions previously prevented claims from being brought where the claimant does not have full beneficial ownership of the claim, the rising cost of dispute resolution led to these rules being largely swept away in domestic litigation and has not prevented externally funded claimants from pursuing their claims. The ICSID tribunal in *CSOB v. Slovak Republic* held that 'absence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute should not and has not been deemed to affect the standing of a claimant in an ICSID proceeding, regardless whether or not the beneficial owner is a State Party or a private party'.[25]

In the later case of *Giovanni Alemanni and others v. Argentina*,[26] the tribunal held that '[i]ndividual views may differ as to whether third-party funding is or is not desirable or beneficial, either at the national or at the international level, but the practice is by now so well established both within many national jurisdictions and within international investment arbitration that it offers no grounds in itself for objection to the admissibility of a request to arbitrate'.

Calls for regulation of third-party funding

The benefits of third-party funding to investors are obvious, and may be a factor in the recent explosion in the number of ISDS claims advanced.[27] However, there are now signs of a backlash, with well-known examples of states withdrawing

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24 For example, England and Wales is generally positive to third-party funding in court proceedings (as well as arbitration) and considers it to be a tool of access to justice, see, for example, *UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV and Others* and *Road Haulage Association Limited v. Man SE and Others* [2019] CAT 26. See also *Essar Oilfields Services Limited v. Norscot Rig Management* [2016] EWHC 2361 (Comm), in which the English High Court reviewed the decision of a London-seated ICC tribunal awarding Norscot, in addition to its legal costs, the cost of the funder's 'success fee'.

25 ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, at §32, www.italaw.com/sites/default/files/case-documents/ita0144.pdf.

26 ICSID Case No. ARB/07/08, Decision on Jurisdiction and Admissibility, 17 November 2014, at §278, www.italaw.com/sites/default/files/case-documents/italaw4061.pdf.

27 As at 1 January 2021 (per the UNCTAD IIA Issues Note 'Investor-State Dispute Settlement Cases: Facts and Figures 2020' published on 2 September 2021 (https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf)), the

from ICSID because of the number of cases being brought against them and, increasingly, pushing for restrictions, or at least increased regulation, of the third-party funding of claims. This process is driven not only by the concerns of states, but also of institutions around the disclosure of links by arbitrators to third-party funders, resulting in potential challenges to arbitrators or awards rendered by them.[28] As law firms increasingly also set up third-party funding groups or joint ventures with funders, conflicts concerns will likely spread to them.

Regulation of third-party funding may be implemented through various means, such as through inclusion in investment treaties, in arbitration rules, in domestic legislation or in a multilateral treaty on ISDS reform.

The current UNCITRAL draft on the regulation of third-party funding provides for a range of options, including outright prohibitions on third-party funding (including through amending BITs to extend denial of benefits clauses to third-party funded parties), and restrictions on third-party funding to cases where it is necessary for the claimant to bring its claim and that the claim is brought in 'good faith' (but it is generally accepted that defining or proving 'necessity' or 'good faith' would be difficult, and raises the issue of what happens if the funding is obtained in the middle of the case or if funding arrangements are amended).

Another potential approach is to restrict permission for third-party funding to cases where the expected return to the funder does not exceed a 'reasonable' amount or where the number of cases funded by a funder against a particular state does not exceed a reasonable number, all of which pose further problems of approach and consistency of outcomes. Any such regulations would, of course, also require provisions dealing with disclosure of the relevant information regardless of whether security for costs is being sought and raises questions of the

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cumulative number of known ISDS cases stood at 1,104, with the majority of these having been initiated after 2010.

28 See *Third-Party Funding in International Arbitration and its Impact on Procedure*, International Arbitration Law Library, Volume 35, pp. 253–292. Situations that may give rise to conflicts of interest include where arbitrators act as advisers to funders, and where an arbitrator or an arbitrator's law firm has a recurring relationship with a third-party funder, which is involved in arbitration before the arbitrator, and the arbitrator or the firm receives income from this relationship. The 2021 ICC Rules at Article 11(7) provide grounds by which a party may challenge an award where disclosure of a link between arbitrator and funder was not made: 'In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.' See https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_11.

consequences – could a tribunal order a party to terminate the funding, terminate the proceedings themselves or only factor in the allocation of costs? Other proposals centre on greater transparency of third-party funding arrangements and provisions for the automatic grant of security for costs against a third-party-funded claimant.

Third-party funding and security for costs applications

Arbitral tribunals have the power to order security for costs, either pursuant to arbitration laws or rules explicitly providing for such power, or general provisions on interim measures. When an arbitral tribunal is faced with a security for costs application, it usually balances the claimant's interest in having access to arbitral justice and the respondent's interest in recovering its costs if it wins.

Respondent states argue that a claimant that requires third-party funding is by definition unlikely to be able to pay the costs awarded against it if it is unsuccessful. However, the funding landscape is complex, and it is not uncommon for third-party funding to be sought by solvent parties. There has been an established trend in investor–state arbitration that tribunals will not regard a party obtaining third-party funding to be a sufficient reason in itself to grant a security for costs order, hence the pressure from respondent states for security to become mandatory.[29] For example, in *RSM Production Corporation v. Grenada*,[30] Grenada's application for security for costs was rejected by the tribunal, which held that the existence of a funder was not evidence of an impecunious claimant. States also point out that non-parties cannot be held liable for costs awards. As considered below, costs insurance has become increasingly relevant to security for costs and to reduce a claimant's costs exposure.

Whether disclosure should be limited to the existence and identity of the funder or whether it should also extend to the terms of the funding agreement remains a controversial question. There is a trend that requires disclosure of the existence of funding and the identity of funders. Domestic legislation on

29 See *EuroGas Inc and Belmont Resources Inc v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3, 23 June 2015; *South American Silver Limited v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013–15, Procedural Order No. 10, 11 January 2016; *Guaracachi & Rurelec v. Bolivia*, UNCITRAL, PCA Case No. 2011–17, Procedural Order No. 14, 11 March 2013. Factors such as the claimant's 'bad' conduct and failures to comply with the tribunal's orders were relevant factors in the tribunal's decision to order security in *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, in addition to the fact that the party had third-party funding.

30 ICSID Case No ARB/10/6, Decision on Costs, www.italaw.com/sites/default/files/case-documents/ita0725.pdf.

third-party funding in some jurisdictions mandates such disclosure and some recent BITs now contain an obligation to disclose the name and address of the third-party funder. Arbitration rules that address the matter also provide for the disclosure of such information, with varying formulations, either authorising the arbitral tribunal to order disclosure of the existence and identity of the third-party funder or putting an obligation on the parties receiving funding to provide information on the existence and nature of the arrangement.[31]

Notably, the Working Paper on the Proposed Amendments prepared by the ICSID Secretariat on the reform of the ICSID Rules provides as follows:[32]

> *Proposed AR 51 on security for costs is a new Rule and does not address the effect of [third-party funding]. Instead, proposed AR 51 requires the Tribunal to consider the responding party's ability to comply with an adverse costs decision and whether a security order is appropriate in light of all the circumstances. As a result, the mere fact of [third-party funding], without relevant evidence of an inability to comply with an adverse costs decision, will continue to be insufficient to obtain an order for security for costs under proposed AR 51. On the other hand, the existence of [third-party funding] coupled with other relevant circumstances may form part of the relevant factual circumstances considered by a Tribunal in ordering security for costs. This will be a fact-based determination in each case.*

As mentioned above, the current UNCITRAL draft on the regulation of third-party funding proposes a number of potential measures.[33] These include an option for the automatic grant of security for costs in the event of third-party funding subject to certain carve-outs. The draft also provides for preventing the funded party from recovering the return paid to the funder or any other expenses relating to the funding.

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31 Arbitral tribunals have requested parties to disclose the existence and identity of a third-party funder (*EuroGas Inc. and Belmont Resources Inc v. Slovak Republic*, ICSID Case No. ARB/14/14; *South American Silver v. Plurinational State of Bolivia*, PCA Case No. 2013-15), as well as in certain cases the details of the financial arrangements (*Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti v. Turkmenistan*, ICSID Case No. ARB/12/6).

32 'Proposals for Amendment of the ICSID Rules – Working Paper', Volume 3, ICSID Secretariat, 2 August 2018, available at: https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf.

33 Comments to which were invited until September 2021.

Investors need to keep a close eye on future developments in the regulation of third-party funding in general and in the context of disclosure, security for costs and the recovery of costs in particular.

Third-party funding for states

Although uncommon at this time, respondent states may also be able to seek third-party funding, particularly where counterclaims are available as an applicable recourse. The availability of a potential counterclaim may be dependent on the wording of the BIT and whether the claim has a sufficient connection with the state's obligations under the relevant BIT.[34]

Third-party funding of a respondent state is technically permissible, but may take the form of an entirely different model to that of investor funding. For example, the funder may pay the costs of defending a claim in return for a share of the amount by which the state's liability in the original claim has been reduced or a share in the relevant investment or its proceeds over time if the investor's claim to it is rejected.[35]

Where the dispute centres on one investor being replaced by a new investor, it may be possible for the state to persuade the new investor to provide an indemnity for the costs of defending a claim of expropriation or to meet the costs of relevant insurance as part of the new contractual arrangements (although the state may equally face pressure from the new investor for an indemnity going in the other direction).

Other financial tools

An investor may consider political risk insurance. Emerging insurance policies aimed at investors offer protection against relevant risks such as political violence, breach of contract, expropriation without full compensation and other failures of obligations by the host government. The suitability of insurance will depend on the nature of the investment, laws of the relevant countries, the type of industry and other considerations. A downside of political risk insurance as opposed to treaty protection is that insurance policies typically have a time limitation of

34 'Counterclaims In Investor-State Dispute Settlement (ISDS) Under International Investment Agreements (IIAS)', Centre for Trade and Economic Integration, Trade and Investment Law Clinic Papers 2012.

35 Von Goeler, J, *Third-Party Funding in International Arbitration and its Impact on Procedure* (Kluwer Law International, January 2016).

15 to 20 years, while treaty protection may be available so long as the relevant BIT remains in force (and often for many years thereafter for pre-existing investments under a 'survival clause').[36]

In addition, the rising number of high-cost and high-value ISDS cases has increased the demand for costs insurance, either as part of third-party funding or as an alternative, perhaps in conjunction with contingency fee agreements, to reduce potential total exposure of the claimant.

The use of contingency fee arrangements has increased over the past 20 years. Even jurisdictions that do not permit contingency fee arrangements in most types of litigation now tend to permit them in arbitration.[37] That said, many law firms will be unwilling to agree to bear the risk of investing up to a decade's worth of legal work on a claim that may not succeed and would likely consider such arrangements only for very high-value claims with very strong merits and only take on a very small number of such cases at any time. Law firms may, however, be more willing to agree a mixed payment structure, where part of their fees are paid in any event, or a conditional fee arrangement where they defer a percentage of their fees until the end of the proceedings, receiving an 'uplift' if the party for whom they act succeeds. Third-party funders may also invest in a portfolio of cases handled by the same law firm, under which they pay the law firm around 30 per cent to 60 per cent of their fees over the course of proceedings, with the law firm in the event of success receiving the balance of their fees with an uplift of two to three times standard fees.[38]

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36 Kowalski, T, 'Mitigating Political Risk: Treaty Protections Versus Political Risk Insurance', *Jones Day Insights*, September 2016.

37 Stoyanov, M and Owczarek, O, 'Third-Party Funding in International Arbitration: Is it Time for Some Soft Rules?', *BCDR International Arbitration Review*, Volume 2, Issue 1 (2015): statutes now expressly permit certain contingency fee agreements in common law jurisdictions. French courts have also now accepted that the laws prohibiting French lawyers from entering pure contingency fee arrangements do not apply to international arbitration proceedings. See Marquais, O and Grec, A, 'Do's and Dont's of Regulating Third-Party Litigation Funding: Singapore vs. France', *Asian International Arbitration Journal*, Volume 16, Issue 1 (2020).

38 Baumann, A and Singh, M, 'New Forms of Third-Party Funding in International Arbitration: Investing in Case Portfolios and Financing Law Firms', *Indian Journal of Arbitration Law*, Volume VII, Issue 2 (2018). Such funding agreements and other new portfolio and financing arrangements may become more common as third-party funders continue to gain popularity.

Arbitration costs insurance allows a party to insure for legal fees, arbitrators' fees, other relevant expenses and adverse cost orders.[39] Insurance can cost significantly less than third-party funding and may be a viable option for cases that would not be accepted by third-party funders. In some arrangements, costs insurance can come in the form of a premium that is fully contingent on the success of the insured party's claim or defence, and there is no premium for when the insured party is unsuccessful.

Costs insurance may, however, impact a tribunal's decision on costs. In *Commerce Group Corp and San Sebastian Gold Mines, Inc v. Republic of El Salvador*,[40] the tribunal determined that it would not order security for costs, in part because the claimant had an adverse costs insurance policy. Third-party funders may take out insurance to protect the party that they are funding from having to pay their opponents' costs in the event that they are unsuccessful, or to provide security for their opponents' costs if the tribunal so orders. The cost of such insurance will be built into the amount that the third-party funder will be entitled to recover should the funded party prevail.

39 McKenny, I C, 'Evolution of the Third-party Funder', in Barton Legum (ed.), *The Investment Treaty Arbitration Review*, Fifth edition (Law Business Research, 2020).

40 ICSID Case No. ARB/09/17.

CHAPTER 7

Constitution of the Tribunal

Rebeca E Mosquera[1]

The arbitrator is the sine qua non of the arbitral process.
The process cannot rise above the quality of the arbitrator.[2]

Introduction

It is unquestionable that the ability to select an arbitrator is one of the foundations of international arbitration.[3] The selection process is the first procedural step in any arbitration. The parties go to great lengths to research and try to predict whether the person they are choosing as their party-appointed arbitrator will in fact be receptive to their position. A great many strategic decisions are made by counsel at this procedural stage. Indeed, given its potential importance to the outcome of a dispute, the selection of the arbitrator or arbitrators is something counsel could evaluate when first assessing whether to bring a claim. This chapter examines the constitution of tribunals in investor–state dispute settlement (ISDS). First, the key factors counsel may wish to consider when nominating an arbitrator are addressed. Second, the chapter analyses how to break a deadlock in appointing a presiding arbitrator. Third, the duties of arbitrators in international arbitration

1 Rebeca E Mosquera is a senior associate at Akerman LLP.

2 George von Mehren, 'Concluding Remarks', in *The Status of the Arbitrator*, 126, 129 (ICC, 1995).

3 Gary Born, *International Commercial Arbitration*, Third edition (Wolters Kluwer, 2021), 1765 ('The need, and opportunity, to select the arbitrators for each dispute that arises is an historical, and distinguishing, feature of international arbitration. . . the existence of this opportunity is one of the principal reasons that both states and commercial parties have, over the centuries, chosen the arbitral process to resolve their international disputes.').

are examined. Fourth, the chapter considers challenges to an arbitrator, including a discussion on recent case law. Finally, the chapter concludes with a discussion of the procedures to replace an arbitrator.

In defence of party appointment

The principle of party autonomy is fundamental to arbitration in general and to international arbitration in particular.

In view of recent developments particularly on investment arbitration, let me stress here that for me it is a fundamental aspect of party autonomy that the parties have the right to appoint one member of the tribunal. If all three members are appointed by an institution or by parties on one side, a fundamental advantage and a fundamental quality of arbitration over domestic courts is lost in my view. Therefore, the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), and other recent agreements negotiated by the EU that provide that only the governments involved appoint the judges of the standing investment court, provide their salaries and decide on their re-appointment without any involvement of the investors, in my view lack a fundamental aspect of neutrality and due process.

– Karl-Heinz Böckstiegel, independent arbitrator (retired)

Factors to consider when nominating an arbitrator

When researching potential arbitrators, the first step should always be to consult the arbitration clause[4] for any specifications. Should none be present, which, with some exceptions, is usually the case in ISDS,[5] one must investigate the type of dispute at hand to decide on the factors to consider.

The 2013 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules have detailed guidelines and procedures on how to nominate a party-appointed arbitrator.[6] However, sometimes the applicable treaty would override or modify the applicable rules. For

4 Generally speaking, in ISDS, the settlement dispute resolution clause is often found in the applicable treaty. However, there are instances in which the settlement dispute mechanism is contained in a contract. See, e.g., *Elsamex v. Honduras*, ICSID Case No. ARB/09/4, Award, 16 November 2012, ¶ 120.

5 See, e.g., Australia–China FTA, Chapter 9, Article 9.14(8).

6 See ICSID Arbitration Rules, Chapter I, 'Establishment of the Tribunal'; see also 2013 UNCITRAL Arbitration Rules, Section II, 'Composition of the arbitral tribunal'.

instance, the United States–Peru Trade Promotion Agreement states that '[t]he arbitration rules applicable . . . and in effect on the date the claim or claims were submitted to arbitration . . . shall govern the arbitration except to the extent modified by this Agreement'.[7] One such modification is that, with its notice of arbitration, the claimant shall provide the name of its party-appointed arbitrator.[8]

Usually, the parties assemble a list of prospective party-appointed arbitrators and they may communicate with them to help narrow down the list. It is important to consider whether the arbitrator has the desired knowledge of the procedure, the applicable law and the subject matter of the dispute. Another subject that counsel often takes into account is how often the arbitrator has been appointed by a state or by an investor. Considerations such as these should help the parties get a better idea of who to appoint.

With respect to 'pre-appointment communications', previous versions of the ICSID and UNCITRAL Draft Code of Conduct for Adjudicators in International Investment Disputes stated that the discussion must be limited to the prospective co-arbitrator's experience, availability, expertise and the absence of any conflict of interest.[9] In turn, Article 7 of version three of the Draft restricted the language stating that there shall be no *ex parte* communication with a prospective arbitrator except '(a) to determine a Candidate's expertise, experience, ability, availability, and the existence of any potential conflicts of interest; (b) to determine the expertise, experience, ability, availability, and the existence of any potential conflicts of interest of a Candidate for Presiding Adjudicator, if both disputing parties so agree; (c) as otherwise permitted by the applicable rules or treaty or agreed by the disputing parties'.[10] The Draft further proposes that the permitted communications under Article 7.1 'shall not address any issues pertaining to [the merits of the case, including] jurisdictional, procedural, or substantive issues that the Candidate or Adjudicator reasonably anticipates could arise in the IID'.[11]

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7 The United States–Peru Free Trade Agreement, Chapter 10, 'Investment', Article 10.16.5.

8 id. at Article 10.16.6.

9 Draft Code of Conduct for Adjudicators in International Investment Disputes, April 2021, Article 7; see also 2013 IBA Guidelines on Party Representation, Guideline 8(a) ('A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest').

10 Draft Code of Conduct for Adjudicators in International Investment Disputes, September 2021, Article 7.1.

11 id. at 7.2.

A further point for consideration might be the language in which the arbitration will be held. It is certainly possible to appoint any given arbitrator to a case that is to be in a language foreign to that of the arbitrator. However, there is a certain cost associated with translating entire proceedings. Due to transparency, in investor–state cases, it is not unusual to conduct hearings in two or more languages and for the tribunal to be fluent only in one of those languages.

Virtual hearings have certainly made internationally located arbitrators more accessible, but depending on how the arbitration will be conducted, location of the arbitrator might be another considerable factor. Furthermore, counsel might be located in different time zones; as such, restricting the arbitrator selection to time zones acceptable to all parties might be a reasonable approach. For example, in an arbitration where counsel is in Paris and one of the arbitrators is in New York, it would become difficult to schedule a virtual hearing before noon in Paris. And, where counsel is located in New York and one of the arbitrators is located in Singapore, the time allocated for hearings may be substantially reduced.

Most of the information available to parties to make an educated selection of an arbitrator is drawn from, but not limited to, CVs, information available online, publications and speeches held. However, when wishing to know more about the procedural or soft skills of an arbitrator, parties often rely on word of mouth.[12] As such, some commentators consider that the process of selecting an arbitrator remains 'a painfully inexact process'.[13]

In addition, there is no question that there is a transparency and diversity hurdle to overcome in international arbitration. Therefore, initiatives such as Arbitrator Intelligence, ArbitralWomen, the Equal Representation in Arbitration Pledge and REAL (Racial Equality for Arbitration Lawyers), among others, coupled with data contained on online platforms such as the GAR ART, ISLG, Jus Mundi and the IAReporter, are crucial to increasing transparency and diversity in international arbitration.

12 Catherine Rogers, 'A window into the soul of international arbitration: arbitrator selection, transparency and stakeholder interests', *Victoria University of Wellington Law Review*, Volume 46, Issue 4, 1180 (2015).

13 Michael McIlwrath, Lucy Greenwood and Ema Vidak-Gojkovic, 'Chapter II: The Arbitrator and the Arbitration Procedure, Puppies or Kittens? How to Better Match Arbitrators to Party Expectations', in Christian Klausegger, et al. (eds), *Austrian Yearbook on International Arbitration*, 62 (2016).

How to choose your arbitrator

How to get a 'good' tribunal

A party's choice of arbitrator is perhaps the most important decision that a party makes in an arbitration. It is often said that it is better to have a bad counsel and a good arbitrator than the reverse. That raises the question: what is meant by a 'good' arbitrator?

Quite often, parties believe that a good arbitrator is an arbitrator who would espouse their views. That in fact is not the case. Biased arbitrators or arbitrators that systematically agree with the parties that appointed them are unlikely to be the most efficient in an arbitral tribunal. Rather, arbitrators who know the facts of the cases in their most minute details and understand the legal issues at stake are far better, regardless of whether they are ultimately in agreement or not with the party appointing them.

A distinguishing feature of the choice of arbitrator is the extreme conservatism that the parties tend to adopt when choosing. When parties are presented with a choice of various profiles, the tendency is to choose the most senior candidate. This may be the best choice in some circumstances. It is not always the best choice. Some cases will require a significant investment of time by the arbitrators. If the case in question is such a case, it may be a good idea to appoint a less experienced arbitrator who has the capacity to devote enough time to the case and the drive to get to the bottom of the facts. This will give that arbitrator a premium in deliberations over the other members of the tribunal who may have had insufficient time to study the case in such detail.

The real question that each party should ask itself is not whether X or Y is a good arbitrator, but whether X or Y is a good arbitrator for this particular case. That is a very different question. Choosing the right person for any given case is more an art than a science.

In this respect, the use of the quantitative data available on the marketplace is of little assistance. First, the databases are frequently not up to date. Second, they may be inaccurate. Third, the most successful arbitrators do not update their profiles regularly and some of them have requested to be removed entirely.

Similarly, it is not particularly useful to scrutinise the various writings of any prospective arbitrator in an attempt to guess their position on any specific legal issue. While it is true that a party should not appoint an arbitrator who has repeatedly taken an opposite position to the one they intend to argue (for example, whether an arbitration agreement should be extended to non-signatories), this type of scenario is more the exception than the norm. This exercise helps to identify who should not be appointed, but it is of no assistance to identify who should be appointed. There is really no way to guess in advance what legal position an arbitrator will take in any given dispute.

For that purpose, there is no substitute for the judgement of experienced counsel. Only experienced counsel will have both the quantitative information and the human intelligence that is necessary to make the right choice for a given case. The

added value seasoned counsel can bring is immeasurable. It results from their experience both as counsel and as arbitrator having sat with many potential candidates.

– Philippe Pinsolle, Quinn Emanuel Urquhart & Sullivan LLP

How to break a deadlock in appointing a presiding arbitrator

Between 2018 and 2019, the number of ICSID-presiding arbitrator deadlocks ranged between 20 per cent and 35 per cent.[14] Generally, most, if not all, institutional rules provide for review of the parties' individual arbitrator nominations or joint proposals by the arbitral institution for adequacy, including an evaluation of impartiality and experience.[15] Nevertheless, as a matter of party autonomy, the vast majority of institutions pay substantial deference to the parties' joint selection of an individual as presiding or sole arbitrator.

In a typical procedure in international arbitration, each party usually selects an arbitrator, known as a 'party-appointed' or 'wing' arbitrator, with the 'presiding arbitrator' or 'chair' often being appointed by the two wing arbitrators, the opposing parties, an arbitral institution or third party. 'It is, however, a right of the parties to almost any arbitration to jointly nominate their preferred candidate for presiding arbitrator. Where a minimum level of co-operation remains, parties should make good use of this opportunity'[16] to avoid a deadlock in appointing a presiding arbitrator.

14 Born, footnote 3, at 1795–1796; 'ICSID, 2019 Annual Report 32 (2019) (between July 2018 and June 2019, parties or party-appointed arbitrators made 80% of all appointments to ICSID tribunals, while ICSID chose remaining 20%); ICSID, 2018 Annual Report 32 (2018) (between July 2017 and June 2018, parties or party-appointed arbitrators made 65.3% of all appointments to ICSID tribunals, while ICSID chose remaining 34.7%); ICSID, 2017 Annual Report 35 (2017) (between July 2016 and June 2017, parties or party-appointed arbitrators made 71.5% of all appointments to ICSID tribunals, while ICSID chose remaining 28.5%); ICSID, 2016 Annual Report 35 (2016) (between July 2015 and June 2016, parties or party-appointed arbitrators made 73% of all appointments to ICSID tribunals, while ICSID chose remaining 27%); ICSID, 2015 Annual Report 27 (2015) (between July 2014 and June 2015, parties or party-appointed arbitrators made 73.3% of all appointments to ICSID tribunals, while ICSID chose remaining 26.7%'.

15 id. at 1788.

16 Freshfields Bruckhaus Deringer, 'Selecting presiding arbitrators: how parties can seek to agree on a mutually acceptable candidate', 8 June 2021, available at: https://riskandcompliance.freshfields.com/post/102gzw0/selecting-presiding-arbitrators-how-parties-can-seek-to-agree-on-a-mutually-acce (last accessed on 15 September 2021).

Pursuant to the 2013 UNCITRAL Arbitration Rules, '[a]rticle 11 allows the court or other competent authority designated in Article 6 to intervene to ensure that deadlocks in the appointment procedure will not prevent the arbitration from going forward. The court or competent authority may also intervene when a deadlock occurs in an appointment procedure agreed to by the parties (a party fails to act as required under such procedure, the parties or the arbitrators are unable to reach an agreement expected of them under such procedure, or a third party fails to perform a function entrusted to it under such procedure).'[17]

The Australian courts have created something similar. In *Tulip Bay Pty Ltd v. Structural Monitoring Systems Ltd*,[18] the Supreme Court of Western Australia was able to exercise its power to appoint arbitrators under the Commercial Arbitration Act 2012 (WA), where the parties were unable to agree on a single arbitrator.[19] There, each party was to appoint a single arbitrator, who could then jointly appoint a third arbitrator. If the two arbitrators were unable to select a third, the president of the Australian Institute of Arbitration would be requested to make the appointment. The Court evaluated the reasons that led to the deadlock in appointing the presiding arbitrator, and ultimately found that the bases were unfounded. Accordingly, the Court exercised its powers under Section 11(4)(a) of the Commercial Arbitration Act 2012 (WA) and appointed an arbitrator on behalf of the party refusing to make the appointment.

In some instances, the applicable treaty may state that the presiding arbitrator has to be appointed by agreement of the disputing parties.[20] As such, the party-appointed arbitrators can invite the parties to inform them of any agreement that the parties may reach. The parties can agree to submit a list of candidates for presiding arbitrator to each other. In turn, each party would rank or comment on any of the candidates included on the opposing party's list. After intense research on both ends, the parties can inform the institutional administrator that they have

17 Born, footnote 3, at 1842.

18 [2019] WASC 223.

19 Resolution Institute, 'Arbitration Deadlock: The Courts to the Rescue', available at: https://www.resolution.institute/resources/case-notes/arbitration-deadlock-the-courts-to-the-rescue (last accessed 11 September 2021).

20 See, e.g., the United States–Peru Free Trade Agreement, Chapter 10, 'Investment', Article 10.19.1 ('Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.').

agreed on the chairperson. The parties can further request that the administrator be the one to reach out to the selected presiding arbitrator to notify and appoint them as president of the tribunal.[21]

Parties unable to agree on the selection of a presiding arbitrator could seek the assistance of the wing arbitrators and develop creative solutions to avoid a deadlock in the appointment of the presiding arbitrator.

For example, the parties could agree that the presiding arbitrator shall be appointed by the co-arbitrators, instead of the appointing authority. The co-arbitrators could provide the parties with detailed instructions to be followed, which might include submissions of lists of a maximum of five candidates who the parties believe meet the requirements to be presiding arbitrators. The lists should not be binding but considered by the co-arbitrators when nominating the chairperson. The co-arbitrators may also have full discretion to consider any candidate even if not included in the parties' lists of proposed arbitrators. A shortened list of candidate, created by the co-arbitrators, would then be shared with the parties.

The parties would be given a deadline to submit a final rank list of their preferred candidates, and would then convey their preferences via email to both co-arbitrators, not copying the opposing party. The co-arbitrators would consider both parties' preferences but retain discretion to make an appointment, based on their own order of preference. The co-arbitrators would then proceed to contact the candidates in accordance with their preferred order, to determine their availability, interest and absence of conflicts, after which they could proceed to make the nomination of the chairperson by mutual agreement.[22]

The duties of the arbitrators

It is generally accepted that arbitrators have a number of obligations and duties with respect to the parties to an arbitration and to the arbitral proceeding per se. The most common duties include the obligation to be impartial and independent, to conduct the arbitration in accordance with the arbitration agreement, to make appropriate disclosures, and to comply with their ethical obligation in keeping information confidential. These duties, and their compliance thereto, protect the integrity of the arbitral proceeding and instil confidence in its users.

21 This was the selection procedure adopted in an ISDS where the author acted as counsel.

22 This was the selection procedure adopted in an ISDS where the author acted as counsel.

How to break deadlock over the chair

The difficulties associated with the choice of arbitrator are worse when it comes to choosing the chair.

Both parties will have their own views as to the chair's profile and these views will rarely coincide. This may often lead to a deadlock. Yet, the parties themselves may not want to go to the appointing authority or the institution.

There are different ways of breaking the deadlock, but they all revolve around the same principle: the choice of the chair has to be made in a mechanical fashion that will produce a name, regardless of respective views of the parties.

If that is what the parties want, the best system is a list system where the number of strikes is such that there will be at least one common choice. For example, the arbitrators can give the parties five names with the possibility of striking only two of them and the obligation to rank the others. Mechanically, this will produce a common name. Of course, the arbitrators should retain their discretion here and not be bound by this mechanical choice. The reason for this is that if, in our example, the common name is ranked third by both parties, it may be worth renewing the exercise.

There are variations around the systems available but they all have the same ingredients. The first ingredient is a system that mechanically produces a choice or choices. The second ingredient is the ability of the arbitrators to exercise some discretion, regardless of that mechanical choice, including by going back to the parties where the mechanical exercise is judged as having produced an unsatisfactory result.

– Philippe Pinsolle, Quinn Emanuel Urquhart & Sullivan LLP

The International Bar Association (IBA) Rules of Ethics for International Arbitrators provide that '[i]nternational arbitrators should be impartial, independent, competent, diligent and discreet' and that '[a]rbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias'.[23]

Under the ICSID Arbitration Rules, an arbitrator who has accepted the appointment (1) shall keep all information confidential that comes to their knowledge as a result of their participation in the arbitral proceedings, (2) shall keep confidential the contents of any award made by the tribunal, (3) shall judge fairly, and (4) shall make appropriate disclosures.[24] In addition, arbitrators under the ICSID Arbitration Rules must render a reasoned award and in writing.[25]

23 IBA Rules of Ethics for International Arbitrators, Introductory Note and Fundamental Rule (1987).

24 ICSID Arbitration Rules, Rule 6.

25 ICSID Arbitration Rules, Rule 47 ('(1) The award shall be in writing and shall contain: (a) a precise designation of each party; (b) a statement that the Tribunal was established

Similarly, under the 2013 UNCITRAL Arbitration Rules, the potential appointed arbitrator shall disclose any circumstances that could give rise to doubts as to their impartiality or independence, and their duty to disclose is continuous throughout the arbitral proceedings.[26] Under these Rules, the arbitral tribunal is also required to conduct the proceedings without delay and in a fair and efficient manner,[27] and to render an award in writing, stating the reasons upon which the award is based, unless the parties agreed otherwise.[28]

Version three of the ICSID and UNCITRAL Draft Code of Conduct for Adjudicators in International Investment Disputes makes clear that the obligation of an arbitrator to be impartial and independent 'encompasses the obligation not to: (a) [be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamour;] (b) be influenced by loyalty to a Treaty Party to the applicable treaty, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the international investment dispute (IID); (c) take instruction from any organization, government or individual regarding the matters addressed in the IID; (d) allow any past or present financial, business, professional or personal relationship to influence their conduct or judgement; (e) use their position to advance any personal or private interest; or (f) assume an obligation or accept a benefit that could interfere with the performance of their duties'.[29]

It is a fundamental expectation of the parties that the individuals adjudicating their dispute be independent and impartial. Although often used interchangeably in practice, the standard of independence and impartiality are indeed distinct standards. '[I]ndependence is concerned with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise. This is considered to be an objective test, mainly because it has nothing to do

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under the Convention, and a description of the method of its constitution; (c) the name of each member of the Tribunal, and an identification of the appointing authority of each; (d) the names of the agents, counsel and advocates of the parties; (e) the dates and place of the sittings of the Tribunal; (f) a summary of the proceeding; (g) a statement of the facts as found by the Tribunal; (h) the submissions of the parties; (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and (j) any decision of the Tribunal regarding the cost of the proceeding.').

26 2013 UNCITRAL Arbitration Rules, Article 11.

27 id., Article 17.

28 id., Article 34, 1–2.

29 Draft Code of Conduct for Adjudicators in International Investment Disputes, September 2021, Article 3.

with an arbitrator's state of mind.'[30] This standard requires that 'there should be no actual or past dependent relationship between the parties that may, or at least appear, to affect the arbitrator's freedom of judgment'.[31] Impartiality, on the other hand, goes to a person's state of mind.[32] It implies an 'absence of external control' and 'bias and predisposition towards a party'.[33] ICSID tribunals have identified independence and impartiality as the two 'key qualifications of arbitrators'.[34]

The IBA Guidelines on Conflicts of Interest in International Arbitration are frequently applied when assessing the impartiality and independence of arbitrators. The Guidelines consist of a traffic light colour-coded list that provides non-exhaustive examples of potential conflicts that may arise. Conflicts on the 'green' list should not lead to disqualification under the objective test already discussed and need not necessarily be disclosed. Conflicts on the 'orange' list should be disclosed and, depending on the facts of a given case, may or may not give rise to doubts as to the arbitrator's impartiality or independence. Circumstances that

30 Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, Fifth edition (Oxford University Press, 2009), 267.

31 Pedro Sousa Uva, 'A Comparative Reflection on Challenge of Arbitral Awards Through the Lens of the Arbitrator's Duty of Impartiality and Independence', 20 *Am. Rev. Int'l Arb.*, 479, 485 (2009).

32 Alan Redfern and Martin Hunter, *The Law and Practice of International Commercial Arbitration* (Sweet and Maxwell, 1999); *National Grid PLC v. The Argentine Republic*, Case No. UN 7949, Decision of the LCIA on the Challenge to Mr Judd L Kessler.

33 Loretta Malintoppi, 'Part III Procedural Issues, Chapter 20 – Independence, Impartiality, and Duty of Disclosure of Arbitrators', *The Oxford Handbook of International Investment Law*, (Oxford University Press, 2008), 807; see also *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014; *Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/14/10, Decision on the Proposal to Disqualify Professor Brigitte Stern, 9 June 2015; see also *Mr. Bob Meijer v. Georgia*, ICSID Case No. ARB/20/28, Decision on the Proposal to Disqualify Professor Dr Klaus Sachs, 15 July 2020.

34 See, e.g., *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Decision on the Proposal to Disqualify Mr Gabriel Bottini, 29 October 2019; see also *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (I)*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov, 17 May 2018; see also *VM Solar Jerez GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/19/30, Decision on the Proposal to Disqualify Professor Dr Guido Santiago Tawil, 24 July 2020.

appear on the 'red' list indicate conflicts of interest and require strict disclosure requirements and express waivers by the parties, or, alternatively, these situations result in a potential arbitrator's inability to accept an appointment.[35]

Another important duty of an arbitrator, connected to the arbitrator's independence and impartiality, is the duty to disclose. The arbitrator should disclose any relationship that could give rise to justifiable doubts.

For the most part, institutions provide guidelines and templates to facilitate the conflicts check and the arbitrator's declaration, which enables the arbitrator to disclose any past and present relationships that may give rise to justifiable doubts regarding their independence and impartiality. Indeed, the IBA Guidelines on Conflicts of Interest in International Arbitration state 'that the fact of requiring disclosure – or of an arbitrator making a disclosure – does not imply the existence of doubts as to the impartiality or independence of the arbitrator'.[36]

Rule 6 of the ICSID Arbitration Rules states, in relevant part, that appointed arbitrators must submit a statement declaring '(a) [their] past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause [the arbitrator's] reliability for independent judgment to be questioned by a party'.[37] They are also required to acknowledge a continuous obligation to promptly disclose any such relationship or circumstance that may arise during the arbitral proceedings.[38]

As such, it is highly recommended to err on the side of caution and make complete disclosures to maintain the integrity of the arbitration proceedings and the award. In *Eiser Infrastructure Ltd et al v. Kingdom of Spain*, the tribunal issued an arbitral award against Spain and in favour of the claimant investors of over US$140 million in damages, coupled with interest.[39] The award was based on an Energy Charter Treaty dispute and rested on a finding that Spain wrongfully revoked the renewable energy investors' subsidies and financial inducements under Spain's legislation enacted in 2007. Subsequently, Spain petitioned for the annulment of the award based upon an allegation that the claimants' party-appointed arbitrator had a conflict of interest because of a failure to disclose a business relationship with the claimants' damages expert. An ICSID committee was established for purposes of deciding the annulment petition. This committee

35 See generally IBA Guidelines on Conflicts of Interest in International Arbitration (2014).

36 IBA Guidelines on Conflicts of Interest in International Arbitration, Preamble (2014).

37 ICSID Arbitration Rules, Rule 6.

38 ibid.

39 *Eiser Infrastructure Ltd. et al. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, ¶ 486.

unanimously decided to annul the award due to 'a manifest appearance of bias'.[40] The committee ordered the claimants to pay the fees and expenses of the members of the committee; the charges for the use of the ICSID facilities; and the fees and expenses incurred by Spain in pursuing its annulment application.[41]

Usually, after an arbitrator makes a disclosure and the parties do not object immediately or within the time limit established to do so, the party is deemed to have waived any challenge in connection with the disclosure.

Apart from these duties and obligations, arbitrators are prohibited from delegating 'their decision-making function to an Assistant or to any other person'.[42] Furthermore, the arbitrator needs to dispose of all relevant issues. Courts have held that the parties also have a similar obligation to raise issues as they arise.[43]

In US domestic arbitration, unless requested otherwise by the parties, an arbitrator may issue an award that 'merely declares a winner and a loser'.[44] However, even when not required, a reasoned award is preferred for enforcement purposes.[45] This is not the case in international arbitration, where institutions require awards to be reasoned.[46] In some cases, the institution provides the arbitrator with a checklist and request to review the award before submitting it to the parties.[47]

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40 id. Decision on the Kingdom of Spain's Application for Annulment, 11 June 2020, ¶¶ 219–220.

41 id. at ¶ 270.

42 Draft Code of Conduct for Adjudicators in International Investment Disputes, September 2021, Article 5.1; see also *Yukos* Set-Aside Petition, Section V (Russia sought to set aside the awards, inter alia, on the ground that the arbitrators did not personally fulfil their mandate but instead delegated their adjudicative function to a PCA assistant. In 2020, the Hague Court of Appeal disagreed, finding that even if the assistant had written part of the award, it did not constitute a breach of the arbitral rules. See The Hague Court of Appeals, 18 February 2020, ECLI:NL:GHDHA:2020:234).

43 *Loren Imhoff Homebuilder, Inc. v. Lisa Taylor, et al.*, No. 2019AP2205, 2020 WL 6495102 (Wis. Ct. App. 5 November 2020).

44 See, e.g., *Cat Chater LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011).

45 See, e.g., *Tools, Inc. v. Chongqing SENCI Import & Export Trade Co.*, 2019 U.S. Dist. LEXIS 50633 (S.D.N.Y. 26 March 2019); see also *Leeward Const. Co., Ltd. v. Am. Univ. of Antigua-College of Medicine*, 826 F.3d 634, 640 (2d Cir. 2016).

46 ICSID Additional Facility Rules, Article 52; London Court of International Arbitration, Arbitration Rules, Article 26.2; International Chamber of Commerce, Arbitration Rules, Article 32(2); Singapore International Arbitration Centre, Arbitration Rule 32.4.

47 ICC Award Checklist, available at: https://iccwbo.org/content/uploads/sites/3/2016/04/ICC-Award-Checklist-English.pdf (last accessed 22 September 2021); AAA-ICDR Award Checklist, available at: https://www.icdr.org/sites/default/files/document_repository/AAA_ICDR_Award_Checklist_3.pdf (last accessed 22 September 2021).

These duties and obligations are critical, as a mere appearance of one party not having had a fair proceeding could lead to the award being challenged.[48]

Challenges to arbitrators

The IBA Guidelines on Conflicts of Interest in International Arbitration apply to arbitrators, and thus prove to be a practical starting point for understanding challenges to arbitrators regarding conflicts of interest. The Guidelines are organised in two parts: one addressing general standards concerning impartiality, independence and disclosure; and another illustrating the practical application of the general standards. The Guidelines reiterate the international arbitration community's effort to avoid unsubstantiated challenges, levied by opposing parties as delay tactics or to interfere with a party's appointed arbitrator.

Choosing 'your' arbitrator – in praise of neutrality

Not infrequently, a party to an investor–state proceeding will search for and then appoint a co-arbitrator who, the appointing party feels confident, will support the position of his or her appointer. That this is contrary to the ethos of international arbitration is undoubted. In the international sphere, the quintessence of dispute resolution by arbitration is an independent and neutral tribunal.

What may not be appreciated by those who seek partiality in their appointees is that the appointment of a partial arbitrator is unlikely to be of assistance, and is more likely to backfire. Time and again, neutral co-arbitrators cringe when their partisan colleague pulls on the team-sweater of his or her appointer. The partial arbitrator irritates the rest of the tribunal and, as any sensible counsel knows, it seldom pays to irritate the minds of those whose job it is to decide the case.

If a party has the better side of a dispute, a properly chosen tribunal will almost always decide in its favour, regardless of the make-up of the tribunal. In investor–state disputes, where stakes can be high, the integrity and acceptability of dispute resolution by arbitration can only be assured by independent and unbiased appointees.

– J William Rowley QC, Twenty Essex

48 See, e.g., ICSID Convention, Article 52; see also ICSID Arbitration Rules, Rule 50; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on 10 June 1958, Article V.

The 2013 UNCITRAL Arbitration Rules address challenges to arbitrators in Articles 11 to 13.[49] Article 12(1) provides that '[a]ny arbitrator may be challenged if circumstances exist that give rise to *justifiable* doubts as to the arbitrator's impartiality or independence'.[50] Article 12(2) elaborates that '[a] party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made'.[51] Article 12(3) explains that '[i]n the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in Article 13 shall apply'.[52]

The addition of 'justifiable' in the 2013 UNCITRAL Arbitration Rules qualifies the type of doubt required to sustain a challenge. Similarly, per the IBA Guidelines, a challenge and subsequent disqualification of an arbitrator should only be successful if an objective test is met.[53] In other words, a doubt is justifiable 'if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case'.[54]

In *Halliburton Company v. Chubb Bermuda Insurance Ltd*, the Supreme Court of the United Kingdom addressed an arbitrator's duty to disclose in an ad hoc arbitration seated in London and governed by New York law. There, the Court had to determine whether an arbitrator's failure to disclose appointments across multiple arbitrations with overlapping subject matter and one common party gave

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49 This standard for arbitrator challenges is similarly addressed by the UNCITRAL Arbitration Rules of 1976 and 2010, with some distinctions. See, e.g., ICSID World Bank Group, available at: https://icsid.worldbank.org/services/arbitration/uncitral/challenge-arbitrators (last accessed on 9 September 2021).

50 2013 UNCITRAL Arbitration Rules, Article 12 (emphasis added); see also id. at Article 11, which establishes the arbitrator's duty to disclose as an ongoing duty throughout the proceeding ('When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by her of these circumstances.'). The 'without delay' requirement was not included in the 1976 Rules. The UNCITRAL Rules even provide model statements of independence pursuant to Article 11 in the annex to the Rules.

51 ibid.

52 ibid.

53 IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 2(c), and Explanation to General Standard 2.

54 ibid.

rise to justifiable doubts as to the arbitrator's impartiality to warrant removal. In short, the Supreme Court found that, to determine whether there is an appearance of bias such that removal of an arbitrator is required, English law will apply the objective test of whether an informed, fair-minded observer would conclude that there is a real possibility of bias. Consequently, the Court dismissed the challenge based upon a finding that the relevant question in the removal proceeding was whether at the date of the hearing for removal, a fair-minded and informed observer would have concluded that there was a real possibility of unconscious bias on behalf of the challenged arbitrator. Further, the Court explained that such an observer would not have made that conclusion because the challenged arbitrator had already provided an explanation for the arbitrator's failure to disclose the appointment in question, at the time of removal, and this explanation was not challenged.[55]

Article 57 of the ICSID Convention provides two core grounds for arbitrator disqualification: (1) the arbitrator manifestly lacks the qualities required by Article 14(1) of the ICSID Convention;[56] or (2) the arbitrator is ineligible for appointment under Articles 37 to 40 of the ICSID Convention.[57] Article 14(1) establishes the requirement of independence and impartiality, the lack of which forms the basis for an arbitrator challenge or disqualification.

In *Suez et al v. Argentina*, the tribunal clarified that '[i]mplicit in Article 57 and its requirement for a challenger to allege a fact indicating a manifest lack of the qualities required of an arbitrator by Article 14, is the requirement that such

55 *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 4; see also J Rich, 'U.K. Supreme Court Rules on Arbitrator Bias in Halliburton v. Chubb', 1 December 2020, *Kluwer Arbitration Blog*, available at: http://arbitrationblog.kluwerarbitration.com/2020/12/01/u-k-supreme-court-rules-on-arbitrator-bias-in-halliburton-v-chubb/ (last accessed 15 September 2021). It is important to note that, here, the Supreme Court found that the challenged arbitrator breached the duty to disclose later appointments. However, the Court did not find bias on the part of the challenged arbitrator on the date of the removal hearings. In the opinion of the author, to judge an arbitrator's conduct regarding their duty to disclose on the date of the hearing, as opposed to the date when the arbitrator accepted the appointment or when they became aware of the potential conflict, may result in peculiar outcomes with respect to an arbitrator's duty to disclose under English arbitration law.

56 ICSID Convention, Article 57; see, e.g., *EDF International S.A., SAUR International S.A. & Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, 25 June 2008, ¶ 68 ('Professor Schreuer indicates that the proposed test for what is "manifest" relates not to the seriousness of the allegation, but to the ease with which it may be perceived. Something is "manifest" if it can be "discerned with little effort and without deeper analysis".').

57 ICSID Convention, Section 2, Constitution of the Tribunal.

The sine qua non when appointing 'your' arbitrator

Both as an advocate and international arbitrator, I always have believed that the fundamental criterion for a party and its counsel in choosing a party-appointed arbitrator is someone who, for whatever reason or on whatever basis, automatically will be respected by the other co-arbitrator and the eventual president, chairperson or presiding arbitrator. In other words, choose someone to whom the other two are bound to listen and take seriously.

That means, first, to rule out anyone whose independence or impartiality inherently is in doubt, such as (1) where a respondent state appoints a national of that state who is paid by the state (even a university professor); (2) where a respondent state has such a character that, objectively speaking, if it appoints one of its nationals, his or her fellow arbitrators will assume that that person 'cannot safely return home unless it supports that state's position'; or (3) where either the investor appoints someone notorious for being pro-investor, or the state appoints someone notorious for being pro-state. I recall being appointed some years ago as judge ad hoc of the Inter-American Court of Human Rights because counsel for the appointing South American state advised it: 'Don't appoint a national. Don't even appoint any Latin American. Appoint instead someone from outside that world.'

Second, the factor of being 'automatically respected' may be influenced by the nature of the arbitration. For example, the required respect in a big construction arbitration may be gained by appointing an icon of that field. I recall sitting in a very complex construction arbitration (*not* an area of my expertise) chaired by an English QC from a leading set of chambers who also had a PhD in the relevant branch of engineering and who was serving on every conceivable board, society or other speciality group for construction disputes. My co-arbitrator also was not an expert in construction matters, so the chairman necessarily dominated the proceedings, which ended with a unanimous award.

So remember, the arbitral corollary to 'Trust is the coin of the realm' is 'Automatic respect for your party's appointee is the sine qua non'.

– Judge Charles N Brower, Twenty Essex

lack be proven by objective evidence and that the mere belief by the challenge of the contest arbitrator's lack of independence or impartiality is not sufficient to disqualify the contested arbitrator'.[58]

58 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007, ¶ 40.

Commentators have explained that challenges to arbitrators in international arbitration have risen in past years. In part, this is due to an increase in selecting arbitration as a preferred mechanism of dispute resolution.[59] Sometimes parties use challenges to delay the proceedings. As such, arbitrators or committees deciding on challenges to arbitrators, and parties opposing them, should be keen in determining whether elements or facts exist that could reveal the true purpose of the challenge. Regardless of whether the challenge is unmeritorious, 'the right to challenge an arbitrator is one of the most effective mechanisms to protect the integrity of the arbitration process . . .'.[60]

Replacement of arbitrators

The replacement of an arbitrator may be necessary for a myriad of reasons, including death, a successful challenge and the resignation of a duly appointed arbitrator. The latter was the case for an arbitrator, appointed to an ICSID tribunal, only to then be challenged over appointments received in other arbitrations against the same nation-state of Bangladesh. In that case, Bangladesh proffered that the appointments of the arbitrator signalled that he could not be neutral and unbiased as some of the arbitrator's earlier decisions in other arbitrations meant that this arbitrator may have prejudged important aspects of the case. The resignation tendered by the arbitrator to avoid delaying the proceedings was accepted by the co-arbitrators.[61]

ICSID Arbitration Rule 7 provides that '[a]t any time before the Tribunal is constituted, each party may replace any arbitrator appointed by it and the parties may by common consent agree to replace any arbitrator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.'[62]

Moreover, the replacement or removal of an arbitrator during an ongoing arbitration proceeding will raise the question as to whether any part of the arbitral process has to be repeated, partially or wholly.[63] For example, Article 15 of the 2013 UNCITRAL Arbitration Rules provides that '[i]f an arbitrator is

59 Christian Albanesi, 'Unmeritorious Challenges – Is it time to say enough?', in Carlos Gonzalez-Bueno (ed.), *40 Under 40: International Arbitration* (Dykinson SL, 2019), 23–24.

60 id. at 29.

61 Cosmo Sanderson, 'Paulsson resigns after challenge over parallel appointments', *Global Arbitration Review*, 31 August 2021, available at: https://globalarbitrationreview.com/paulsson-resigns-after-challenge-over-other-appointments (last accessed 15 September 2021).

62 ICSID Arbitration Rules, Rule 7.

63 Born, footnote 3, at 2094.

Have you ever thought of appointing the president first . . . ?

A simple way around the commonplace deadlock over president

With critics of the present system proposing such things as 'blind appointments' of arbitrators to minimise 'unconscious bias', particularly in party-appointed members of a tribunal, those who greatly approve of the current system might be advised to work on imagining other ways of constituting a tribunal.

For example, I was much impressed by the ingenuity of counsel, for both the claimant and the respondent state-owned entity, in the context of a case where the arbitration clause had provided for all three arbitrators to be appointed by the ICC International Court of Arbitration. (A good example of how the corporate lawyers putting the contract together so often neglect to seek the advice of their partners who may be called upon to clean up the mess when the contract is breached!) When the balloon went up, the lawyers on both sides understandably turned their noses up at that arbitration clause and negotiated a replacement: the parties first would agree on the president of their tribunal, only after which they would decide upon and simultaneously exchange the names of the co-arbitrators that they were nominating.

The first advantage: that of choosing your party-appointed arbitrator *knowing who the president is*, which should lead counsel to appoint as co-arbitrators persons who they know are highly regarded by the president. The result should be a compatible threesome.

Second advantage: no need to worry, as claimant, whom the respondent will appoint or, as respondent, whom the claimant will appoint – as both parties will work on the same basis, namely to make the president happy by selecting co-arbitrators he or she respects and to whom he or she will listen.

In this case, the president they selected was a celebrated QC, former head of his chambers and a deputy High Court judge; the respondent appointed a recently retired and highly respected Law Lord; and I was appointed by the claimant (whose counsel incidentally I had whooped in a major arbitration – always a very satisfying appointment!). The result was an approximately US$2.5 billion unanimous award. In the end the parties agreed that the claimant would waive the interest portion of the award and the respondent would immediately pay the principal amount of the award.

– Judge Charles N Brower, Twenty Essex

replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise'.[64]

64 2013 UNCITRAL Arbitration Rules, Article 15.

On the other hand, Article 14(1) and (2) of the Permanent Court of Arbitration (PCA) Arbitration Rules, which is essentially the same as Article 14 of the UNCITRAL Arbitration Rules, provides that 'in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may . . . appoint the substitute arbitrator.'[65]

Parties faced with the replacement of an arbitrator should perform the same careful arbitrator research as they did at the beginning of the arbitral process.

65 2012 PCA Arbitration Rules, Article 14(1), (2).

CHAPTER 8

Jurisdiction: Main Elements

Stanley U Nweke-Eze[1]

Introduction

Jurisdiction is an essential precondition to an arbitral tribunal's ability to resolve an investment dispute between an investor and a host state. The issue of jurisdiction is primarily determined by reference to the relevant investment instrument that gives authority to the tribunal (i.e., an investment treaty, domestic foreign investment law or the parties' arbitration agreement). Some elements are important in establishing the jurisdiction of an arbitral tribunal. For example, the tribunal is expected to determine whether the parties (i.e., the investor and host state) have consented to submit the dispute to arbitration, whether the party instituting the claim is a covered investor, and whether the transactions that give rise to the claim qualify as a covered investment in the territory of the host state.[2] These elements are discussed in this chapter.

Establishing consent to arbitration

The consent of the host state and investor is the bedrock of the arbitral tribunal's jurisdiction and lies in the parties' common intention and agreement to submit any dispute arising in their relationship to arbitration. In simple words, the parties'

1 Stanley U Nweke-Eze is a senior associate at Templars.

2 In relation to disputes brought under the International Centre for the Settlement of Investment Disputes (ICSID), the parties would, in addition, also need to comply with the principles governing jurisdiction under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). See Articles 25 to 27 of the ICSID Convention. It has been argued that a similar standard applies to claims under Article 4(2) of the ICSID Additional Facilities given its reference to Article 25 of the ICSID Convention. See also *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID, Award, 4 May 2016, Paragraph 186.

consent confers jurisdiction to the arbitral tribunal. It must, therefore, be established that the host state and investor have given their unequivocal consent to submit a dispute to arbitration.[3]

Consent to arbitration can take varying forms so long as it is clear[4] and free from coercion, fraudulent inducement or mistake.[5] Also, consent shall not be presumed in the face of ambiguity – it must, instead, be established[6] – and it has been held that the burden of establishing consent 'lies primarily upon the claimant'.[7]

The consent of the host state typically takes the form of an offer in an investment treaty,[8] a domestic investment law[9] or an arbitration agreement between the parties.[10] Indeed, the host state can provide conditions under which consent will

3 *Ethyl v. Canada*, ad hoc arbitration, Award on Jurisdiction, 24 June 1998, Paragraph 59.

4 *Tenaris and Talta v. Venezuela (II)*, ICSID, Decision on Annulment, 28 December 2018, Paragraph 337.

5 *Abaclat & Others v. Argentine Republic*, ICSID, Decision on Jurisdiction and Admissibility, 4 August 2011, Paragraphs 436–438.

6 *PNG Sustainable Development v. Papua New Guinea*, ICSID, Award, 5 May 2015, Paragraphs 255–256; *Daimler v. Argentina*, ICSID, Award, 22 August 2012, Paragraph 175.

7 *National Gas v. Egypt*, ICSID, Award, 3 April 2014, Paragraph 118.

8 This is usually contained in a clause in an investment treaty between two contracting states agreeing to submit future investment disputes arising between an investor from the home state and the host state to arbitration. See, for example, Article 9(3) of the China–Nigeria BIT (2001) and Article 9(1) of the Egypt–Netherlands BIT (1996). A provision on consent in an investment treaty is typically no more than a standing offer that requires the acceptance of an investor. Acceptance in this context can be effected by filing a claim against the host state. See *American Manufacturing & Trading INC v. Republic of Zaire*, ICSID, Award, 21 February 1997, Paragraph 5.23; *Daimler v. Argentina*, ICSID, Award, 22 August 2012, Paragraph 168.

9 These typically provide for the resolution of investment disputes between a foreign investor and the host state through arbitration. For example, Section 26(2) of the Nigerian Investment Promotion Commission Act 1995 provides that 'any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration . . .'. However, provisions such as this are generally nothing more than an offer that may be accepted by the investor, and the filing of a claim at ICSID by an investor in line with any respective national law signifies the acceptance of this offer. See *Inceysa v. El Salvador*, ICSID, Award, 2 August 2006, Paragraph 332; *SPP v. Egypt*, ICSID, Decision on Jurisdiction, 14 April 1988, Paragraph 116.

10 This is usually contained in a clause in an investment agreement between the host state and the investor agreeing to submit future disputes arising in relation to the investment agreement to arbitration. See *Duke Energy v. Peru*, ICSID, Decision on Jurisdiction, 1 February 2006, Paragraphs 80–81; *ST-AD v. Bulgaria*, PCA, Award on Jurisdiction, 18 July 2013, Paragraph 337.

be given (for example, a good-faith attempt by the investor to settle the dispute amicably)[11] or limit its consent to specific investments or disputes that meet the characteristics indicated by it[12] (for instance, limiting its consent to disputes arising out of an alleged act of expropriation).[13]

Also, it must be determined that the investor has given its consent to arbitrate. Normally, the request for arbitration (or notice of arbitration) is considered to qualify as the consent of the investor.[14] Therefore, when a request or notice is delivered by the investor, it is deemed that the investor has accepted the offer to arbitrate by the host state contained in an investment treaty, domestic foreign investment law or an arbitration agreement.[15]

Note that neither the investor nor the host state can unilaterally rescind or withdraw consent once it has been granted and perfected.[16] The unilateral irrevocability rule is founded on the idea that once a contract is finalised, it becomes a binding agreement between the parties. The irrevocability of consent, however, applies once the consent has been completed and does not prohibit the parties from mutually rescinding their consent.[17]

Personal jurisdiction: 'covered investor'

Another important element that goes to the root of an arbitral tribunal's jurisdiction is the determination of whether the investment dispute arises between the proper parties (i.e., a covered investor and a host state). If, for instance, the proposed claimant does not qualify as an investor under the relevant instrument (i.e., an investment treaty, investment law or contract), the arbitral tribunal would lack the jurisdiction to act.

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11 *Burlington v. Ecuador*, ICSID, Decision on Jurisdiction, 2 June 2010, Paragraph 315; *ST-AD v. Bulgaria*, PCA, Award on Jurisdiction, 18 July 2013, Paragraphs 372, 337.

12 *Inceysa v. El Salvador*, ICSID, Award, 2 August 2006, Paragraphs 184–185.

13 *Beijing Shougang and others v. Mongolia*, PCA, Award, 30 June 2017, Paragraphs 436, 439, 446.

14 *AES v. Hungary (II)*, ICSID, Award, 23 September 2010, Paragraph 6.3.1; *National Grid v. Argentina*, ICSID, Decision on Jurisdiction, 20 June 2006, Paragraph 49.

15 *Ethyl v. Canada*, ad hoc arbitration, Award on Jurisdiction, 24 June 1998, Paragraph 59.

16 For instance, the closing phrase of Article 25(1) of the ICSID Convention states that when the parties have given their consent, no party may withdraw its consent unilaterally.

17 ICSID 2.3: Consent to Arbitration, Irrevocability of Consent, p. 37.

The covered investor can either be a natural or a juridical person. In relation to natural investors, most investment treaties define a qualified investor by reference to the person's state of origin or nationality,[18] while others define a covered investor by reference to either the nationality or permanent residency of the individual.[19] Hence, to qualify as a covered investor under the relevant investment treaty, it suffices for the investor to be a national of or (if applicable) permanently reside in the other contracting party's state (i.e., the home state). A natural person, that is a national of the host state, generally cannot bring a claim against the host state on the basis of an investment treaty.[20]

Regarding corporate or juridical investors, most investment treaties provide all or either of the following yardsticks for assessing the nationality of a corporate investor: the place of incorporation;[21] the place of constitution in accordance with the law in force in the country;[22] the nationality of the controlling persons;[23] and the location of the place of administration or management (or the seat of the corporation).[24] Satisfying one criterion, or a combination of two or more, would suffice to establish nationality.[25]

It is also important to establish that the respondent state is the host state where the investment was made and a contracting party to the applicable investment treaty or, if applicable, a party to the relevant investment agreement with

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18 Article 1 of the China–Nigeria BIT (2001), for example, defines an investor to include 'nationals and companies of both Contracting Parties' and defines 'national' as 'natural persons having the nationality of that Contracting Party'. See also Article 1(3) of the Egypt–Finland BIT (2004) and Article 1(2) of the China–Uzbekistan BIT 2011.

19 Article 1(7) of the Energy Charter Treaty (1998) defines 'investor' as '[a] natural person having the citizenship or nationality of or who is permanently residing in [a] Contracting Party in accordance with its applicable law'. See also Article 1(b)(i) of the Canada–Argentina BIT (1993).

20 Note that Article 25(2)(a) of the ICSID Convention provides that investors who had the nationality of the contracting party to the dispute (i.e., host state) on the date on which the parties consented to submit the dispute to arbitration and on the date on which the request for arbitration was registered are excluded from its jurisdiction.

21 This is the most common. See, for example, Article 1(c)(ii) of the United Kingdom–El Salvador BIT (2001) and Article 1(a)(ii) of the Philippines–Switzerland BIT (1997).

22 Article 1(3)(b) of the Greece–Cuba BIT (1997).

23 Article 1(b)(ii) and (iii) of the Netherlands–Bahrain BIT (2007); Article 1(b)(iii) of the Brazil–Netherlands BIT (1998).

24 Article 1(2) of the Germany-China BIT (2003).

25 Article 2(b) of the China–France BIT (2007); Article 1(2)(b) of the France–Libya BIT (2006). And to substantiate the inclusion of an investor under the treaty, the test of control is sometimes coupled with additional formal requirements such as incorporation and administration. See, for example, Article 1(2) of the Burkina Faso–Chad BIT (2001).

the investor. Hence, if a host state is not one of the contracting parties to an investment treaty or contract[26] the tribunal may have no jurisdiction to determine the dispute.[27]

Subject-matter jurisdiction: 'covered investment'

To ascertain whether the arbitral tribunal has subject-matter jurisdiction, it must be determined that there is a dispute or disagreement between an investor and a host state relating to a legal right or obligation contained in a relevant instrument (i.e., an investment treaty, investment legislation or a contract) that arises directly out of a covered investment. There must, therefore, be a connection between the parties' dispute and the prospective claimant's investment.[28]

As a first step, it is important to establish that the interests of the investor qualify as a covered investment under the relevant instrument. If the qualifying investor's interests in the host state do not qualify as an investment under the relevant instrument, the arbitral tribunal lacks the jurisdiction to act in relation to the claims.

The definition of 'investment' is, indeed, an important element of an arbitral tribunal's jurisdiction and a key feature in determining whether the substantive protections contained in the relevant instrument are applicable.[29] However, there is no generally accepted definition of investment under international investment law because investment treaties adopt varying approaches. Many adopt an open-ended, asset-based definition of investment, usually starting with 'every

26 For example, a state-owned entity, except in instances where the conduct of that entity can be attributed to the contracting party, or where, under the ICSID Convention and supported by the underlying investment treaty or contract, the claim is against 'constituent subdivisions or agencies of a contracting state' that has been 'designated to the [ICSID] by that state'); see Article 25(1) of the ICSID Convention; *Mytilineos v. Serbia (I)*, PCA, Partial Award on Jurisdiction, 8 September 2006, Paragraph 173.

27 *Öztaş Construction v. Libya*, ICC, Final Award, 14 June 2018, Paragraph 94.

28 *National Grid v. Argentina*, ICSID, Decision on Jurisdiction, 20 June 2006, Paragraphs 138–140.

29 *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID, Award, 4 October 2013, Paragraphs 145–163; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID, Award, 16 January 2013, Paragraph 133.

kind of asset' and followed by an illustrative, non-exhaustive list comprising different examples of assets. For instance, Article 1 of the China–Turkey Bilateral Investment Treaty (BIT) (2015) provides as follows:

> *The term 'investment' means every kind of asset, connected with business activities, invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with its laws and regulations, and shall include in particular, but not exclusively: (a) movable and immovable property, as well as any other rights as mortgages, liens, pledges and any other similar rights; (b) reinvested returns, claims to money or any other rights having financial value related to an investment; (c) shares, stocks or any other form of participation in companies; (d) industrial and intellectual property rights such as patents, industrial designs, technical processes, as well as trade-marks, goodwill, know-how and other similar rights; (e) business concessions conferred by law or by contract, including concessions related to natural resources; (f) rights under contracts, including turnkey, construction, management, production, or revenue sharing contracts . . .*[30]

Other investment treaties adopt an enterprise-based definition of investment. For example, Article 1 of the Morocco–Nigeria BIT (2016) defines investment as:

> *[a]n enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party in whose territory the investment is made taken together with the asset of the enterprise which contribute sustainable development of that Party and has the characteristics of an investment involving a commitment of capital or other similar resources, pending profit, risk-taking and certain duration. An enterprise will possess the following assets: a) Shares, stocks, debentures and other instruments of the enterprise or another enterprise; b) A debt security of another enterprise; c) Loans to an enterprise; d) Movable or immovable property and other property rights such as mortgages, liens or pledges; e) Claims to money or to any performance under contract having a financial value; f) Copyrights and intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State; g) Rights conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources.*[31]

30 See also Article 1 of the UK–China BIT (1986).

31 See also Article 1 of the China–Hong Kong BIT (2016); Article 2(4) of the Brazil–India BIT (2020).

Newer investment treaties also require the investment to have specified characteristics by seeking to limit the scope of covered investments, instead of embracing broad, open-ended definitions. For example, Article 1 of the Slovakia Model BIT (2019) provides that investment means a specified list of assets that:

> *[a]n investor owns or controls, directly or indirectly, that has the characteristics of an investment, inter alia, the commitment of capital or other resources, the expectation of gain or profit the assumption of risk, a certain duration and the investor performs via its investment substantial business activities in the Host State . . .*[32]

Some investment treaties expressly provide that the investment must be in accordance with the law of the host state. Hence, to the extent that the investment is contrary to the laws of the host state, some tribunals will not accept that it is covered and will declare lack of jurisdiction to act.[33] However, other tribunals have taken the opposite view, insisting that conforming with the law of the host state is not an element of the definition of investment that affects the subject-matter jurisdiction of the tribunal.[34]

Having established that the interests of the investor qualify as an investment under the relevant instrument, it must also be established that a dispute (i.e., a disagreement on a point of fact or law between an investor and a host state in relation to a covered investment)[35] has arisen. Put differently, the investor and the host state must hold conflicting legal or factual views, or both, relating to the question of the performance or non-performance of a legal obligation arising in relation to an investment in the host state.[36]

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32 See also Article 3.3 of the Morocco Model BIT (2019), which provides the following characteristics: (1) contribution to sustainable development to the host state; (2) a certain duration; (3) a commitment of capital or resources; (4) an expectation of profit; and (5) risk taking.

33 *Fraport v. Philippines (I)*, ICSID, Award, 16 August 2007, Paragraph 401.

34 *Quiborax v. Bolivia*, ICSID, Decision on Jurisdiction, 27 September 2012, Paragraph 226.

35 *Suez v. Argentina*, ICSID, Decision on Jurisdiction, 16 May 2006, Paragraph 29.

36 *Industria Nacional de Alimentos v. Peru*, ICSID, Award, 7 February 2005, Paragraph 48. Indeed, the subject-matter jurisdiction under the ICSID Convention is a legal dispute that arises directly out of a transaction that qualifies as an investment (Article 25 of the ICSID Convention). The 1978 Additional Facility Rules of ICSID provides for the settlement of disputes that fall outside this definition, including legal disputes between a state (or a constituent subdivision or agency of a state) and a national of another state 'which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State' (Article 2(b) of the Additional Facility Rules).

To sum up, the notion of investment and the existence of a legal dispute in relation to the investment are crucial in conferring or divesting arbitral tribunals of subject-matter jurisdiction.

Territorial jurisdiction

Most investment treaties provide that a qualified investment is one that is made in the territory of the respondent host state. For example, Article 1(f) of the Canada–Venezuela BIT (1996) provides that investment 'means any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly, including through an investor of a third state, in the territory of the other Contracting Party in accordance with the latter's laws'.[37]

Although some investment treaties do not expressly require that the investment will be made in the territory of the host state, a holistic interpretation of these treaties usually reveals that there is an implicit requirement that the investments need to be in the territory of the host state to enjoy the protections of the treaty. For example, although Article 1(1) of the Sweden–Egypt BIT (1978) does not expressly require that a protected investment needs to be made within the territory of the host state, Article 2(2) of the treaty provides that 'investments by nationals or companies of either Contracting State *on the territory of the other Contracting State* shall not be subjected to a treatment less favourable than that accorded to investments by nationals or companies of third States'.[38] Therefore, establishing that the investment in question was made in the territory of the respondent host state is generally crucial in determining whether an arbitral tribunal can assume jurisdiction in relation to the claim.

Sovereignty over the boundaries of the host state is usually relevant in determining whether the investment was, indeed, made in the territory of the respondent host state, particularly in instances where the boundaries of the host state are subject to disputes arising from succession, annexation or other territorial issues.[39] The specific ways that arbitral tribunals address these disputes vary.

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37 See also Article 1 of the Argentina–US BIT (1991); Article 1 of the Argentina–Italy BIT (1990); Article 1 of the Australia–Uruguay BIT (2019).

38 (Emphasis added). See also Argentina–Mexico BIT (1996); Germany–Sri Lanka BIT (2000); Australia–Uruguay BIT (2019); *Inmaris Perestroika v. Ukraine*, ICSID, Decision on Jurisdiction, 8 March 2010, Paragraphs 114–116.

39 See, for example, investment disputes that arose out of the Russia–Ukraine BIT (1998), which are also relevant to the Russia–Ukraine territorial dispute in relation to the Crimea peninsula. Some of the cases include: (1) *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation*, PCA Case No. 2015–07; (2) *PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation*, PCA Case No. 2015–21; (3) *Limited*

For example, a tribunal may take the view that no territorial dispute arises in the circumstances and proceed on that basis, or that 'territory' should be interpreted by reference to the time when the applicable investment treaty was signed or came into force, or interpret 'territory' as the jurisdiction where the host state has control over, in line with the object and purpose of the relevant investment treaty, among others.[40] In any event, it is important for a tribunal to approach these issues with care, given that delving into a territorial dispute between state parties, in whole or in part, instead of an investment dispute between a covered investor and the relevant host state, will amount to a tribunal acting outside its subject-matter and personal jurisdiction.

It is easier to determine the 'territory' in which a tangible investment (for example, factories and oil fields) is made than it is to determine the territory for intangible assets.[41] In identifying the territorial requirement in relation to monetary investments, for instance, the tribunal in *Abaclat v. Argentina* observed that:

> *With regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. With regard to investments of a purely financial*

Liability Company Lugzor, Limited Liability Company Libset, Limited Liability Company Ukrinterinvest, Public Joint Stock Company DniproAzot, Limited Liability Company Aberon Ltd v. The Russian Federation, PCA Case No. 2015–29; (4) *Stabil LLC, Rubenor LLC, Rustel LLC, Novel-Estate LLC, PII Kirovograd-Nafta LLC, Crimea-Petrol LLC, Pirsan LLC, Trade-Trust LLC, Elefteria LLC, VKF Satek LLC, Stemv Group LLC v. The Russian Federation*, PCA Case No. 2015-35; (5) *PJSC Ukrnafta v. The Russian Federation*, PCA Case No. 2015-34; (6) *Everest Estate LLC et al v. The Russian Federation*, PCA Case No. 2015–36; (7) *NJSC Naftogaz of Ukraine (Ukraine) et al v. The Russian Federation*, PCA Case No. 2017–16; and (8) *Oschadbank v. The Russian Federation*, PCA Case No. 2016–14.

40 See, generally, P Tzeng, 'Investments on Disputed Territory: Indispensable Parties and Indispensable Issues', *Brazilian Journal of Investment Law*, 14(2), 2017, 122; R Happ and S Wuschka, 'Horror Vacui: Why Investment Treaties Should Apply to Illegally Annexed Territories', 33 *Journal of International Arbitration*, 2016, 245, 260; B S Vasani and T L Foden, 'Burden of Proof Regarding Jurisdiction', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), 271; A Grabowski, 'The Definition of Investment Under the ICSID Convention: A Defense of Salini' (2014) 15 *Chicago JIL* 287, 289. See also Article 29 of the Vienna Convention on the Law of Treaties 1969 and Article 15 of the Vienna Convention on Succession of States in Respect of Treaties 1978 in the Context of Annexed Territories.

41 C R Zheng, 'The Territoriality Requirement in Investment Treaties: A Constraint on Jurisdictional Expansionism' (2016), *Singapore Law Review* 34: pp. 139–140. See also *EMV v. Czech Republic*, ad hoc arbitration, Partial Award on Liability, 8 July 2009, Paragraphs 37–38.

> *nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred. Thus, the relevant question is were the invested funds ultimately made available to the Host State and did they support the latter's economic development? This is also the view taken by other arbitral tribunals.*[42]

Tribunals have therefore held that indirect investments are generally protected and can satisfy the territoriality requirement. Also, there is no requirement for a movement or flow of capital or value into the host state's borders, so long as the ultimate beneficiary of the investment is the host state.[43]

Overall, satisfying the temporal jurisdiction of an arbitral tribunal depends on the nature and definition of the investment under the relevant instrument.

Temporal jurisdiction

The period within which the alleged breach of an obligation occurred and the time of instituting a claim are essential in determining whether an arbitral tribunal has the authority to adjudicate an investment dispute between an investor and a host state.[44] In determining the role of timing in the jurisdiction of arbitral tribunals, reference is typically made to the wording of the relevant instrument (i.e., the investment treaty, investment legislation or investment contract)[45] or customary international law.

For instance, most investment treaties expressly state that they cover investments made prior to the entry into force of the relevant treaty or after its entry into force.[46] In circumstances where investment treaties do not contain express

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42 *Abaclat & Others v. Argentine Republic*, ICSID, Decision on Jurisdiction and Admissibility, 4 August 2011, Paragraph 374. See also *Fedax N.V. v. The Republic of Venezuela*, ICSID, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, Paragraph 41. See also decisions in relation to contractual investments: *Bayview Irrigation District et al. v. United Mexican States*, ICSID, Award, 19 June 2007, Paragraph 101; and cross-border investments: *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, Paragraph 144.

43 See *Gold Reserve v. Venezuela*, ICSID, Award, 22 September 2014, Paragraphs 261–262; *Nova Scotia Power v. Venezuela (II)*, ICSID, Award, 30 April 2014, Paragraph 130.

44 *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016, Paragraph 326.

45 And if the instrument is silent in relation to the temporal scope, reference is usually made to the Vienna Convention on the Law of Treaties, the ILC Draft Articles and arbitration precedents.

46 *Cortec Mining v. Republic of Kenya*, ICSID, Award, 22 October 2018, Paragraphs 284, 286. Article 8 of the German Model BIT (2008). Article 11 of the China–Nigeria BIT (2001), for

provisions in this regard, there is no consensus on whether investments are covered by the investment treaty. While some hold the view that these investments are covered,[47] a few tribunals have held otherwise, insisting that investments made prior to the entry into force of the investment treaty are not covered by the provisions of the investment treaty.[48] Further, if the investment did not exist before the host state's alleged measure that amounted to a breach of the treaty, it is settled that a tribunal has no temporal jurisdiction to determine the dispute.[49]

It has also been held that an investment treaty will not, in the absence of clear wording to the contrary in the treaty, apply retroactively to measures or acts that occurred before the treaty came into force.[50] Nonetheless, facts that occurred before the entry into force of a treaty have, in certain instances, been taken into consideration in determining whether the treaty was subsequently breached (for example, for the purpose of understanding the background to the dispute, causal links and details of the alleged breach).[51]

There are, however, generally accepted exceptions to the principle of non-retroactivity. For instance, the principle of retroactivity may not apply to an action of a host state that constitutes a continuous or composite act. A continuous act has been defined as a single act that extends over the entire time during which the act continues to breach an international obligation.[52] A composite act is made

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instance, provides that its substantive provisions will 'apply to investments which are made prior to or after its entry into force by investors or either Contracting Party'.

47 See Z Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), pp. 340–341.

48 See, for example, *Impregilo v. Pakistan (II)*, ICSID, Decision on Jurisdiction, 22 April 2005, Paragraphs 309–311; *B3 Croatian Courier v. Republic of Croatia*, ICSID, Award, 5 April 2019, Paragraphs 613–615.

49 *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA, Award, 24 March 2016, Paragraph 326.

50 See *Carrizosa v. Colombia*, ICSID, Award, 19 April 2021, Paragraphs 124–125, 153–156; *Jan de Nul v. Egypt*, ICSID, Award, 6 November 2008, Paragraphs 132–133; *The Renco Group Inc. v. Republic of Peru II*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, Paragraph 140; *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, ICSID, Decision on Jurisdiction, 9 November 2004, Paragraph 177. See also Article 28 of the VCLT and Article 13 of the ILC Draft Articles.

51 *Técnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID, Award, 29 May 2003, Paragraph 68; *Aaron C. Berkowitz et al (formerly Spence International Investments et al) v. Republic of Costa Rica*, ICSID, Interim Award (Corrected), 30 May 2017, Paragraphs 217–218.

52 Article 14(2) of the ILC Draft Articles. See also *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID, Decision on Jurisdiction, 29 January 2004, Paragraph 166; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, Paragraph 3.43.

up of a 'series of actions or omissions defined in aggregate as wrongful'.[53] Note, however, that a 'composite act' does not crystallise until the last portion of the series of acts or omissions that constitute the alleged breach under the investment treaty occurs.[54] Nevertheless, there does not seem to be an agreed position on the extent of the relevance of continuous and composite acts. For instance, while some tribunals take the view that continuous or composite acts before the treaty enters into force are relevant only as factual background,[55] others have opted for the opposite position and have appeared to give these acts more weight and relevance beyond merely setting out the factual background.[56]

Some investment treaties provide a time frame within which a claim must be instituted against the host state in the event of an alleged breach. The recent United States–Mexico–Canada Agreement, for example, provides that 'an investor may not claim if more than four years have elapsed from the date on which the investor first acquired, or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage'.[57] While some tribunals have enforced the limitation period strictly and held that it is "'clear and rigid" and it is not subject to any suspension, prolongation or other qualification',[58] others have hinted that the limitation period may be renewed (in relation to continuing breaches)[59] or suspended for deserving circumstances.[60] If an investment treaty is silent on the point, tribunals typically apply the principles of customary international law in deciding the issue, and lean towards allowing such claims unless the claimant was so dilatory and negligent that it would be inequitable to consider its claim.[61]

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53 Article 15 of the ILC Draft Articles. See also *Talsud v. Mexico*, ICSID, Award, 16 June 2010, Paragraph 12.44; *El Paso Energy International Company v. The Argentine Republic*, ICSID, Award, 31 October 2011, Paragraph 518.

54 *Global Telecom Holding S.A.E. v. Canada*, ICSID, Award, 27 March 2020, Paragraphs 411, 412.

55 *MCI Power Group LC and New Turbine Inc v. Republic of Ecuador*, ICSID, Award, 31 July 2007, Paragraph 93.

56 *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v. The Republic of Ecuador [I]*, PCA Case No. 34877, Interim Award, 1 December 2008, Paragraphs 282–284.

57 See Article 14.D.5(c).

58 *Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, Paragraph 265. See also *Spence International Investments et al. v. Costa Rica*, ICSID, Interim Award (Corrected), 30 May 2017, Paragraph 208.

59 *UPS v. Canada*, ICSID, Award on the Merits, 24 May 2007, Paragraph 28.

60 *Feldman v. Mexico*, ICSID, Award, 16 December 2002, Paragraphs 57–58.

61 *Nagel v. Czech Republic*, SCC, Final Award, 9 September 2003, Paragraph 128.

A tribunal may also have jurisdiction over a claim arising after a treaty has been terminated. Usually, the termination of an investment treaty does not end its protections and obligations forthwith. Sunset clauses in investment treaties often offer continued protection for investment after the termination of a treaty, usually between 10 and 15 years, and can extend up to 20 years.[62] For example, the Nigeria–China BIT (2001) stipulates post-treaty protection of 10 years,[63] while the United Kingdom–China BIT (1986) provides for post-termination treaty protection of 15 years.[64]

Concluding thoughts

As seen in the foregoing discussions, the jurisdiction of the arbitral tribunal is a vital element in investment arbitration. All aspects of jurisdiction need to be considered, including subject-matter, personal, territorial and temporal jurisdiction. These varying facets of jurisdiction, including consent to arbitration, need to be analysed before taking steps to institute an arbitration claim, and that analysis should be carried out in a timely manner and with clarity against the backdrop of the relevant investment instrument upon which the prospective investment arbitration would be founded.

62 Article 13(3) of the Netherlands–Poland BIT (1992); Article 15 of the China–Germany BIT (2003).

63 Article 14.

64 Article 12.

Interlude

Arbitrators on procedure in investment disputes

Time spent on consent is never wasted

Consent in commercial arbitration will normally be expressed by an arbitration clause in a contract or a separate arbitration agreement outside the contract. Consent in investment arbitration may be expressed by a state in a BIT or in a multilateral treaty such as the Energy Treaty Charter or unilaterally in a specific domestic law regarding the protection of foreign investment by substantive provisions and by the submission to arbitration.

While these submissions to arbitration seem clear in the abstract, their application in a particular case often leads to difficulties and disputes either as to the validity of the consent and even more so regarding the extent of the consent to a party or a relevant issue in the dispute at hand.

In the case management by the arbitral tribunal, one has to be first aware that consent must be given utmost importance from the very beginning of the procedure because, unless consent is established, the procedure cannot go on due to lack of jurisdiction of the tribunal and the investment of time and costs involved cannot be justified.

This does not necessarily mean that a bifurcation of the procedure is appropriate whenever a respondent raises an alleged lack of consent because, in practice, such an objection is often raised without a sufficient showing of a factual or legal justification. On the other hand, in exceptional cases, the procedure may have to go beyond bifurcation between a hearing on jurisdiction and later one on the merits.

In the *Philip Morris v. Australia* case, which I chaired and which was administered by the PCA at The Hague, for the first time in my many years of arbitral practice, it was agreed by the parties, and our tribunal agreed as well, that not only two rounds of submissions would address the need of bifurcation, but that even a separate hearing was organised specifically dealing with the question of whether bifurcation was appropriate. The tribunal decided in favour of bifurcation, and then, after further rounds of submissions by the parties on jurisdiction, a further hearing on jurisdiction was held. However, the obvious considerable delay and additional costs of such a procedure were due to the high political profile and relevance of the dispute for both Australia and for Philip Morris.

– Karl-Heinz Böckstiegel, independent arbitrator (retired)

Better bifurcation

Whether to request the bifurcation, or trifurcation, of proceedings is a question that any claimant party should weigh carefully at the outset of an investment case.

Tribunals will generally consider granting such applications when convinced that a bifurcation will enhance the efficiency of the proceedings, having assessed whether bifurcation is likely to produce duplication in the taking of evidence and

the likely gain or loss of time in each procedural scenario. But saving time may not be the only factor that the tribunal may consider in deciding to bifurcate.

Allowing more time and attention to be given to quantum questions may, for example, be a good reason to tackle liability and damages in separate phases. This may be especially true in investment cases, in which matters of valuation are of particular importance and complexity. Another advantage may be to allow the parties to settle their dispute after the liability decision.

Applications to bifurcate are almost systematically made at the outset of the case, and seek to have jurisdictional objections addressed in a separate phase. These applications are increasingly lengthy, may be time-consuming, and are not always successful.

Agreeing between the parties at the outset on bifurcation can certainly contribute to the efficiency of the proceedings. Likewise, treating competence and liability in one single phase and reserving damages for a separate phase may in some cases be preferable than having an initial jurisdictional phase followed by liability and quantum together.

– Alexis Mourre, MGC Arbitration

The reality of transparency

It is now standard practice in investor–state arbitration that transparency features on the agenda for the first session. Should the existence of the arbitration be published? Should the hearing be accessible to the public? Should submissions and exhibits be posted publicly? Witness statements and expert reports? And if so, what are the exceptions? Answers to these questions almost always depend on the agreement of the parties.

ICSID and UNCITRAL Arbitration Rules contain some provisions, but here again most of these refer back to the parties' consent. The forthcoming amendment of the ICSID Rules is somewhat more detailed (Chapter X). Some treaties with ISDS provisions contain specific provisions on transparency (e.g., USMCA).

We now know that the award in ICSID arbitration is not confidential and need not wait for leakage to the press by the winning party (or its counsel). According to the ad hoc annulment Committee in *Sodexo v. Hungary*, 'the ICSID Convention and the ICSID Arbitration Rules do not impose a duty of confidentiality on the parties with respect to the awards' (PO3, ¶ 13).

The Mauritius Convention of 2014 is rarely applicable as it is ratified by nine states only. This is also the case for the UNCITRAL Rules of Transparency of 2014. These rules apply to an arbitration initiated under the UNCITRAL Arbitration Rules pursuant to an ISDS treaty concluded on or after 1 April 2014. It is notable that these two instruments contain provisions on public access that are broader than public access to court proceedings in many countries (the United States is an exception).

In practice, agreement and consent by parties to transparency of the arbitration in investor–state arbitration varies. In a number of cases, the investor and the state agree to full or limited transparency. In other cases, they agree to complete confidentiality and privacy. In yet other cases, either the investor or the state is opposed to transparency. Most investment arbitrators consider it their duty to encourage transparency. They are disappointed to see that the same actors who vaunt transparency in public forums, object to transparency in actual arbitrations ('This case is special').

There are other disappointments, too. Take the case where the arbitrators have been able to persuade the parties that the hearing should be accessible to the public in a room adjacent to the hearing room. At the conclusion of the hearing, the tribunal secretary informs them that there were merely two persons present – the parents of one of the associates on the claimant's team!

A matter that has not received much attention is the cost of transparency. Few seem to realise that it takes time to draft confidentiality orders, to consider and decide on confidential and protected information (including redactions), and to prepare for a public hearing. Public hearings also require more personnel (technicians) and expensive special equipment (in particular for delayed transmission). The parties ultimately bear these costs.

– Albert Jan van den Berg, Hanotiau & van den Berg

Cultural factors are less important than they used to be – but don't forget them

When, so many years ago, I started arbitral work, it was considerably more difficult and complicated to agree on the major issues of the procedure for a given case. Domestic arbitration, in particular, had long traditions in a number of jurisdictions, and these procedures had developed in very different ways. Commodity or maritime arbitration as well as 'normal' commercial arbitration, for example, differed considerably between these categories and between various countries, such as England, the US and Germany. And both counsel and arbitrators entering an international commercial arbitration would, to a great extent, rely on their home experiences, which made agreements on common denominators often difficult.

Today, at least in international arbitration, we have a different situation. The globalisation of international commerce and investment has also spread the use of arbitration all over the world. On one hand, this brings a growing number of players into the field who are not familiar with international arbitration. On the other hand, the enterprises, states, law firms and arbitrators gather common experiences. Further, global instruments such as the IBA Rules and Guidelines, as well as their continuing cooperation in a growing number of cases, facilitate a harmonisation of many aspects of the procedure in practice.

But still, we have to realise that differences in the legal culture of the parties, of their counsel and of the arbitrators, have to be taken into account in shaping the

procedure. Otherwise, surprises, misunderstandings and resulting conflicts in the management of the case are inevitable.

In recent years, I find these differences to have become less relevant because common, or at least very similar, applications have developed in the practice of international arbitration. They include, in particular, a full written procedure including memorials on all aspects of the case, written witness statements and expert reports provided by the parties, some kind of document disclosure procedures if necessary, and cross-examination at the hearing.

However, as soon as a party is not represented by experienced counsel, or a private or state party is represented by in-house lawyers, or a member of the tribunal is less familiar with modern arbitration practice, the tribunal will have to make special efforts to assure that neither party is surprised or at a disadvantage in the arbitral procedure.

– Karl-Heinz Böckstiegel, independent arbitrator (retired)

How I ran the tribunal

In cases I chaired, I would start early in the procedure the elaboration of what I call the tribunal working paper, which summarises the major procedural and substantive aspects of the case and contentions of the parties, all this of course without any pre-judgment. This tribunal working paper is distributed to my co-arbitrators and regularly updated as the procedure goes on, at the latest right after the hearing and possible post-hearing briefs. It then provides the starting point for well-informed deliberations of the tribunal and usually allows a speedy process until the award. But of course, depending on the complexity of the case and possible dissents in the tribunal, it may still not always be possible to issue the award very quickly.

– Karl-Heinz Böckstiegel, independent arbitrator (retired)

The value of a schedule of references

All parties to an investment treaty case have an interest in facilitating the delivery of the award within a reasonable time. The usual tribunal consists of three members and one tribunal secretary. That team has to organise, understand and assess the work of up to two dozen lawyers, representing the investors and the state, together with a number of highly qualified experts. Memorials, evidence, expert reports and pre- and post-hearing submissions are usually voluminous. The tribunal needs assistance to navigate the material.

My practice is to require a schedule of references. This document consists of line items identifying the issues in the case at a level of generality in terms of topics. The

columns of the schedule have headings referring to all sources of material on each topic: each pleading, witness statements, expert reports, submissions. The references in each box must be comprehensive.

A list of issues should be identified early in the process, and the first draft of the schedule of references should be prepared before the hearing. It is updated after the post-hearing submissions. If properly prepared, the tribunal is able to use the schedule as a complete guide for purposes of writing the award. The schedule also reduces the possibility of relevant material being overlooked.

The first time I required such a schedule in an investment treaty case, I was told: 'The silks love it and the juniors hate it.' So be it.

– James Spigelman QC, One Essex Court

Use a common document platform

'For a tribunal the benefits are extraordinary'

Counsel, especially those practising from large, multinational law firms, rely on their own document management platforms to organise their cases. No doubt such platforms, being known quantities, are easy to use by those familiar with them (i.e., other members of the firm). But there is not an arbitrator I know who has not been confounded repeatedly by his or her inability to open, download or otherwise gain access to the memorials, exhibits and statements that are said to reside in a multiple-encrypted zip-folder, box or some other file compression software served up by a party as an attachment to an email from counsel.

The problem is compounded by different parties using different systems and then by changing the designation of exhibits for the agreed hearing bundle. The expensive time wasted by arbitrators in trying to access the file is enormous. Worse, arbitrators (many of whom who do not have IT specialists at hand) have to store, organise and manage enormous volumes of materials on their own. This is not their highest and best use. It is only sensible for the parties to do their utmost to help them.

The solution is for parties and tribunals to discuss and agree the use of a common document management platform as soon as the case begins. Such platforms (Opus 2 being the current best-of-breed) will organise and keep the case record updated as well as provide secure access to counsel and tribunal members throughout the case.

For a tribunal, the benefits are extraordinary. They include proper document management, the ability to mark-up (and then to find again) pleadings, statements, reports and exhibits, 24-hour access from anywhere in the world, a ready-made hearing bundle, a document presentation tool for use at the hearing and the ability to go as paperless as is suitable for each user. Obviously, there is a cost for the use of such platforms, but in terms of cost-benefit, there is no contest.

– J William Rowley QC, Twenty Essex

Disability – a modest proposal

Ever wondered whether any of the participants in an international arbitration has a disability? I confess – with a few exceptions, I hadn't. Until, that is, a biking accident where I fractured my femur. For many weeks I was confined to a wheelchair. That way of living is definitely different.

In my arbitration practice, the first lesson I learned was to be open about it with my co-arbitrators and the parties. I told them that I had to stretch from time to time and that occasionally a nurse would pop up in the background. I am grateful that, without exception, all were very accommodating. I am lucky that I can now walk and bike again. But the experience taught me that the disabilities of others are unfortunately not temporary.

There are various forms of disability. The World Health Organization created the International Classification of Functioning, Disability and Health in 2001. They include mobility and physical impairments, vision disability and hearing disability. There is also a broad category of invisible disabilities (e.g., diabetes, prostate issues).

I think that most, if not all, of these forms of disability can be accommodated in the practice of international arbitration. It includes the temporary disability (if it may be called that) of a witness in the happy circumstance of being pregnant. More challenging are disabilities such as narcolepsy (a chronic neurological disorder that affects the brain's ability to control sleep–wake cycles).

In any event, in my view, the key is creating awareness and being transparent about disabilities in arbitration. I recommend to include in the agenda for the first session and the pre-hearing conference the following line item:

Disability inclusion

> *Whether there are any disability considerations among the parties, witnesses or other participants which need to be taken into account in establishing the arbitral procedure, including the hearing.*

– Albert Jan van den Berg, Hanotiau & van den Berg

The award will be largely written by the time post-hearing briefs arrive

(Or why there is no substitute for closing arguments)

There is no substitute for closing arguments.

Nowadays, counsel often ask for longer-than-needed openings, and plan to use the balance (of the hearing week) on cross-examinations. The possibility of doing an oral closing is seen as merely that – a possibility if time allows – with the offer of post-hearing briefs increasingly being seen as a good alternative.

But they are not. There is also no substitute for closing arguments. This is because there is no better way for counsel to engage with the tribunal on open issues. Closings provide the ideal forum to answer the arbitrators' questions and to tie a party's case to the evidence as it developed over the hearing. Good counsel will sacrifice set-piece openings and unnecessary cross-examination to maximise the benefit of engaging with the tribunal's question during closing submissions.

As a rule of thumb, for a one-week hearing, try always to reserve the Friday (all or half of it) for oral closings. Prepare and hand out a written, point-form slide deck, in which all essential points are summarised. In an electronic version of the deck, include hyperlinks to relevant transcript passages, exhibits, witness statements, expert reports and authorities. And at the beginning of the week, ask the tribunal to identify later in the week particular points or questions it would like to see dealt with in closings (most tribunals, without having been asked, will have told the parties where they want help from the parties in their closings). Finally, time the length of your closing in the knowledge that a tribunal is bound to ask questions and to test you. If your time allotment is three hours, make sure that it takes you no more than two to cover your deck. This will leave you the extra hour that you will need to respond to and engage with the tribunal.

Post-hearing briefs are rarely a good alternative. Almost every tribunal will have its initial deliberation immediately after the oral hearing (often they will have exchanged preliminary views in the process of identifying questions they wish counsel to deal with). And the best chairperson will have reserved time to tackle the award immediately after the hearing. This means that the award will often largely be written by the time post-hearing briefs arrive. And the reality is that they seldom sway a tribunal from the initial views it has reached at the close of the hearing.

– J William Rowley QC, Twenty Essex

CHAPTER 9

Procedural Issues in an Arbitration: Disclosure

Eun Young Park, Sup-Joon Byun, Seokchun Yun and Shul Park[1]

Introduction

Investor–state arbitration has seen tremendous growth in the past 50 to 60 years. Since the introduction of the International Centre for Settlement of Investment Disputes (ICSID) Convention in 1966, there has been a dramatic increase in the number of cases, with 58 ICSID arbitration cases registered in 2020.[2] In total, over 1,000 investor–state arbitration cases (ICSID and otherwise) have been reported to have been initiated.[3]

With such growth also came the backlash against investor–state dispute. Several states have denounced the ICSID Convention or announced that they will terminate their bilateral investment treaties.[4] The idea of a standing 'investment court' system has been introduced and implemented in several investment treaties to replace ad hoc investor–state arbitration tribunals.[5] The main arguments

1 Eun Young Park is a partner, Sup-Joon Byun is a senior foreign attorney, Seokchun Yun is a senior attorney and Shul Park is an attorney at Kim & Chang.

2 ICSID, The ICSID Caseload – Statistics, Issue 2021–2, at https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The%20ICSID%20Caseload%20Statistics%202021-2%20Edition%20ENG.pdf.

3 United Nations Conference on Trade and Development (UNCTAD), 'UNCTAD releases data on over 1,000 investor-state arbitration cases', 11 February 2021, at https://unctad.org/news/unctad-releases-data-over-1000-investor-state-arbitration-cases.

4 UNCTAD, IIA Issues Note: 'Denunciation of the ICSID Convention and BITs: Impact on Investor–State Claims, No. 2, December 2010, at https://unctad.org/system/files/official-document/webdiaeia20106_en.pdf.

5 See, for example, Chapter 8 of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.

against investment arbitration were the lack of transparency in arbitral proceedings and the tribunals' decisions or awards, the inconsistency in the awards from different arbitral tribunals and the doubt regarding legitimacy of the system.

In many ways, the backlash stems from the procedural aspects of investment arbitration. In the infancy of investor–state arbitration, the rules of international commercial arbitration, as the default form of 'arbitration', were adopted without much thought as to whether they would be appropriate. One of the main features of international commercial arbitration that separates it from domestic court litigation is the flexibility to set procedural rules, the efficient resolution of the dispute by limiting challenges to the decision, and the confidential and private manner of the proceedings. Unlike international commercial arbitration, however, investment arbitration is not a purely private dispute; the respondent is a sovereign state and the dispute usually involves the public sector or regulation, or both. The tension between the public nature of investor–state disputes and the private nature of dispute resolution through arbitration is something that the arbitration community needs to work on to ensure that investor–state arbitration remains a widely accepted dispute resolution mechanism. Indeed, in many ways the procedural rules of investment arbitration have evolved to address the concerns of this backlash and should continue to do so.

In this chapter, we explore the following procedural issues in investment arbitration: how tension has brought forth the push for transparency in arbitration proceedings and awards as well as intervention by third parties, and the resulting changes in arbitration rules and investment treaties, and decisions from arbitral tribunals; we also discuss how document production practice in investment arbitration cases mirrors and departs from that in international commercial arbitration through reference to the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (the IBA Rules); finally, we explore how recent developments (i.e., the covid-19 pandemic) have affected investment arbitration hearing formats.

Document production

Document production serves as an important opportunity for parties to gather relevant documents that may be in the other party's possession, custody or control. Document production becomes more important when there is an imbalance of information or evidence between the parties. Because an investor–state arbitration is a dispute between an investor and the host state, there is often an inherent imbalance of information. Therefore, document production is often a critical procedural issue in investor–state arbitration.

Arbitration rules or guidelines on document production

As with any other procedural issue in arbitration, the parties to investor–state arbitration can agree on whether to have document production and if so, the scope and process of that document production. However, investment treaties generally do not contain detailed procedural rules on document production; neither do the most commonly used rules in investment arbitration, such as the ICSID Arbitration Rules and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. The arbitration rules simply provide the tribunal with the authority to call upon the parties to produce documents or other evidence,[6] and for the parties to cooperate with the tribunal in the production of these documents.[7]

Because the investment treaties and the arbitration rules do not contain detailed procedural rules on document production (or whether this needs to be conducted), these matters would have to be agreed between the parties or determined by the tribunal through procedural orders. However, it is often difficult for parties to agree on the scope and process of document production due to the vast differences of each country's practice, especially between common and civil law jurisdictions.

Accordingly, investment arbitration tribunals often rely on the IBA Rules, which also include provisions on document production.[8] The IBA Rules purport to be an exemplary 'harmonisation' of the procedures used in different jurisdictions.[9] While the IBA Rules when first introduced were intended to apply to international commercial arbitration, they can also be applied to investment

6 See ICSID Arbitration Rule 34(2): 'The Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts'; UNCITRAL Arbitration Rules Article 27(3): 'At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence.'

7 ICSID Arbitration Rule 34(3): 'The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2).'

8 For example, see *Elliott Associates, L.P. v. Republic of Korea*, PCA Case No. 2018-51, Procedural Order No. 1, 1 April 2019, Paragraph 5.3.6; and *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19, Procedural Order No. 1, 9 March 2018, Paragraph 18.3.

9 IBA Task Force for the Revision of the IBA Rules on the Taking of Evidence in International Arbitration / Consolidated Amendments, Commentary on the Revised Text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration (2021), p. 2, at www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D.

arbitration.[10] Considering the abundance of materials on the IBA Rules and their interpretation (for example, on the interpretation of the standard of 'relevance and materiality'), we do not discuss the IBA Rules in detail here.

The principle of equal treatment in document production and 'state secrets'

The question arises, however, as to whether the same standards applied in commercial arbitration can be applied in investment arbitration. The dynamics of investment arbitration are fundamentally different from commercial arbitration in that the respondent is a sovereign state while the claimant is a private individual that invested in the respondent state. There is an inherent imbalance of accessibility to information, especially in cases of expropriation where the investor no longer has access to the investment, in that the respondent state may have more or may gain access to further information through measures such as investigation. The principle of equal treatment or 'equality of arms' is often a key concern in document production in investment arbitration cases and an issue to be aware of when the IBA Rules are referred to or a decision on document production needs to be made by the tribunal.

For example, one recurring question is whether the respondent state may refuse to produce documents that are classified as state secrets. Under Article 9(2)(f) of the IBA Rules, a party may resist document production on the 'grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling'.[11] While this ground of objection may not be invoked often in commercial arbitration and therefore serves limited purpose, in investment arbitration the host state has an incentive to classify certain documents or information as secret, to object to their production. In this regard, the question arises as to whether the respondent state may argue that any and all documents that it classifies as state secrets can be exempted from production.

Investment arbitration tribunals have ruled in various instances that the respondent state cannot declare all documents immune from production merely on the basis of its national laws or its own designation, but that it would have to justify how it substantively qualifies documents as state secret under

10 The word 'commercial' in the 1999 IBA Rules was deleted when the IBA Rules were revised in 2010 to clarify that the IBA Rules may be adopted in both commercial and investment arbitration. id., p. 3.

11 Article 9(2)(f) of the IBA Rules.

Article 9(2)(f) of the IBA Rules. In *Biwater Gauff v. Tanzania*, the tribunal held that Tanzania was not allowed to resist production under Article 9(2)(f) by relying on a domestic law permitting the respondent state-wide and undefined discretion to declare itself immune from the duty to produce documents, and that allowing this would violate the principle of equal treatment.[12] Recently, in *Elliott Associates LP v. Republic of Korea*, the tribunal ordered the Republic of Korea, which asserted privilege for documents being 'politically sensitive', to submit a privilege log explaining the reasons for claiming privilege in detail. The tribunal held that it would determine whether the grounds of special political or institutional sensitivity invoked by the party opposing production was 'compelling'.[13]

When the respondent state is able to justify in detail how it determined that releasing the information in question would be injurious to its national security, instead of asserting the national security privilege as a blanket refusal, tribunals have ruled in favour of the host state, including in *Global Telecom Holding SAE v. Canada*.[14] In such manner, investment arbitration tribunals have been conscious of the difference between commercial and investment arbitration and have developed a practice to ensure that the principle of equal treatment is not violated in admitting the grounds of refusal to disclose put forward in the IBA Rules.

Transparency versus privacy and confidentiality

Necessity of transparency in investment arbitration

For many reasons, transparency has been an important procedural issue in investment arbitration. While privacy and confidentiality are key features that often make international commercial arbitration preferable to domestic litigation, they are often less desirable in investment arbitration. Unlike international commercial arbitration, which primarily concerns disputes between private parties, investment arbitration involves a sovereign state. Investment arbitration also often engages the public interest; for example, the investment in disputes often involve public goods and service sectors, and the state measure in question often involves government regulations enacted for public welfare. There is also the issue of the

12 The tribunal found that 'the only ground which might justify a refusal . . . is the protection of privileged or politically sensitive information, including State secrets restated in article 9.2(f) of the IBA Rules of Evidence'. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2, 24 May 2006, pp. 8–9.

13 *Elliott Associates L.P. v. Republic of Korea*, PCA Case No. 2018-51, Procedural Order No. 8, 13 January 2020, Paragraph 25.

14 *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 4, 3 November 2018, Paragraph 43.

cost that the state will incur from the dispute and the amount that has to be paid by the state if it were to receive a disadvantageous award. This led to calls for (more) transparency in investment arbitration as well as (more) public involvement in investment arbitral proceedings.

The need for a different set of rules of transparency and confidentiality for investment arbitration cases first became apparent in cases such as *Metalclad Corporation v. The United Mexican States and Loewen Group, Inc and Raymond L Loewen v. United States of America*. In *Metalclad v. Mexico*, Mexico filed a request for a confidentiality order in response to the claimant providing information regarding the dispute to a company's shareholders.[15] The tribunal ruled that, while there is no general principle of confidentiality within the North American Free Trade Agreement (NAFTA) or the ICSID (Additional Facility) Rules that would restrict the parties from speaking publicly about the case, the public discussions of the dispute should be limited to what they are legally obligated to disclose to facilitate an orderly proceeding of the arbitration.[16] In *Loewen v. United States*, the tribunal denied the United States' request that all filings be made public because Article 44(2) of the ICSID Additional Facility Rules provided that the minutes of hearings 'shall not be published without the consent of the parties'.[17] However, the tribunal acknowledged that this does not mean the parties should be precluded from discussing the case in public, 'thereby depriving the public of knowledge and information concerning government and public affairs'.[18] These cases raised awareness of the need for greater transparency in investment arbitration.

However, achieving the right balance between transparency and confidentiality or privacy can be challenging. There are various reasons to advocate for more transparency, including that the public arguably has the right to have access to information regarding the arbitration when the subject matter of the dispute involves matters of a public nature. More transparency may also ensure government accountability.[19] On the other hand, having complete transparency would mean that certain sensitive business and government information would also

15 *Metalclad v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of the Tribunal, 30 August 2000, Paragraph 13.

16 ibid.

17 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on hearing of Respondent's objection to competence and jurisdiction, 5 January 2001, Paragraphs 24–26.

18 id., Paragraph 26.

19 Mabel I Egonu, 'Investor State Arbitration Under ICSID: A Case for Presumption Against Confidentiality?', *Journal of International Arbitration*, Volume 24, Issue 5 (2007), p. 488.

have to be disclosed to the public. Furthermore, transparency and, in particular, allowing involvement of the public or third parties in investment arbitration could make the proceedings inefficient. Resolving this tension between the traditional characteristics of private dispute resolution and the public nature of investment arbitration has become one of the most important procedural issues in investment arbitration in recent years.

Arbitration rules on transparency

Key changes resulting from the push for greater transparency include the 2006 revisions to the ICSID Arbitration Rules and the 2013 adoption of the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration (the UNCITRAL Rules on Transparency) along with the 2014 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (also known as the Mauritius Convention).

In many ways, the 2006 revisions to the ICSID Arbitration Rules were an important step towards achieving more transparency in investment arbitration and a significant departure from the practice of international commercial arbitration. Under the revised ICSID Arbitration Rules, unless either party objects, the tribunal may allow other persons in addition to the parties to attend or observe the hearings subject to appropriate logistical arrangements and procedures for protection of proprietary or privileged information.[20] Rule 48(4) also requires ICSID to promptly publish excerpts of the legal reasoning for the awards.[21] The revised ICSID Arbitration Rules also include provisions on third-party submissions, which is discussed further below. The newly introduced transparency provisions affected ICSID arbitration practice almost immediately as these provisions apply as the default to cases under the auspices of ICSID.

The UNCITRAL Rules on Transparency, introduced in 2013, provide an even higher degree of transparency than the revised ICSID Arbitration Rules. Article 3 of the UNCITRAL Rules on Transparency provide that the notice

20 See ICSID Arbitration Rule 32(2): 'Unless either party objects, a Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts, during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.'

21 See ICSID Arbitration Rule 48(4): 'The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.'

of arbitration, the response to the notice of arbitration, other written statements or submissions by the parties, any written submissions by a non-disputing party, hearing transcripts and orders, decisions and awards of the tribunal are to be made available to the public.[22] Article 6 also states that hearings shall be public.[23] Of course, there are exceptions to transparency: Article 7 states that the arbitral tribunal may determine that (1) certain information is confidential and protected,[24] or (2) the release of certain information would jeopardise the integrity of the arbitral process[25] such that it shall not be made available to the public. In addition, Article 7(5) of the UNCITRAL Rules on Transparency makes clear that a respondent state would not need to disclose that which it considers to be contrary to its essential security interests.

While the UNCITRAL Rules on Transparency include more detailed and broader transparency provisions than the ICSID Arbitration Rules, the former arguably has limited application. The UNCITRAL Rules on Transparency only

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22 See UNCITRAL Rules on Transparency, Article 3(1): 'Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.' Other paragraphs of Article 3 provide for the possible publication of expert reports, witness statements, exhibits and other documents, and the process of publication of the above documents.

23 See UNCITRAL Rules on Transparency, Article 6(1): 'Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ("hearings") shall be public.'

24 In particular, Article 7(2) defines 'confidential or protected information' as follows:

a. Confidential business information;

b. Information that is protected against being made available to the public under the treaty;

c. Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or

d. Information the disclosure of which would impede law enforcement as confidential or protected information.

25 See Article 7(7) of the UNCITRAL Rules on Transparency: 'The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances.'

apply to investment arbitrations arising from investment treaties entered into on or after 1 April 2014. For investment arbitrations arising from investment treaties entered into before 1 April 2014, the parties have to agree to apply the Rules.[26] While the Mauritius Convention, in which the state parties consent to application of the UNCITRAL Rules on Transparency to disputes arising from investment treaties entered into before 1 April 2014, was intended to expand the scope of applicability of the Rules, only 23 states have signed the Convention.[27] Considering that the vast majority of investment treaties from which investment arbitrations arise were entered into before 1 April 2014, the UNCITRAL Rules on Transparency unfortunately have had relatively limited application.

Investment treaties on transparency

With the growing demand from the public, states have started to include specific transparency provisions in their investment treaties as well. Examples of this include the free trade agreements (FTAs) entered into with the United States. Article 11.2 of the US–Republic of Korea FTA, for example, provides that the submissions, hearing transcripts and orders, awards or decisions of the tribunal shall be made available to the public and the hearings shall also be open to the public.[28] Within these provisions, the treaties usually include exceptions to

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26 See UNCITRAL Rules on Transparency, Article 1.

27 As at 31 August 2021. See UNCITRAL, Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014), at ---https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status.

28 See the following excerpt of Article 11.2 (Transparency of Arbitral Proceedings) of the US–Republic of Korea FTA (2007):

> 1. *Subject to paragraphs 2, 3, and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:*
>   a. *the notice of intent;*
>   b. *the notice of arbitration;*
>   c. *pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 11.20.4 and 11.20.5 and Article 11.25;*
>   d. *minutes or transcripts of hearings of the tribunal, where available; and*
>   e. *orders, awards, and decisions of the tribunal.*
> 2. *The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.*
> 3. *Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 23.2 (Essential Security) or Article 23.4 (Disclosure of Information).*

transparency, such as information designated as protected information, provided that a respondent state shall not be required to withhold from the public information required to be disclosed by its laws.[29]

The question remains, however, of whether there is room for further development. The introduction of an 'investment court system' in Chapter 8 of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada sought to bring groundbreaking changes to the investor–state dispute resolution system. While we do not go into the details of the investment court system here, there is no doubt that this movement came as a backlash against investor–state arbitration, which was claimed to lack transparency, consistency and legitimacy. Chapter 8 of CETA specifically includes a provision on transparency of the proceedings, which provides for a broader scope of information and documents to be made public than the UNCITRAL Rules on Transparency.[30] In the face of such pressure, it would be important to deliberate on the appropriate

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4. *Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures: . . .*
5. *Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.*

29 ibid.

30 See Article 8.36 (Transparency of proceedings) of CETA:

1. *The UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section.*
2. *The request for consultations, the notice requesting a determination of the respondent, the notice of determination of the respondent, the agreement to mediate, the notice of intent to challenge a Member of the Tribunal, the decision on challenge to a Member of the Tribunal and the request for consolidation shall be included in the list of documents to be made available to the public under Article 3(1) of the UNCITRAL Transparency Rules.*
3. *Exhibits shall be included in the list of documents to be made available to the public under Article 3(2) of the UNCITRAL Transparency Rules.*
4. *Notwithstanding Article 2 of the UNCITRAL Transparency Rules, prior to the constitution of the Tribunal, Canada or the European Union as the case may be shall make publicly available in a timely manner relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository.*
5. *Hearings shall be open to the public. The Tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. If the Tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection.*
6. *Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should apply those laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information.*

expansion of the scope of the transparency provisions in the arbitration rules or investment treaties for the existing investor–state arbitration mechanism to remain as the preferred method of resolving investor–state disputes.

Third-party interveners

Necessity of intervention by third parties

With the push for increased transparency, and the nature of investment arbitration involving the public interest, there has been a push for increased involvement of third parties with rights to or interests in the arbitration. Local communities affected by an investment or resulting dispute may have an interest in the outcome of the arbitration and wish to participate in the proceedings. Individuals and groups that may not have a direct stake but have an interest in the dispute, such as the home state of the investor, local governments, public international organisations or non-governmental organisations, may also wish to provide their opinion on issues in which they can provide their expertise. On the other hand, allowing third-party intervention can impede the efficiency of the proceeding and would be a significant departure from the existing private dispute resolution mechanism.

The movement to allow participation of third-party, and specifically amicus curiae, submissions started relatively early. The first investment arbitration tribunal to allow an amicus curiae submission was *Methanex Corporation v. United States* in 2001.[31] Despite there being no explicit provision on amicus curiae submissions in NAFTA or the UNCITRAL Arbitration Rules 1976, the tribunal declared that it had the power to accept amicus written submissions pursuant to Article 15(1) of the UNCITRAL Arbitration Rules 1976, pursuant to the tribunal's authority to conduct the proceedings as it deems appropriate.[32] The case highlighted the need for arbitration rules or investment treaties to include explicit provisions on whether and when a tribunal would be allowed to accept submissions from third parties.

Arbitral rules and investment treaties on third-party intervention

The ICSID Arbitration Rules were revised in 2006 and the UNCITRAL Rules on Transparency were introduced in 2013 to include specific provisions on submission as amicus curiae. Under ICSID Arbitration Rule 37(2), a tribunal may allow non-disputing parties to file a written submission on any matter within

31 *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001.

32 id., Paragraph 47.

the scope of dispute.[33] The Rule states that the tribunal should consider whether the non-disputing party submission would assist the tribunal in determining the issues at hand and whether the non-disputing party has a significant interest in the proceedings. On the other hand, the tribunal would need to ensure that the non-disputing party submission would not disrupt the proceedings or unduly burden or unfairly prejudice either party.

The UNCITRAL Rules on Transparency contain a similar provision on third-party submissions. Under Article 4, the tribunal may allow a non-disputing party to file a written submission and in doing so, the tribunal shall consider similar issues prescribed in the ICSID Arbitration Rules.[34] However, the UNCITRAL

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33 See ICSID Arbitration Rule 37(2):

(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non-disputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

a. the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

b. the non-disputing party submission would address a matter within the scope of the dispute;

c. the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

34 See Article 4 (Submission by a third person) of the UNCITRAL Rules on Transparency:

1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:

a. Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);

b. Disclose any connection, direct or indirect, which the third person has with any disputing party;

c. Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);

Rules on Transparency go a step further in providing detailed procedures on how a third party can make an application for submission, and the requirements for the content and length of the submission filed by the third party.[35]

In line with the changes in arbitration rules, some investment treaties also specifically allow and provide for procedures regarding amicus curiae submissions. For example, Article 11.20(5) of the US–Korea FTA provides that the tribunal may allow a non-disputing party to file an amicus curiae submission, with the tribunal to have similar considerations as those listed in the ICSID Arbitration Rules.[36]

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d. Describe the nature of the interest that the third person has in the arbitration; and

e. Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

a. Whether the third person has a significant interest in the arbitral proceedings; and

b. The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

4. The submission filed by the third person shall:

a. Be dated and signed by the person filing the submission on behalf of the third person;

b. Be concise, and in no case longer than as authorized by the arbitral tribunal;

c. Set out a precise statement of the third person's position on issues; and

d. Address only matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.

35 ibid.

36 See Article 11.20 (Conduct of Arbitration), Paragraph 5 of the US–Korea FTA as follows:

5. After consulting the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written amicus curiae submission with the tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

a. the amicus curiae submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties;

b. the amicus curiae submission would address a matter within the scope of the dispute; and

c. the amicus curiae has a significant interest in the proceeding.

The tribunal shall ensure that the amicus curiae submission does not disrupt the proceeding or unduly burden or unfairly prejudice either disputing party, and that the disputing parties are given an opportunity to present their observations on the amicus curiae submission.

Third-party intervention in an investment arbitration case

A relatively recent investment arbitration case in which an amicus curiae brief was submitted and played a meaningful role is *Philip Morris v. Uruguay*.[37] The case involved the tobacco control measures implemented by Uruguay, and the tribunal accepted the submission of: (1) a joint amicus brief by the WHO and the Framework Convention on Tobacco Control Secretariat on how the Uruguayan measures were an effective means for protecting public health; and (2) an amicus brief by the Pan American Health Organization on how the Uruguayan measures were reasonable and effective in reducing tobacco consumption pursuant to ICSID Arbitration Rule 37(2).[38] In allowing their submissions, the tribunal stated that the submissions may be beneficial considering the particular knowledge and expertise of the qualified entities regarding the matters in dispute, and added that 'in view of the public interest involved in this case, granting the Request would support the transparency of the proceeding and its acceptability by users at large'.[39] As this transpired, the tribunal made many references to these amici submissions in its final award. The tribunal denied the requests from the Avaaz Foundation and the Inter-American Association of Intellectual Property to submit a written submission as a non-disputing party, however, because both were submitted late in the proceeding, and allowing the submission may have disrupted the proceeding and unfairly prejudiced the parties.[40]

While there have been meaningful developments in allowing third-party written submissions in investment arbitration, we may consider further expanding the scope of involvement of third parties. One limitation to the current system is that the communities affected by the investment in dispute may not be able to participate due to the cost of intervention. To facilitate their participation, the arbitration rules could prescribe rules for the allocation of costs of third-party intervention.

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37 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016.

38 id., at Paragraphs 35–48.

39 id., at Paragraph 39.

40 id., at Paragraphs 49–55. The tribunal also mentioned that the Avaaz Foundation did not provide sufficient grounds as to how it may offer a perspective, knowledge or insight to the case. Regarding the Inter-American Association of Intellectual Property (ASIPI), the tribunal found that, considering the relationship between ASIPI and the claimants, it was not seen as sufficiently independent.

Hearings

Public access to hearings

The desire for greater transparency in investment arbitration has led to some investment arbitration hearings being held in public. As discussed above, the ICSID Arbitration Rules were revised in 2006 so that a tribunal may allow other persons to attend the hearing subject to appropriate logistical arrangements and protection of proprietary or privileged information.[41] The UNCITRAL Rules on Transparency go a step further and mandate that the hearings shall be public subject to the protection of confidential information or the integrity of the arbitral process.[42] Certain investment treaties also specifically include a provision that hearings should be made public.[43]

If the hearings are open to the public, ICSID can provide a video link so that the hearing is broadcast to a specific room on the premises of the hearing (e.g., the World Bank hearing centre in Washington, DC, or Paris).[44] However, this grants only limited access to the hearing in that only those who can attend have access to the hearings. Alternatively, the video link could be webcast: the first live internet broadcast of a public ICSID hearing was on 31 May 2010 in *Pac Rim Cayman LLC v. Republic of El Salvador*.[45] The case was broadcast to the public based on Article 10.21.2 of the Dominican Republic–Central America FTA (2004), which mandated that the hearing be open to the public. Henceforth, several hearings have been broadcast live on the internet.[46]

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41 See ICSID Arbitration Rule 32(2).

42 See UNCITRAL Rules on Transparency, Article 6(1). See also UNCITRAL Rules on Transparency, Article 6(3): 'The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.'

43 Article 11.2(2) of the US–Republic of Korea FTA (2007).

44 ICSID, 'Oral Procedure', at https://icsid.worldbank.org/services/arbitration/convention/process/oral-procedure.

45 UNCTAD, 'Transparency: UNCTAD Series on Issues in International Investment Agreements II', 2012, p. 40, at https://unctad.org/system/files/official-document/unctaddiaeia2011d6_en.pdf.

46 ibid.

Physical versus virtual hearings

In terms of the venue of the hearing and whether the hearing needs to be held in-person or can be held virtually, neither the ICSID Arbitration Rules nor the UNCITRAL Arbitration Rules include specific provision on this. This is generally not perceived as mandating a physical hearing or prohibiting virtual hearings. Even before the onset of the covid-19 pandemic, an increasing number of hearings were held virtually to accommodate participants from all around the world. In fact, approximately 60 per cent of the hearings and sessions organised by ICSID in 2019 were held virtually.[47] Because of the covid-19 pandemic, in-person hearings have become extremely challenging if not impossible due to travel restrictions, and virtual hearings are increasingly becoming the preferred choice. Indeed, virtual hearings could make it easier to broadcast the hearing to the broader public, thereby satisfying the need for greater transparency, with the added benefit of reducing the costs of proceedings.

One recurring question that has arisen since the emergence of the covid-19 pandemic has been whether hearings can be held virtually despite objections from one party, and whether this would qualify as grounds to annul or set aside an award. Interestingly, in a recent decision in *Landesbank v. Spain*, the chair of the ICSID Administrative Council denied the claim from Spain that the unilateral decision to hold a virtual hearing was grounds to disqualify the tribunal.[48] In this case, the hearing was originally supposed to be held in person but due to the pandemic, the tribunal issued a procedural order mandating that the hearing be held virtually instead. Spain argued that it would be inappropriate to hold the hearing virtually due to the complexity of the case and requested the entire tribunal be disqualified on the grounds its decision to hold the hearing virtually was based on 'serious misrepresentations and misleading statements',[49] which qualify as 'dishonest behaviour' and violate the 'high moral character' standard required for the tribunal under Articles 57 and 14 of the ICSID Convention.[50]

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47 ICSID, 'A Brief Guide to Online Hearings at ICSID', 24 March 2020, at https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid.

48 *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Proposal for Disqualification of Christopher Greenwood, Charles Poncet and Rodrigo Oreamuno, 15 December 2020.

49 For example, the respondent argued that the tribunal misrepresented that one of its arbitrators could not travel from Costa Rica for the hearing because Costa Rica's borders were closed when in fact Costa Rica announced that it was going to reopen the borders before the hearing date. id., at Paragraph 43.

50 ibid.

Needless to say, the chair denied Spain's request to disqualify the tribunal, noting that 'any arbitral tribunal is called on to balance considerations of efficiency and avoiding delay with ensuring that the parties are properly heard', and the 'Tribunal itself is best placed to balance these considerations'.[51] Other cases have been decided in a similar fashion.[52]

To address these issues, the 2020 IBA Rules now expressly allow tribunals to order that a hearing be conducted virtually or remotely.[53] While it remains to be seen whether the trend to hold hearings in a virtual format will continue post-pandemic, the recent changes show the need for investment arbitration rules and practices to develop and adapt to the change of circumstance and the needs of the public.

Conclusion

Investment arbitration departs from the rules and practice of international commercial arbitration in important respects. The core purpose of this chapter has been to examine those differences in the context of disclosure in investment arbitration and the frameworks that have been adopted to address these issues, namely through document production and the use of the IBA Rules to allow for a harmonious system between different legal regimes, the increasing demand for transparency and the adaptation of arbitration rules and treaties to meet this demand, third-party intervention and, finally, the use of virtual hearings as an alternative to hearings in person.

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51 id., at Paragraph 142.

52 See *Vattenfall AB and Others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision of the Chairman of the Administrative Council, 8 July 2020, in which Germany's proposal to disqualify the arbitral tribunal because the tribunal's decision to hold a virtual hearing despite its objections created the 'appearance of bias' was denied by the chairman of the ICSID Administrative Council.

53 See Article 8.2 (Evidentiary Hearing) of the IBA Rules:
At the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing. In that event, the Arbitral Tribunal shall consult with the Parties with a view to establishing a Remote Hearing protocol to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions. The protocol may address:

- *a. the technology to be used;*
- *b. advance testing of the technology or training in use of the technology;*
- *c. the starting and ending times considering, in particular, the time zones in which participants will be located;*
- *d. how Documents may be placed before a witness or the Arbitral Tribunal; and*
- *e. measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted.*

While the measures taken have had varying degrees of success, there is still room for further improvement. The ongoing endeavours of the UNCITRAL working groups, aimed at reforming the ICSID rules and regulations, are an example of how the legal regime continues to adapt and modify itself to address such concerns. Investment arbitration, by its very nature, will necessarily develop to satisfy both the public interests of the states and the private interests of the investors involved.

CHAPTER 10

Ethical Obligations

Patricia Nacimiento and Adilbek Tussupov[1]

Introduction

Arbitration is a dispute settlement mechanism that is naturally based on the process of cooperation of parties with each other and with an arbitral tribunal. Cooperation without observance of ethical norms cannot lead to fair and equitable outcomes. Put simply, observance of ethics is the 'responsibility of everyone in the process and it is central to managing effective proceedings and ensuring enforceable awards'.[2]

In this regard, it is fair to say that there is an obvious risk that arbitration may 'no longer be useful for the worldwide business community'[3] if it fails to maintain its position as a trusted dispute settlement mechanism for which observance of ethical rules and norms is essential. However, the question that arises is what the term 'ethics' exactly means in the context of arbitration, in particular investment treaty arbitration, where it is common to have actors (i.e., parties, lawyers, experts, witnesses, arbitrators) coming from different jurisdictions and legal systems.

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2 Lockhart, D, 'Ethical Obligations in Arbitration' (*AIDC Newsletter*, 2014), available at https://disputescentre.com.au/wp-content/uploads/2015/02/Ethical-obligations-in-arbitration.pdf (accessed 8 August 2021).

3 Clouet, L M, 'Arbitrating under the table: the effect of allegations of corruption in relation to the jurisdiction of the arbitral tribunal and the enforcement of foreign arbitral awards' (NYU Academic Paper, 2018), available at https://nyu.academia.edu/LuisMar%C3%ADaClouet (accessed 8 August 2021).

Dilemma of ethical duties of counsel

The question of ethics in law and, in particular, in the legal profession has always had a central place. Bar associations and respective regulatory authorities of practically all jurisdictions oblige lawyers to act with integrity and honesty.[4] A high degree of ethical standards by lawyers is necessary to maintain trust in the legal profession at large.

The above may be even more important and relevant when speaking of ethical behaviour in international investment arbitration for two main reasons. First, ensuring ethical conduct during the dispute resolution process between a foreign investor and a state would help to maintain trust not only in the legal profession, but in the investor–state dispute settlement mechanism itself, which is at times subjected to certain criticism and call for reform (although usually for other reasons).[5] Second, investment arbitration in its classic form is a creature of public international law that always involves at least one sovereign and almost always involves issues of an administrative nature (i.e., *acta iure imperii*), which warrants serious and objective examination that would otherwise not be possible in an unethical setting (e.g., where the tribunal is knowingly provided with false statements or evidence, or both). A decision of an arbitral tribunal in an investor–state dispute that is tainted by unethical conduct of legal counsel could at the very least cast doubts on the enforceability of such a decision, and in the worst case scenario on the reliability of the investor–state dispute settlement mechanism at large.

This topic, however, is not without difficulties and uncertainties. The main issue is how to identify the applicable ethical standards for legal counsel in international arbitration, especially investment treaty arbitration. Generally, the ethical conduct of legal counsel in investment arbitration is guided by (1) the national rules of the jurisdictions where the respective counsel is based and (2) international standards elaborated by various institutions.

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4 See, e.g., 'Principles of the Solicitors Regulation Authority', available at www.sra.org.uk/solicitors/standards-regulations/principles/; 'Rules of Professional Practice of the Rechtsanwälte and Rechtsanwältinnen of the Federal Republic of Germany', available at www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/bora_engl_stand_1_11_2011.pdf; 'Code of Conduct of the Chamber of the Legal Consultants of the City of Nur-Sultan, Kazakhstan', available at https://zangerpalata.kz/Docs/Kodex.pdf.

5 For more details on criticism of the investor–state dispute settlement mechanism, see Touzet, J and de Vaublanc, M V, 'The Investor-State Dispute Settlement System: The Road to Overcoming Criticism', *Kluwer Arbitration Blog* (6 August 2018), available at http://arbitrationblog.kluwerarbitration.com/2018/08/06/the-investor-state-dispute-settlement-system-the-road-to-overcoming-criticism/ (accessed 8 August 2021).

As to (1), it is argued that unlike national court proceedings, where lawyers usually act under certain rules and standards adopted by the relevant authorities at the seat of the court, international arbitration is detached from 'procedural frameworks' of domestic legal systems.[6] It is also argued that the level and extent of such 'detachment' is not particularly clear.[7] It would probably be fair to say that the extent of 'detachment' from the national legal framework of attorneys' conduct would vary from jurisdiction to jurisdiction, if detached at all.[8] For example, the lawyers' ethical duties towards their clients under national laws or rules would probably not be affected by the mere fact that they are engaged for the purposes of international arbitration. Advice and substantial work in such matters, except for advocacy in some cases, is usually carried out from the lawyers' respective seats, and their engagement would often be subjected to regulation 'at the seat' of their offices. The uncertainty arises when speaking of ethical standards applicable to procedural issues and duties that the counsel owes towards the adjudicators. Here the 'devil is in the detail', as the more overarching duties, such as a duty not to mislead the arbitral tribunal, should, in our opinion, be treated as binding as a matter of course for any lawyer practising law.[9] The most problematic issues that are in this regard often noted by various authors are disclosure obligations, witness communications and confidentiality.[10] The issues are indeed problematic because, as mentioned above, the dispute settlement mechanism is so international (counsel and arbitrators usually come from different jurisdictions and legal systems) that the meaning and scope of 'ethics' in this context may be

6 Rogers, C A, *Ethics in International Arbitration* (Oxford University Press, 2014), Paragraph 3.10.

7 ibid.

8 e.g., on 30 May 2018, the Solicitors Regulation Authority adopted the Overseas and Cross-border Practice Rules, which may also be applicable to solicitors of England and Wales when representing clients in international arbitration proceedings.

9 For example, the Code of the Council of Bars and Law Societies of Europe provides that any 'lawyer shall never knowingly give false or misleading information to the court'. See Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, Article 4.4.

10 See, e.g., Cremades, B M, 'Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration' (1998), 14(2) *Arb. Int'l.*; Hammond, S A, 'Spoliation in International Arbitration: Is it time to reconsider the "Dirty Wars" of the International Arbitral Process?' (2009), 3(1) *Disp. Resol. Int'l.* 1; Rau, A S and Sherman, E F, 'Tradition and Innovation in International Arbitration Procedure' (2009), 30(3) *Tex. Int'l. L. J.* 89.

fundamentally different. In fact, so different that what is allowed in one jurisdiction may be considered to be a crime in another.[11]

In relation to (2), the various professional associations and arbitration institutions have tried to address the issue of ethics through adopting guidelines and rules. For example, the International Bar Association (IBA) adopted the Guidelines on Party Representation in International Arbitration in 2013 (the IBA Guidelines).[12] Although the IBA Guidelines do go into specific details that are indeed relevant for the purposes of international arbitration (e.g., addressing the communication of counsel with the arbitral tribunal),[13] they explicitly state that they 'are not intended to displace otherwise applicable mandatory laws [and] rules'.[14] The Guidelines also state that they are not to 'vest arbitral tribunals with powers otherwise reserved to bars or other professional bodies'. These Guidelines are contractual in nature, and their application (either in their entirety or partially) depends upon the agreement of the parties.[15] In other words, one can say that there is an option for parties to subject their lawyers to the IBA Guidelines if they wish to do so.

Certain guidelines directed at legal representatives' conduct in international arbitration and rules have also been adopted by some arbitration institutions.[16] However, the nature of these guidelines is similar to that of the IBA Guidelines in the sense that they are contractual in nature and it is for the parties to decide whether they are applicable.

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11 See Rogers, C A, *Ethics in International Arbitration* (Oxford University Press, 2014), Paragraph 3.20 with reference to the Paris Court of Appeals, File No. 06/06272, Judgment of 28 March 2007: 'In 2007, an American-licensed attorney who was a French national employed with a major US law firm was criminally convicted and ordered to pay a EUR 10,000 fine in France for interviewing a witness in France for the purposes of obtaining information for a court proceeding in the Unites States in violation of French law.'

12 Available at www.ibanet.org/MediaHandler?id=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F.

13 IBA Guidelines 7–8.

14 IBA Guidelines, Preamble.

15 Pierre Bienvenu and Michael Kotrly argue that the applicability of the IBA Guidelines can also be possible upon the tribunal's own decision. See, Bienvenu, P and Kotrly, M (2013), 'Examining IBA Guidelines on Party Representation in International Arbitration', available at www.nortonrosefulbright.com/de-de/wissen/publications/bb5df928/examining-iba-guidelines-on-party-representation-in-international-arbitration.

16 See, e.g., 'General Guidelines for the Parties' Legal Representatives, Annex to the 2020 Arbitration Rules of the London Court of International Arbitration', available at www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Annex; '2017 Guidelines On Party-Representative Ethics of the Singapore Institute of Arbitrators', available at www.siarb.org.sg/images/SIARB_Party-Rep-Ethics_Guidelines_Aprl18.pdf.

Moreover, practice shows that arbitration practitioners can also be found in breach of ethical standards by certain professional organisations such as the Chartered Institute of Arbitrators (CIArb). In its decision of 20 July 2015, the Disciplinary Tribunal of the CIArb found that one of the fellows of the institute committed misconduct of the CIArb by-laws, by, inter alia, misleading another law firm on the amount of incurred expenses and costs. The fellow was expelled from the organisation and ordered to pay a fine of £25,000.[17] The problem, of course, is that not all arbitration practitioners are members (or fellows) of these organisations.

'Ethics' and good faith in investment arbitration

Legal representatives and arbitrators owe a duty towards 'the international business community at large' to maintain arbitration as a safe and legitimate dispute settlement mechanism.[18] As stated above, the question of ethics directly correlates with questions of legitimacy of arbitration as a dispute settlement mechanism. The fact that international arbitration remains popular shows that although the theoretical question of identification of applicable ethical norms is not straightforward, there is nevertheless general trust in the system. In the context of investment treaty arbitration, this is proven by the fact that the general number of disputes referred to investor–state tribunals has grown considerably in recent years.[19]

A possible reason for the maintained trust despite the difficulty identified above is that arbitral tribunals, with rare exceptions, are attentive to the general principle of good faith. This was referred to as 'a supreme principle, which governs legal relations in all of their aspects and content' by the tribunal in the International Centre for Settlement of Investment Disputes (ICSID) case of *Inceysa v. El Salvador*.[20] The scope of the good faith principle, as provided by *Black's Law Dictionary*, is particularly broad, as it is defined in the following terms:

17 *In the matter of the Chartered Institute of Arbitrators' Disciplinary Tribunal between the Chartered Institute of Arbitrators and Andriy Astapov*, Decision, 20 July 2015, available at https://ciarb.org/media/1408/tribunal-final-decision-andriy-astapov-july-2015.pdf.

18 Beale, K D and Esposito, P, 'Emergent International Attitudes Towards Bribery, Corruption and Money Laundering' (2009), 75(3) *Int'l. J. of Arb., Med. and Disp. Mgmt.* 360, 361. See also, Clouet, L M, 'Arbitrating under the table: the effect of allegations of corruption in relation to the jurisdiction of the arbitral tribunal and the enforcement of foreign arbitral awards' (NYU Academic Paper, 2018), available at https://nyu.academia.edu/LuisMar%C3%ADaClouet.

19 See the 'Statistics of the United Nations Conference on Trade and Development' available at https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf.

20 *Inceysa v. El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, Paragraph 230.

> *A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. – Also termed bona fides.*[21]

Similar or even broader definitions of the principle of good faith have been provided by other authors as well.[22] It is codified, inter alia, in the Vienna Convention on the Law of Treaties[23] and has been often referred to in state-to-state disputes by the International Court of Justice,[24] as well as by tribunals in investor–state disputes.[25]

As illustrated, the principle's scope is quite generous, and although there may be questions as to its usefulness in terms of very specific matters (such as, for example, attorney–client privilege), it can serve well as a basis for demanding parties and their legal representatives to act in a generally ethical way. In other words, on the basis of the principle of good faith, parties and their representatives should be expected to adhere to certain minimal standards of ethical behaviour, such as ensuring that they do not intentionally submit false statements or evidence to the tribunal. Investment tribunals can react strongly when it becomes clear that a party is being intentionally untruthful and unethical towards them.

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21 *Black's Law Dictionary*, 10th edition (Thomson Reuters, 2014), 808.

22 See, e.g., Sipiorski, E, *Good Faith in International Investment Arbitration* (Oxford University Press, 2019); see also, generally, Schreuer, C (21 January 2010), 'Legal Opinion' in the case of *Anatolie Stati, Gabriel Stati, Ascom Group, S.A. and Terra Raf Trans Traiding ('Stati Parties') v. Republic of Kazakhstan ('Kazakhstan')*, available at www.italaw.com/sites/default/files/case-documents/italaw11739.pdf.

23 Article 26 of the Vienna Convention on the Law of Treaties dated 1969.

24 See, e.g., *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 2008 ICJ 177, 229, Paragraph 145; *Nuclear Tests (Australia/New Zealand v. France)*, 1974 ICJ Paragraph 46 (judgment of 20 December 1974).

25 See, e.g., *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012; *Nordzucker v. Poland*, UNCITRAL, Second Partial Award (Merits), 28 January 2009, Paragraphs 92–94; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, Paragraphs 828–863; *Genin, Eastern Credit Ltd. Inc. and AS Baltoil v. Republic of Estonia*, Award, 25 June 2001, Paragraph 367; *Técnicas Medioambientales Tecmed S. A. v. The United Mexican States*, Award, 29 May 2003, Paragraph 123; *Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004, Paragraph 138; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Paragraph 307; *Siemens v. Argentina*, Award, 6 February 2007, Paragraph 308; *Frontier Petroleum v. Czech Republic,* UNCITRAL, Final Award, 12 November 2010, Paragraph 300.

In the case of *Sanum Investments v. Laos People's Democratic Republic*, the arbitral tribunal found that the claimants were 'likely attempting to obstruct justice' by paying a witness not to testify.[26] The tribunal further found it plausible that the claimants were 'attempting to mislead the Treaty Tribunal'.[27] These findings reflect the ethical expectations that the arbitral tribunal had towards the parties and their legal representatives.

In another investor–state dispute between Spentex Netherlands, BV and the Republic of Uzbekistan, the ICSID tribunal was reportedly[28] dissatisfied with the lack of cooperation and disclosure from the respondent's side. It was reported that the Uzbek state argued that the claimants bribed Uzbek public officials; however, the state refused to disclose information on the domestic investigation of the allegedly corrupt officials and measures taken against them (if any).[29] The tribunal is said to have refused protection of the claimant's investment because of corruption, while at the same time penalising the state in its costs decision[30] noting, inter alia, its unwillingness to cooperate and investigate the alleged corruption.[31] Obviously, the question of proper disclosure is not always under the control of legal

26 *Sanum Investments Limited v. The Lao People's Democratic Republic*, PCA Case No. 2013-13, Award, 6 August 2019, Paragraph 176.

27 ibid.

28 The arbitral award in *Spentex Netherlands, B.V. v. Republic of Uzbekistan* (ICSID Case No. ARB/13/26, Award, 27 December 2016) is not publicly available. The authors rely on the publication by Katherine Betz that includes references to the text of the award. See, Betz, K, *Proving Bribery, Fraud and Money Laundering in International Arbitration* (University of Basel, Cambridge University Press, 2017).

29 *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Paragraph 941 as referenced in Betz, K, *Proving Bribery, Fraud and Money Laundering in International Arbitration* (University of Basel, Cambridge University Press, 2017), p. 134.

30 It is reported that the tribunal's majority consisting of Professor August Reinisch and Stanimir Alexandrov, stressing the respondent's own responsibility for corrupt practices in Uzbekistan, offered a choice of two options: (1) either Uzbekistan donates US$8 million to one of the United Nations' anti-corruption funds within 90 days, in addition to covering its own legal fees and 50 per cent of the costs of the proceedings; or (2) Uzbekistan pays 75 per cent of more than US$17 million of the claimant's legal fees and 100 per cent of the costs of the proceedings in addition to its own legal fees. See, Djanic, V, 'In newly unearthed Uzbekistan ruling, exorbitant fees promised to consultants on eve of tender process are viewed by tribunal as evidence of corruption, leading to dismissal of all claims under Dutch BIT', *Investment Arbitration Reporter* (22 June 2017), available at www.iareporter.com/articles/in-newly-unearthed-uzbekistan-ruling-exorbitant-fees-promised-to-consultants-on-eve-of-tender-process-are-viewed-by-tribunal-as-evidence-of-corruption-leading-to-dismissal-of-all-claims-under-dutch/.

31 See footnote 29.

representatives and is often dependent on the conduct of their clients. However, the findings and subsequent decisions made by the *Spentex* tribunal are once again indicative of certain ethical expectations that it had towards the parties.

In the case of *Cementownia v. Turkey*, the arbitral tribunal dismissed the claimant's case because it found that it had been based on falsified documentation. Although the act complained of took place before the arbitration, the arbitral tribunal still seems to have taken issue with the fact that the true position was not volunteered to it in the first place. The tribunal stated:

> *Parties to an arbitration proceeding must conduct themselves in good faith. This duty, as the Methanex tribunal found, is owed to both the other disputing party and to the Tribunal.*[32]

Occasionally, a party volunteers information relating to its fraudulent or corrupt conduct. In *World Duty Free v. Kenya*, the claimant openly disclosed to the tribunal the facts of what was then found to be corruption. The claimant stated that 'in order to be able to do business with the Government of Kenya, [the Claimant] was required in March 1989 to make a "personal donation" to . . . then President of the Republic of Kenya' in the amount of US$2 million.[33] On the basis of this volunteered information, the arbitral tribunal found that the claimant's case could not be pleaded in arbitration proceedings under the principle of *ex turpi causa non oritur actio*.[34]

Despite the general principle of good faith, ethical and truthful behaviour is also required by the principle of cooperation in international arbitration, which is, inter alia, enshrined in the ICSID Arbitration Rules.[35] A tool in arbitral tribunals' arsenal that is directed at remedying a situation in which one of the parties is not cooperating in good faith (i.e., ethically) is the possibility of drawing 'adverse inferences'.[36] This right is said to be exercisable by arbitral tribunals where parties

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32 *Cementownia 'Nowa Huta' S.A. v. Republic of Turkey*, Award, 17 September 2009, Paragraph 153.

33 *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, Paragraph 66.

34 id., Paragraph 179.

35 Article 34(3) of the ICSID Arbitration Rules: 'The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2).'

36 Tsatsos, A, 'Burden of Proof in Investment Treaty Arbitration: Shifting?', *Humboldt Forum Recht* 2009, p. 94, with reference to Sharp, J, 'Drawing Adverse Inferences from the Non-Production of Evidence' (2006), 22(4) *J. of Int'l. Arb.*, 549.

unreasonably and unjustifiably withhold relevant information.[37] Investment tribunals do not shy away from utilising this tool in investor–state cases.[38]

Evidently, be it the situation of 'ethical vacuum' as found by Catherine Rogers[39] or the ethical mess likened to a 'teenager's bedroom' by Gary Born,[40] investment treaty tribunals do seem to have ethical expectations of the parties and their legal representatives, which they regularly enforce in investor–state arbitration proceedings. However, it is fair to say there is no consistency in approaches to the ethical obligations of counsel in investment arbitration. One of the possible solutions could be the establishment of a multilateral investment court, which could theoretically become a single source for regulation of conduct of parties, parties' legal representatives and arbitrators.[41]

Conclusion

The necessity of addressing the issue of regulating the proper conduct of legal representatives in international arbitration is widely acknowledged and is not regarded as a minor problem.[42] While attention is usually directed at procedural and decision-making matters when speaking of ethical conduct, adherence to

37 Mehren, R, 'Rules of arbitral bodies considered from a practical point of view' (1992), 9(3) *J. of Int'l. Arb.* , 110.

38 For example, *Europe Cement Investment & Trade S.A. v. The Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009; *Methanex Corporation v. United States of America*, NAFTA, Final Award, 3 August 2005; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008; *Feldman v. Mexico*, NAFTA, Award, 16 December 2002.

39 Rogers, C, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' (2002), 23(2) *Mich. Int'l L.J.* 341, 342.

40 Queen Mary Institute for Regulation and Ethics Conference 'The Arguments For and Against Further Regulation of Arbitration Counsel', 11 September 2014. Presentations are available at www.qmul.ac.uk/law/events/items/the-future-of-ethics-in-international-arbitration-the-arguments-for-and-against-further-regulation-of-arbitration-counsel.html; www.ibanet.org/MediaHandler?id=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F.

41 For further details on the discussion of the establishment of a multilateral investment court, see Bungenberg, M and Reinisch, A, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court – Options Regarding the Institutionalization of Investor-State Dispute Settlement*, Second Edition (Springer Open, 2019), available at https://link.springer.com/book/10.1007/978-3-662-59732-3.

42 Brower, C and Schill, S, 'Regulating counsel conduct before international arbitral tribunals', in Bekker, P, Dolzer, R and Waibel, M (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press, 2010), 488–509; Cairns, D, 'Advocacy and the Function of Lawyers in Intenrational Arbitration', in Fernández-Ballesteros, M A and Arias, D (eds), *Liber amicorum Bernardo Cremades* (La Ley, 2010), 291.

good faith standards is important 'during all stages of the arbitral process'.[43] The issue should be one of the most important subjects of discussion not only in academic circles and in publications such as this, but also indeed by states and relevant regulation authorities at appropriate forums (e.g., the United Nations Conference on Trade and Development).

43 Lockhart, D, 'Ethical Obligations in Arbitration' (*AIDC Newsletter*, 2014), available at https://disputescentre.com.au/wp-content/uploads/2015/02/Ethical-obligations-in-arbitration.pdf.

CHAPTER 11

Applicable Law in Investment Treaty Arbitration

Stefan Riegler, Dalibor Valinčić and Borna Dejanović[1]

Introduction

The issue of applicable law in investment treaty arbitration, despite its long development, remains an unsettled point. The very nature of investment protection, based on a web of treaties between sovereign states, renders it difficult to establish common characteristics pertaining to the applicable law in resolving investment treaty disputes.

This chapter sets out general principles related to the issue of applicable law in investment treaty arbitration. It begins with a discussion of the application of the principle of party autonomy to the issue of applicable law, before addressing the methods used by tribunals in resolving conflicts of law.

The chapter then focuses on the three main sources of law in investment treaty arbitration: first, the predominant role of investment treaties, second, the prominent role of general international law, and third, the impact of municipal law.

Finally, the authors explain how conflicts between applicable laws are resolved in investment arbitration proceedings, as well as illustrate the potential consequences of a tribunal's failure to properly identify and correctly apply the relevant laws.

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Party autonomy – the fundamental tenet in investment treaty arbitration

Respect for party autonomy is a fundamental principle governing the conduct of investment arbitration proceedings, including determinations of the applicable law. Thus, in general, the primacy in the determination of applicable law is given to the laws or the rules of law agreed upon by the disputing parties, and tribunals are deemed bound by such choice of law.[2]

The International Centre for Settlement of Investment Disputes (ICSID) Convention provides that '[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties',[3] while the ICSID Convention Additional Facility Rules stipulate that '[t]he Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute'.[4]

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, likewise, stipulate that '[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute'.[5] In the same vein, the International Chamber of Commerce (ICC) Arbitration Rules and the Stockholm Chamber of Commerce (SCC) Arbitration Rules provide that '[t]he parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute'[6] and that '[t]he Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties',[7] respectively. The Vienna International Arbitral Centre Rules of Investment Arbitration, which entered into force on 1 July 2021, similarly provide that '[t]he arbitral tribunal shall decide the dispute in accordance with the law or rules of law agreed upon by the parties'.[8]

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2 Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), p. 192.

3 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, open for signature on 18 March 1965, entered into force on 14 October 1966 (the ICSID Convention), Article 42(1).

4 ICSID Convention Additional Facility Rules, Article 54(1).

5 United Nations Commission on International Trade Law Arbitration Rules, adopted in 1976, as revised in 2010 and 2013 (the UNCITRAL Arbitration Rules), Article 35(1).

6 Rules of Arbitration of the International Chamber of Commerce, adopted in 2012, as amended in 2017 and 2021 (the ICC Arbitration Rules), Article 21(1).

7 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, adopted in 2017 (the SCC Arbitration Rules), Article 27(1).

8 Rules of Investment Arbitration of the Vienna International Arbitral Centre (the Vienna Investment Arbitration Rules), Article 27(1).

Many, although not all,[9] investment protection treaties lay down an explicit choice of law. Those treaties that do stipulate the laws that apply often set out that the dispute is to be resolved in accordance with the provisions of the treaty itself. However, due to the specific role that the underlying treaty usually has in investment arbitration, the treaty is considered to be the main source of law, even if it does not contain such a self-reference.

Alongside the treaty itself, investment treaties often provide for two additional sources of law. Many treaties designate the applicability of international law, while a smaller number of treaties also contain references to municipal law.[10]

If a treaty does not provide for a choice of law, the disputing parties may otherwise reach an agreement of the applicable law or laws. As a general rule, the choice of law does not have to be stated expressly or in writing.[11] But, it must still be made clearly and unequivocally, showing a clear intention of the parties.[12] A tribunal may, for example, derive an agreement on the choice of law based on the parties' submissions in the arbitration proceedings.[13]

What if neither the treaty nor the parties have determined the applicable law?

Occasionally, treaties do not stipulate a choice of law clause and the parties fail to otherwise agree on the applicable law. It may also happen that, notwithstanding a valid choice of law, certain incidental issues arising in the dispute fall outside

9 Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), p. 200.

10 Dafina Atanasova, 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?', *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 3, pp. 409–410.

11 Rupert Reece, Alexis Massot, et al., 'Chapter 7: Searching for the Applicable Law in WTO Litigation, Investment and Commercial Arbitration', in Jorge A Huerta-Goldman, Antoine Romanetti, et al. (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration*, Global Trade Law Series, Volume 43, pp. 208–213.

12 Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), pp. 198–199; see also *Compañía del Desarrollo de Santa Elena (CDSE) v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, Paragraph 63.

13 *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, Paragraphs 20–24.

the scope of its application. In such scenarios, the tribunal is entrusted with the task of identifying and determining the law or laws to be applied, with a margin of discretion in this exercise.

Arbitration rules applied in investment treaty disputes may provide guidance to the tribunal on how to determine the applicable law. The ICSID Convention stipulates that the tribunal shall apply 'the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.[14] The ICSID Convention Additional Facility Rules state that '(a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable' shall be applied.[15]

An early question relating to the ICSID Convention was whether there is any preference in the application of either the host state's municipal law or international law. The initial approach was that the ICSID Convention had stipulated only a subordinate and subsidiary role to the international law. Consequently, tribunals put more focus on the law of the host state, while international law was applied only in a corrective or complementary role in the case of gaps in the host state law or where the host state law was not compliant with the fundamental principles of international law. This has been most illustratively depicted in the *Amco* and *Klöckner* cases.[16]

That early jurisprudence, however, concerned investment contract arbitrations and not investment treaty arbitrations. The approach changed following the annulment decision in the *Wena* case, a treaty-based arbitration, where the annulment committee held that the substantive provisions of international law can be applied independently and in conjunction with the host state's law, even where

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14 ICSID Convention, Article 42(1). These rules provide for prospective application of the substantive law of a third state, neither the host state nor the state where the investor is domiciled, as the host state's conflict of law rules should be considered. See Rupert Reece, Alexis Massot, et al., 'Chapter 7: Searching for the Applicable Law in WTO Litigation, Investment and Commercial Arbitration', in Jorge A Huerta-Goldman, Antoine Romanetti, et al. (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration,* Global Trade Law Series, Volume 43, p. 211.

15 ICSID Convention Additional Facility Rules, Article 54(1).

16 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad Hoc Committee Decision on the Application for Annulment, 16 May 1986, Paragraph 20; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Ad Hoc Committee Decision, 3 May 1985, Paragraph 69. See also Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), p. 202.

no lacunae or inconsistencies were found in the municipal law.[17] While other tribunals have followed the reasoning that international law does not only have a corrective or supplementary role,[18] there are still ongoing debates on the proper application of international law as a substantive law in treaty disputes.[19]

Other dominant arbitration rules provide even greater discretion to arbitral tribunals. If there is no choice of law agreement, the UNCITRAL Arbitration Rules stipulate that 'the arbitral tribunal shall apply the law which it determines to be appropriate',[20] and the ICC Arbitration Rules state that 'the arbitral tribunal shall apply the rules of law which it determines to be appropriate',[21] while the SCC Arbitration Rules recommend a blend of the two, stating that 'the Arbitral Tribunal shall apply the law or rules of law that it considers most appropriate'.[22] References to 'rules of law', instead of a plain 'law', may be deemed to provide for more substantial freedom for application of not only an entire legal system, but also a specific limited set of rules. The Vienna Investment Arbitration Rules set out even an arguably broader guidance to the tribunals in the absence of the parties' agreement on the applicable law, stipulating that in such cases 'the arbitral tribunal shall apply the applicable law or rules of law which it considers appropriate, including any relevant treaties, relevant national laws of any State, any relevant international custom and general principles of law'.[23]

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17 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, Paragraphs 37–46.

18 See, e.g., *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, Paragraphs 115–123; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, Paragraphs 231–240.

19 See Emmanuel Gaillard and Yas Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process', 18 *ICSID Rev*. 375 (2003); see also Monique Sasson, 'Chapter 10: The Applicable Law and the ICSID Convention', in Crina Baltag, *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2016), pp. 273–300.

20 UNCITRAL Arbitration Rules, Article 35(1). See also UNCITRAL Arbitration Rules, Article 35(2), stating that the tribunal shall decide in accordance with the terms of the contract and take the usages of trade into account.

21 ICC Arbitration Rules, Article 21(1). See also ICC Arbitration Rules, Article 21(2), stipulating that the tribunal shall take account of the provisions of the contract and the relevant trade usages.

22 SCC Arbitration Rules, Article 27(1). See also SCC Arbitration Rules, Article 27(2), stipulating that the designation of the municipal law of a state shall be deemed to refer to the substantive law, not to the conflict of law rules.

23 Vienna Investment Arbitration Rules, Article 27(2).

Tribunals have affirmed that, in the absence of an agreement on the applicable law, they can apply both municipal and international law.[24] In this sense, it is the tribunal's task to determine whether and to what extent issues are subject to the application of only municipal or international norms.

In determination of the law applicable to the substance of the dispute, or to incidental questions, tribunals should – as a general rule – take appropriate consideration of the parties' positions. However, some tribunals have held that, in determining, interpreting and applying the law or laws, they are not restricted to the parties' submissions. The civil law principle of *iura novit curia* – or, tailored to arbitration, *iura novit arbiter* – essentially allows the tribunal to consider sources of law not suggested by the parties, as well as to form its own opinion on the applicable law.[25] In applying this principle, a tribunal should generally not surprise the parties with its own legal theory that was not subject to a debate and that the parties could not have anticipated. Such an approach is well acknowledged in international law and confirmed by the International Court of Justice (ICJ).[26] Investment arbitration tribunals often rely upon it,[27] and such reliance is supported by the views of annulment committees.[28]

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24 *Burlington Resources Inc. v. Republic of Ecuador (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, Paragraphs 178–179; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Award, 16 September 2015, Paragraph 91; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, Paragraph 117.

25 See Dafina Atanasova, 'Conflict of treaty-norms in investment arbitration', University of Geneva, Thesis, 2017, pp. 208–212.

26 *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgment, 25 July 1974, I.C.J. Reports, 1974, p. 9, Paragraphs 17–18.

27 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, Paragraph 92; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, Paragraph 118; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, Paragraph 141.

28 See, e.g., *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, Paragraph 295; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, Paragraph 84; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Ad Hoc Committee Decision, 14 June 2010, Paragraph 23.

An investment treaty as the primary source of law applicable to the dispute

The primary source of substantive law in investment arbitration is the investment treaty itself, supplemented by both general international law and municipal law of the host state.[29] Treaties often provide for various means of substantive protection to the investor, such as the host state's obligation to provide fair and equitable treatment[30] and full protection and security,[31] or to refrain from expropriating the investment without due compensation[32] or discriminatory or arbitrary treatment.[33]

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29 See Dafina Atanasova, 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?', *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 3, p. 400, particularly referring to the determinations of the tribunals in *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, Paragraph 181 and *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, Paragraphs 138–140.

30 See, e.g., Agreement between the United Mexican States and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments, signed on 25 August 1998, entered into force on 23 February 2001, Article 2(3) stipulating that '[e]ach Contracting State shall in any case accord investments of the other Contracting State fair and equitable treatment'.

31 See, e.g., Agreement between the Government of the Republic of Croatia and the Government of Canada for the Promotion and Protection of Investments, signed on 3 February 1997, entered into force on 30 January 2001, stating that: '[e]ach Contracting Party shall accord investments or returns of investors of the other Contracting Party . . . (b) full protection and security'.

32 See, e.g., Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments, signed on 6 May 2009, entered into force on 22 January 2012, Article VI, prescribing that '[i]nvestments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and provided that such expropriation is accompanied by prompt, adequate and effective compensation'.

33 See, e.g., Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, signed on 4 March 1994, entered into force on 16 November 1996, Article II(3)(b), setting out the commitment by which '[n]either Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments'.

When interpreting treaties, tribunals resort to the means of interpretation provided for in the 1969 Vienna Convention on the Law of Treaties (VCLT).[34] Tribunals should interpret the treaty 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[35] In practice, tribunals scrutinise the ordinary meaning of the terms of the treaty, sometimes by invoking references in dictionaries.[36] Tribunals also consider the context in which substantive provisions appear, construing the relevant rule in conjunction with other treaty standards, as well as the object and purpose of the treaty, which may be found in the preamble.[37]

In addition to the above, tribunals also consider subsequent agreements between the parties, subsequent practice in relation to the relevant treaty, and the rules of international law applicable to the parties.[38] If there still appear to be ambiguities, or unreasonable interpretations arise, as well as for purposes of verifying the results, tribunals may resort to supplementary means of interpretation, including the treaty's preparatory work and the circumstances leading to its conclusion.[39]

In interpreting the treaty, tribunals frequently examine analogous case law and follow the reasoning taken by other tribunals, acknowledging that adherence to interpretations established in other cases contributes to the harmonious development of investment law and the certainty of the rule of law.[40] As Dolzer

34 Vienna Convention on the Law of Treaties (VCLT), open to signature on 23 May 1969, entered into force on 27 January 1980, Articles 31 and 32. See also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Catalogue, Oxford University Press, 2012), pp. 28–30.

35 VCLT, Article 31(1), unless the parties intended to assign a special meaning to a specific term (VCLT, Article 31(4)).

36 See, e.g., *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, Paragraph 319.

37 See, e.g., *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Paragraphs 296–309; *Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, Paragraph 197.

38 VCLT, Article 32(3).

39 id., Article 32. See also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Catalogue, Oxford University Press, 2012), p. 31.

40 *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, Paragraphs 17–33; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, Paragraph 90; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, Paragraph 62; *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, Paragraph 50; *Duke Energy Electroquil Partners &*

and Schreuer held, '[d]rawing on the experience of past decision-makers plays an important role in securing the necessary uniformity and stability of the law', especially since '[a] coherent case law strengthens the predictability of decisions and enhances their authority'.[41] Although previous awards do not carry binding precedential value and tribunals are not bound by foregoing arbitral practice, case law indeed plays a prominent role in developing consistent interpretations of the content of equivalent substantive standards of protection, which are often agreed by the states in investment treaties. With that said, arbitrators and tribunals may of course take different views,[42] which may lead to tribunals departing from earlier jurisprudence.[43]

Investment treaties almost invariably contain substantive rules that the tribunal is bound to apply. However, treaties rarely include a comprehensive set of rules governing all relevant aspects of the dispute. As the *AAPL* tribunal concluded, a treaty 'is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature'.[44]

Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008, Paragraphs 116–117; *Burlington Resources Inc. v. Republic of Ecuador (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, Paragraphs 99–100.

41 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Catalogue, Oxford University Press, 2012), p. 33.

42 *Burlington Resources Inc. v. Republic of Ecuador (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, Paragraph 187, referring to the divergent view on the role of case law by Professor Brigitte Stern.

43 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, Paragraph 97; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, Paragraph 64; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, Paragraphs 76–77.

44 *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, Paragraph 21.

Similar conclusions were reached by the *Azurix* and the *LG&E* tribunals.[45] The *ADC* tribunal directly applied the underlying treaty, arguing that the treaty's express terms provide for its substantive rules of law to be applied to the dispute, but as may be complemented by rules of general international law and customary international law.[46]

In this respect, the content and the nature of substantive rules and standards provided for in investment treaties are still being developed, especially since they should be construed and applied in conjunction with other sources of international law. For instance, the fair and equitable treatment standard has sometimes been equated with the international minimum standard of treatment under customary international law,[47] while sometimes it has been considered as an autonomous and evolving treaty standard,[48] the latter approach even leading to discussions about whether it should form a self-standing rule of customary international role.[49]

Further, application of investment treaty provisions themselves can sometimes broaden the scope and the content of the substantive rules governing a dispute. Some treaties contain a 'most-favoured nation clause', mandating the host state not to subject investments or investors protected under such a treaty to treatment less favourable than what the host state accords to investors of third states. If investors of third states are granted a more favourable protection under the treaty covering their investment, then the substantive provisions of such a treaty may be imported and applied in disputes based on a treaty containing the most-favoured nation clause. Tribunals, for instance, have imported from other treaties more

45 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, Paragraphs 65–68; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, Paragraphs 85–87.

46 *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, Paragraph 290.

47 North American Free Trade Agreement between Canada, the United States and Mexico, signed on 17 December 1992, entered into force on 1 January 1994 (NAFTA), Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA, 31 July 2001.

48 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, Paragraphs 7.4.1–7.4.12.

49 See Campbell McLachlan, 'Is There an Evolving Customary International Law on Investment?', *ICSID Review – Foreign Investment Law Journal*, 2016, Volume 31, Issue 2.

favourable conditions for just compensation[50] or extensive obligations to provide fair and equitable treatment.[51]

Other sources of international law as a source of applicable law in investment disputes

The application of substantive rules of a treaty alone may be sufficient for a tribunal to resolve a dispute. However, substantive provisions provided for by treaties are hardly ever self-sufficient to cover every single aspect of an investment treaty dispute, mandating consideration and application of other sources of law.

Frequently, both bilateral[52] and multilateral[53] treaties stipulate that disputes are to be settled in accordance with the 'rules' or the 'principles' of international law.[54] Some treaties, such as the Energy Charter Treaty, even contain a combined reference to both rules and principles of international law.[55] The tribunal in *Suez* concluded, based on the treaties that instructed the tribunal to apply principles of international law, that 'international law may apply to every extent relevant', ultimately concluding it would apply 'any relevant rules of international law'.[56]

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50 See, e.g., *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003.

51 See, e.g., *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

52 See, e.g., Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, signed on 20 April 2015, entered into force on 11 October 2017, Article 34(1), stating that '[a] Tribunal established under this Section shall decide the issues in dispute consistently with this Agreement and applicable rules of international law'; see also Agreement between the Government of the Republic of Croatia and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investment, signed on 2 December 1994, entered into force on 1 June 1996, Article 9(4), stipulating that '[t]he arbitration tribunal shall decide in accordance with principles of international law'.

53 See, e.g., NAFTA, Article 1131, stipulating that '[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'.

54 See Dafina Atanasova, 'Conflict of treaty-norms in investment arbitration', University of Geneva, Thesis, 2017, p. 55.

55 The Energy Charter Treaty, signed on 17 December 1994, entered into force on 16 April 1998, Article 26(6), stipulating that '[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law'.

56 *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, Paragraph 63; see

It is generally understood that the references to international law should cover the full range of its sources, as specified in Article 38(1) of the Statute of the ICJ, including (1) general or particular international conventions establishing rules expressly recognised by the states, (2) international custom, as evidence of a general practice accepted as law, (3) the general principles of law recognised by civilised nations, and (4) judicial decisions and scholarly writings, as subsidiary means for the determination of rules of law.[57]

Some treaties specifically stipulate that the customary international law and general principles of law are to be applied, such as the China–Colombia Bilateral Investment Treaty (BIT), stating that the tribunal may base its decision 'on the general principles of law, and on the principles evidenced by general state practice and accepted as law and *opinio juris*'.[58]

With respect to the customary international law, tribunals frequently apply, for instance, the principles of attribution and state responsibility,[59] the consequences of the state of necessity,[60] or the standard of compensation for wrongful expropriation,[61] affirming the view that customary international law plays an

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also Dafina Atanasova, 'Conflict of treaty-norms in investment arbitration', University of Geneva, Thesis, 2017, p. 58.

57 Statute of the International Court of Justice, Article 38(1). See International Bank for Reconstruction and Development, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States', in *The History of the ICSID Convention*, Volume II-2, p. 962; see also Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, 'Applicable Law', in *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), pp. 545–639.

58 Bilateral Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the People's Republic of China, Article 9.11, signed on 22 November 2008, entered into force on 2 July 2013.

59 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, Paragraph 89; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, Paragraph 190; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, Paragraphs 276–328.

60 *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (also known as Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic)*, ICSID Case No. ARB/01/3, Award, 22 May 2007, Paragraphs 294–313, and Decision on the Application for Annulment of the Argentine Republic, Paragraphs 355–395; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, Paragraphs 304–331, and Ad Hoc Committee Decision on the Application for Annulment of the Argentine Republic, 25 September 2007, Paragraphs 101–150.

61 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, Paragraphs 8.2.1–8.2.11.

important role in investment treaty arbitration.[62] Likewise, tribunals often invoke upon the general principles of law, such as the good faith principle,[63] the burden of proof[64] and the principle of estoppel,[65] demonstrating their relevance in investment arbitrations.[66]

Treaty provisions are often applied in conjunction with the rules of international law, such as the rules on treaty interpretation and state responsibility, even if the underlying treaty does not explicitly refer to such rules.[67] In this respect, under Article 31(3)(c) of the VCLT, the substantive rules of a treaty have to be interpreted and applied by taking the relevant rules of international law into account to the extent applicable, with an aim of integrating the entire system of international law into the legal framework created by the treaty.[68] In that vein, there were

62 See Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, 'Applicable Law', in *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), pp. 606–607; see also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Catalogue, Oxford University Press, 2012), p. 17.

63 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, Paragraph 142; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, Paragraphs 230–239.

64 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, Paragraph 83; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, Paragraph 121; *Alpha Projektholding GmbH v. Ukraine,* ICSID Case No. ARB/07/16, Award, 8 November 2010, Paragraph 236.

65 *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award, 30 March 2010, Paragraphs 348–354; *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, Paragraphs 7.1.1–7.1.3.

66 See Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, 'Applicable Law', in *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), pp. 607–610; see also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Catalogue, Oxford University Press, 2012), p. 18.

67 Dafina Atanasova, 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?', *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 3, pp. 417–418, referring to Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, Second Edition (Oxford University Press, 2018).

68 See Campbell McLachlan, 'Is There an Evolving Customary International Law on Investment?', *ICSID Review – Foreign Investment Law Journal*, 2016, Volume 31, Issue 2, pp. 264–269; see also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Catalogue, Oxford University Press, 2012), pp. 17–18.

views that, simply by consenting to investment arbitration, the investor and the host state agreed to apply general international law, including customary international law.[69]

Controversies have revolved around the application of EU law as substantive law in investment treaty arbitration proceedings. In some cases, tribunals have indeed considered that EU law, being a constituent component of a national legal system, should be considered, interpreted and applied, if and where required.[70] However, subsequent developments, especially the determination that intra-EU investment arbitrations are incompatible with EU law,[71] generated a number of uncertainties in relation to the application of EU law, including with respect to arbitrations under extra-EU BITs. These uncertainties were, for the most part, generated by the view that the application of EU law in investment arbitrations is entrusted to tribunals that are not part of the judicial system of the EU and cannot seek preliminary rulings on the interpretation of EU law from the Court of Justice of the European Union (CJEU). Since investment arbitration tribunals are deemed not to have authority to refer questions to the CJEU, which is deemed to be the ultimate arbiter on the proper interpretation and application of EU law under the EU system, their operation arguably threatens the autonomy of EU law.

Municipal law as a broadly applicable and relevant source of applicable law

As discussed above, the underlying treaty and other sources of international law are predominantly applied as a source of substantive law in investment disputes. But that is not to say municipal law has no relevance. To the contrary, many treaties specifically stipulate that municipal law, primarily that of the host state, applies in a dispute. Likewise, the parties to the dispute may, explicitly or implicitly, agree

69 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, Paragraph 89; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, Paragraph 290.

70 See, e.g., *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, Paragraph 100; *Electrabel SA v. Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Paragraphs 4.192–4.199.

71 *Slovak Republic v. Achmea BV*, Case C-284/16, Judgment of the Grand Chamber of the Court of Justice of the European Union, 6 March 2018. This decision prompted the termination of intra-EU BITs; see Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, signed on 5 May 2020, entered into force on 29 August 2020.

to the applicability of municipal law. Further, even if there is no reference to municipal law in the treaty, the parties' agreement (if any) or the relevant arbitration rules may still be relevant, and the specifics of the case might trigger its application to the extent determined to be required or necessary.

Where choice of law provisions may be found, references to municipal law mainly appear to be included in addition to international law, while only seldomly are they included independently or to the exclusion of international law.[72] This might imply a subsidiary role reserved for municipal law in investment disputes. Recent trends appear to show a tendency of allowing tribunals to consider municipal law, but distinguishing it from the principal norms applicable to the dispute.[73]

Sometimes, certain specific or incidental issues need to be resolved by applying municipal law, irrespective of the existing choice of the treaty or international law as the applicable law.[74] For instance, the application of municipal law may be warranted for determining whether the rights comprising the investment, which the investor seeks to protect, actually exist.[75] This aspect is even more relevant as the prospective liability of the host state is closely interrelated with the scope and the nature of the rights forming part of the investment.[76]

Moreover, certain treaties provide protection only to investments made 'in accordance with the [host state's] laws', limiting the scope of application of the treaty and the host state's consent.[77] In such cases, the legality of the investment

72 Dafina Atanasova, 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?', *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 3, pp. 411–414.

73 id., p. 417.

74 id., pp. 404–406.

75 *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, Paragraph 112; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, Paragraphs 142–145.

76 See Zachary Douglas, 'Applicable Laws', in *The International Law of Investment Claims* (Cambridge University Press, 2009), pp. 63–64.

77 See, e.g., Agreement between the Government of the Republic of Bosnia and Herzegovina and the Government of Malaysia for the Promotion and Protection of Investments, singed on 16 December 1994, entered into force on 27 May 1995, Article 1(2)(a), linking the notion of the 'investments' vested with protection under the treaty to only those investments that 'are made in accordance with the laws, regulations and national policies of the Contracting Parties'.

is assessed under the municipal law of the host state, irrespective of the law applicable to the main issues in dispute.[78]

To invoke the protection of an investment treaty, the investor needs to have the nationality of its home state – the other state party to the treaty. This issue must be resolved with reference to the national law of the state whose nationality the investor claims to have.[79] Tribunals sometimes also have to resort to the municipal law of different states, in cases where the investor is asserted to have dual or multiple nationality.[80] Likewise, the issues pertaining to the investor's legal status and capacity, as well as corporate actions and corporate governance, are governed by the municipal law of its home state.[81]

Municipal law may also be relevant in the application of 'umbrella clauses'.[82] To determine whether a contractual commitment has validly been established, as well as to assess the issues related to its execution, tribunals may resort to the municipal law of the host state, or such other laws that may apply in relation to the contractual relationship.[83]

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78 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, Paragraphs 105–114; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, Paragraphs 118–123; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, Paragraphs 318–320; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, Paragraphs 83–86.

79 *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, Paragraphs 195–201; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, Paragraph 55.

80 See, e.g., *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019; *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt (formerly Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt)*, ICSID Case No. ARB/02/9, Award, 27 October 2006, Section 3.4.1.

81 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding, 10 May 1988, Paragraphs 104–105; *Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation*, ICSID Case No. ARB/92/2, Award, 4 May 1994, Paragraphs 26–29.

82 See, e.g., Agreement between the Republic of the Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, Article X(2), stating that '[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party'.

83 See, e.g., *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004.

These examples clearly demonstrate the importance of municipal law in investment treaty arbitration. Because the arbitrators may not have the experience in dealing with issues pertaining to the relevant municipal law, primarily of the host state,[84] tribunals often rely on the interpretation of national law by various legal authorities from that jurisdiction. However, difficulties may arise if, for instance, the investor claims that the host state impaired its investment by serious misapplication of the applicable national law, which may limit the tribunal in relying on the authoritative interpretation of national law in the jurisprudence of national courts or other authorities.

Resolving conflicts of laws and the prospective consequences of misapplying the law

Treaties sometime explicitly provide for multiple sources of law, without setting out the hierarchy between them in cases of prospective conflicts, thereby requiring tribunals to determine the ranking in their application to specific issues in dispute.[85] The *CME* tribunal, deciding on the basis of the Czech Republic–Netherlands BIT,[86] concluded that the treaty's choice of law provision did not rank the precedence between various sources of law, and did not provide an exclusive choice of law, implying that it may even apply additional sources of law.[87] In

84 For some guidance on the strategy that parties' counsel may resort to in relation to identifying and interpreting the applicable laws in international arbitration, see Gabrielle Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions', *Arbitration International*, 2005, Volume 21, No. 4, pp. 631–638.

85 See, e.g., Agreement between the Republic of France and Argentina on the Promotion and Reciprocal Protection of Investments, signed on 3 July 1991, entered into force on 3 March 1993, Article 8(4), stipulating that the tribunal shall base its decision on (1) the provisions of the BIT, (2) the legislation of the host state party to the dispute, including conflict of laws rules, (3) the terms of any private agreements concluded on the subject of the investment, and (4) the relevant principles of international law.

86 See, e.g., Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991, entered into force on 1 October 1992, Article 8(6), stipulating that '[t]he arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: – the law in force of the Contracting Party concerned; – the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; – the provisions of special agreements relating to the investment; – the general principles of international law'.

87 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, Paragraphs 396–413. See also Dafina Atanasova, 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?', *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 3, p. 409; Yas Banifatemi, 'The Law Applicable in Investment Treaty

such scenarios, the tribunal's task is to determine which rules should apply to a specific issue in dispute, especially in the cases of a dispute between the parties on the point of applicable laws and their hierarchy.[88]

Both the treaty and general international law are often applied seamlessly in investment treaty arbitration proceedings. However, in certain specific circumstances, differences between the substantive rules provided for by a treaty and the applicable rules of general international law may arise. If the treaty conflicts with a peremptory norm of general international law, general international law should prevail.[89] However, such conflicts are unlikely in relation to investment treaties. Outside such unlikely scenarios, tribunals have held that the treaty, as the principal source of law, should have primacy in application.[90]

Potential conflicts may also arise in the application of the treaty or international law and municipal law. In some cases, they may apply concurrently and in parallel.[91] In the case of a conflict between an investment treaty and the relevant municipal law, the underlying treaty should be deemed to be the prevailing source of law. An important part of the rule for resolution of such conflict is a well-established rule that states cannot invoke the provisions of municipal law as justification for their failure to perform a treaty.[92] By the same token, conflicts between municipal law and general international law, including customary law, are resolved under the maxim that municipal law may not violate and be incompliant with international law.[93]

Arbitration', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), pp. 198–199.

88 *Total SA v. Argentine Republic*, ICSID Case No ARB/04/1, Decision on Annulment, 1 February 2016, Paragraphs 196–197.

89 VCLT, Article 53.

90 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, Paragraphs 333–354, and Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, Paragraphs 186–210.

91 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, Paragraphs 116–117; *Adriano Gardella S.p.A. v. Côte d'Ivoire*, ICSID Case No. ARB/74/1, Award, 29 August 1977, Paragraph 4.3; *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980, Paragraph 4.64.

92 VCLT, Article 27.

93 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, Paragraph 107; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 200, Paragraphs 92–93; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award of the Tribunal, 23 September 2003, Paragraphs 105, 207; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision

The tribunal's task of identifying the proper law or laws applicable to the matter in dispute, as well as of appropriately applying such law, is of paramount importance. Any errors made by the tribunal discharging its mandate in this respect may entail a significant corollary. The tribunal may either fail to identify and apply the proper law, or commit an error of law of such substantial magnitude that may be construed as a complete disregard of the applicable law.[94] The failure to identify properly and apply the law may be qualified as a manifest excess of the tribunal's powers and a derogation from its mandate, which may result in the annulment of the tainted arbitral award.[95]

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on Liability, 3 October 2006, Paragraph 94; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 19 October 2009, Paragraph 218. See also Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, 'Applicable Law', in *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), pp. 617–630.

94 See Dafina Atanasova, 'Conflict of treaty-norms in investment arbitration', University of Geneva, Thesis, 2017, pp. 64–65.

95 ICSID Convention Arbitration Rules, Article 52(1)(b). See also *Venezuela Holdings, B.V., et al. (formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (also known as Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic)*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010.

Interlude

Arbitrators on the role and art of advocacy in ISDS

Ten rules for better written advocacy

Rule 1: use short sentences
Short, easy-to-understand sentences are more effective than long ones.

Rule 2: use language that non-native speakers can understand
Use language that arbitrators from a different legal background can understand accurately. For example, the French word '*procès*' is often translated into the English word 'trial'. For a US lawyer, however, 'trial' signifies the hearing on the merits, while for a French lawyer, '*procès*' designates the entire procedure, from the filing of the complaint until the final judgment. It is best to avoid referring to a procedural device in your own national system to describe what you want to accomplish in a request for arbitral relief.

Rule 3: start each paragraph with a topic sentence
The first sentence of each paragraph should announce the main point of the paragraph. This organisation will make your argument clearer and stronger.

Rule 4: describe the parties by their names and not by their procedural position
Even though it is investment arbitration, do not refer to the parties simply as 'claimant' and 'respondent'. The arbitrators will not always remember who they are (and neither will you). Use the parties' names.

Rule 5: do not use the pronouns 'you' and 'we' in correspondence and pleadings
When drafting correspondence and pleadings, do not refer to opposing counsel or their client as 'you', and to oneself or one's own client as 'we'. Instead, refer to the parties (e.g., 'ABC Corporation is seeking to delay the proceedings in bad faith' as opposed to 'You are seeking to delay the proceedings in bad faith'). This keeps the debate from getting personal and gives your writing a more professional (and less offensive!) tone.

Rule 6: minimise abbreviations
Only introduce an abbreviation when it is essential to do so. It is not essential in contexts where one would not do so in ordinary speech. For example, we do not stop to define 'John Smith' in ordinary speech – we simply refer to him as 'Smith'. Do not make arbitrators uselessly memorise lists of coded names.

Rule 7: do not make your opponent's argument
It can be tempting to begin a responsive argument by summarising the point in question. In that case, begin the argument by stating that the adversary's point is wrong. For example: 'ABC Corporation errs in suggesting that the sun rises in the west'. Do not merely summarise your opponent's argument because by doing so, you risk stating your opponent's argument in a clearer manner than they do.

Rule 8: facts should show, not tell
The tone of the fact section should always remain factual and neutral, without drifting into argument. By carefully selecting the facts and presenting them in the right way, you should lead the reader to conclude by himself or herself that your client is right and the adversary is wrong. This approach is much more effective than merely telling the reader what to think.

Rule 9: do not use superlatives
When discrediting the opponent's point, you only need to establish the point's lack of merit – adding a superlative is unnecessary. In those rare cases where it is necessary to convey a stronger degree of emphasis, it is better to do so through careful selection of nouns and adjectives than through the addition of a superlative.

Rule 10: begin a procedural letter to the tribunal with what you want and who you are
When writing a procedural letter to the tribunal, start by stating who your client is, and what you are asking. For example: 'On behalf of respondent ABC Brazil, we respectfully submit that the tribunal should deny the request for documents stated in the 20 June letter of claimant XYZ Corp.' The tribunal should not have to wonder until the end of the letter why it is that you are writing.

– Barton Legum, Dentons

Advocacy in investor–state disputes – what's different?

Commercial arbitration is generally about interpreting a contract to decide which party owes money to the other and how much.

Some would say that treaty arbitration is no different, that it consists of interpreting a treaty and deciding how much money, if any, the state should pay to the investor. That, however, does not capture the full reality of investment arbitration.

The political dimension
Rightly or wrongly, there is a perception among arbitrators that investment arbitration is not just about money. Rather, arbitrators have the impression that they are asked to pass judgement on the actions of a state whose motivation can go well beyond the simple breach of a treaty protection. This perception is amplified by the legitimacy crisis that currently afflicts investment arbitration. As a result, there is an extra dimension in treaty arbitration and it is crucial to take that extra dimension treaty. Failure to do so, by limiting the arguments merely to why the treaty has been breached, may fail to address some of the elements that go into the decision-making process of the tribunal.

This does *not* mean that political or societal considerations should be at the heart of the argument. The argument should remain technical in nature and non-political, but the narrative of the investor should be such that it gives sufficient comfort to the tribunal that is not interfering with the inherent powers of a state. The very notion of a state is of course abstract, and the actions that are criticised in investment arbitration are very often taken by one or more individuals. Sometimes there is coordination among them, sometimes there is not (and the state may be at fault for the lack of coordination). In some cases, the tribunal may have the impression that the state has acted in bad faith. Those cases, however, are the exception. Very often, the tribunal will take the view that the state is not in bad faith but that it may nonetheless have to indemnify certain investors because it had made promises in an investment treaty and those promises are to be respected.

Any good oral argument in an investment treaty arbitration takes into account the political dimension of the underlying story without addressing it as such. That is easier said than done. However, this is a major difference between treaty arbitration and commercial arbitration.

No aggressive grace notes

Another aspect of advocacy before investment arbitration tribunals is the need to adopt a very neutral tone and to avoid aggression. Unnecessarily aggressive pleadings or oral submissions are generally not helpful in commercial arbitration. In investment treaty arbitration, they can have a *disastrous* impact on the parties whose counsel choose to adopt them. Investment arbitration pulls specialists from both the commercial arbitration arena and public international law, including those appearing before the International Court of Justice (ICJ). Counsel's behaviour before the ICJ has to be policed in the extreme. As a result, it is counterproductive to address opposing counsel in the same way as one would address an adversary in a commercial court in a domestic dispute. That behaviour can reflect badly on a party that does not realise that the game is played with slightly different rules in front of investment arbitration tribunals.

– Philippe Pinsolle, Quinn Emanuel Urquhart & Sullivan LLP

Less is definitely more

A more and more common feature of investment cases is long written and oral submissions. It is now not infrequent to see memorials spanning 500-plus pages, a significant part of which are quotes of investment awards that can be easily retrieved on the internet, with thousands of footnotes. These submissions invariably include a significant number of repetitions, as if repeating arguments could make them stronger.

And oral submissions, more often than not, are accompanied by hundreds of dense slides, the reading of which – if they *can* be read mid-presentation – will inevitably distract the tribunal and create a distance between its author and its audience.

Blaise Pascal wrote in one of the letters in *Les Provinciales:* '*Mes lettres n'avaient pas accoutoumé . . . d'être si étendues . . . Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte.*' ('My letters were never accustomed to being so extensive . . . I only made this one longer because I didn't have the leisure to make it shorter' – or as it is sometimes said, 'I'm writing you a long letter because I don't have the time to write a short one.') Being short requires focus and takes more time than drafting an encyclopedic statement of every minute aspect of a party's case. The time needed to be short and concise, however, will always be well spent.

– Alexis Mourre, MGC Arbitration

What persuades on the substance?

Tips on advocacy during the substantive stage

As counsel, it is always difficult to identify the argument that will convince an arbitral tribunal. And as arbitrator, it is not always easy to say exactly which argument has led the tribunal in a certain direction. Yet, some principles ought to be respected if the advocacy during the merits stage is to have the greatest chance of being successful.

Narrative pull

First, a party has to develop a narrative. The advocate is a storyteller and that story must be comprehensive and must explain the case from the beginning to the end. That story is the background to the legal arguments; those legal arguments will be understood by the tribunal in a much better way if they form part of an overall narrative. The narrative has to be consistent internally; it also has to be consistent with the facts of the case, as established by the written documentation and the testimonies. Finally, it must sound logical. If the narrative is a good one, that is great. Of course, not every case is a candidate for a good narrative. Either way, developing a narrative is essential. Merely reciting the legal arguments one after the other will be insipid and ultimately ineffective.

Properly connected legal argument

The second principle is that the narrative should not override legal considerations. Too often the legal portion of the oral or written submissions is neglected. The legal discussion is frequently another discussion of the facts, presented in a different manner, but not a true legal discussion. Convincing an arbitral tribunal can only be achieved by putting forward clear and consistent legal reasoning. Ultimately, it is the tribunal that will have to draft the award. To do so, it needs to understand each party's legal position from the beginning to the end. To be of help in the drafting

of an award, the legal arguments must be articulated in a logical fashion and more importantly they must lead to the conclusion that is requested in the prayer for relief. Sometimes, the legal arguments are developed separately from the facts and with no direct or obvious connection to the damages requested. The tribunal is then faced with a story (the facts), a discussion of some legal principles, and one or more requests for indemnification. Parties tend to think that the arbitral tribunal will make a choice among these various elements and find the reasoning to give them the relief requested. That is not only wrong, it is a recipe for disaster. It is not for the tribunal to make a choice. It is for each party to advance their own choice, with the assistance of counsel.

A good discipline is to proceed in the following manner: (1) start from the prayer for relief, (2) identify the rule or legal principle that is applicable to obtain the prayer for relief, and (3) explain why that principle, applied to the facts, leads to the desired result. This is surprisingly absent from many submissions.

Acknowledge your weaknesses

The absence of clear legal reasoning is generally not due to the lack of talent of counsel but to the fear that clarity will expose a weak argument. It is, however, futile to attempt to hide from the tribunal a very weak point in the reasoning. A weak point should be addressed up front with the tribunal rather than buried in confusing explanations in the hope that the tribunal will not see it. Any attempt to defuse a weak point will often backfire because the party will not have had the opportunity to address the tribunal fully on why it should prevail notwithstanding this weak point. As a result, in deliberations, the tribunal will have insufficient arguments in front of it to overcome that difficulty.

In summary, regardless of whether the legal arguments are strong or weak, clarity is key.

Don't dilute your strongest arguments

Lastly, when there is one good argument and three bad arguments, it is not a good idea (especially in oral submissions) to plead all four of them. It is an even worse idea to put them on the same footing. Good counsel can tell the difference between a good argument and a bad one. When it comes to oral submissions, only good arguments should be presented. Putting forward good and bad arguments as if they had equivalent force will only dilute the good argument and sometimes confuse the tribunal.

– Philippe Pinsolle, Quinn Emanuel Urquhart & Sullivan LLP

If it's worth saying, is it worth saying thrice?

Sadly, it is commonplace today for memorials to extend into hundreds of pages. Worse, replies and rejoinders are now almost always longer than the underlying memorial to which they respond. Something has gone badly wrong.

Mindful advocates will understand how much a focused, precise and un-repetitive submission will be appreciated by the members of the tribunal. Bearing in mind the inadvisability of irritating the mind of your decision maker, the best counsel will avoid the chaff and present only the wheat. He or she will do so succinctly and without reiteration. Those who follow this course will not be only be rewarded suitably if their case is sound, they will also be much admired and sought after.

– J William Rowley QC, Twenty Essex

CHAPTER 12

Substantive Protections: MFN

Mark Mangan and Ananya Mitra[1]

Introduction

Arbitral tribunals have grappled with the interpretation and application of most-favoured nation (MFN) clauses in over 100 investment treaty cases. With no doctrine of binding precedent in international arbitration, and the prevalence of different philosophical viewpoints, these cases have given rise to divergent outcomes, particularly on the question of whether an MFN clause can apply to procedural rights and obligations.

In this chapter, MFN jurisprudence is analysed and a framework provided for understanding how seemingly inconsistent decisions on the application of MFN clauses to procedural rights and obligations can (mostly) be explained by certain key variables. These comprise (1) the language of the MFN clause, (2) the ambition of the party relying on it, and ultimately (3) the views of the arbitrators tasked with deciding whether states intend for MFN clauses to apply to procedural issues. Once these analytical filters are applied, not only does the existing jurisprudence appear more coherent but the outcome in future MFN debates should become increasingly predictable.

With that said, an initial word of caution is needed. The authors have deliberately structured the analysis so that the subjective views of individual arbitrators are considered last in the expectation that the first two (objective) criteria should explain most cases. Indeed, if the third filter were controlling – that is, if the

1 Mark Mangan is a partner and Ananya Mitra is an associate at Dechert LLP. The authors are grateful for the research and analysis undertaken by Miranda Elvidge, as well as further research conducted by Dano Brossmann of Dechert Paris. The chapter is based on a paper first delivered by Mark Mangan at an international arbitration conference in Seoul on 20 August 2014. The chapter reflects the current state of the jurisprudence and should not be taken to represent the personal views of the authors, Dechert LLP or the firm's clients.

determination of MFN debates were wholly dependent on who was appointed to hear the debate – then not only would that lead to more arbitration about whether an MFN claim could be arbitrated, but it would cast doubt on the coherence of the current system for the resolution of investor–state disputes.

Overview of MFN clauses in practice

MFN clauses impose on the host state an obligation to accord to investors of the other state 'treatment' no less favourable than that given to investors from third states. They were developed in response to free trade agreements in which states granted preferential market access to other trading partners.[2] The aim of such a provision, as described by the International Institute for Sustainable Development, is 'to establish the same rules of play for all investors in competition in a given country and to prevent any nationality-based distortions'.[3] (MFN can be distinguished from the 'national treatment' standard, which requires states to grant to investors of one state treatment at least as good as what it accords its own nationals.)

In practice, there are three ways an MFN clause can be deployed. First, it could itself be used as the basis of a claim. That is, an investor could seek damages for a breach of the MFN clause based on more favourable treatment allegedly accorded to investors of a third state, in similar circumstances. In *Parkerings v. Lithuania* (2007), for instance, the tribunal held there was no breach of the MFN clause as alleged since the claimant and the relevant third-state investor were not operating 'in like circumstances'.[4] Similarly, the tribunal in *Bayindir v. Pakistan* (2009)[5] rejected the merits of an MFN claim on the basis that the claimant failed to substantiate that it was in 'a similar situation' to the third state investor, which was allegedly being accorded more favourable treatment.

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2 See UNCTAD Series on Issues in International Investment Agreement II, Most-Favoured Nation Treatment: A Sequel (2010), Introduction.

3 International Institute for Sustainable Development (IISD) Best Practices Series: The Most Favored-Nation Clause in Investment Treaties (February 2017), p. 21.

4 *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8), Award dated 11 September 2007 (Laurent Lévy (P), Julian Lew (C), Marc Lalonde (R)) (*Parkerings*), Paragraphs 366–430. See also the similar ruling in *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro* (ICSID Case No. ARB(AF)/12/8), Award dated 4 May 2016 (Andrés Rigo Sureda (P), Emmanuel Gaillard (C), Brigitte Stern (R)), Paragraphs 361–364.

5 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award dated 27 August 2009 (Gabrielle Kaufmann-Kohler (P), Karl-Heinz Böckstiegel (C), Franklin Berman (R)) (*Bayindir (merits)*), Paragraphs 386–390 and 421–423.

Second, an MFN clause can be used to import substantive protections from another investment treaty (the reference treaty) into the treaty relied upon to bring the claim and through which the tribunal has jurisdiction (the principal treaty).

Third, an MFN clause could (depending on the circumstances) be used by an investor to access preferable procedural rights found in the reference treaty or avoid more onerous procedural requirements in the principal treaty.

The focus of the remainder of this chapter is on the second and third of these applications of MFN clauses, particularly the last one in which much of the controversy regarding MFN clauses arises.

Substantive rights

Most investment treaty tribunals have allowed (and in several instances, host states have not objected to) claims in which an investor has invoked an MFN clause to access more favourable substantive protections found in another treaty. This includes allowing investors to access the following rights or benefits through an MFN clause.

- The fair and equitable treatment (FET) standard: *Bayindir v. Pakistan* (2005),[6] *Rumeli Telekom v. Kazakhstan* (2008)[7] and *Hesham Warraq v. Indonesia* (2014).[8]
- A broadening of the FET standard to include the obligation to grant investment permits: *MTD v. Chile* (2004).[9]

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6 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction dated 14 November 2005 (Gabrielle Kaufmann-Kohler (P), Karl-Heinz Böckstiegel (C), Franklin Berman (R)) (*Bayindir (jurisdiction)*), Paragraphs 227–235. See also *Bayindir (merits)*, Paragraphs 156–160.

7 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award dated 29 July 2008 (Bernard Hanotiau (P), Marc Lalonde (C), Stewart Boyd (R)) (*Rumeli Telekom*), Paragraph 575. (The parties agreed that Kazakhstan was subject to additional substantive obligations by the operation of the MFN clause: Paragraph 575.) (Annulment decision upheld the award.)

8 *Hesham T. M. Al Warraq v. Republic of Indonesia* (UNCITRAL UN-0088-02), Final Award dated 15 December 2014 (Bernardo M Cremades (P), Michael Hwang (C), Fali Sam Nariman (R)) (*Hesham Warraq*), Paragraphs 547–555.

9 *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7), Award dated 25 May 2004 (Andrés Rigo Sureda (P), Marc Lalonde (C), Rodrigo Oreamudo Blanco (R)), Paragraphs 103–104. (Annulment decision upheld the award.)

- The full protection and security standard: *OAO Tatneft v. Ukraine* (2010)[10] and *Devas v. India* (2016).[11]
- An obligation not to deny justice: *Rumeli Telekom v. Kazakhstan* (2008).[12]
- A broadening of the protection against 'discriminatory' measures to include 'arbitrary' and 'unreasonable' measures: *Sergei Paushok v. Mongolia* (2011).[13]
- An obligation to accord 'treatment no less favourable than that required by international law': *ATA v. Jordan* (2010).[14]
- A higher standard of host state liability: *AAPL v. Sri Lanka* (1990).[15]
- A more favourable definition of 'just compensation': *CME v. Czech Republic* (2003).[16]
- The obligation to provide 'effective means of asserting claims and enforcing rights': *White Industries v. India* (2011).[17]

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10 *OAO Tatneft v. Ukraine* (PCA Case No. 2008-8), Partial Award on Jurisdiction dated 28 September 2010 (Francisco Orrego Vicuña (P), Charles N Brower (C), Marc Lalonde (R)), Paragraphs 249–250. See also Paragraphs 362–365 of the award on the merits dated 29 July 2014.

11 *Cc/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited., and Telcom Devas Mauritius Limited v. The Republic of India* (PCA Case No. 2013-09), Award on Jurisdiction and Merits dated 25 July 2016 (Marc Lalonde (P), David R Haigh (C), Anil Dev Singh (R)), Paragraph 496. (David R Haigh issued a dissenting opinion disagreeing with the majority on the 'essential security defence' under the principal treaty. Dissenting opinion of Anil Dev Singh on the Award on Quantum.)

12 *Rumeli Telekom*, Paragraph 575.

13 *Sergei Paushok et al. v. Government of Mongolia* (Ad Hoc/UNCITRAL), Award on Jurisdiction and Liability dated 28 April 2011 (Marc Lalonde (P), Horacio Grigera Naón (C), Brigitte Stern (R)), Paragraphs 307 and 571.

14 *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2), Award dated 18 May 2010 (L Yves Fortier (P), Ahmed Sadek El-Kosheri (C), W Michael Reisman (R)), footnote 16.

15 *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Final Award dated 27 June 1990 (Ahmed Sadek El-Kosheri (P), Berthold Goldman (C), Samuel K B Asante (R)) (*AAPL*), Paragraph 43. (Dissenting opinion of Samuel K B Asante in relation to the majority's finding that MFN treatment should be accorded to all aliens based on customary international law.)

16 *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL), Final Award dated 14 March 2003 (Wolfgang Kühn (P), Stephen M Schwebel (C), Ian Brownlie (R)), Paragraphs 496 and 500. (Ian Brownlie issued a separate opinion disagreeing with the majority based on the principle of *effet utile*.)

17 *White Industries Australia Limited v. The Republic of India* (UNCITRAL), Final Award dated 30 November 2011 (J William Rowley (P), Charles N Brower (C), Christopher Lau (R)), Paragraphs 11.1.1–11.3.3.

- The obligation 'not to impair by unreasonable, arbitrary, or discriminatory measures the management, maintenance, use, enjoyment, or disposal of such investments': *Rumeli Telekom v. Kazakhstan* (2008).[18]
- An umbrella clause: *EDF v. Argentina* (2012)[19] and *Arif v. Moldova* (2013).[20]

Two decisions rendered under the Turkey–Turkmenistan Bilateral Investment Treaty (BIT) MFN clause, however, appear to swim against this jurisprudential tide. The MFN clause guaranteed treatment 'no less favourable than that accorded *in similar situations*' to other investments. The tribunals in *İçkale v. Turkmenistan* (2016)[21] and *Muhammad Cap v. Turkmenistan* (2021)[22] both held that the phrase 'in similar situations' precluded the use of the MFN clause to access substantive protections in another treaty as the scope of protection under the MFN clause was limited to discriminatory treatment of a claimant investor as compared to other investors in a factually similar situation. In contrast, the tribunal in *Bayindir v. Pakistan*[23] permitted the import of an FET clause based on an MFN clause that also referred to 'treatment no less favourable than that accorded in similar situations' to third state investments.

Nonetheless, there are limits as to how far an MFN clause can be used to benefit from the substantive protections of another treaty. The MFN clause operates within the framework of the principal treaty and thus it cannot be used to, for example, alter the definitions of 'investor' (*ratione personae*)[24] or 'investment'

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18 *Rumeli Telekom*, Paragraph 575.

19 *EDF International SA and others v. Argentina* (ICSID Case No. ARB/03/23), Award dated 11 June 2012 (William W Park (P), Gabrielle Kaufmann-Kohler (C), Jesús Remón (R)), Paragraphs 925–934. (Annulment decision upheld the award.)

20 *Franck Charles Arif v. Moldova* (ICSID Case No. ARB/11/23), Award dated 8 April 2013 (Bernardo M Cremades (P), Bernard Hanotiau (C), Rolf Knieper (R)) Paragraphs 394–395.

21 *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award dated 8 March 2016 (Veijo Heiskanen (P), Carolyn Lamm (C), Philippe Sands (R)), Paragraphs 326–332. (Partially dissenting opinion of Philippe Sands, which was not related to MFN. Partially dissenting opinion of Carolyn Lamm regarding credibility of testimony, unrelated to MFN.) (Annulment decision upheld the award.)

22 *Muhammet Cap and Bankrupt Sehil Insaat Endustri VE Ticaret Ltd STI v. Turkmenistan* (ICSID Case No. ARB/12/6), Award dated 4 May 2021 (Julian Lew (P), Bernard Hanotiau (C), Laurence Boisson de Chazournes (R)), Paragraphs 789–794 (emphasis added).

23 See the MFN clause in *Bayindir (jurisdiction)*, Paragraph 201.

24 *ST-AD GmbH v. Republic of Bulgaria* (PCA Case No. 2011-06 (*ST-BG*)), Award on jurisdiction dated 18 July 2013 (Brigitte Stern (P), Bohuslav Klein (C), J Christopher Thomas (R)) (*ST-AD*), Paragraph 397; *Louis Dreyfus Armateurs SAS v. Republic of India* (PCA Case No. 2014-26), Decision on Jurisdiction dated 22 December 2015 (Jean E Kalicki (P), Julian Lew (C), J Christopher Thomas (R)), Paragraphs 146–148.

(*ratione materiae*),[25] or the temporal application of the principal treaty (*ratione temporis*).[26] A tribunal has also ruled that an MFN clause could not be used to escape an express substantive provision of the principal treaty.[27] MFN claims have likewise failed in circumstances where the tribunal held that the relevant substantive protection in the reference treaty was not more favourable than the one in the principal treaty.[28]

Procedural rights and obligations

While the jurisprudence regarding the application of MFN clauses to substantive rights has been largely consistent and predictable, much greater variance has been observed in decisions regarding the application of MFN clauses to procedural rights and obligations. The divergence traces its roots back to the *Maffezini v. Spain* (2000)[29] decision, in which the tribunal took the view that the MFN clause in the Argentina–Spain BIT applied to procedural rights (specifically, the

25 *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic* (UNCITRAL, LCIA Case No. UN 7927), Award on Preliminary Objections to Jurisdiction dated 19 September 2008 (Francisco Orrego Vicuña (P), Doak Bishop (C), Bernardo Cremades (R)), Paragraph 41.

26 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award dated 29 May 2003 (Horacio Grigera Naón (P), José Carlos Fernández Rozas (C), Carlos Bernal Verea (R)) (*Tecmed*), Paragraph 69; *Krederi Ltd. v. Ukraine* (ICSID Case No. ARB/14/17), Award dated 2 July 2018 (excerpts) (August Reinisch (P), Markus Wirth (C), Gavan Griffith (R)) (*Krederi*), Paragraphs 294–295; *ABCI Investments Limited v. Republic of Tunisia* (ICSID Case No. ARB/04/12), Decision on Jurisdiction dated 18 February 2011 (Bernard Hanotiau (P), L Yves Fortier (C), Pierre Tercier (R)), Paragraph 174. (Dissenting opinion of Brigitte Stern unrelated to MFN.) See also Stephan Schill, 'Maffezini v. Plama: Reflections on the Jurisprudential Schism in the Application of Most-Favored-Nation Clauses to Matters of Dispute Settlement', Amsterdam Law School Legal Studies Research Paper No. 2017-12, Amsterdam Center for International Law No. 2017-11, p 15.

27 *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB701/08), Award dated 25 April 2005 (Francisco Orrego Vicuña (P), Marc Lalonde (C), Francisco Rezek (R)) (*CMS*). (Partially annulled by ad hoc committee but not on MFN.) The tribunal held at 377 that such an application of the MFN clause would be inconsistent with the principle of *ejusdem generis*.

28 *AAPL*, Paragraph 54. See also *Oxus Gold v. Uzbekistan* (UNCITRAL UN-0066-03), Final Award dated 17 December 2015 (Pierre Tercier (P), Marc Lalonde (C), Brigitte Stern (R)), Paragraphs 863–864 (partially dissenting opinion of Marc Lalonde unrelated to MFN).

29 *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction dated 25 January 2000 (Francisco Orrego Vicuña (P), Thomas Buergenthal (C), Maurice Wolf (R)) (*Maffezini*).

obligation to pursue local remedies for 18 months before resorting to arbitration). The tribunal based its decision primarily on its interpretation of the terms of the clause and the importance investors attach to procedural rights:

> *Notwithstanding the fact that the basic treaty containing the MFN clause does not refer expressly to dispute settlement as covered by the MFN clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. . . .*[30]

The International Centre for Settlement of Investment Disputes (ICSID) tribunal in *Plama v. Bulgaria* (2005)[31] took a fundamentally different conceptual approach, although admittedly it was faced with a different MFN clause and a more ambitious argument from the claimant as to how it could be used. Rather than seeking to avoid a procedural burden (as Maffezini did successfully), Plama wanted to access a different type of arbitration (ICSID rather than ad hoc) and expand the tribunal's jurisdiction to consider more than just a claim for compensation for an expropriation as allowed under the Bulgaria–Cyprus BIT. The *Plama* tribunal rejected the claim, concluding that the ability to expand a tribunal's jurisdiction through an MFN clause cannot be implied but must be stated expressly (controversially, drawing on practice from commercial arbitrations):

> *The tribunal in Maffezini also noted that in other treaties the MFN provision mentions 'all rights contained in the present Agreement' or 'all matters subject to this Agreement', in which case, according to the [Maffezini] tribunal, 'it must be established whether the omission [in the Argentina–Spain BIT] was intended by the parties [i.e., Contracting Parties] or can reasonably be inferred from the practice followed by the parties in their treatment of foreign investors and their own investors' ([Maffezini] Decision, Paragraph 53). The present Tribunal considers such a basis for analysis in principle to be inappropriate for the question whether dispute resolution provisions in the basic treaty can be replaced by dispute resolution provisions in another treaty. As explained above, an arbitration clause must be clear and unambiguous and the reference to an arbitration clause must be such as to make the clause part of the contract (treaty).*[32]

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30 *Maffezini*, Paragraph 54 (emphasis added).

31 *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction dated 8 February 2005 (Carl F Salans (P), Albert Jan van den Berg (C), V V Veeder (R)) (*Plama*).

32 *Plama*, Paragraph 218.

The debate as to which of these positions is more appropriate continues some 20 years later. The dividing line between those tribunals that have applied MFN to procedural rights and an even greater number that have rejected that premise across some 45 decisions is set out below.

Decisions on whether an MFN clause extends to procedural rights[33]

MFN clause applies to a procedural right or obligation	MFN clause does not apply to a particular procedural issue
Maffezini v. Spain (25 January 2000)	*Yaung Chi Oo Trading v. Myanmar* (31 March 2003)
Siemens v. Argentina (3 August 2004)	*Tecmed v. Mexico* (29 May 2003)
Camuzzi v. Argentina (10 June 2005)	*Salini v. Jordan* (15 November 2004)
Gas Natural v. Argentina (17 June 2005)	*Plama v. Bulgaria* (8 February 2005)
Suez v. Argentina (16 May 2006)	*Berschader v. Russia* (21 April 2006)
Telefónica v. Argentina (25 May 2006)	*Telenor v. Hungary* (13 September 2006)
National Grid PLC v. The Argentine Republic (20 June 2006)	*Wintershall v. Argentina* (8 December 2008)
AWG Group v. Argentina (3 August 2006)	*Quasar* (formerly *Renta 4*) *v. Russia* (20 March 2009)
Suez v. Argentina (3 August 2006)	*Tza Yap Shum v. Peru* (19 June 2009)
RosInvest v. Russia (1 October 2007)	*Austrian Airlines v. Slovak Republic* (9 October 2009)
Impregilo v. Argentina (21 June 2011)	*Les Laboratoires Servier v. Poland* (3 December 2010)
Hochtief v. Argentina (24 October 2011)	*ICS Inspection v. Argentina* (10 February 2012)
Teinver v. Argentina (21 December 2012)	*Daimler v. Argentina* (22 August 2012)
Garanti Koza v. Turkmenistan (3 July 2013)	*EURAM v. Slovak Republic* (22 October 2012)

33 This table excludes cases in which a claim for the application of an MFN clause to procedural rights was not analysed by the tribunal in the award.

MFN clause applies to a procedural right or obligation	MFN clause does not apply to a particular procedural issue
Le Chèque Déjeuner v. Hungary (3 March 2016)	*Accession Mezzanine v. Hungary* (16 January 2013)
Venezuela US v. Venezuela (26 July 2016)	*Kilic v. Turkmenistan* (2 July 2013)
Krederi v. Ukraine (2 July 2018)	*ST-AD GmbH v. Bulgaria* (18 July 2013)
	Sanum v. Laos (13 December 2013)
	H&H v. Egypt (6 May 2014)
	Menzies v. Senegal (5 August 2016)
	A11Y v. Czech Republic (9 February 2017)
	Ansung Housing v. China (9 March 2017)
	Busta v. Czech Republic (10 March 2017)
	Anglia Auto v. Czech Republic (10 March 2017)
	Beijing Urban Construction Group v. Yemen (31 May 2017)
	Christian Doutremepuich v. Mauritius (23 August 2019)
	Heemsen v. Venezuela (29 October 2019)
	Itisaluna v. Iraq (3 April 2020)

This split in the jurisprudence has raised questions about the coherence and predictability of investor–state dispute resolution. The thesis of this chapter, however, is that almost all these decisions can be explained after one applies the correct analytical filters. The most important of these is the precise language of the MFN clause in question to be interpreted and applied by the tribunal.

The precise wording of MFN clauses

The MFN clauses currently in operation vary greatly. Each must be interpreted according to its precise terms. There are clauses with formulations that are seemingly broad (extending, for instance, to 'all matters' relating to a protected investment or investor)[34] or narrow (e.g., limiting the MFN obligation to the FET standard)[35] and many other clauses in between.

Before addressing the relevant principles that would help interpret an MFN clause, it is acknowledged that some commentators consider it inappropriate to sift through the precise words used within an MFN clause in order to determine the contracting states' intentions regarding its application to procedural issues. It is argued that the MFN concept does not apply to procedural rights or matters of jurisdiction as a matter of public international law.[36] In other words, MFN clauses should not be interpreted 'BIT by BIT',[37] as it were, because MFN is a

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34 Argentina–Spain BIT (1991): Article IV: '1. Each Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party. 2. *In all matters* governed by this Agreement, such treatment shall be no less favorable than that accorded by each Party to investments made in its territory by investors of a third country.' (emphasis added).

35 Russian Federation–Spain BIT (1990), Article 5: '1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party. 2. *The treatment referred to in paragraph 1* above shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of a third State.' (emphasis added). (This is the English translation that is published in the UN Treaty Series. It was quoted in *Quasar de Valors SICAV S.A. and others (formerly Renta 4 S.V.S.A and others) v. The Russian Federation* (SCC Case. No. 024/2007), Award dated 20 March 2009 (Jan Paulsson (P), Charles N Brower (C), Toby T Landau (R)) (*Quasar* (formerly *Renta 4*)) at Paragraph 68.)

36 See, for example, Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails', *Journal of International Dispute Settlement*, Vol. 2, No. 1 (2011), pp. 97–113 (Douglas (2011)), p 97: 'There is a fundamental distinction in general international law between the substantive obligations in a treaty, which are addressed to the state parties, and the provisions that create a jurisdictional mandate for an international tribunal, which are addressed to the tribunal and to the disputing parties, who enter into a relationship of procedural equality once arbitration proceedings have been commenced. This distinction must be respected by investment treaty tribunals in confronting the question of the scope of MFN clauses'; footnote 1: 'In short, not only is the application of the MFN clause to procedural requirements flawed as a matter of principle, it is redundant in so far as such requirements are not condition precedents to the exercise of the tribunal's jurisdiction and can be waived in circumstances where strict adherence to them would be futile'; p 99: 'If each case is to be approached as a sui generis exercise in treaty interpretation, then the prospects for a coherent international law of investment seems remote.'

37 *Quasar* (formerly *Renta 4*), Paragraph 94.

'term of art in international law and treaty obligations employing this term of art have an ancient pedigree'.[38] But if that ancient pedigree only related to substantive rights, as has been argued, that could be explained by the fact that BITs are a relatively recent phenomenon, starting in 1959,[39] with those providing investors with a direct right of recourse against states not appearing until about a decade later.[40] Before then, investors did not have different procedural rights merely because of their country of origin and therefore no question should have arisen as to whether certain foreign citizens or investors had more favourable procedural treatment than others. Instead, all foreigners had to rely on the domestic court system of the host state in which they invested or their own state to espouse a claim on their behalf through a process known as diplomatic protection. The 'MFN substantive rights only' argument is also undermined by the fact some treaties expressly extend MFN clauses to dispute resolution matters. For instance, the UK–Ukraine BIT (1993) incorporated such an MFN clause over a decade before the *Maffezini* ruling in 2005.[41]

Thus, the concept of 'MFN' treatment does not appear to be presumptively limited to substantive rights as a matter of public international law. The precise wording of the MFN clause will need to be considered, as discussed below.

38 Douglas (2011), p. 99.

39 According to UNCTAD: 'the first ever BIT was concluded on 25 November 1959 between Germany and Pakistan and entered into force on 28 April 1962, i.e. 2 years and 5 months after the signing of the treaty' (UNCTAD, 'The Entry into Force of Bilateral Investment Treaties (BITs)', p. 3; https://unctad.org/system/files/official-document/webiteiia20069_en.pdf).

40 For instance, see Malaysia–Netherlands BIT (1971), Article 12; Congo–France BIT (1972), Article 9.

41 UK–Ukraine BIT (1993), Article 3(3): 'For the avoidance of doubt it is confirmed that the [MFN and national] treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.' Article 8 provides for settlement of disputes between an investor and a host state.

Principles of treaty interpretation

An MFN clause must be interpreted 'in good faith in accordance with the ordinary meaning' of its terms 'in their context and in the light of its object and purpose' pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties 1969 (VCLT). Article 31 of the VCLT further provides that:[42]

- the above-mentioned 'context' comprises the text of the treaty (including its preamble and annexes) and agreements made in connection with the conclusion of the treaty;[43]
- any subsequent agreements or practice establishing the interpretation of the treaty terms as between the contracting states as well as any relevant rules of international law applicable in the relations between the contracting states should be considered;[44] and
- a special meaning shall be given to a term if the parties so intended.[45]

Article 32 of the VCLT allows supplementary means of interpretation, including the *travaux préparatoires*, to be relied upon to confirm or to determine the meaning of the treaty if applying the Article 31 rules of interpretation yields a result that is ambiguous, obscure or manifestly absurd or unreasonable.[46]

42 This is a unity exercise in which all aspects of Article 31 are to be applied in a singular 'General rule of interpretation' as stipulated in the heading of the provision.

43 VCLT, Article 31(2).

44 id., Article 31(3).

45 id., Article 31(4).

46 id., Article 32.

In practice, tribunals interpreting MFN clauses have considered the following principles.

- The precise terms of the MFN clause.[47]
- The context, including other clauses in the treaty[48] and the preamble.[49]
- The relevant object and purpose of the clause[50] or treaty.[51]
- The negotiation history/*travaux préparatoires* of the MFN clause.[52]
- The host state's treaty practice.[53]
- The principle of *ejusdem generis*, which means that an MFN clause can apply to 'only those rights that fall within the subject matter of the clause'.[54]

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47 See *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales de Agua S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Jurisdiction dated 16 May 2006 (Jeswald W Salacuse (P), Gabrielle Kaufmann-Kohler (C), Pedro Nikken (R)) (*Suez v. Argentina* (ICSID Case No. ARB/03/17)), Paragraphs 55–56. (Separate opinion of Pedro Nikken unrelated to MFN. Annulment decision upheld the award.)

48 See *Vladimir Berschader and Moïse Berschader v. The Russian Federation* (SCC Case No. 080/2004), Award dated 21 April 2006 (Bengt Sjövall (P), Todd Weiler (C), Sergei Lebedev (R)) (*Berschader*), Paragraphs 185–192 (separate opinion by Todd Weiler regarding the interpretation of the MFN clause); *Austrian Airlines v. Slovak Republic* (UNCITRAL), Final Award dated 9 October 2009 (Gabrielle Kaufmann-Kohler (P), Charles N Brower (C), Vojtěch Trapl (R)) *(Austrian Airlines*), Paragraph 135. (Separate opinion of Charles N Brower in which he agrees with the majority interpretation of the dispute resolution clause but dissents with respect to the interpretation of the MFN clause.)

49 *Bayindir (merits)*, Paragraphs 154–157.

50 *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35), Decision on Preliminary Issues of Jurisdiction dated 3 March 2016 (Karl-Heinz Böckstiegel (P), L Yves Fortier (C), Daniel Bethlehem (R)) (*Le Chèque Déjeuner*), Paragraphs 161–163. (Annulment decision upheld the award.)

51 See *Suez v. Argentina* (ICSID Case No. ARB/03/17), Paragraph 57; *Hesham Warraq*, Paragraphs 548–551. See also *Berschader*, Separate Opinion of Todd Weiler dated 7 April 2006, Paragraphs 5–6.

52 See *Austrian Airlines*, Paragraphs 137–140.

53 *Maffezini*, Paragraphs 57–61; *Telenor Mobile Communications A.S. v. The Republic of Hungary* (ICSID Case No. ARB/04/15), Award dated 13 September 2016 (Royston Goode (P), Nicholas W Allard (C), Arthur L Marriott (R)) (*Telenor*), Paragraphs 96–97; *Austrian Airlines*, Paragraph 134. See also *Plama*, Paragraph 195.

54 See ILC, Final Report of the Study Group on the Most Favoured-Nation clause (2015) (ILC MFN Report (2015)), Paragraphs 79 and 35 (summarising the 1978 ILC Draft Articles on MFN). See *Maffezini*, Paragraph 56: 'From the above considerations it can be concluded that if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle. Of course, *the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of*

- The principle of contemporaneity, which requires that a clause be considered against the backdrop of circumstances existing at the time the treaty was concluded.[55]
- The principle of *expressio unius est exclusio alterius*, with the result that when an MFN clause expressly lists exceptions, all other subject matters (including dispute resolution) should be presumed to fall within the scope of the clause.[56]
- The principle of *effet utile*, which has been relied upon to reject an interpretation of the MFN clause, which would (in the tribunal's view) render other treaty provisions nugatory.[57]

Armed with these tools of treaty interpretation, the different types of MFN clauses now in operation can be considered.

Tribunal decisions on differently worded MFN clauses

MFN jurisprudence can be categorised according to the precise wording of the MFN clause at issue. Those cases in which a tribunal (unanimously or by majority) accepted that an MFN clause could be applied to a procedural or jurisdictional issue are marked below with a tick and those that rejected that premise are indicated with a cross (the symbols are of course for convenience and do not necessarily indicate that a tribunal got the decision right or wrong).

Some MFN clauses expressly extend to dispute resolution provisions

Some MFN clauses expressly stipulate that they apply to dispute resolution provisions.[58] Their application to procedural issues therefore should not be controversial. Nonetheless, there can still be debate as to whether such a clause allows a party to

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foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle.' (emphasis added).

55 *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic* (PCA Case No. 2010-9), Award on Jurisdiction dated 10 February 2012 (Pierre-Marie Dupuy (P), Marc Lalonde (C), Santiago Torres Bernárdez (R)) (*ICS*), Paragraphs 289–296.

56 See *Austrian Airlines*, Separate Opinion of Charles Brower dated 9 October 2019, Paragraphs 3–10; for the opposite interpretation based on the same principle, see *ICS*, Paragraphs 310–313.

57 *ICS*, Paragraphs 314–317.

58 For instance, Article 3 of the Barbados–Venezuela BIT (1994) provides: '3. The treatment provided for in paragraphs (1) and (2) [ie MFN provisions] above shall apply to the provisions of Articles 1 to 11 of this Agreement.' Article 8 provides for settlement of disputes between investors and states. See also footnote 41, above.

replace one arbitral forum (e.g., ICSID) with another forum (e.g., UNCITRAL ad hoc) taken from a different treaty. This question was considered and answered in the affirmative in the following three cases, although each was accompanied by a dissent.

	Garanti Koza v. Turkmenistan (2013)[59]	Dissenting opinion of Professor Laurence Boisson de Chazournes
	Venezuela US v. Venezuela (2016)[60]	Dissenting opinion of Professor Marcelo Kohen
	Krederi v. Ukraine (2018)[61]	Unidentified dissenting arbitrator[62]

Some MFN clauses expressly exclude dispute resolution provisions from the scope of MFN treatment

At the opposite end of the spectrum, there are some investment treaties that expressly carve-out procedural rights from the scope of the MFN clause. Examples include the following treaties.

x	Singapore–Indonesia BIT	Article 5(3)
x	ASEAN–China Investment Agreement	Article 5(4)
x	Colombia–United Kingdom BIT	Article III(2)
x	Comprehensive and Progressive Agreement for Trans-Pacific Partnership	Article 9.5(3)

59 *Garanti Koza LLP v. Turkmenistan* (ICSID No. ARB/11/20), Decision on Objection to Jurisdiction for Lack of Consent dated 3 July 2013 (John M Townsend (P), Laurence Boisson de Chazournes (C), George Constantine Lambrou (R)) (*Garanti Koza)*, Paragraph 62. (Dissenting opinion of Laurence Boisson de Chazournes concerning the interpretation of the MFN clause.)

60 *Venezuela US, S.R.L. v. The Bolivarian Republic of Venezuela* (PCA Case No. 2013-34), Interim Award on Jurisdiction dated 26 July 2016 (Peter Tomka (P), L Yves Fortier (C), Marcelo Kohen (R)) (*Venezuela US*), Paragraphs 100–130. (Dissenting opinion by Professor Marcelo Kohen as regards the interpretation of the MFN clause.)

61 *Krederi*, Paragraphs 304 and 341.

62 The award notes that a minority disagrees with the majority ruling on the MFN issue on the basis that the dispute resolution clause does not provide express consent to arbitration generally but only to UNCITRAL, and the MFN clause cannot be used as a basis of abrogating those limits: *Krederi*, Paragraph 343.

These treaties were all agreed after the *Maffezini* and *Plama* decisions and make crystal clear that these states do not want the MFN clause in those treaties to be used to expand a party's procedural rights.

Most MFN clauses do not expressly refer to dispute resolution clauses

Most MFN clauses are imprecise as to whether they apply to dispute resolution procedures. Generally speaking, the more broadly worded an MFN clause is, the more likely it will be interpreted as extending to dispute resolution provisions.

For instance, a number of tribunals have interpreted MFN clauses that refer to 'all matters'[63] as being sufficiently broad to include dispute resolution provisions. In all these cases, the claimants relied on the MFN clause to avoid either a requirement to litigate claims before domestic courts before arbitration could be initiated or a pre-arbitration cooling-off (i.e., negotiation) period.

Maffezini v. Spain (2000)[64]

Camuzzi v. Argentina (2005)[65]

Gas Natural v. Argentina (2005)[66]

Telefónica S.A. v. Argentina (2006)[67]

Suez v. Argentina (ICSID Case No. ARB/03/17) (2006)[68]

Suez v. Argentina (ICSID Case No. ARB/03/19) (2006)[69]

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63 For example: Article IV(2) of the Argentina–Spain BIT (quoted in *Maffezini*, Paragraph 38): 'In *all matters* subject to this Agreement, [fair and equitable] treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.' (emphasis added).

64 *Maffezini*: Paragraphs 38, 56 and 64.

65 *Camuzzi International S.A. v. The Argentine Republic II* (ICSID Case No. ARB/03/7), Decision on Preliminary Objections dated 10 June 2005 (Enrique Gómez-Pinzón (P), Henri C Alvarez (C), Héctor Gros Espiell (R)) (*Camuzzi*), Paragraphs 15–17, 28 and 34.

66 *Gas Natural SDG, S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/10), Decision of the Tribunal on Preliminary Questions of Jurisdiction dated 17 June 2005 (Andreas F Lowenfeld (P), Henri C A Alvarez (C), Pedro Nikken (R)) (*Gas Natural*), Paragraph 31. (The MFN clause referred to 'all matters': see Paragraphs 26 and 30.)

67 *Telefónica S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/20), Decision of the Tribunal on Objections to Jurisdiction dated 25 May 2006 (Giorgio Sacerdoti (P), Charles N Brower (C), Eduardo Siqueiros (R)) (*Telefónica*), Paragraphs 103–104.

68 *Suez v. Argentina* (ICSID Case No. ARB/03/17), Paragraphs 55–56. See also Paragraphs 59 and 63.

69 *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), Decision on Jurisdiction dated 3 August 2006 (Jeswald W Salacuse (P), Gabrielle Kaufmann-Kohler (C), Pedro Nikken (R)) (*Suez*

AWG v. Argentina (2006)[70]

Impregilo v. Argentina (2011)[71]

Teinver v. Argentina (2012)[72]

The tribunal in *Berschader v. Russia* (2006), however, held that the MFN clause in the Soviet Union–Belgium BIT (1989) did not cover dispute resolution despite referring to 'all matters'. While that decision may at first glance appear inconsistent, the tribunal was dealing with a different type of claim. The claimants in the cases listed above were seeking to avoid pre-arbitration litigation or negotiation requirements, whereas the claimants in *Berschader* argued that the MFN clause could be used to expand the scope of the dispute resolution clause, which only provided for the arbitration of disputes relating to 'the amount or mode of compensation for [expropriation]', to include additional causes of action such as an alleged breach of the FET and 'constant' security and protection standards.[73]

Some MFN clauses guarantee MFN treatment to 'activities in connection with investments', including 'the management, utilization, use and enjoyment of an investment'[74] (or similar formulation), or 'management, maintenance, use,

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v. Argentina (ICSID Case No. ARB/03/19)), Paragraphs 63–68. (Separate opinion of Pedro Nikken unrelated to MFN.) (Decision on annulment upheld the award.)

70 *AWG Group Ltd. v. Argentine Republic* (UNCITRAL), Decision on Jurisdiction dated 3 August 2006 (Jeswald W Salacuse (P), Gabrielle Kaufmann-Kohler (C), Pedro Nikken (R)) (*AWG*), Paragraphs 61–68. (Separate opinion of Pedro Nikken unrelated to MFN.)

71 *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Award dated 21 June 2011 (Hans Danelius (P), Charles N Brower (C), Brigitte Stern (R)) (*Impregilo*), Paragraphs 12 and 108. (Dissenting opinion of Brigitte Stern in relation to the interpretation of the MFN clause.) (Decision on annulment upheld the award.)

72 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/01), Decision on Jurisdiction dated 21 December 2012 (Thomas Buergenthal (P), Henri C Alvarez (C), Kamal Hossain (R)) (*Teinver*), Paragraphs 159 and 186. (Separate opinion of Kamal Hossain in which he disagrees with conclusions regarding the MFN clause.)

73 *Berschader*, Paragraph 86. The tribunal noted that while the MFN clause referred to 'all matters', the expression was qualified by a 'particular' reference to Articles 4, 5 and 6, which are substantive provisions. The tribunal concluded at Paragraphs 193 and 194 that the expression 'all matters' should not be read literally. The tribunal also noted at Paragraphs 202–203 that the available jurisprudence at the time the treaty was concluded did not clearly address the question of whether an MFN right could be applied to an arbitration clause and thus it was 'distinctly conceivable' that the state parties did not intend for the MFN clause to apply to dispute resolution provisions.

74 For example, Article 3(2) of the Argentina–Germany BIT (1991) as translated into English in the UN treaty series (UNTS Vol. 1910, 171 (1996)) states: 'None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less

enjoyment or disposal of their investments'[75] (or similar formulation) rather than 'all matters'. Attempts to use such clauses to access more favourable dispute resolution procedures have yielded mixed results.

Some tribunals have accepted that these types of MFN clauses can apply to dispute resolution provisions.

- *Siemens v. Argentina* (2004)[76]
- *National Grid v. Argentina* (2006)[77]
- *Hochtief v. Argentina* (2011)[78]

Others have rejected such attempts.

- x *Wintershall v. Argentina* (2008)[79]
- x *ICS Inspection v. Argentina* (2012)[80]
- x *Daimler v. Argentina* (2012)[81]

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favorable treatment of *activities related to investments* than granted to its own nationals and companies or to the nationals and companies of third States.' The Protocol of the BIT stipulates at Paragraph (2)(a) that: 'The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of article 3, paragraph 2: *the management, utilization, use and enjoyment of an investment*.' (emphasis added).

75 For instance, Article 3(2) of the UK–Argentina BIT (quoted at *National Grid v. Argentina*, (UNCITRAL), Decision on Jurisdiction, 20 June 2006 (Andrés Rigo Sureda (P), E Whitney Debevoise (C), Alejandro Miguel Garro (R)) *(National Grid)*, Paragraph 81) states: 'Neither Contracting Party shall in its territory subject investors or companies of the other Contracting Party, as regards their *management, maintenance, use, enjoyment or disposal* of their investments, to treatment less favorable than that which it accords to its own investors or to investors of any third State.' (emphasis added).

76 *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction dated 3 August 2004 (Andrés Rigo Sureda (P), Charles N Brower (C), Domingo Bello Janeiro (R)) *(Siemens)*, Paragraphs 102–103. (Separate opinion of Domingo Bello Janeiro unrelated to MFN.)

77 *National Grid*, Paragraphs 56 and 93.

78 *Hochtief AG v. Argentine Republic* (ICSID Case No. ARB/07/31), Decision on Jurisdiction dated 24 October 2011 (Vaughan Lowe (P), Charles N Brower (C), J Christopher Thomas (R)) *(Hochtief)*, Paragraphs 98–99. (Separate opinion of J Christopher Thomas as regards the interpretation of the MFN clause.)

79 *Wintershall Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/04/14), Award dated 8 December 2008 (Fali S Nariman (P), Piero Bernardini (C), Santiago Torres Bernárdez (R)) (*Wintershall*), Paragraphs 191–193 and 197.

80 *ICS*, Paragraph 326.

81 *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award dated 22 August 2012 (Pierre-Marie Dupuy (P), Charles N Brower (C), Domingo

Some MFN clauses are narrowly drafted as applying only to 'treatment' of an investor or investment. Tribunals have held that such a formulation does not extend to dispute resolution rights.

- x *Yaung Chi Oo. v. Myanmar* (2003)[82]
- x *Salini v. Jordan* (2004)[83]
- x *Plama v. Bulgaria* (2005)[84]
- x *Telenor v. Hungary* (2006)[85]
- x *Austrian Airlines v. Slovak Republic* (2009)[86]
- x *EURAM v. Slovak Republic* (2012)[87]
- x *Kilic v. Turkmenistan* (2013)[88]
- x *ST-AD GmbH v. Bulgaria* (2013)[89]
- x *Sanum v. Laos* (2013)[90]

Bello Janeiro (R)) (*Daimler*), Paragraphs 205–206 and 281. Dissenting opinion of Charles N Brower regarding the interpretation of the MFN clause. Separate opinion of Domingo Bello Janeiro explaining why his views on MFN rights had evolved since *Siemens* (2004).

82 *Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar* (ASEAN ID Case No. ARB/01/1), Award dated 31 March 2003 (Sompong Sucharitkul (P), James R Crawford (C), Francis Delon (R)) (*Yaung Chi*) Paragraph 83.

83 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction dated 9 November 2004 (Gilbert Guillaume (P), Bernardo M Cremades (C), Ian Sinclair (R)) (*Salini*), Paragraphs 104 and 119.

84 *Plama*, Decision on jurisdiction dated 8 February 2005, Paragraphs 187 and 191.

85 *Telenor*, Paragraphs 25, 100 and 102(2).

86 *Austrian Airlines*, Paragraphs 122 and 140.

87 *European American Investment Bank AG (Austria) v. Slovak Republic* (PCA Case No. 2010-17), Award on Jurisdiction dated 22 October 2012 (Christopher Greenwood (P), Alexander Petsche (C), Brigitte Stern (R)) (*EURAM*), Paragraphs 407 and 455.

88 *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Award dated 2 July 2013 (J William Rowley (P), William W Park (C), Philippe Sands (R)) (*Kilic*), Paragraphs 4.2.1 and 7.9.1. (Separate opinion of William W Park unrelated to MFN. Annulment decision upheld the award.)

89 *ST-AD*, Paragraphs 380 and 403. The tribunal noted that the MFN clause was unique as it was 'included in the same article as the dispute resolution provision, which also includes both substantive protections . . . as well as some procedural and jurisdictional aspects'. It concluded based on a textual analysis and the *travaux préparatoires* that the MFN clause did not apply to dispute resolution: id., Paragraphs 400–403.

90 *Sanum Investments Limited v. Lao People's Democratic Republic* (PCA Case No. 2013-13), Award on Jurisdiction dated 13 December 2013 (Andrés Rigo Sureda (P), Bernard Hanotiau (C), Brigitte Stern (R)) (*Sanum*), Paragraphs 344–345 and 358.

Other MFN clauses have wording that is even more restrictive, guaranteeing MFN treatment only in relation to the FET standard.[91] Investors have been unsuccessful when attempting to use such clauses to access more favourable dispute resolution provisions found elsewhere.

- x *Quasar* (formerly *Renta 4*) *v. Russia* (2009)[92]
- x *Tza Yap Shum v. Peru* (2009)[93]

In short, the precise language used in an MFN clause should largely determine its potential utility.

The ambition of the investor – how does it seek to use the MFN clause?

The second factor (or analytical filter) to be considered is how far the investor is seeking to stretch the MFN clause. As noted above in the context of the discussion of *Berschader*, some investors merely wish to *avoid* a treaty's pre-arbitration requirements whereas other claimants have more ambitiously attempted to use an MFN clause to *obtain* a procedural right that did not otherwise exist. Put simply, the greater the ambition or creativity of the claimant in how it seeks to deploy the MFN clause, the more likely it will fail.

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91 For instance, Spain–Soviet Union BIT (1990), Article 5(1)-(2): '1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party. 2. *The treatment referred to in paragraph 1* above shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of a third State.' (emphasis added).

92 *Quasar* (formerly *Renta 4*), Paragraph 119. (Separate opinion of Charles N Brower as regards the interpretation of the MFN clause.)

93 *Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6), Decision on Jurisdiction and Competence dated 19 June 2009 (Judd Kessler (P), Hernando Otero (C), Juan Fernández-Armesto (R)) (*Tza Yap Shum*), Paragraph 220. (Request for annulment was dismissed in its entirety, including with respect to the tribunal's jurisdiction pursuant to the MFN clause.)

Claimants seeking to avoid mandatory pre-arbitration domestic court litigation or a cooling-off period

Several tribunals have allowed claimants to use MFN clauses to avoid pre-arbitration litigation requirements or cooling-off periods,[94] or both, reasoning that such a requirement is merely procedural and does not affect the state's consent to arbitration.

MFN clauses referring to 'all matters'

Maffezini v. Spain (2000)[95]

Camuzzi v. Argentina (2005)[96]

Gas Natural v. Argentina (2005)[97]

Telefónica v. Argentina (2006)[98]

AWG v. Argentina (2006)[99]

Suez v. Argentina (2006) (ICSID Case No. ARB/03/17)[100]

Suez v. Argentina (2006) (ICSID Case No. ARB/03/19)[101]

Impregilo v. Argentina (2011)[102]

Teinver v. Argentina (2012)[103]

94 Article X of the Spain–Argentina BIT (1991) provides an example of both a negotiation and domestic litigation requirement preceding arbitration: '2. If a dispute within the meaning of section 1 cannot be settled within six months as from the date on which one of the parties to the dispute raised it, it shall be submitted, at the request of either party, to the competent tribunals of the Party in whose territory the investment was made. 3. The dispute may be submitted to an international arbitral tribunal in any of the following circumstances: (a) At the request of one of the parties to the dispute, when no decision has been reached on the merits after a period of 18 months has elapsed as from the moment the judicial proceeding provided for in section 2 of this article was initiated or [w]hen such a decision has been reached, but the dispute between the parties persists; (b) When both parties to the dispute have so agreed.' (This clause is quoted at *Teinver*, Paragraph 74.)

95 *Maffezini*, Paragraphs 56 and 64.

96 *Camuzzi*, Paragraphs 15–17, 28 and 34.

97 *Gas Natural*, Paragraph 31.

98 *Telefónica*, Paragraph 103–104. See also footnote 63 where the tribunal notes that the claims in *Plama* were 'considerably more far reaching'.

99 *AWG*, Paragraphs 53 and 61–68.

100 *Suez v. Argentina* (ICSID Case No. ARB/03/17), Paragraphs 55–66.

101 *Suez v. Argentina* (ICSID Case No. ARB/03/19), Paragraphs 61 and 68.

102 *Impregilo*, Paragraph 108.

103 *Teinver*, Paragraph 186.

MFN clauses referring to 'activities' related to the investment, including 'the management, utilization, use and enjoyment of an investment' (or similar formulation) or 'management, maintenance, use, enjoyment or disposal' of investments[104]

Siemens v. Argentina (2004)[105]

National Grid v. Argentina (2006)[106]

Hochtief v. Argentina (2011)[107]

Nonetheless, there are four instances in which tribunals took the view that an MFN clause cannot be used to avoid a mandatory pre-arbitration litigation requirement before commencing an arbitration, which are grouped below based on the language of the MFN clause.

MFN clauses referring to 'activities' related to the investment, including 'the management, operation, use or enjoyment of an investment' (or similar formulation) or 'management, maintenance, use, enjoyment or disposal' of investments

x *Wintershall v. Argentina* (2008)[108]

x *ICS Inspection v. Argentina* (2012)[109]

x *Daimler v. Argentina* (2012)[110]

104 In addition to the cases listed, in *Ambiente v. Argentina* (2013) the claimant contended that the MFN clause in the Argentina–Italy BIT, which referred to 'the income and activities related to such investments and to all other matters', could be used to avoid pre-arbitration litigation. The argument was ultimately not considered by the majority, which accepted the claimant's primary argument that recourse to the Argentine courts would have been futile: *Ambiente Ufficio S.p.A. and others v. The Argentine Republic* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility dated 8 February 2013 (Bruno Simma (P), Karl-Heinz Böckstiegel (C), Santiago Torres Bernárdez (R)) (*Ambiente*), Paragraphs 628–629. (Separate opinion of Santiago Torres Bernárdez analysing the use of an MFN clause.)

105 *Siemens*, Paragraphs 32, 63 and 102–110.

106 *National Grid*, Paragraphs 56 and 93.

107 *Hochtief*, Paragraphs 98–99.

108 *Wintershall*, Paragraphs 191–193 and 197.

109 *ICS*, Paragraph 326.

110 *Daimler*, Paragraph 281.

MFN clause referring to 'treatment' of investments

x *Kilic v. Turkmenistan* (2013)[111]

The tribunals in these four cases, taking their inspiration from *Plama v. Bulgaria*, reasoned that the pre-arbitration litigation requirements in a treaty form part of the host state's consent to arbitration and thus must be complied with for the tribunal to have jurisdiction to determine the claim.[112] According to this school of thought:

> *There has to be evidence that the MFN provision was designed to apply to change the jurisdictional limitations on the tribunal because the host State's consent was predicated on compliance with those limitations [i.e., pre-arbitration domestic litigation].*[113]

The tribunals in *Wintershall, ICS*, *Daimler* and *Kilic* gave different reasons for rejecting the claimant's reliance on the MFN clause.

The *Wintershall* tribunal held that clear and unambiguous language is necessary to extend an MFN clause to procedural rights, noting academic commentary that supported that view.[114] It emphasised that the MFN clause at issue before it (Article 3 of the Argentina–Germany BIT (1991)) referred only to treatment as regards 'activities' relating to the investment rather than 'all matters' as was the case in *Maffezini*.[115] Moreover, under the Argentina–Germany BIT, a separate restrictively worded MFN provision (Article 4(4)) guaranteed no less favourable treatment in relation to the relevant substantive protections – full protection and security and expropriation.[116] The tribunal held that the Article 3 MFN clause could not be applied to procedural issues as to do so would deprive Article 4 of utility (applying the *effet utile* principle).[117] The tribunal criticised the reasoning in *Siemens* in which a different tribunal had taken the view that Article 4 of

111 *Kilic*, Paragraph 7.9.1.

112 *Wintershall*, Paragraphs 160(2), 162, 172 and 190; *ICS*, Paragraph 326.

113 ILC MFN Report (2015), Paragraph 114.

114 *Wintershall*, Paragraph 167. See also Paragraphs 169–171.

115 *Wintershall*, Paragraph 172.

116 Article 4(4) of the Argentina–Germany BIT (1991) as translated into English in *Siemens*, Paragraph 88: '(4) The nationals or companies of each Contracting Party shall enjoy in the territory of the other Contracting Party *the treatment of the most favored nation in all matters covered in this Article.*' (emphasis added).

117 *Wintershall*, Paragraph 163.

the treaty was inserted out of an abundance of caution and thereby allowed the claimant to invoke Article 3 to circumvent the pre-arbitration domestic litigation requirement.[118]

The *ICS* tribunal emphasised that the prevailing view at the time the principal treaty was agreed was that MFN provisions were limited to substantive protections, invoking the principle of contemporaneity.[119] It also applied the principle of *effet utile*, noting that allowing the MFN clause to be used to circumvent the pre-arbitral litigation requirement would deprive it of utility.[120] Additionally, it considered the reference to the 'territory' of the host state in the MFN clause[121] as further indication that the parties did not intend to include investor–state arbitration within its scope (although it accepted that domestic litigation would be covered).[122]

The *Daimler* tribunal considered the same MFN clause as in *Wintershall* and deployed similar reasoning to conclude that the MFN clause could not be used to avoid a pre-arbitral litigation requirement.[123] Additionally, similar to the *ICS*

118 *Wintershall*, Paragraphs 185–186.

119 *ICS*, Paragraphs 289 and 292–295. The tribunal relied on jurisprudence and the World Bank draft guidelines for the treatment of foreign direct investment (the World Bank Guidelines). The World Bank Guidelines, according to the tribunal, reflected a distinction between substantive protection and dispute settlement: (*ICS*, Paragraph 294) 'Shortly after the time of conclusion of the [principal] Treaty, in 1992, the Development Committee of the World Bank also adopted Guidelines on the Treatment of Foreign Direct Investment. This instrument also does not explicitly define the term "treatment". However, the structure of the World Bank Guidelines, and in particular Part III devoted to "treatment" and setting forth the range of common substantive standards of investment protection, suggests that the prevailing view at the time was that treatment was meant to cover discrete principles of conduct applicable to the State hosting the foreign investment: the legal regime of the investment safeguarding it from any discriminatory or unfair and inequitable practices within the host State's territory. Meanwhile, "dispute settlement" is dealt with in Part V of those Guidelines, separately from standards of "treatment".'

120 *ICS*, Paragraphs 315–317.

121 Article 3(1) of the UK–Argentina BIT states: 'Neither Contracting Party shall *in its territory* subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.' (emphasis added).

122 *ICS*, Paragraphs 296, 305–308.

123 *Daimler*, Paragraph 281. The tribunal referred to the final version of the World Bank Guidelines: *Daimler*, Paragraph 222.

tribunal, it placed emphasis on the 'limiting effect' of a reference to the 'territory' of the host state in the MFN clause.[124] (In contrast, such a reference was considered irrelevant by the *Maffezini*[125] and *Hochtief*[126] tribunals.)

The *Kilic* tribunal's reasoning was focused on the narrow wording of the MFN clause in that case, which was limited to 'treatment' of protected investments.[127] It held that this language was most similar to that of other clauses in the same treaty that covered substantive rights, and thus appeared to indicate that the MFN protection was only intended to extend to such rights.[128] Notably, the tribunal acknowledged that it 'can understand' that a broader formulation extending to 'all matters' or 'management' of investments could form the basis of an MFN clause being applied to dispute resolution rights.[129]

Claimants seeking to circumvent a fork-in-the-road provision

Many investment treaties incorporate a 'fork-in-the-road', which requires the claimant to elect, irrevocably, to pursue its claim either via international arbitration or through the domestic courts. Notably, fork-in-the-road provisions were specifically identified (*in obiter*) by the *Maffezini* tribunal as the type of clauses that could *not* be avoided by using an MFN clause – on the grounds that to bypass them would 'upset the finality of arrangements that many countries deem important as a matter of public policy'.[130] Many years later, the tribunal in *H&H Enterprises Investments v. Egypt* (2014) specifically rejected an attempt to invoke an MFN clause to circumvent a fork-in-the-road provision of the principal treaty.[131]

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124 *Daimler*, Paragraphs 93, 225–231, 236.

125 *Maffezini*, Paragraph 61.

126 *Hochtief*, Paragraphs 107–111.

127 Article II.2 of the Turkey–Turkmenistan BIT (1992) (quoted at *Kilic*, Paragraph 4.2.1)

128 *Kilic*, Paragraphs 7.3.1–7.3.9.

129 *Kilic*, Paragraph 7.6.9.

130 *Maffezini*, Paragraph 63.

131 *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB/09/15), Award dated 6 May 2014 (redacted) (Bernardo M Cremades (P), Veijo Heiskanen (C), Hamid Gharavi (R)) (*H&H*), Paragraph 358. The MFN clause referred to 'treatment' of 'investments' and 'associated activities in connection with an investment.': Egypt–US BIT (1986) (not quoted in the award). In the event, the tribunal determined that the fork-in-the-road provision applied to the circumstances of the case but did not in fact deprive it of jurisdiction.

Claimant seeking to circumvent a time bar

Claimants sometimes seek to avoid a time bar for the filing of claims through an MFN clause. This has failed on at least two occasions.

x	*Tecmed v. Mexico* (2003)[132]
x	*Ansung Housing v. China* (2017)[133]

Claimants attempting to expand a tribunal's jurisdiction beyond limits contained in the relevant BIT

Some investment treaties have dispute resolution clauses that limit the tribunal's jurisdiction to specific breaches (such as the FET standard) or remedies (for instance, compensation payable for an expropriation). Numerous investors have failed to convince a tribunal that these limitations can be circumvented through an MFN clause to include causes of action or remedies found in other treaties. (For each case, the relevant jurisdictional limitation the investor was seeking to overcome is indicated in parenthesis.)

x	*Salini v. Jordan* (2004)[134] (the dispute resolution (DR) clause in the principal treaty stipulated that any claim under an investment agreement must be resolved according to the relevant contractual mechanism)
x	*Plama v. Bulgaria* (2005)[135] (the right of arbitration was limited to the amount of compensation for an expropriation)
x	*Telenor v. Hungary* (2006)[136] (DR clause in the principal treaty limited to disputes concerning expropriation, payment of compensation for loss through revolution, etc., and repatriation of investments)[137]
x	*Berschader v. Russia* (2006)[138] (arbitration right limited to disputes concerning the amount or mode of compensation payable for expropriation)[139]

132 *Tecmed*, Paragraphs 69–74.

133 *Ansung Housing v. China* (ICSID Case No. ARB/14/25), Award dated 9 March 2017 (Lucy Reed (P), Michael Pryles (C), Albert Jan van den Berg (R)), Paragraphs 136–141.

134 *Salini*, Paragraphs 70–96 and 102–119.

135 *Plama*, Paragraphs 185–210.

136 *Telenor*, Paragraphs 100 and 102(2). See also Paragraphs 96–98.

137 The relevant dispute resolution clause is set out at *Telenor*, Paragraph 25.

138 *Berschader*, Paragraphs 12(i), 151 and 208.

139 The relevant dispute resolution clause is set out at *Berschader*, Paragraph 151.

x	*Quasar* (formerly *Renta 4*) *v. Russia* (2009)[140] (DR clause limited to disputes concerning the amount or method of payment of compensation due for an expropriation)
x	*Tza Yap Shum v. Peru* (2009)[141] (arbitration right limited to disputes concerning the amount of compensation due for expropriation)
x	*Austrian Airlines v. The Slovak Republic* (2009)[142] (DR clause limited to the 'amount or the conditions of payment' of compensation for expropriation and transfer obligations)
x	*Servier v. Poland* (2010)[143] (arbitration right limited to expropriation)
x	*EURAM v. Slovak Republic* (2012)[144] (DR clause limited to amount of compensation for expropriation and transfer obligations)
x	*Accession Mezzanine v. Hungary* (2013)[145] (DR clause limited to claims of expropriation)
x	*Sanum v. Laos* (2013)[146] (DR clause provided a right to arbitration only in relation to the amount of compensation for expropriation)
x	*ST-AD GmbH v. Bulgaria* (2013)[147] (right of arbitration limited to the amount of compensation)

140 *Quasar* (formerly *Renta 4*), Paragraphs 92 and 119. However, the tribunal interpreted the dispute resolution clause, which was limited to compensation for expropriation, as being wide enough to cover the merits of an expropriation claim. For completeness, we note that the award was successfully challenged before the Swedish courts. In its ruling, the Svea Court of Appeal included in its analysis a consideration of both the dispute resolution clause and the MFN provision to conclude that the tribunal lacked jurisdiction: Judgment of the Svea Court of Appeal dated 18 January 2016: Decision on Jurisdiction with respect to *ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Paragraph 31.

141 *Tza Yap Shum*, Paragraphs 216–220.

142 *Austrian Airlines*, Paragraphs 133–140.

143 *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S. and Arts et Techniques du Progres S.A.S. v. Republic of Poland* (UNCITRAL), Final Award dated 14 February 2012 (William W Park (P), Bernard Hanotiau (C), Marc Lalonde (R)) (*Servier*), Paragraphs 511 and 519. (Interim award on jurisdiction dated 3 December 2010 is not public.)

144 *EURAM*, Paragraphs 450–455.

145 *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezelo Zrt v. Republic of Hungary* (ICSID Case No. ARB/12/3), Decision on Respondent's Objection under Arbitration Rule 41(5) dated 16 January 2013 (Arthur W Rovine (P), Marc Lalonde (C), Donald M McRae (R) subsequently replaced by Zachary Douglas (R)) (*Accession Mezzanine*), Paragraphs 73–74.

146 *Sanum*, Paragraphs 355 and 358.

147 *ST-AD*, Paragraph 371, 375 and 403.

x	*A11Y Ltd v. Czech Republic* (2017)[148] (arbitration right limited to disputes concerning agreements between investors and the host state, compensation for losses from armed conflict etc., expropriation and transfer of investments and returns)
x	*Busta v. Czech Republic* (2017)[149] (arbitration right limited to breaches of agreements between investors and the host state, compensation for losses for armed conflict etc, expropriation and repatriation of investment and returns)
x	*Anglia v. Czech Republic* (2017)[150] (related claimant to the *Busta* case with identical tribunal, claims and ruling on the MFN issue)
x	*BUCG v. Yemen* (2017)[151] (arbitration consent limited to the amount of compensation for expropriation, while other disputes could be referred to arbitration upon the mutual agreement of the parties)

The flagbearer for this line of cases in which investors have (unsuccessfully) sought to circumvent an express limitation to a right of arbitration would have to be *Plama v. Bulgaria* (2005). Nonetheless, only two years later, an investor was able to use an MFN clause to bring additional claims before an investment treaty tribunal in *RosInvest v. Russia* (2007).[152] Specifically, the tribunal accepted that the MFN clause in Article 3 of the Russia–UK BIT, which refers to treatment 'as regards [investors'] management, maintenance, use, enjoyment or disposal of their investment'[153] could be used to pursue a claim for expropriation despite the treaty's dispute resolution clause (Article 8) being limited to the determination of compensation for expropriation.[154] A Swedish district court, however, disagreed

148 *A11Y Ltd v. Czech Republic* (ICSID Case No. UNCT/15/1), Decision on Jurisdiction dated 9 February 2017 (L Yves Fortier (P), Stanimir Alexandrov (C), Anna Joubin-Bret (R)) (*A11Y*), Paragraphs 103–107.

149 *Ivan Peter Busta and James Peter Busta v. Czech Republic* (SCC Case No. V 2015/014), Final Award dated 10 March 2017 (Yas Banifatemi (P), August Reinisch (C), Philippe Sands QC (R)) (*Busta*), Paragraphs 163–169.

150 *Anglia Auto Accessories Ltd. v. Czech Republic* (SCC Case No. V 2014/181), Award dated 10 March 2017 (Yas Banifatemi (P), August Reinisch (C), Philippe Sands (R)) (*Anglia*), Paragraphs 188–194.

151 *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30), Decision on Jurisdiction dated 31 May 2017 (Ian Binnie (P), Zachary Douglas (C), John M Townsend (R) (*BUCG*), Paragraphs 112–121 and 146.

152 *RosInvestCo UK Ltd. v. Russia* (SCC Case No. V079/2005), Award on Jurisdiction dated October 2007 (Karl-Heinz Böckstiegel (P), Lord Steyn (C), Franklin Berman (R)) (*RosInvest*). The final award was rendered on 12 September 2010.

153 The full text of the MFN clause is set out at *RosInvest*, Paragraph 23.

154 *RosInvest*, Paragraph 133.

and ruled that the tribunal 'erred in permitting RosInvestCo to use the treaty's Most-Favoured Nation treatment clause to access a more favourable arbitration clause contained in a different treaty'.[155]

The tribunal in *Le Chèque Déjeuner v. Hungary* (2016) took a similar approach to the *RosInvest v. Russia* tribunal, permitting the MFN clause in the France–Hungary BIT to be used to overcome a right of arbitration in the principal treaty limited to expropriation.[156] The MFN clause covered 'activities in connection with' protected investments,[157] which the tribunal held was 'rather wide'[158] and capable of expanding its jurisdiction to cover FET claims.[159] The tribunal was of the view that any limitation on the MFN clause would have to be set out clearly and unambiguously[160] (which is the exact opposite of the approach taken in *Plama*). Notably, the presiding arbitrator in *Le Chèque Déjeuner* also sat in the *RosInvest* case in the same capacity and noted several common features between the clauses and the claims, concluding that: 'while not all other details are identical or similar, the above common features would speak in favor of a similar result in both cases'.[161] The tribunal (somewhat controversially) also adopted an 'evolutionary interpretation of the MFN clause', determining its scope based on the fact that Hungary had agreed to investment treaties incorporating generally worded (i.e., not restricted) arbitration clauses subsequent to the conclusion of the principal treaty.[162]

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155 Investment Arbitration Reporter, 'Arbitral Victory in Yukos Case Slowly Unravelling as U.S. Hedge Fund Declines to Spend More Money Defending Arbitral Award from Russian Attack' (10 April 2012), https://www.iareporter.com/articles/arbitral-victory-in-yukos-case-slowly-unraveling-as-u-s-hedge-fund-declines-to-spend-more-money-defending-arbitral-award-from-russian-attack/. Accessed on 24 September 2021.

156 *Le Chèque Déjeuner*, Paragraph 222.

157 Article 4(1), France–Hungary BIT (1987) quoted at *Le Chèque Déjeuner*, Paragraph 185: 'Each Contracting Party shall accord in its territory and maritime zones, to investors of the other Party, in respect of their investments and *activities in connection with such investments*, the same treatment accorded to its own investors or the treatment accorded to investors of the most-favoured nation, if the latter is more advantageous.' (emphasis added).

158 *Le Chèque Déjeuner*, Paragraph 186.

159 id., Paragraphs 205 and 221.

160 id., Paragraph 159.

161 id., Paragraph 213.

162 id., Paragraphs 164–175.

Claimants seeking to access a different arbitral forum

Investors have occasionally sought to replace one form of arbitration with another, again yielding mixed results.

Tribunals have accepted that an MFN clause could be used to arbitrate before a different forum in three cases in which the MFN clause expressly referred to dispute resolution.

Garanti Koza v. Turkmenistan (2013),[163] noting that allowing such access through the MFN clause gives the investor a choice, which is more favourable than having no choice[164]

Venezuela US v. Venezuela (2016)[165]

Krederi Ltd. v. Ukraine (2018)[166]

However, other tribunals have held that MFN clauses (which, notably, did not expressly refer to dispute resolution) could not be used to unlock access to a different form of arbitration.

x *Yaung Chi Oo. v. Myanmar* (2003)[167]

x *Plama v. Bulgaria* (2005)[168]

x *Heemsen v. Venezuela* (2019)[169]

x *Itisaluna v. Iraq* (2020)[170]

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163 *Garanti Koza*, Paragraphs 75–78.

164 id., Paragraphs 94–97.

165 *Venezuela US*, Paragraphs 100–130.

166 *Krederi*, Paragraph 341.

167 *Yaung Chi*, Paragraph 83.

168 *Plama*, Paragraph 184.

169 *Jorge Heemsen and Enrique Heemsen v. Venezuela* (PCA Case No. 2017-18), Award dated 29 October 2019 (Yves Derains (P), Enrique Gomez-Pinzon (C), Brigitte Stern (R)) (Heemsen), Paragraphs 402, 405–410.

170 *Itisaluna Iraq LLC and others v. Republic of Iraq* (ICSID Case No. ARB/17/10), Award dated 3 April 2020 (Daniel Bethlehem (P), Wolfgang Peter (C), Brigitte Stern (R)) *(Itisaluna)*. The principal treaty in this case was a multilateral treaty rather than a BIT. The claimants sought to file claims with ICSID for breach of the Organization for Islamic Cooperation (OIC) treaty, which contemplates ad hoc arbitration. The reference treaty was a BIT between the relevant host state and another country. The tribunal considered that MFN clauses are 'capable of applying' to dispute resolution provisions but noted that extra caution should be exercised when interpreting a multilateral investment treaty such as the OIC on the basis that an expansive interpretation would 'inevitably colour the appreciation of the legal obligations of other OIC Agreement Contracting Parties': *Itisaluna*: Paragraph 153.

These decisions are consistent with the (*obiter*) view expressed by the *Maffezini* tribunal that an MFN clause cannot be used to establish consent to a different form of arbitration.[171]

Claimants seeking to import consent to arbitration

Perhaps the most ambitious use of an MFN clause is to seek to deploy it to import a right to arbitration that does not otherwise exist in the principal treaty. This has failed twice.

x	*Christian Doutremepuich v. Mauritius* (2019)[172]	The claim was rejected because of the specific wording of the MFN clause as well as the *ejusdem generis* principle. The tribunal noted the lack of 'substantial identity between the subject matter' of the principal treaty, which did not provide a right of arbitration and the reference treaty, which did
x	*Menzies v. Senegal* (2016)[173]	The tribunal did not accept that the MFN clause in the GATS trade agreement, which does not contain any dispute resolution provisions at all, could be used to import consent to ICSID arbitration from the Senegal–UK and Senegal–Netherlands BITs

While the claimant in *Michael Anthony Lee-Chin v. Dominican Republic* (2020)[174] also raised an argument that the tribunal had jurisdiction pursuant to the MFN clause, the tribunal's majority did not need to decide the issue after determining that the dispute resolution clause in the principal treaty was sufficient to establish its jurisdiction.[175]

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171 *Maffezini*, Paragraph 63.

172 *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius* (PCA Case No. 2018-37), Award on Jurisdiction dated 23 August 2019 (Maxi Scherer (P), Olivier Caprasse (C), Jan Paulsson (R)) (*Doutremepuich*), Paragraphs 217–218.

173 *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal* (ICSID Case No. ARB/15/21), Award dated 5 August 2016 (Bernard Hanotiau (P), Hamid Gharavi (C), Pierre Mayer (R)) (*Menzies*), Paragraphs 132–145.

174 *Michael Anthony Lee-Chin v. Dominican Republic* (ICSID Case No. UNCT/18/3), Partial Award on Jurisdiction dated 15 July 2020 (Diego P Fernández Arroyo (P), Christian Leathley (C), Marcelo Kohen (R)) (*Michael Anthony Lee-Chin*). (Dissenting opinion of Prof Marcelo Kohen that included an analysis of the MFN clause.)

175 id., Paragraphs 195–196.

The arbitrator divide: Maffezini v. Plama

The relatively high number of dissents issued on the interpretation and application of MFN clauses to procedural issues (16 instances out of 47 cases)[176] as well as the vigour with which many of the majority and dissenting opinions have been expressed confirm that the language of an MFN clause alone and the way an investor seeks to deploy it cannot wholly explain the outcome in all cases. Indeed, arbitrators have repeatedly reached different conclusions despite considering the same objective filters (i.e., the same MFN clause, the same ambition of the claimant, and the same arguments from the parties – as demonstrated in the following table).

Dissenting views as regards the application of the relevant MFN clause to procedural rights[177]

Case	Majority	Dissent
Berschader (April 2006)	Bengt Sjövall (president), Sergei Lebedev	Todd Weiler
Impregilo (June 2011)	Hans Danelius (president), Charles Brower	Brigitte Stern
Quasar (formerly *Renta 4*) (March 2009)	Jan Paulsson (president), Toby Landau	Charles Brower
Austrian Airlines (October 2009)	Gabrielle Kaufmann-Kohler (president), Vojtěch Trapl	Charles Brower
Hochtief (October 2011)	Vaughan Lowe (president), Charles Brower	J Christopher Thomas

176 These include dissenting views recorded within the body of the main award (for instance, see *Busta*, Paragraph 168 and *A11Y*, Paragraph 108) as well as views set out in 'separate' (rather than 'dissenting') opinions (for instance, *Teinver*, Separate Opinion of Kamal Hossain dated 21 December 2012 and *Berschader*, Separate Opinion of Todd Weiler dated 7 April 2006). In addition to the dissenting opinions from the 45 cases listed in the 'Decisions on whether the MFN clause extends to procedural rights' table, we also include, in the 'Dissenting views as regards the application of the relevant MFN clause to procedural rights' table, two cases in which a dissenting view was expressed as regards the MFN issue although the tribunal's majority reached its decision without considering it: *Michael Anthony Lee-Chin*, Dissenting Opinion of Professor Marcelo Kohen dated 10 July 2020, Section III; *Ambiente*, Dissenting Opinion of Santiago Torres Bernárdez dated 2 May 2013.

177 Without wishing to cause offence, arbitrators' professional and honorary titles have been omitted from the table due to space constraints, while being included when individuals are referenced in the text of the chapter.

Case	Majority	Dissent
Daimler (August 2012)	Pierre-Marie Dupuy (president), Domingo Bello Janeiro	Charles Brower
Teinver (December 2012)	Thomas Buergenthal (president), Henri Alvarez	Kamal Hossain
Ambiente (February 2013)[178]	Bruno Simma (president), Karl-Heinz Böckstiegel	Santiago Torres Bernárdez
Venezuela US (July 2016)	Peter Tomka (president), Yves Fortier	Marcelo Kohen
Garanti Koza (July 2013)	John M Townsend (president), George Constantine Lambrou	Laurence Boisson de Chazournes
Busta (March 2017)	Yas Banifatemi, (president), Philippe Sands	August Reinisch
Anglia[179] (March 2017)	Yas Banifatemi, (president), Philippe Sands	August Reinisch
A11Y (February 2017)	Yves Fortier (president), Anna Joubin-Bret	Stanimir Alexandrov
Krederi (July 2018)	August Reinisch, (president), Markus Wirth, Gavan Griffith	The award notes that an (unidentified) minority disagrees with the majority ruling as regards the MFN clause[180]
Itisaluna (April 2020)	Daniel Bethlehem (president), Brigitte Stern	Wolfgang Peter
Michael Anthony Lee-Chin (July 2020)	Diego P Fernández Arroyo (president), Christian Leathley	Marcelo Kohen

There have also been instances of entire tribunals agreeing (sometimes unanimously) to a position contrary to that taken by other tribunals considering the same treaty language and the same procedural issue. For example, the tribunals in *Siemens* (2004), *Wintershall* (2008), *Hochtief* (2011) and *Daimler* (2012) all considered whether the MFN clause in the Argentina–Germany BIT (covering 'activities',

178 The majority ruling was issued in February 2013 and the dissenting opinion was issued in May 2013.

179 Although listed separately, as noted, this case involved a related claimant to those in the *Busta* case with an identical tribunal, claims and ruling on the MFN issue issued on the same date for both cases.

180 *Krederi*, Paragraph 343.

including 'management, utilization, use and enjoyment' of an investment)[181] could be used to circumvent the express obligation to pursue pre-arbitration litigation before Argentinian courts for 18 months before an investor could elevate the matter to investor–state arbitration. While the tribunals in *Siemens* and *Hochtief* allowed the claimants to submit their respective disputes directly to arbitration without first going through the domestic courts, the *Wintershall* and *Daimler* tribunals took a narrower view and rejected the claims. Dissenting opinions were issued by J Christopher Thomas QC and Professor Charles Brower in *Hochtief* and *Daimler*, respectively.

The tribunal majority in *Impregilo* (2011), which considered the same issue under the Argentina–Italy BIT, lamented that it would be 'unfortunate if the assessment of these issues would in each case be dependent on the personal opinions of individual arbitrators'.[182] The *ST-AD* tribunal similarly noted that previous decisions, including the four under the Argentina–Germany BIT, 'reflect a complete lack of consistency, which results from a fundamental difference of views between various arbitrators'.[183]

The inconsistent decision-making can largely be explained by the philosophical divide between those who, on the one side, align (broadly speaking) with the *Maffezini* approach that an MFN clause should extend to dispute resolution issues unless expressly excluded and, on the other, those who view the issue as one of jurisdiction based on limitations to the contracting states' consent to arbitration, thus aligning with the *Plama* approach that an MFN clause does not extend to dispute resolution provisions unless expressly stated in the treaty. The *Plama* tribunal, while acknowledging that it was dealing with a more narrowly worded

181 The four tribunals used slightly different English translations of Paragraph 2 of the Protocol of the Argentina–Germany BIT (1991), which sets out the scope of 'activities' under the MFN clause. The *Hochtief* tribunal referred to 'management, *utilization*, use and enjoyment of an investment', which is the translation published in the United Nations Treaty Series (*Hochtief*, Paragraph 3) whereas the *Siemens*, *Wintershall* and *Daimler* tribunals referred to 'the management, *maintenance*, use and enjoyment of an investment' (*Siemens*, Paragraph 63), 'management, *operation*, use or enjoyment of an investment' (*Wintershall*, Paragraph 169), and 'management, use, enjoyment, and *disposal* of an investment' (*Daimler*, Paragraph 207), respectively (emphasis added).

182 *Impregilo*, Paragraph 108.

183 *ST-AD*, Paragraph 386.

MFN clause[184] and a claimant that was seeking to be more ambitious than that which was attempted in *Maffezini*,[185] summed up its philosophy thus:

> *The principle with multiple exceptions as stated by the tribunal in the Maffezini case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.*[186]

Without expressing a view on which approach is correct, it is noted that Article 31 of the VCLT essentially requires a good faith interpretation in accordance with the ordinary meaning of the words used, without necessarily requiring that there be 'no doubt' as to that interpretation as suggested in *Plama*.

The table below lists arbitrators according to whether they upheld or rejected an argument to apply an MFN clause to a procedural issue.[187] Admittedly, it is a blunt instrument for analysis as it does not take into account the two objective filters already discussed (i.e., the MFN clause wording and the claimant's ambition), which will often be determinative of an MFN argument. With that said, we focus on those cases in which there was a dissent as that is a clear indication that the first two objective filters cannot fully explain the decisions reached by all members of the tribunal. The table also includes arbitrators who sat on tribunals

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184 *Plama*, Paragraphs 187 and 205.

185 *Plama*, Paragraph 224. See also Paragraph 209 where the tribunal notes: 'It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.' The tribunal in *Suez v. Argentina*, ICSID Case No. ARB/03/19, Paragraph 65 also noted the 'radical effect' of the MFN claim in *Plama*.

186 *Plama*, Paragraph 223 (emphasis added).

187 The below table is a simplified presentation according to which side of the debate the reasoning broadly aligns with. It is noted, however, that in some cases an arbitrator or tribunal broadly follows the *Plama* approach (by determining that an MFN clause does not extend to dispute resolution unless expressly included) while at the same time distinguishing from the circumstances of the *Plama* award or even criticising the tribunal's analysis (see, for instance, *Austrian Airlines* (Paragraph 119) and *Quasar* (formerly *Renta 4*) (Paragraphs 95–96)). The same may be said for some cases that appear to follow the *Maffezini* approach – see, for example, *A11Y* (Paragraph 106). Moreover, some cases endorse both *Plama* and *Maffezini*; for instance, where a *Maffezini* public policy exception is applicable (see *Itisaluna*, Paragraphs 210–212). The table does not capture these nuances. Further, in the table we do not include the majority tribunal members in *Ambiente* and *Michael Lee-Chin*, as they did not analyse the MFN issue, while including the arbitrators who issued dissents relating to the MFN clauses in those cases.

that enjoyed unanimity but who rendered decisions on similar claims contrary to other tribunals, again revealing a philosophical divide among the arbitrators.[188] This includes the arbitrators who sat in *Le Chèque Déjeuner* (2010), which was a unanimous decision, yet clearly in the minority as the outcome was contrary to 12 prior decisions[189] and four subsequent decisions[190] concerning similar MFN clauses while following a decision that was set aside (see above). It is noted that several arbitrators appear on both sides of the table, reflecting either an evolution in their thinking or a change in factual circumstances in the cases being decided.

Select arbitrator views on MFN clauses[191]

MFN clause applied to a procedural issue	Rejected the application of an MFN clause to a procedural issue
Andrés Rigo Sureda • *National Grid* (president; unanimous) • *Siemens* (president; unanimous)	Andrés Rigo Sureda • *Sanum Investments* (president; unanimous)
Daniel Bethlehem • *Le Chèque Déjeuner* (state; unanimous)	Daniel Bethlehem • *Itisaluna* (president; majority)
Domingo Bello Janeiro • *Siemens* (state; unanimous)	Domingo Bello Janeiro • *Daimler* (state; majority)

188 In *Siemens* (2004), *National Grid* (2006), *Wintershall* (2008) and *ICS* (2012), the tribunals rendered inconsistent unanimous decisions concerning similar MFN clauses (referring to 'activities in connection with investments', including 'the management, utilization, use and enjoyment of an investment' (or similar formulation), or 'management, maintenance, use, enjoyment or disposal of their investments') in relation to similar claims (to avoid pre-arbitration procedural requirements). Two other decisions were rendered on similar wording and claims – *Daimler* and *Hochtief* – which were accompanied by dissenting opinions.

189 *Salini v. Jordan* (2004), *Plama v. Bulgaria* (2005), *Telenor v. Hungary* (2006), *Berschader v. Russia* (2006), *Quasar (formerly Renta 4) v. Russia* (2009), *Tza Yap Shum v. Peru* (2009), *Austrian Airlines v. The Slovak Republic* (2009), *Servier v. Poland* (2010), *EURAM v. Slovak Republic* (2012), *Accession Mezzanine v. Hungary* (2013), *Sanum v. Laos* (2013) and *ST-AD GmbH v. Bulgaria* (2013).

190 *A11Y v. Czech Republic* (2017), *Busta v. Czech Republic* (2017), *Anglia v. Czech Republic* (2017) and *BUCG v. Yemen* (2017).

191 The table indicates the cases in which an arbitrator has sat, whether they issued a dissent, and which side appointed them. For completeness, for each arbitrator, the table also includes other cases in which he or she was a tribunal member and a unanimous decision was reached as regards the application of the MFN clause to procedural rights.

MFN clause applied to a procedural issue	Rejected the application of an MFN clause to a procedural issue
Gabrielle Kauffman-Kohler • *AWG* (investor; unanimous) • *Suez v. Argentina* (ICSID Case No. ARB/03/17) (investor; unanimous) • *Suez v. Argentina* (ICSID Case No. ARB/03/19) (investor; unanimous)	Gabrielle Kauffman-Kohler • *Austrian Airlines* (president; majority)
John Townsend • *Garanti Koza* (president; majority)	John Townsend • *BUCG* (state; unanimous)
Yves Fortier • *Le Chèque Déjeuner* (investor; unanimous) • *Venezuela US* (investor; majority)	Yves Fortier • *A11Y* (president; majority)
Alejandro Miguel Garro • *National Grid* (state; unanimous)	Anna Joubin-Bret • *A11Y* (state; majority)
August Reinisch • *Busta* (investor; dissenting) • *Anglia* (investor; dissenting)	Bengt Sjövall • *Berschader* (president; majority)
Charles Brower • *Quasar* (formerly *Renta 4*) (investor; dissenting) • *Impregilo* (investor; majority) • *Hochtief* (investor; majority) • *Daimler* (investor; dissenting) • *Austrian Airlines* (investor; dissenting) • *Siemens* (investor; unanimous) • *Telefónica* (investor; unanimous)	Brigitte Stern • *Impregilo* (state; dissenting) • *EURAM* (state; unanimous) • *Sanum* (state; unanimous) • *Itisaluna* (state; majority) • *ST-AD* (president; unanimous) • *Heemsen* (state; unanimous)
E Whitney Debevoise • *National Grid* (investor; unanimous)	Fali Nariman • *Wintershall* (president; unanimous)
George Constantine Lambrou • *Garanti Koza* (investor; majority)	J Christopher Thomas • *Hochtief* (state; dissenting) • *ST-AD* (state; unanimous)
Hans Danelius • *Impregilo* (president; majority)	Jan Paulsson • *Quasar* (formerly *Renta 4*) (president; majority) • *Doutremepuich* (state; unanimous)
Henri Alvarez • *Teinver* (investor; majority) • *Camuzzi* (investor; unanimous) • *Gas Natural* (investor; unanimous)	Kamal Hossain • *Teinver* (state; dissenting)

MFN clause applied to a procedural issue	Rejected the application of an MFN clause to a procedural issue
Karl-Heinz Böckstiegel[192] • *Le Chèque Déjeuner* (president; unanimous) • *RosInvest* (president; unanimous)	Laurence Boisson de Chazournes • *Garanti Koza* (state; dissenting)
Peter Tomka • *Venezuela US* (president; majority)	Marc Lalonde • *ICS* (investor; unanimous) • *Accession Mezzanine* (investor; unanimous) • *Servier* (state; unanimous)
Stanimir Alexandrov • *A11Y* (investor; dissenting)	Marcelo Kohen • *Venezuela US* (state; dissenting) • *Michael Anthony Lee-Chin* (state; dissenting)
Thomas Buergenthal • *Teinver* (president; majority) • *Maffezini* (investor; unanimous)	Philippe Sands • *Busta* (state; majority) • *Anglia* (state; majority) • *Kilic* (state; unanimous)
Todd Weiler • *Berschader* (investor; dissenting)	Piero Bernardini • *Wintershall* (investor, unanimous)
Vaughan Lowe • *Hochtief* (president; majority)	Pierre-Marie Dupuy • *Daimler* (president; majority) • *ICS* (president; unanimous)
Wolfgang Peter • *Itisaluna* (investor; dissenting)	Santiago Torres Bernárdez • *Ambiente* (state; dissenting) • *Wintershall* (state; unanimous) • *ICS* (state; unanimous)
	Sergei Lebedev • *Berschader* (state; majority)
	Toby Landau • *Quasar* (formerly *Renta 4*) (state; majority)
	Unidentified arbitrator • *Krederi* (dissenting)[193]
	Vojtěch Trapl • *Austrian Airlines* (state; majority)

192 While Mr Böckstiegel was also part of the majority in *Ambiente*, that case is not listed as the majority did not analyse the MFN clause.

193 The award notes that an unidentified minority disagrees with the majority ruling on the MFN clause on the basis that the dispute resolution clause does not provide express consent to arbitration generally but only to UNCITRAL, and the MFN clause cannot be used as a basis of abrogating those limits: *Krederi*, Paragraph 343. The tribunal comprised August Reinisch (president), Markus Wirth (investor) and Gavan Griffith (state).

MFN clause applied to a procedural issue	Rejected the application of an MFN clause to a procedural issue
	Yas Banifatemi • *Busta* (president; majority) • *Anglia* (president; majority)

It bears emphasising that the above table provides only a broad-brush analysis of arbitrator decision-making on MFN clauses. Furthermore, a single dissenting (or majority) opinion does not an arbitrator make.[194] Experienced arbitrators will be open-minded when confronted with different factual scenarios, new legal arguments and the shifting winds of arbitral jurisprudence and academic commentary. For instance, Professor Domingo Bello Janeiro supported the *Maffezini* approach in *Siemens* (2004) and then switched sides in *Daimler* (2012) on the basis that, in his words:

> *(1) judicial practice has become more varied and more awards have been rendered that disagree with the position maintained in the Siemens arbitration; (2) several States, including Argentina, have since refined the focus of the Maffezini / Siemens awards, leading me to rethink my original conclusion and Argentina's consent to this type of application of the MFN clause; and 3) the Siemens tribunal did not conduct an analysis of several of the points now covered extensively and very carefully by [the Daimler] award (for example, evidence of understanding of the common use of the word 'treatment', Argentine practice, limitation of the MFN clause, the logical fallacy of the expressio unius argument).*[195]

Professor Gabrielle Kauffman-Kohler allowed the application of an MFN clause to dispute resolution provisions in *Suez v. Argentina*, wrote an article advocating for that approach, and then subsequently rejected the use of an MFN clause as a basis for the tribunal's jurisdiction in *Austrian Airlines*.[196] (The change in Professor Kaufmann-Kohler's position, however, appears to be consistent with the change in the ambition of the relevant investor – in *Suez*, the investor sought to avoid a pre-arbitration litigation requirement, whereas in *Austrian Airlines*, the

194 'One swallow does not make a summer, neither does one fine day; similarly, one day or brief time of happiness does not make a person entirely happy': Aristotle, *The Nicomachean Ethics*.

195 *Daimler*, Opinion of Professor Domingo Bello Janeiro dated 16 August 2012, Paragraph 34.

196 See *Daimler*, Opinion of Professor Domingo Bello Janeiro dated 16 August 2012, Paragraph 5 (where Professor Janeiro specifically noted Professor Kauffman-Kohler's change in position).

investor sought to expand the scope of claims that could be brought before the treaty tribunal.) Other arbitrators to adjust their decision-making to the precise circumstances in which an MFN clause was invoked include Andrés Rigo Sureda, Sir Daniel Bethlehem QC, John M Townsend and Yves Fortier QC.

Furthermore, the mere fact an arbitrator forms part of a majority or a unanimous tribunal does not necessarily reflect their own personal views. Arbitrators will often sign awards notwithstanding any disagreements between tribunal members to maintain tribunal harmony and preserve the integrity (and enforceability) of the award. Professor Bello Janeiro explained in *Daimler* why he had accepted a contrary position on the MFN clause in *Siemens* (while formally dissenting on other issues):

> *I participated in the [Siemens] decision, including of course the Decision on Jurisdiction, and endorsed the opinion of the other members of the tribunal specifically in order to ensure the smooth internal functioning of the tribunal. My disagreement related only to aspects with greater actual relevance, repercussion, and substantive content. . . . In addition, my failure to dissociate myself from the formal aspects of the jurisdiction decision can easily be explained by the fact that in practice there was no point in expressing any dissent because the other tribunal members were in full agreement.*[197]

Nonetheless, some arbitrators have left little doubt as to where they stand on the application of MFN clauses to procedural issues. Professor Brigitte Stern in her dissenting opinion in *Impregilo* noted:

> *Unless specifically stated to the contrary, the qualifying conditions put by the State in order to accept to be sued directly on the international level by foreign investors cannot be displaced by an MFN clause, and a conditional right to ICSID cannot magically be transformed into an unconditional right by the grace of the MFN clause. The access to the right as provided by the basic treaty cannot be modified through an MFN clause. Any other solution comports in my view great dangers.*[198]

197 *Daimler*, Opinion of Professor Domingo Bello Janeiro dated 16 August 2012, Paragraph 2 (emphasis added).

198 *Impregilo*, Concurring and Dissenting Opinion of Professor Brigitte Stern dated 21 June 2011, Paragraph 99.

Others have expressed their views in academic commentary (which, of course, could also evolve over time). In an article, Professor Zachary Douglas QC has:

> *made the case for a negative answer to the question of whether an MFN clause in a basic treaty can be relied upon by the investor to expand the jurisdiction of an international tribunal established in accordance with the jurisdictional provisions in the basic treaty by incorporating the more favourable 'treatment' reflected in the jurisdictional provisions in a third treaty.*[199]

The ILC Study Group on MFN clauses suggests that the 'competing approaches' in MFN case law reflect 'a difference between those who regard investment agreements as public international law instruments, and those who regard investor–state dispute settlement as being more of a private law nature akin to contractual arrangements'.[200] Dr Santiago Torres Bernárdez's dissent in *Ambiente* appears to be consistent with the foregoing thesis. Dr Bernárdez considered the presumption that dispute resolution must be expressly 'contracted-out' of an MFN clause in order to be excluded from its scope as being 'nonsensical in public international law', characterising it as 'the main legal shortcoming' of *Maffezini* and similar decisions.[201]

An advocate for the opposing view is Professor Charles Brower, who in his dissenting opinion in *Daimler*, criticised the 'analytical flaw'[202] in the majority decision. In his words:

> *It is difficult to imagine a more fundamental aspect of an investor's 'treatment' by a host Government than that investor's ability to exercise and defend its legal rights by prompt access to dispute settlement mechanisms, and fair and efficient administration of justice.*[203]

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199 Douglas (2011), p 113. See also footnote 36. Additionally, the *Kilic* tribunal relied on Professor Douglas' book, *The International Law of Investment Claims* (Cambridge University Press, 2009), where he notes that an MFN clause 'does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty, unless there is an unequivocal provision to that effect in the basic investment treaty': *Kilic*, Paragraph 7.8.10.

200 ILC MFN Report (2015), Paragraph 169; see also Paragraphs 170–172.

201 *Ambiente*, Dissenting Opinion of Santiago Torres Bernárdez dated 2 May 2013, Paragraph 337.

202 *Daimler*, Dissenting Opinion of Charles N Brower dated 15 August 2012, Paragraph 2.

203 id., Paragraph 20.

This sentiment was echoed by Dr Todd Weiler (also nominated by the investor) in his dissenting opinion in *Berschader*, in which he disagreed with his colleagues' decision to follow *Plama,* arguing:

> *There is simply no reason to suppose that – absent some specific treaty language – any given MFN provision should be more or less narrowly defined. In other words, MFN clauses apply to all aspects of the regulatory environment governed by an investment protection treaty, including availability of all means of dispute settlement.*[204]

Conclusion

The apparent inconsistency in investor–state dispute settlement jurisprudence on the interpretation of MFN clauses and their application to procedural rights or obligations can be largely explained based on the precise language of the MFN clause (and other terms of the treaty) and the ambition of the party invoking it. Nonetheless, it is undeniable that the legal and cultural background of the arbitrators and their specific opinions on the subject can have an impact on how these cases are decided. This is not itself objectionable within a system of law in which there is no doctrine of binding precedent and an increasingly diverse pool of arbitrators. With that said, inconsistent decision-making can fuel calls for reform, including the need for an apex appellate body with the authority to resolve such issues once and for all.

In the meantime, some states have taken the matter into their own hands. Argentina, which was a respondent in many cases in which investors sought to apply MFN clauses to dispute resolution provisions (with mixed results),[205] has entered into new BITs that specifically exclude dispute resolution provisions from the scope of the MFN clause.[206] Recently signed China BITs have included similar limiting language.[207] Australia has likewise terminated a number of its BITs and

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204 *Berschader*, Separate Opinion of Todd Weiler dated 7 April 2016, Paragraph 20.

205 Argentina was a respondent in *Siemens*, *Daimler*, *Wintershall*, *Hochtief*, *Impregilo*, *Gas Natural*, *Telefónica*, *Suez* (twice) and *AWG*.

206 See, for example, Argentina–Japan BIT (2018), Article 3(3): 'For greater certainty, the treatment referred to in this Article [Most-Favoured-Nation Treatment] does not encompass international dispute settlement procedures or mechanisms under any international agreement.' (According to the UNCTAD database, this BIT is yet to come into force.)

207 See, for example, Canada–China BIT (2012), Article 5(3): 'For greater certainty, the [most-favoured nation] "treatment" referred to in paragraphs 1 and 2 of this Article does not encompass the dispute resolution mechanisms, such as those in Part C [mechanism for the settlement of investment disputes], in other international investment treaties and other trade agreements.'

replaced them with free trade agreements, which include narrower MFN wording that applies only to 'measures' taken by the counterparty state (rather than investor rights generally).[208] Other states can also be expected to provide guidance within future treaties (or through joint statements on existing agreements)[209] on how any agreed MFN clause is to be applied in practice, having been alerted to the level of disagreement within the arbitral community on the issue.

Investors can also mitigate the risks and uncertainties as regards MFN clauses. Investments can be structured (or restructured) to fall within the terms of a treaty that provides sufficient substantive protection backed up with a clear right of arbitration without having to rely on an MFN clause. However, should an investor be reliant on an MFN clause to advance its case, the parties will be wise to choose their arbitrators carefully.

208 See, for example, Australia–Hong Kong Free Trade Agreement (2019), Article 5.

209 *National Grid*, Paragraph 85: '[A]fter the decision on jurisdiction in Siemens, the Argentine Republic and Panama exchanged diplomatic notes with an "interpretative declaration" of the MFN clause in their 1996 investment treaty to the effect that, the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention.'

CHAPTER 13

Substantive Protections: Fairness

Elodie Dulac and Jia Lin Hoe[1]

Introduction

The fair and equitable treatment (FET) standard has been described as the standard in investment treaty disputes that is the most important,[2] most frequently adjudicated[3] and most frequently found to be breached.[4] While historically the expropriation standard was more prevalent, FET claims have grown in popularity as mass nationalisations have become increasingly rare and states adopt less intrusive measures, alongside the development of investment-treaty arbitration.[5] The FET protection is a standard feature in investment treaties.[6] At the time of writing, only 125 out of a total of 2,574 investment treaties do not contain an FET provision (and even then, it may be possible to import FET into those treaties using the most-favoured nation clauses in them).[7]

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2 Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', 6 *J. World Inv. & Trade* 358–359 (2005), p. 357.

3 J Álvarez, *The Public International Law Regime Governing International Investment* (Cambridge University Press, 2011), p. 177.

4 Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, Sixth edition (Oxford University Press, 2015), Paragraph 8.96.

5 United Nations Conference on Trade and Development (UNCTAD), 'Fair and Equitable Treatment: UNCTAD Series on IIAs II: A Sequel' (2012), available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (UNCTAD Series), p. 10.

6 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 *(Total v. Argentina)*, Paragraph 106.

7 See UNCTAD, Mapping of IIA Content, available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping, accessed on 1 September 2021. See also P Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press, 2016), p. 145 (noting that in 2014, only 50 out of a total of 1,964 BITs did not contain an FET provision). See, e.g.,

We set out below the evolution in and different permutations of treaty language on the FET standard before focusing on the notions of 'fairness' and exploring in more detail the core components of the FET standard, in particular the protection of legitimate expectations.

Evolution in the different formulations of the FET standard

Unqualified FET standard

The first manifestations of the FET clause in the context of international investment agreements were in the Draft Convention on Investments Abroad (1959) and the Organisation for Economic Co-operation and Development (OECD) Draft Convention on the Protection of Foreign Property (1967), which provided that '[e]ach Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties', without any qualification.[8] The OECD Draft Convention was used by most OECD countries as the basis of their treaty negotiations,[9] and its influence was obvious in the growing number of bilateral investment treaties (BITs) negotiated from the late 1960s.[10] The unqualified FET provision is the most common formulation of the FET standard, currently contained in 1,984 out of 2,574 treaties, for most first-generation treaties.[11]

While there were few investment treaty cases from the 1970s to the 1990s,[12] from the mid-1990s investment treaty claims emerged and quickly rose, almost invariably revolving around an FET claim.[13] This led to a focus on FET and to an

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PAO Tatneft (formerly OAO Tatneft) v. Ukraine, PCA Case No. 2008-8, Award on the Merits, 29 July 2014, Paragraphs 326–365 (where the Russia–Ukraine BIT did not contain an FET clause but FET was imported from the UK-Ukraine BIT through the most-favoured nation clause in the Russia–Ukraine BIT).

8 UNCTAD Series, p. 5.

9 ibid.

10 OECD (2004), 'Fair and Equitable Treatment Standard in International Investment Law', OECD Working Papers on International Investment, 2004/03, OECD Publishing, available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf, p. 5.

11 See UNCTAD, 'Mapping of IIA Content', available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping, accessed on 1 September 2021.

12 See UNCTAD, 'Investment Dispute Settlement Navigator', available at https://investmentpolicy.unctad.org/investment-dispute-settlement?status=1000, accessed on 1 September 2021, for a list of known investment treaty cases. The first known investment treaty case listed is *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990.

13 See Christophe Bondy, 'Fair and Equitable Treatment – Ten Years On', in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Series, Volume 20 (Kluwer Law International, 2019), pp. 203–205.

intense debate as to whether the unqualified FET standard constituted an autonomous, broad standard distinct from the minimum standard of treatment under customary international law, which had historically been circumscribed to egregious situations.[14] By 2012, it was observed that many tribunals had interpreted the FET standard as self-standing where it is not expressly linked in the treaty to the minimum standard of treatment.[15] However, attempts (many successful) by investors to invoke the unqualified FET standard have resulted in a backlash from states that, as explained below, have reacted by narrowing or qualifying the FET standard in later treaties and even removing the FET protection altogether.

FET linked to international law or customary international law

Some of the earlier treaties linked FET to principles of international law.[16] There were broadly two formulations of this.

The first provided that '[i]nvestments shall at all times be accorded fair and equitable treatment . . . and shall in no case be accorded treatment less than that required by international law',[17] which tribunals have interpreted as providing that the international customary minimum standard operates as a floor and not a ceiling.[18]

The second formulation, such as that set out in Article 1105(1) of the North American Free Trade Agreement (NAFTA) (enacted in 1994), provides that '[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment . . .'.

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14 The minimum standard of treatment was articulated in the early 20th century, with the most cited case being that of *Neer (USA) v. United Mexican States* (1927), where the Mexican US General Claims Commission held that 'the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily acknowledge its insufficiency'.

15 UNCTAD Series, p. xiv.

16 Of 348 treaties that contain FET provisions that refer to international law, 223 were concluded between the 1960s and 1990: see UNCTAD, 'Mapping of IIA Content', available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping, accessed on 1 September 2021.

17 See, e.g., Article II(3)(a) of the US–Ukraine BIT (signed on 4 March 1994, entered into force on 16 November 1996); Article II(2)(a) of the Argentina–US BIT (signed 14 November 1991, entered into force on 20 October 1994).

18 See, e.g., *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, Paragraph 253; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, Paragraph 361.

However, following the NAFTA tribunal's finding in *Pope and Talbot v. Canada* in April 2001 that the FET standard in NAFTA was 'additive' to the international minimum standard,[19] the NAFTA Free Trade Commission issued Notes of Interpretation in July 2001 clarifying that FET does 'not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens'.[20] Provisions linking FET to the customary international law standard were subsequently incorporated into the model BITs or BITs of a number of countries, such as the US Model BIT (2012), which provides that '[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment',[21] and other treaties involving non-NAFTA countries. For example, the Association of Southeast Asian Nations (ASEAN)–Australia–New Zealand Free Trade Agreement (FTA) provides that '[f]or greater certainty: . . . the concepts of "fair and equitable treatment" . . . do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights'.[22] The United Nations Conference on Trade and Development (UNCTAD) World Investment Report for 2016 reported that while 2 per cent of earlier BITs from 1962 to 2011 contained FET provisions referring to the customary international law standard, 35 per cent of BITs from

19 *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, Paragraph 110. See, e.g., *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, Paragraph 331 (finding that the content of Article II(2)(a) of the Canada–Costa Rica BIT, which provides that '[e]ach Contracting Party shall accord investments of the other Contracting Party: (a) fair and equitable treatment in accordance with principles of international law', is not limited to the minimum standard of treatment under customary international law).

20 The NAFTA Free Trade Commission's Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

21 See, e.g., Article 5(1) of the 2012 US Model BIT.

22 Chapter 11, Article 6(2)(c) of the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (signed on 27 February 2009, entered into force on 10 January 2010), Article 91 of the Japan–Philippines Economic Partnership Agreement (signed on 9 September 2006, entered into force on 12 November 2008). See also Article 132(2)(a) of the China–Peru FTA (signed on 29 April 2009, entered into force on 1 March 2010); Article 10.10(2)(c) of the Malaysia–New Zealand FTA (signed on 26 October 2009, entered into force on 1 August 2010); Article 10.4(1) of the India–Republic of Korea Comprehensive Economic Partnership Agreement (signed on 7 August 2009, entered into force on 1 January 2010); Article 7(1) and (2) of the Morocco–Nigeria BIT (signed on 3 December 2016, not yet entered into force).

2012 to 2014 contained these provisions.[23] More recently, such provisions have been included in PACER Plus (2017),[24] and the ASEAN–Hong Kong, China SAR Investment Agreement (2017).[25]

However, a number of tribunals have observed in recent years that even where the FET standard under the treaty is limited to the customary international law standard, it does not provoke a major disruption in the level of protection because the customary international law standard has evolved and has become indistinguishable from the autonomous FET standard.[26]

FET with additional substantive content

Given the uncertainty as to the scope of the unqualified FET standard, and from states' perspective the overly broad content given to it, there has been a recent trend of investment treaties having more developed FET provisions to more

23 UNCTAD, 'World Investment Report 2016, Investor Nationality: Policy Challenges', available at https://unctad.org/system/files/official-document/wir2016_en.pdf, p. 114.

24 Article 9(1) and (2) of the Pacific Agreement on Closer Economic Relations Plus (signed on 14 June 2017, entered into force on 13 December 2020).

25 Article 5(1)(c) of the ASEAN–Hong Kong, China SAR Investment Agreement (signed on 12 November 2017, entered into force on 17 June 2019).

26 See, e.g., *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, Paragraph 520. See also *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, Paragraphs 8.44 and 8.47 (referring to the Switzerland–Venezuela BIT, which prefaced the FET standard with the qualification 'in accordance with the rules and principles of international law', which the tribunal found was conclusive in confirming the meaning of the FET standard as the duties imposed by customary international law. However, the tribunal found that the result in the case would not be materially different under the autonomous standard); *Murphy Exploration and Production Company International v. Republic of Ecuador II*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, Paragraph 208 ('The international minimum standard and the treaty standard continue to influence each other, and, in the view of the Tribunal, these standards are increasingly aligned'). For a contrary view, see, e.g., *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, Paragraph 357 (finding that under customary international law, absent a denial of justice, judicial decisions interpreting domestic law cannot breach international law) and Paragraph 359 (holding that 'judicial decisions that are arbitrary, unfair or contradict an investor's legitimate expectations may also breach the FET standard even if they do not rise to the level of a denial of justice'). See also *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, Paragraph 125.

clearly circumscribe the content of the FET standard, and notably to preserve more freedom for states to regulate without the FET standard.[27]

Some treaties do so by referring to denial of justice, which has been recognised by commentators and tribunals as indisputably forming part of the FET standard but as imposing a high bar. For instance, the ASEAN Comprehensive Investment Agreement (2009) provides that 'fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process'.[28]

Other treaties list types of behaviour by states that may result in a breach of FET, using qualifiers such as 'fundamental' breaches or 'manifestly' wrongful behaviour. For example, the Canada–EU Comprehensive Economic and Trade Agreement (CETA) (2016) provides:[29]

> *A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.*

27 See, e.g., Yulia Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment*, International Arbitration Law Library, Volume 50 (Kluwer Law International, 2019), p. 51; Christophe Bondy, 'Fair and Equitable Treatment – Ten Years On', in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Series, Volume 20 (Kluwer Law International, 2019), p. 219.

28 Article 11 of the ASEAN Comprehensive Investment Agreement (signed on 2 February 2009, entered into force on 24 February 2012). See also, e.g., Article 5(1)(a) of the Hong Kong, China SAR–ASEAN Investment Agreement (adopted on 12 November 2017, entered into force on 17 June 2019); Article 3(2)(a) of the Indonesia–Singapore BIT (signed on 11 October 2018, entered into force on 9 March 2021).

29 Article 8.10(2) of the Canada–EU CETA (signed on 30 October 2016, not yet entered into force). See also Article 9(2) of the Netherlands Model BIT (2019).

Similar formulations are found in recent EU agreements, including the EU–Singapore Investment Protection Agreement (2018)[30] and the EU–Vietnam Investment Protection Agreement (2019).[31] The European Commission has stated that the purpose of these provisions is to include a 'closed text which defines precisely the standard of treatment, without leaving unwelcome discretion to the Members of the Tribunal'.[32]

In addition, some treaties clarify that the FET standard does not prevent a state from modifying its laws. For example, the France–Colombia BIT (2014) states '[i]t should also be understood that the obligation to provide fair and equitable treatment does not include a stabilization clause or prevents its legislation from being changed'.[33] In a similar vein, in the Canada–EU CETA, 'the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objections',[34] and it clarifies that 'the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section [including FET]'.[35]

Removal of the FET standard

While most first-generation BITs contained an FET provision, there has been a reversal of this trend in recent years with some treaties going beyond qualifying the FET standard, and removing it altogether. For instance, India's model

30 Article 2.4(2) of the EU–Singapore Investment Protection Agreement (signed on 15 October 2018, not yet entered into force).

31 Article 2.5(2) of the EU–Vietnam Investment Protection Agreement (signed on 30 June 2019, not yet entered into force).

32 European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (Press Release, February 2016), available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf, p. 2.

33 Article 4(1) of the France–Colombia BIT (signed on 10 July 2014, entered into force on 14 October 2020).

34 Article 8.9(1) of the Canada–EU CETA (signed October 30, 2016, not yet entered into force).

35 id., at Article 8.9(2).

BIT (2016) makes no reference to FET and instead refers only to violations of customary international law:[36]

> *No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law*[37] *through: (i) Denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or (iv)manifestly abusive treatment, such as coercion, duress and harassment.*

Other recent examples include the Australia–China FTA (2015), which contains only national treatment and most-favoured nation treatment as substantive treaty protections,[38] the amendment to the South African Development Community Investment Protocol (2016), which contains only prohibition against expropriation and national treatment as substantive treaty protections,[39] and the Morocco-Rwanda BIT (2016), which contains the standard substantive protections but excludes the FET standard.[40]

Notions of 'fairness'

UNCTAD notes that 'the original purpose and intent behind FET clauses was to protect against the many types of situations of how unfairness may manifest itself, such as, for example, an arbitrary cancellation of licences, harassment of an investor through unjustified fines and penalties or creating other hurdles with a view to disrupting a business'.[41] Commentators note that the concept of

36 Article 3.1 of the India Model BIT (2016).

37 For greater certainty, it is clarified that 'customary international law' only results from a general and consistent practice of states that they follow from a sense of legal obligation.

38 Article 9.3 and 9.4 of the Australia–China FTA (signed on 17 June 2015 and entered into force on 20 December 2015).

39 Agreement amending Annex 1 (Co-operation on Investment) of the South African Development Community Protocol on Finance and Investment (signed on 31 August 2016, not yet entered into force).

40 Morocco–Rwanda BIT (signed on 19 December 2016, not yet entered into force).

41 See UNCTAD Series, pp. 6–7.

'equity', on the other hand, suggests a balancing process between the protection granted to the investor and the state's regulatory decisions that may be taken in the public interest.[42]

In arbitral practice, tribunals have considered the ordinary meaning of 'fair and equitable' as a collective term meaning 'just', 'even-handed', 'unbiased' and 'legitimate'.[43] Other tribunals have considered the ordinary meaning of 'fair' and 'equitable' as distinct concepts but defined 'equitable' as meaning 'fair' and note that '[t]he definition of each term uses the other and underlines their relationship'.[44] Some tribunals have also considered that FET needs to be interpreted in a balanced manner, taking into account both state sovereignty and the necessity to protect foreign investment and its continuing flow, without attributing the concept of balance specifically to 'fairness' or 'equity'.[45] Other tribunals have found that while '[p]hilosophers and scholars have devoted tomes to the subject of fairness', their work is not helpful in answering the practical question of what criteria a tribunal should apply to determine if treatment is in breach of FET.[46] Instead, it is more helpful to consider the elements that previous cases have found to be inherent components of the FET standard.[47]

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42 ibid.; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, Second edition (Oxford University Press, 2017), Paragraph 7.24.

43 See *Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award, 3 March 2010, Paragraph 430; *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, Paragraph 113; *Siemens A.G. v. The Argentina Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, Paragraph 390; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, Paragraph 430.

44 *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award, 3 November 2008 (*National Grid*), Paragraph 168. See also *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award, 7 December 2018, Paragraph 428; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, Paragraph 276.

45 See, e.g., *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award, 7 December 2018, Paragraph 428.

46 *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, Paragraph 221.

47 *Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Award, 11 December 2013, Paragraphs 504, 518–519; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, Paragraphs 538 and 539.

Core elements of FET

Subject to treaty language expressly limiting the content of the FET standard, the concept of FET is inherently flexible and potentially applicable to any type of host state misconduct (including both acts and omissions). Nonetheless, recurring fact patterns and similarities between cases have enabled tribunals and scholars to articulate categories of behaviour that indisputably violate the FET standard.[48] The core components of FET are often said to encompass: (1) the protection of legitimate expectations; (2) the protection against conduct that is arbitrary, unreasonable, disproportionate and lacking in good faith; (3) the principles of due process and transparency; and (4) protection against denials of justice.[49] Of these elements, the protection of investors' legitimate expectations relied on to make their investments have been described as the 'dominant element'[50] or the 'most important function'[51] of the FET standard, and even as 'a general principle of international law'.[52] We discuss this element in more detail below.

Protection of legitimate expectations

One of the first expressions of the protection of legitimate expectations was famously set out in the *Tecmed* decision, which provided as follows:

> *The Arbitral Tribunal considers that this provision of the Agreement [fair and equitable treatment], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with*

48 *Waguih Elie George Siag et al. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, Paragraph 450.

49 See, e.g., *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, Paragraph 355; *GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. V2014/168, Final Award, 29 April 2020, Paragraph 543.

50 *Saluka v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Paragraphs 301–302. See also *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, Paragraph 426 ('The Tribunal also notes that other arbitral tribunals have considered the protection of legitimate investor expectations as even *the "dominant" or "primary element", the "dominant feature", or "one of the major components"* of FET') (emphasis added).

51 *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Paragraph 7.75.

52 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, Paragraphs 575–576.

> *the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations . . . The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions . . . that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.*[53]

Subsequent tribunals have refined this approach and identified further elements relevant for such an FET/legitimate expectations claim to succeed, noting that a claimant must establish that:[54] (1) clear and explicit (or implicit, including through a consistent course of conduct by the state over a number of years)[55] representations were made by or attributable to the state in order to induce the investment; (2) these representations were reasonably relied upon by the claimant; and (3) these representations were subsequently repudiated by the state.

The determination of whether there has been a breach of legitimate expectations is fact specific. Nonetheless, it appears from the case law that the following considerations are relevant to whether a breach of legitimate expectations, and thereby a breach of FET, occurred.

- The more specific the commitments made by the state to the particular investor or in the context of the particular industry,[56] the higher the chances

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53 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, Paragraph 154.

54 See, e.g., *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Award, 22 February 2021, Paragraph 162; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB16/6, Award, 27 August 2019, Paragraph 1367; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019, Paragraph 482.

55 See, e.g., *Occidental Exploration and Production Company v. Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, 1 July 2004; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.

56 See, e.g., *Total v. Argentina*, Paragraph 121 (the 'more specific the declaration to the addressee(s), the more credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future in a context of reciprocal trust and good faith'); *Jurgen Wirtgen and others v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, Paragraph 409 ('To ascertain whether the state has granted a stabilization

of success. In contrast, general political or legislative statements or speeches are less likely to form the basis of an FET claim.[57]

- The more drastic the alteration of the state's regulatory framework, the higher the prospects of success.[58] For instance, one of the factors that led to a successful FET claim in *Eiser v. Spain* was the tribunal's finding that Spain's repeal of the existing legislation and decision to apply an entirely new method to reduce the remuneration for the claimants' existing plants deprived the claimants of essentially all of the value of their investment, in breach of their legitimate expectations.[59] The tribunal observed that the factual and legal situation in that case differed fundamentally from that addressed in *Charanne v. Spain*, which rejected investors' claims that changes to Spain's regulatory regime violated FET, as the measures complained of in *Charanne* had far less dramatic effects, reducing the profitability of plants by 8.5 per cent to 10 per cent.[60]
- Tribunals may consider whether the state's changes to the legal framework are disproportionate to the state's aims,[61] taking into account the context in

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commitment or given a specific assurance, the form, the content and the clarity of the alleged promise are of critical relevance').

57 See, e.g., *El Paso v. Argentina*, ICSID Case No. ARB/03/15 Award, 31 October 2011, Paragraph 395 (noting that presidential statements can persuade investors to invest but that it is not possible 'to rely on these proposals to claim legal guarantees'); *SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. Italian Republic*, SCC Case No. V2016/32, Final Award, 25 March 2020, Paragraph 817 ('While general statements can create legitimate expectations in theory . . . the general statements made to the public in order to advertise a particular regulatory regime can only create expectations, if any, that are in line with the regulatory regime itself').

58 See, e.g., *Toto v. Lebanon*, ICSID Case No. ARB/07/12 Award, 7 June 2012, Paragraph 244 ('changes in the regulatory framework would be considered as breaches of the duty to grant full protection and fair and equitable treatment only in case of a drastic or discriminatory change in the essential features of the transaction'); *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, Paragraph 599 (noting that Law 42, which increased the state's revenues in an oil concession to 50 per cent, was not in breach of FET as it 'did not purport to fundamentally alter the structure of the contracts').

59 *Eiser Infrastructure Ltd. and Energia Solar Luxembourg v. Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, Paragraph 418.

60 id., at Paragraphs 367–368.

61 See, e.g., *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016, Paragraph 319 ('In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to

which the measures were taken, including the economic and social conditions of the host state.[62]

- Thought may also be given to whether the investor has exercised due diligence, including considering industry practices and expectations,[63] and whether its legitimate expectations were reasonable in light of the circumstances.[64] For

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maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment . . .').

62 See, e.g., *National Grid*, Paragraph 180 ('what would be unfair and inequitable in normal circumstances may not be so in a situation of economic and social crisis'); *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, Paragraph 626 (an investor investing in a country that was in a crisis was not entitled to expect the same level of stability as in countries such as the UK, the US or Japan); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, Paragraph 370 ('The Tribunal further accepts Respondent's explanation that the circumstances of political and economic transition prevailing in Estonia at the time justified heightened scrutiny of the banking sector. Such regulation by a state reflects a clear and legitimate public purpose'); *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31 Award, 15 June 2018, Paragraphs 570 and 572 ('It is undisputed that the Tariff Deficit poses a legitimate public policy problem for Spain . . . [but] the Tribunal cannot agree that the Tariff Deficit justified the elimination of the key features of the RD 661/2007 regime and its replacement by a wholly new regime, not based on any identifiable criteria').

63 See, e.g., *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, Paragraph 558 ('Given the oil industry's typically expected returns and its experience with governmental responses to market changes, it would be unsurprising to an experienced oil company that given its access to the State's exhaustible natural resources, with the substantial increase in world oil prices, there was a chance that the State would wish to revisit the economic bargain underlying the contracts').

64 See, e.g., *FREIF Eurowind v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award, 8 March 2021, Paragraph 544 ('The Tribunal steps in the shoes of [the claimant] . . . and considers whether its alleged expectations were legitimate based on the information it knew and the information it should have reasonably and objectively known according to the expected level of due diligence'); *Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, Paragraph 600 ('[G]iven the State's regulatory powers, in order to rely on legitimate expectations, the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State'); *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007, Paragraph 333 ('The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate

example, the tribunal in *Masdar v. Spain* found that the claimant had undertaken substantial due diligence by commissioning external reports, engaging in multiple discussions with its co-venturer who had detailed knowledge of the regulatory framework, having extensive discussions with the Spanish banks that put up the capital for the projects and consulting law firms in respect of regulatory issues, and was satisfied that the claimant's legitimate expectations were reasonable.[65]

One key issue that remains subject to debate is the extent to which the general regulatory framework can give rise to legitimate expectations and the scope of any such expectations. This has been amply highlighted by diverging results in a recent (and ongoing) series of cases arising out of changes in Spain's renewable energy framework. In these cases, some tribunals found that Spain's general legislation in and of itself did not give rise to any legitimate expectations;[66] other tribunals found that the legal framework created legitimate expectations that the relevant tariffs and premiums would be maintained for the operational life of the plant;[67] while a third category of tribunals found that the legal framework gave rise to the more limited expectation of a reasonable rate of return.[68]

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expectations were reasonable in light of the circumstances'), cited in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (*Masdar v. Spain*), Paragraph 498.

65 *Masdar v. Spain*, Paragraphs 497 and 498.

66 See, e.g., *Charanne Construction v. Spain*, SCC Case No. 062/2012 Award, 21 January 2016 (*Charanne v. Spain*), Paragraph 503 ('in the absence of a specific commitment, the Claimants could not have a reasonable expectation that the regulatory framework established by RD 661/2007 and RD 1578/2008 remain frozen'); *NextEra Energy Spain Holdings B.V. and NextEra Energy Global Holdings B.V. v. Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, Paragraph 584 ('The Tribunal is not convinced that in the circumstances of the present case the mere fact of Regulatory Framework I was a sufficient basis for the expectation that the Claimants would be guaranteed the terms of Regulatory Framework I. The Framework was based on legislation and legislation can be changed . . . Thus, on its own, Regulatory Framework I could not reasonably have been the basis for an expectation by Claimants that they would be entitled to receive precisely the benefits that such Regulatory Framework prescribed').

67 See, e.g., *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, (*Cube v. Spain*), Paragraphs 296, 298, 390; *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, May 31, 2019, (*9REN v. Spain*) Paragraph 297.

68 *Infracapital Fl S.a.r.l and Infracapital Solar B.V. v. Spain*, ICSID ARB/16/18, Decision on Jurisdiction, Liability and Decisions on Quantum, 13 September 2021, Paragraphs 586–587;

This divergence in results may be explained in part on the basis that there are two schools of thought on the question. The first school of thought considers that statements in general laws or regulations of sufficient clarity and specificity can give rise to protected legitimate expectations.[69] The second school of thought considers that a specific commitment giving rise to legitimate expectations cannot result from general regulations and that something more is needed.[70] That being said, the majority in *STEAG v. Spain* declined to adopt either school of thought and noted that while general laws may not always give rise to legitimate expectations, it was also wrong to hold that they could never give rise to legitimate expectations as it all depends on the case at hand.[71]

RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux sarl v. Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018 (*RREEF v. Spain*), Paragraphs 379, 384; *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, Paragraph 464 (drawing support from the *RREEF v. Spain* decision) and 473.

69 See, e.g., *Cube v. Spain*, Paragraph 388 ('At least in the case of a highly-regulated industry, and provided that the representations are sufficiently clear and unequivocal, it is enough that a regulatory regime be established with the overt aim of attracting investments by holding out to potential investors the prospect that the investments will be subject to a set of specific regulatory principles that will, as a matter of deliberate policy, be maintained in force for a finite length of time. Such regimes are plainly intended to create expectations upon which investors will rely; and to the extent that those expectations are objectively reasonable, they give rise to legitimate expectations when investments are in fact made in reliance upon them'); *9REN v. Spain*, Paragraph 295 ('There is no doubt that an enforceable "legitimate expectation" requires a clear and specific commitment, but in the view of this Tribunal there is no reason in principle why such a commitment of the requisite clarity and specificity cannot be made in the regulation itself where (as here) such a commitment is made for the purpose of inducing investment, which succeeded in attracting the Claimant's investment and once made resulted in losses to the Claimant').

70 See, e.g., *Charanne v. Spain*, Paragraph 503 ('the Claimants could not have the legitimate expectation that the regulatory framework established by RD 661/2007 and RD 1578/2008 would remain unchanged for the lifetime of their plants. Admitting the existence of such an expectation would, in effect, be equivalent to freeze the regulatory framework applicable to eligible plants, although circumstances may change').

71 *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Award, 17 August 2021, Paragraph 508.

Conclusion

While the historical debate about the relationship between FET and the minimum standard of treatment appears to have taken on less significance in recent years, the content of the FET standard and the basis on which legitimate expectations may be formed remains hotly debated, notably in the current wave of renewable cases against Spain and Italy. Importantly, it remains to be seen how future tribunals will interpret FET provisions in recent treaties, which seek to circumscribe their content, and whether they will still have 'teeth'. In the meantime, the selection of arbitrators for particular cases will remain important given the divergent views within the investor–state dispute settlement arbitral community as to how the FET standard, in its various formulations, should be interpreted and applied to a given set of circumstances.

CHAPTER 14

Substantive Protections: Expropriation

Derek Soller, Rafael T Boza, Kristina Fridman and Roland Reimers[1]

Introduction

For centuries, the right to compensation for the taking of private property has been one enshrined in most extant modern legal orders, most often at the constitutional level.[2] And, as discussed below, international law has protected foreign investors' right to compensation long before the International Centre for Settlement of Investment Disputes (ICSID) era.

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2 See, e.g., US Constitution, Amendment V; J Ristik, 'Right to Property: From Magna Carta to the European Convention on Human Rights', 30 *SEEU Review* 145, 146–147 (discussing how the Magna Carta 'provided the foundation for property rights protection'); Norway Constitution of 1814 with amendments to 2016, Article 105 ('If the welfare of the State requires that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Treasury.'); Basic Law of Germany (1949), Section I, Article 14; Constitution of the Federative Republic of Brazil of 1988 with Amendments to 2017, Article V, Sections XXII–XXV (guaranteeing the right to property and establishing that expropriation is allowed for public necessity with just compensation). The greatest exception, of course, were (and are in fewer cases) socialist and communist legal orders, which often limit (or even prohibit) personal ownership of certain types of property. See, e.g., Constitution of the USSR (1936), Chapter I, Articles 5–6, 10 (establishing that all property except personal property is owned by the state); Constitution of the USSR (1974), Chapter I, Articles 10–13 (same); The Constitution of the Socialist Federal Republic of Yugoslavia, Chapter I, Article 12 ('The means of production and other means of associated labour, products generated by associated labour and income realized through associated labour, resources for the satisfaction of common and general social needs, natural resources and goods in common use shall be social property. No one may acquire the right of ownership of social resources . . .').

It is therefore natural that an investor's right to be compensated for an expropriation is often enshrined in bilateral and multilateral investment treaties as well as trade agreements. It is arguably also the most important protection, for at least two reasons.

First, in some cases it is the only protection practically available to investors: numerous treaties only provide for arbitration of disputes regarding claims of expropriation, leaving investors without recourse for the violation of other substantive protections technically granted by the treaty.[3] Moreover other investment treaties, such as the United States–Mexico–Canada Agreement (and the North American Free Trade Agreement (NAFTA) that it recently replaced) exclude certain subject matter from all protections except expropriation.[4]

Second, and relatedly, to date the protection against expropriation without just compensation has been less 'controversial' than the protection of fair and equitable treatment (FET) and even protections afforded by national treatment or most-favoured nation (MFN) provisions. Many states have taken pains to limit the substantive scope of FET protections in both existing and new investment treaties. Similarly, the effect of MFN clauses, particularly the extent to which substantive protections can be imported through these clauses, has been the subject of considerable debate.

That is not to say that the concept of expropriation is free from controversy. As discussed below, there is no accepted definition of what constitutes an 'expropriation' in international law, particularly in cases where a state has not actually taken title to property of an investor, but has allegedly deprived an investor of property rights through other means – including through general or specific regulations ('indirect expropriation').

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3 See, e.g., Mongolia–US BIT (1997), Article XI (exempting most protections except those against expropriation and transfer in the treaty for 'matters of taxation'); US–Argentina BIT (1994), Articles XI and XII (exempting 'measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests' and all but expropriation and transfer for 'matters of taxation'); see also, e.g., A Newcombe, 'General Exceptions in International Investment Agreements', Draft Discussion Paper for the BIICL Eight Annual WTO Conference (2008) (discussing some of the general exceptions included in investment agreements).

4 United States–Mexico–Canada Agreement, Chapter 14, Annex 14-E.2 and 6(b) (limiting the availability of arbitration to certain covered sectors). North America Free Trade Agreement, Chapter II, Article 1114 (allowing environmental regulation otherwise consistent with the treaty), Article 1138 (excluding decisions motivated by national security) and Annex 1138.2 (excluding acquisition decisions in Canada and Mexico from protection).

Whether and to what degree a state may infringe on the property or activities, or both, of foreign investors without triggering liability for an expropriation is likely to only become more controversial, particularly in terms of the consequences of regulations promulgated to protect the environment. As discussed below, the recent decision of the tribunal in *Eco Oro v. Colombia* provides a framework to explore these issues.

The historical right to compensation for expropriation under international law

The historical origins of expropriation claims lie in physical seizures of investor property.[5]

In the late 19th and early 20th centuries, expropriation claims generally concerned physical takings and, at times, arose in the form of 'mass expropriations', such as large-scale confiscations and nationalisations.[6] Mass expropriations of this kind occurred, notably, in the context of revolutionary movements in Russia and Mexico.[7]

One of the earliest international arbitrations concerning the expropriation of physical property is the *Delagoa Bay Railway* matter, decided in 1900.[8] In *Delagoa*, the tribunal considered the issue of compensation due to the United States and the United Kingdom from Portugal, which had rescinded a 35-year railway concession and seized a railroad under construction in modern-day Mozambique, without paying any compensation.[9] In deciding this issue, the tribunal held that:

> *[w]hether one would, indeed, brand the action of the government as an arbitrary and dispoiling measure or as a sovereign act prompted by reasons of state which always prevails over any railway concession, or even if the present case should be regarded*

5 See, e.g., B Sabahi, N Rubins and D Wallace, Jr, 'Expropriation', in *Investor-State Arbitration*, Second edition (Oxford University Press, 2019), at Section 18.03 et seq.

6 See UNCTAD, 'Expropriation: UNCTAD Series on Issues in International Investment Agreements II' (July 2012), available at https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf.

7 ibid.

8 See Gleider I Hernandez, 'Delagoa Bay Railway Arbitration', *Max Planck Encyclopedia of International Law* (Oxford University Press, August 2017), available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2025?rskey=dlMBsJ&result=87&prd=OPIL.

9 See David C Baldus, 'State Competence to Terminate Concession Agreements with Aliens', 53 *Kentucky L.J.* 1, 56, available at https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=2996&context=klj.

> *as one of legal expropriation, the fact remains that the effect was to dispossess private persons from their rights and privileges of a private nature conferred upon them by the concession, and . . . the State which is the author of such dispossession is bound to make full reparation for the injuries done by it.*[10]

Expropriation of physical property also featured in the *Chorzów Factory* case, decided by the Permanent Court of International Justice (PCIJ) in 1928. There, Germany sought reparations from Poland, in the name of two companies, for Poland's seizure of property that those companies had owned in Silesia, a territory transferred to Polish control pursuant to the German–Polish Convention on Upper Silesia of 1922 (the Convention). In its decision, the PCIJ concluded that Poland's physical seizure of the property violated the Convention, and that Poland was 'under an obligation to pay, as reparation to [Germany], a compensation corresponding to the damage sustained' by the two companies on whose behalf Germany made its claim.[11]

Around the middle of the 20th century, the notion that expropriation could also occur in the absence of a physical taking – that is, by an 'effective transfer of property rights without physically seizing or formally taking over the property' – gained prominence.[12] Grounds for the growing relevance of 'indirect expropriations' lay primarily in two developments: (1) the enshrinement in international investment agreements of investors' rights to challenge state conduct; and (2) the heightened frequency with which states intervened in their respective economies.[13]

Although subject to increased attention in the mid-20th century, the concept of expropriation of intangible property was not new. In the *Chorzów Factory* case, the PCIJ held that the expropriation of the property at issue also constituted

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10 ibid.

11 See United Nations, 'Summaries of Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice', (2012), available at https://legal.un.org/PCIJsummaries/documents/english/PCIJ_FinalText.pdf. The *Chorzów* case is most often cited for its holding on damages in the case of an illegal expropriation, namely that damages should restore a claimant to the same position it would have been in if not for the illegal acts. Therefore, the state either (1) has to give the property back (restitution), or (2) if restitution is not practical or possible, pay full reparations for all damages resulting from the illegal acts.

12 See B Sabahi, N Rubins, D Wallace, footnote 5 at Section 18.03.

13 See UNCTAD, 'Expropriation: UNCTAD Series on Issues in International Investment Agreements II' (July 2012), available at https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf.

an 'indirect expropriation of the patents and contract' of the German company that had possessed the 'contractual rights for the management and operation of the factory'.[14] Similarly, in the *Norwegian Shipowners' Claims* case, a matter concerning the construction of ships in United States shipyards, the Permanent Court of Arbitration concluded that the violation of 'intangible property rights arising from a contract amounted to an expropriation'.[15]

In modern jurisprudence, the principle is now well established that intangible property, 'including rights arising from a contract', is 'susceptible of an expropriation in the same way as tangible property'.[16] Decisions issued by the Iran–US Claims Tribunal, as well as by tribunals in ICSID and NAFTA Chapter 11 cases, have echoed and entrenched this principle in recent decades.[17] Underlying this notion is the understanding that the 'key function of property is less the tangibility of "things", but rather the capability of a combination of rights in a commercial and corporate setting and under a regulatory regime to earn a commercial rate of return'.[18] In present times, therefore, it is accepted wisdom that compensable expropriations can be of tangible or intangible property.

Defining expropriation

Most investment treaties protect foreign investors from expropriation or measures tantamount to an expropriation that is not done (1) for a public purpose, (2) in a non-discriminatory manner, (3) in accordance with due process and (4) against

14 Christoph Schreuer, 'The Concept of Expropriation under the ETC and other Investment Protection Treaties', available at https://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf; see also *Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1 (involving the expropriation of property in Costa Rica by the government of Costa Rica, whereby the government did not take title to, or possession of, the property at the time of the expropriation).

15 See Schreuer, footnote 14. See *Norwegian Shipowners' Claims (Norway v. United States)*, Award, 13 October 1922, 1 RIAA 307 (analysing the requisitioning of ships being built, and yet to be built, by shipyards in the United States for Norwegian buyers).

16 See Schreuer, footnote 14.

17 ibid. (collecting cases).

18 Schreuer, footnote 14 (citing T Wälde and A Kolo, 'Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law', 50 *Int'l & Comp. L. Quarterly* 811, 835 (2001)).

payment of prompt adequate and effective compensation (which is often further defined as market value).[19]

Under such treaties, therefore, investors are owed compensation for expropriation regardless of the reason for it. In addition, investor–state tribunals have distinguished between 'lawful' expropriations – which meet the first three of the above criteria – and 'unlawful' expropriations that do not.[20] If the latter, most tribunals have found that damages should be measured pursuant to the standard of 'full reparation' set forth in the *Chorzów Factory* case, rather than the payment of 'prompt adequate and effective compensation'.[21]

However, there is no doubt that some tribunals have noted that, in many cases, these standards of compensation are identical.[22] As such, most awards addressing

19 See, e.g., Energy Charter Treaty, Article 13(1); Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Article V; Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, Article VI.

20 See, e.g., *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, Paragraph 480.

21 See, e.g., id. at Paragraph 481 ('The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation'); but see, *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, Paragraph 261.

22 See *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016 ('the Tribunal does not have to make a finding in this context as to whether the compensation standard to be applied is the standard contained in Article 5(1) subparagraphs 2 and 3 of the Treaty or rather the customary international law standard of restitution. In any event, the amount of compensation to be paid to Claimant will be based on the valuation of Norpro Venezuela as of the date of expropriation, i.e., 15 May 2010.'). See also, *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, Paragraph 541 ('[I]n the present case the distinction between compensation for a lawful expropriation and compensation for an unlawful expropriation may not make a significant practical difference.'); *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, Paragraph 307 ('It is not surprising, therefore, that, generally, where an unlawful expropriation is found to have occurred, treaty-based compensation will often provide the same result as compensation based on customary international law.').

expropriation claims question whether an 'expropriation' has occurred, and if so, whether the appropriate compensation has been provided for the taking.[23]

Therefore, before addressing whether an expropriation is prohibited by the treaty, a tribunal must determine whether an expropriation has occurred at all. This implicates two questions: whether there is 'property' capable of being expropriated and whether a state's actions constitute an expropriation, or a measure tantamount to expropriation, of that property.

In cases of classic expropriation, the state openly and officially takes title to a piece of private property. Tribunals and commentators refer to these acts as 'direct expropriation'. Here, generally, there is little discussion about whether 'property' exists, as it is the type of property (such as real property, stock ownership or certain types of intellectual property) subject to official, recorded recognition by the host state. Neither is there a discussion of whether a state's actions constitute an expropriation because usually the state has openly transferred ownership to another party or itself.

However, the majority of disputed expropriation claims implicate state measures alleged to be 'tantamount to an expropriation'. Tribunals and commentators refer to these cases as 'indirect expropriation'. Below, we first discuss the types of property that tribunals have found to be subject to expropriation and then examine the ways in which tribunals have determined whether particular actions of the state constitute a measure tantamount to expropriation.

23 See, e.g., *Tidewater Investment Srl and Tidewater Caribe, C.A. v. Venezuela*, ICSID Case No. ARB/10/5, Award, Paragraph 27 (discussing 'at the outset' respondents' acceptance that certain governmental acts had an expropriating effect before turning to a discussion of compensation); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (discussing finding of expropriation before turning to other issues); but see *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Partial Dissenting Opinion of Brigitte Stern, 7 September 2015, Paragraphs 6–24 (setting out that a legal expropriation and an expropriation that only lacks compensation should not be treated the same, and that the standard of compensation for a legal expropriation is just compensation and the standard of compensation for an illegal expropriation is full reparation).

Types of property subject to expropriation

For an expropriation to exist, there must be a property right to be expropriated. Whether there is a notion of property in international law was subject to debate. In 1982, Judge Rosalyn Higgins in her lecture in The Hague Academy of International Law said:

> *I am very struck by the almost total absence of any analysis of conceptual aspects of property. So far as the concept of property itself is concerned, it is as if we international lawyers say: property has been defined for us by municipal legal systems; and in any event, we know property when we see it. But how can we know if an individual has lost property rights unless we really understand what property is?*[24]

Judge Higgins's insight remains, some 40 years later, compelling. In the context of investment protection, a host states' laws regarding property remain the starting point for determining whether an expropriation has occurred.[25] However, there is more guidance now compared to 1984, as to what constitutes 'property' for the purposes of investor claims.

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24 Rosalyn Higgins, 'The Taking of Property by the State, Recent Developments in International Law', 176 *Recueil des Cours* 267, 268 (1982) (emphasis in original); see, e.g., *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, CA, et al. v. Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, Paragraphs 116–117; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, Paragraph 460; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment treaties: Standards of Treatment* (Kluwer, 2009), Paragraph 7.19 ('Conceptually, property can only be expropriated if it exists. If a right was never acquired or has been otherwise extinguished under local law, it cannot be expropriated.'); Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009).

25 See *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, 14 July 2006, Paragraph 47; *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, 6 February 2007, Paragraphs 69–80, 267–269 (discussing potential application of local law with respect to property rights and interpretation of applicable treaties); *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41. See, e.g., *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, Paragraph 162 ('In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.'); *Georg Gavrilović and Gavrilović d.o.o. v. Croatia*, ICSID Case No. Arb/12/39, Award, 26 July 2018, Paragraph 432 (holding same); *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, Paragraph 705 ('If no valid rights exist under domestic law, there can be no expropriation').

First, investment treaties often define and enumerate examples of what constitutes an 'investment' of a foreign investor that is subject to expropriation. A typical formulation of the definition of investment in these treaties reads: 'every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk' and includes '[an] enterprise, "shares, stock, and other forms of equity participation in an enterprise", construction contracts, licenses, authorization, and permits, among others'.[26]

Second, tribunals have grappled with the definition of property, explicitly or implicitly, in dozens of investor–state cases. They do so in the first instance when determining their jurisdiction, which only exists if an 'investment' exists per the definition in the relevant treaty. In addition, certain ICSID tribunals have added the criteria for 'investments' most famously enumerated by the tribunal in *Salini v. Morocco*. These factors require tribunals to evaluate whether the claimant's investment involves: (1) a contribution of money or assets; (2) a certain duration; (3) an element or assumption of risk by both sides; and (4) a contribution to the economic development of the host state (the *Salini* Factors).[27] In cases where a tribunal has found that a claimant's activities do not constitute an 'investment', there can of course be no expropriation of that investment.[28]

In many cases in which an investor claims the loss of a property right recognised by municipal law, or in the relevant treaty, there is no further discussion of whether an expropriation can exist. This is true, for example, in cases involving

26 *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Award, 22 March 2019.

27 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, Paragraph 52.

28 See, e.g., *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (holding that 'the Tribunal has held that the 2008 Concession and Industrias Infinito's other pre-existing mining rights did not qualify as "investments" of the Claimant under Article I(g) of the Treaty, because they are assets controlled indirectly by the Claimant through a host State enterprise that do not fall within the scope of the Treaty's definition of investment. For the same reason, these assets do not qualify as investment that can be expropriated directly in breach of Article VIII of the Treaty').

real property,[29] stock ownership[30] and intellectual property.[31] However, there are two types of rights that may not traditionally be considered property as such in host state legal systems, but are the subject of multiple expropriation claims: contractual rights and commercial opportunities.

Contractual rights

It has become well accepted that contractual rights are a type of property that can be the subject of claims for indirect expropriations, even if these 'rights' may not be formally recognised under the host state law.[32]

However, it is equally well accepted that not every breach of contract can be considered an indirect expropriation. Rather, tribunals have consistently held that the deprivation of contractual rights must be the result of exercise by the state party of sovereign authority, rather than simply the actions of a contracting party.[33]

In cases where the investor has a contractual relationship with a state body, authority, state-owned entity or even a private entity that under certain circumstances acts as the state's arm in a business transaction, the expropriation of

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29 See, e.g., *Georg Gavrilović and Gavrilović d.o.o. v. Croatia*, ICSID Case No. Arb/12/39, Award, 26 July 2018; *Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1.

30 ICSID Case No. ARB/06/2, Award, 16 September 2015, Paragraph 239 (finding that the respondent's revocation of the claimant's concessions substantially deprived the claimant of the value of its investment – the shares that the claimant held in a company).

31 *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 8 July 2016, Paragraphs 272–273, 286 (the tribunal looked at the Uruguayan Trademark Law and the relevant treaty to determine whether claimants had a property right to trademark, finding that claimants have such a right, but denying the claimants' indirect expropriation claim under the police powers doctrine and because the claimants only suffered a partial loss of its profits).

32 See, e.g., *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Final Award, 22 December 2003, Paragraph 61 (citing the *Norwegian Shipowners Claim* for the proposition that international law recognises the possibility of expropriation of contractual rights); *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009; but see, *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezelo v. Republic of Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015 (holding that 'it is not possible to expropriate a pure contractual right because it is not a thing that has an independent existence from the personalized contractual relationship in which it is embedded').

33 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/56/10, Articles 4, 7, 31.

contractual rights may take the form of a breach of contract if the state-owned entity acted as a sovereign.[34] As stated by the tribunal in *Parkerings-Compagniet v. Lithuania*:

> *[A] breach of an agreement will amount to an expropriation only if the State acted not only in its capacity of party to the agreement, but also in its capacity of sovereign authority, that is to say using its sovereign power. The breach should be the result of this action. A State or its instrumentalities which simply breach an agreement, even grossly, acting as any other contracting party might have done, possibly wrongfully, is therefore not expropriating the other party.*

Other intangible rights

In some investor–state cases, an investor has not sought to identify any alleged property right formally recognised by a host state's legal system, or guaranteed by contracts. Rather, the investor has alleged a state's interference with the commercial opportunities of investment undertaken.

There are numerous examples of cases in which the tribunal has rejected a claim of expropriation that alleged such intangible rights.[35] These cases tend to subscribe to the logic expressed by the tribunal in *Emmis v. Hungary*, which found that 'Hungarian law is undoubtedly broad enough to include intangible

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34 See, e.g., *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, Paragraph 443; August Reinisch, 'Expropriation', in Peter T Muchlinski, Federico Ortino, Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Second edition (Oxford University Press, 2012) at 128.

35 See, e.g., *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, Paragraph 301 ('right to formal negotiations cannot be subject to an "expropriation" in the sense of Article 5 of the BIT, because it lacks the nature of proprietary right, i.e. of "asset" in the sense of Article 5(2) of the BIT'); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, Paragraph 118 (finding no expropriation because 'it appears to the Tribunal that the Claimant never really possessed a "right" to obtain tax rebates upon exportation of cigarettes'); *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020, Paragraph 472 ('At best, Eskosol might argue that it was *well positioned to eventually secure a legal right*, but nothing in the Italian legislation transformed positioning to secure a future legal right into a legal right as such.' (emphasis in original)); *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021, Paragraph 256 ('Article 13 of the ECT, like other expropriation guarantees, is concerned with the protection of property interests, including certain legal rights to money or benefits, from seizure or taking, or with conduct equivalent thereto. It is not intended to

assets as well as movable and immovable property *stricto sensu*, it is nevertheless an essential attribute of a proprietary right that it be an asset capable of ownership, valuation and alienation'.[36]

However, a few awards have recognised the existence of these rights, while not finding an expropriation. For example, the tribunal in *Pope & Talbot* recognised that access to a market could be a type of 'property right' under NAFTA.[37] In that case, the tribunal did not find an expropriation because the claimant was still able to have limited market access. Similarly, in *Cargill v. Poland*, the tribunal found that, in principle, the claimant 'has a right to use and enjoy the production facilities owned by its subsidiary. This right is an intangible asset which is included in the definition of Investment given by the Treaty.'[38] However, it found that the deprivation of this asset did not sufficiently deprive the investor of its overall investment to be considered an expropriation.[39]

Finally, in at least one fairly recent case, *UP v. Hungary*, the tribunal found that an indirect expropriation may be based on the diminution value of an investor's shares, without interference with any other property right.[40] There, the investor engaged in the business of selling 'food vouchers' that employers could provide to employees as compensation at a lower tax rate than salary. A change in Hungarian law reduced the tax benefit to these vouchers and created other vouchers that were more beneficial (and could only be issued by banks, which the claimant was not).[41] Because 97 per cent of the claimant's business had been the sale of food vouchers, the tribunal found that there had been an indirect expropriation of the claimant's shares.[42] The tribunal did not address whether the result would be the same if the claimant had owned a more diverse investment, rather than one that was based on one aspect of the Hungarian tax code.

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protect the wider range of interests associated with the idea of reasonable or legitimate expectations.').

36 *Emmis International Holding B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Award,16 April 2014, Paragraph 192.

37 *Pope & Talbot Inc. v. The Government of Canada*, Interim Award, 26 June 2000, Paragraphs 81–96.

38 *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, 29 February 2008, Paragraph 583.

39 id. at Paragraphs 586–589.

40 *UP (formerly Le Chèque Déjeuner) and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, Paragraphs 304–305.

41 ibid.

42 id. at Paragraphs 352–354.

Determining whether a government act constitutes an expropriation

If a protected property right is identified, tribunals examining claims of indirect expropriation must examine whether the property right has in fact been indirectly expropriated. It has long been accepted that such indirect expropriation may be accomplished with one action, or through a series of measures that have a cumulative effect of an expropriation – a 'creeping expropriation'.

In either case, tribunals have used numerous different formulations to define whether a state's actions constitute an expropriation under the relevant treaty. However, these can be roughly divided into two tests: the 'sole effect' doctrine;[43] and the 'police powers' doctrine.[44] They are discussed in turn below.

The sole effects doctrine

Under the sole effects doctrine, a tribunal determines the existence of an indirect expropriation solely through an inquiry into the 'reality of the impact'[45] of government action, without examination of the stated purpose or propriety of the measure.

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43 Rudolf Dolzer and Felix Bloch, 'Indirect Expropriation: Conceptual Realignments?', in 5 *Int'l L.F. Du Droit International* 155 at 163 (2003).

44 See id. at 158; see also Reinisch, footnote 34, at 33; Campbell McLachlan QC, et al., *International Investment Arbitration* (Oxford University Press, 2007) at 296; see also B Appleton, 'Regulatory Takings: The International Law Perspective', 11 *N.Y.U. Envtl L.J.* 35, at 39–46.

45 McLachlan, footnote 44 at 295; see also Appleton, footnote 44 at 38 (explaining that the US Supreme Court considered that 'regulatory takings require the court to look to the impact of the regulation and to establish the existence of a substantial impact'); see also *Compañía del Desarrollo de Santa Elena SA v. Costa Rica*, Award, ICSID Case No. ARB/96/1, 17 February 2000 (the Santa Elena property, owned by Compañia del Desarrollo de Santa Elena, SA (CDSE), comprised more than 15,000 hectares of land, including 30km of Pacific Ocean coastline, a tropical dry forest and numerous rivers, springs, mountains and valleys. CDSE purchased the property in 1970 to develop portions of the tract as a tourist resort and residential community. On 5 May 1978, Costa Rica issued an expropriation decree for Santa Elena to convert the property into a national park. However, Costa Rica did not compensate CDSE for the expropriation and did not take title to the property until this tribunal issued its arbitral award); Kenneth I Juster, 'The Santa Elena Case: Two Steps Forward, Three Steps Back', 10 *Am. Rev. of Int'l Arb.* 3, 371 (1999).

The rationale behind this test was stated by the tribunal in *Siemens v. Argentina*, which held that:

> *The [relevant BIT] refers to measures that have the effect of an expropriation; it does not refer to the intent of the State to expropriate. A different matter is the purpose of the expropriation, but that is one of the requirements for determining whether the expropriation is in accordance with the terms of the Treaty and not for determining whether an expropriation has occurred.*[46]

The impact of the state measures to the investment must be 'of a certain "magnitude or severity" in order to constitute an expropriation'.[47] There is no clear 'red-line' determining what is that 'certain' magnitude that must be reached before a measure or series of measures can be considered expropriation. The 'test is whether that interference is sufficiently restrictive to support the conclusion that the property has been "taken" from the owner'.[48]

In certain cases, tribunals have focused on the effect on the claimants' entire investment. Thus, for example, in the recent award in *Muhammet Çap & Sehil Inşaat Endustri v. Turkmenistan*, the tribunal stated that '[i]n the Tribunal's view, to constitute expropriation, the acts, omissions and interferences must affect the value of the whole investment, not just part(s) of it'.[49] However, other tribunals have emphasised that this test can be applied to an entire investment or 'distinct part thereof'.[50]

The first formulation, requiring a diminution of the value of an entire investment, has generally been applied in cases in which the claim of expropriation regards the diminution in value of an investment due to the expropriation of 'commercial opportunities' rather than traditional property rights. For example, in *Muhammet Cap*, the claimant alleged a creeping expropriation through a series

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46 *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, Paragraph 270.

47 Reinisch, footnote 34, at 30 (citing *Phillips Petroleum Co. v. Iran*, 21 Iran–U.S. C.T.R. 79 (1989) (citing *Pope & Talbot, Inc. v. Government of Canada*, Interim Award, 7 ICSID Rep 43, 69)); *Tza Yap Shum v. Republic of Peru*, Award, ICSID Case No. ARB/07/6, 7 July 2011 (deciding that the imposition of a tax lien on accounts and funds flowing through the financial system was an indirect expropriation).

48 McLachlan, footnote 44 (citing *Pope & Talbot*).

49 *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, Paragraph 809.

50 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, Paragraph 193.

of alleged government actions, including breaches of contract and unwarranted investigations that allegedly destroyed the value of the claimants' business. In *Pope & Talbot v. Canada*, the claimant alleged that Canada's regulation of the amount of softwood timber it could export to the US at a particular price was tantamount to expropriation and that each time Canada reduced its quota allocation, a further expropriation occurred.[51] The tribunal held that the claimant's 'access to the U.S. market is a property interest subject to protection under Article 1110', but that Canada's interference with that property right was not substantial enough to constitute an expropriation.[52] Given that the claimant was still in control of its business, still exporting softwood lumber to the US, and still earning a profit, the fact that its profits had diminished was insufficient to show an indirect expropriation.[53]

In *ADM v. Mexico*, as another example, the government imposed a significant tax for four years that the claimants alleged was discriminatory and amounted to an expropriation.[54] The tribunal again held that the tax was not sufficiently restrictive to amount to an expropriation.[55]

Finally, in *Total v. Argentina*, the claimant alleged that the loss of value to its shares due to Argentina's freeze on gas tariffs in response to the 2001 financial crisis did amount to an expropriation.[56] The tribunal held that as the claimant retained control of its investment, it had failed to show that all or substantially all of the value of its investment had been deprived and thus, no expropriation had occurred.[57] However, where identifiable rights traditionally considered 'property' are the target of the alleged expropriation, tribunals may be more open to considering that an entire investment need not be affected. For example, a state's permanent seizure of a factory owned by an investor's subsidiary would be an expropriation, regardless of whether that company owned numerous other assets.[58]

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51 *Pope & Talbot Inc. v. The Government of Canada*, Interim Award, 26 June 2000, Paragraphs 81–86.

52 id. at Paragraph 96.

53 id. at Paragraphs 100–105.

54 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, Paragraphs 239, 246.

55 id. at Paragraphs 239–252.

56 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, Paragraphs 185–187.

57 id. at Paragraphs 191–199.

58 See, e.g., *Georg Gavrilović and Gavrilović d.o.o. v. Croatia*, ICSID Case No. Arb/12/39, Award, 26 July 2018.

While some commentators have called the sole effects doctrine the 'majority rule',[59] this may only be true in a certain type of case, namely one in which the alleged measures' effect was specific to the claimant's property, rather than a measure of general application that happened to affect the claimant.

For example, in *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina,* a water concession was the subject of numerous actions by local authorities that destroyed the claimants' ability to run the concession profitably.[60] Similarly, in *Metalclad v. Mexico*, the claimant received a federal permit to construct a hazardous waste landfill. Months after construction began, local authorities eventually demanded that claimants apply for a municipal building permit, which it denied after construction was finished.[61] In the case of *Santa Elena v. Costa Rica*, the subject of the alleged expropriation was a particular piece of property, taken in all but name (and later in name) by the host state for purposes of creating a nature preserve.[62]

In *Burlington v. Ecuador*, as a more recent example applying the sole effects test, Ecuador passed Law 42, which taxed certain profits from crude oil at 50 per cent and then later at 99 per cent.[63] In setting out the standard for an indirect expropriation, the tribunal noted that '[w]hen assessing the evidence of an expropriation, international tribunals have generally applied the sole effect and focused on substantial deprivation'.[64] The tribunal concluded that Law 42 did not constitute an indirect expropriation even at the 99 per cent tax rate because the claimant was still able to generate a commercial return, even if its profits had diminished considerably.[65]

In each of these cases, faced with an action or series of actions aimed at a particular piece of property, the tribunal looked only at the effects of those actions to determine whether the state had effected an indirect expropriation.

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59 See McLachlan, footnote 44 at 296 (characterising the rule as controversial); see Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Fourth edition (Sweet and Maxwell Ltd, 2004) at 494–496.

60 See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007.

61 See *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, Paragraphs 102–112.

62 *Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1.

63 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, Paragraph 419.

64 id. at Paragraph 396.

65 id. at Paragraphs 420–457.

The police powers doctrine

Numerous other tribunals have foregone the sole effects test and instead relied upon the 'police powers' doctrine to determine whether a state's actions constitute an indirect expropriation. Under this analysis, the tribunal reviews the alleged purpose of state actions as well as the effect of the measures to determine whether the regulation is within the valid police powers of the state.[66] If the measure is (or at least some combination of) rational, proportional and non-discriminatory, the state will not be liable for expropriation, even if the investor is substantially deprived of a property right.[67]

The cases in which tribunals apply the police powers doctrine tend to be those in which a government action does not prima facie concern one particular piece of property, but rather are the results of measures of general application that have an effect on the claimants' property.[68] In such cases, as stated by the late Francisco Orrego Vicuña, 'Government officials love to regulate, investors and businessmen hate to be regulated. Reasonable regulations are not an obstacle. They are needed and many times welcome. It is the abusive regulation that ought to be controlled. International mechanisms are one way of doing this.'[69]

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66 See *Sedco, Inc. et al. v. National Iranian Oil Company et al.*, Interlocutory Award of the Iran–United States Claims Tribunal, Chamber Two No. ITL-55-129-33 of 17 September 1985 at Paragraph 90.

67 See *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, Paragraphs 291–301, 305.

68 See e.g., *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, Paragraphs 279–288; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the tribunal on Jurisdiction and Merits, 3 August 2005, Part IV.D, Paragraph 7 ('[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.'); *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, Paragraphs 237–240 ('In sum, a general regulation is a lawful act rather than an expropriation if it is non-discriminatory, made for a public purpose and taken in conformity with due process.').

69 Francisco Orrego Vicuña, 'Carlos Calvo, Honorary NAFTA Citizen' 11 *N.Y.U. Env. L.J.* 19 (2002).

The decision in *Philip Morris Brands Sàrl et al v. Oriental Republic of Uruguay* is a well-known example of application of the police powers doctrine.[70] The tribunal was composed of three well-known arbitrators, Professor Piero Bernardini, Gary Born and Judge James Crawford, under the Switzerland–Uruguay Bilateral Investment Treaty (BIT). Philip Morris argued that Uruguay's regulations imposing restrictions on the sale of tobacco products, including uniform presentation of tobacco products (the 'single presentation') and displaying warnings and images on the cigarette boxes (the '80/80 requirement') were indirect expropriations of its brand and goodwill.[71] Uruguay contended that the challenged measures were a legitimate exercise of its 'police power' to protect public health. The tribunal analysed both the sole effects (as 'substantial depravation') and the policy powers theories and found using both theories that there was no expropriation.

As to the specific analysis of Uruguay's police powers, the tribunal considered that a state's 'reasonable bona fide exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that measures taken for that purpose should not be considered expropriatory'.[72] Specifically, in evaluating Uruguay's adopted measures, the tribunal considered that they were consistent with Uruguay's international obligations, where adopted for the public welfare, they were not discriminatory and they were proportionate. Arbitrator Gary Born dissented, but not as to the existence of an expropriation. Rather, Mr Born argued that the measures were breaches of the obligation to provide FET and considered that the single presentation requirement was 'arbitrary and disproportionate' and 'wholly unnecessary to accomplish' its purpose.[73]

Finally, certain recent investment treaties have included text that arguably requires tribunals to use the police powers doctrine when deciding on the existence of an indirect expropriation. For example, Annex 811(2)(b) of the Canada–Colombia Free Trade Agreement (FTA) includes guidelines as to what constitutes an expropriation. The recent case of *Eco Oro,* discussed below, shows

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70 ICSID Case No. ARB/10/7, Award, 8 July 2016; for an extensive discussion of the *Phillip Morris v. Uruguay* case, see Prabhash Ranjan, 'Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay', 9 *Asian J. of Int'l L.* 98 (2019).

71 ICSID Case No. ARB/10/7, Award, 8 July 2016.

72 id. at Paragraph 295; see also OECD, '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law', (2004) OECD Working Papers on International Investment 4/2004, OECD Publishing.

73 *Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion Co-Arbitrator Gary Born, 8 July 2016.

how one tribunal applied such language to a claim of indirect expropriation. Notably, the tribunal decision in *Eco Oro* classified the application of the Annex as an 'exception' to actions that would otherwise have constituted an indirect expropriation.[74] This may signal that the tribunal would have used the sole effect test, but for the inclusion of the Annex.

Indirect expropriation: a case study in Eco Oro Minerals v. Colombia

As discussed above, it has long been recognised that contractual rights may be indirectly expropriated, but there is some disagreement among tribunals regarding whether and when regulation that deprives an investor of its property amounts to an indirect expropriation. One area in particular has created significant tension between the investor–state dispute settlement framework and the state's power to regulate: the environment. Climate change is only getting worse, and many countries are far from the targets set in the Paris Agreement.[75] Regulation curtailing fossil fuel investment and moving towards renewable energy, among other environmental initiates, is necessary for states to meet those commitments.[76] However, implementing environmental regulations can have significant impacts for states.

For example, when the Obama administration denied the permit for the controversial Keystone XL Pipeline, the company behind the project, TC Energy Corporation,[77] filed a US$15 billion NAFTA claim.[78] After the Trump administration, which notoriously rolled back many important environmental protections,[79] subsequently approved the project, TC Energy voluntarily discontinued the

74 See *Eco Oro,* Paragraphs 623–699.

75 United Nations, 'ICC report: "Code red" for human driven global heating, warns UN chief', 9 August 2021, https://news.un.org/en/story/2021/08/1097362.

76 K Tienhaara, 'Regulatory Chill in a Warming Word: The Threat to Climate Policy Posed by Investor-State Dispute Settlement', 7 *Trans. Environ. L.* 229, 230 (2018).

77 At the time of the request for arbitration, the company was called TransCanada Corporation. See 'About our name change', https://www.tcenergy.com/TC-Energy/.

78 *TransCanada Corporation & TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/16/21, Request for Arbitration, 24 June 2016.

79 N Popovich et al., 'The Trump Administration Rolled Back More than 100 Environmental Rules. Here's the Full List', *New York Times,* 20 January 2021, https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html.

arbitration.[80] However, after the Biden administration changed course again and cancelled the Keystone XL Pipeline, TC Energy announced in July 2021 that it had filed a new notice of intent to renew its claim for US$15 billion.[81]

When Germany passed legislation to shut down all of its nuclear power plants in response to the 2011 Fukushima crisis, as another example, it was hit with a €7 billion claim by Vattenfall, alleging breaches of the Energy Charter Treaty (ECT).[82] Germany eventually settled all of the claims related to the shutdown for a total of €2.4 billion.[83] These and other examples have caused some scholars to worry that the protections afforded to foreign investors may stand in the way of states' ability to effectively deal with the issue of climate change through environmental regulation.[84]

One way that states have tried to address this issue is by limiting the applicability of protections for foreign investors when it comes to environmental regulations. A survey in 2011 found that over half of the new treaties concluded since 2005 addressed environmental concerns in some way.[85] A similar, but expanded study in 2014 found that nearly all of the investment treaties concluded in 2012 and 2013 included some language regarding the environment.[86] This language generally falls into three categories: recognising protection of the environment as a goal of the treaty, carving out environmental regulation from measures that can constitute an indirect expropriation and preventing a race to the bottom by prohibiting the contracting states from avoiding environmental regulation to attract foreign

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80 *TransCanada Corporation & TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/16/21, Request for Discontinuance pursuant to Rule 34(1), 23 March 2017; *TransCanada Corporation & TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/16/21, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding, 24 March 2017.

81 C Sanderson, 'Keystone XL investor threatens new claim against US', *Global Arbitration Review*, 5 July 2021, https://globalarbitrationreview.com/keystone-xl-investor-threatens-new-claim-against-us.

82 C Sanderson, 'Germany settles with Vattenfall', *Global Arbitration Review*, 5 March 2021, https://globalarbitrationreview.com/germany-agrees-settle-vattenfall-case.

83 ibid.

84 See e.g., K Tienhaara, footnote 76; K Miles, 'Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes', 1 *Climate L.* 63, 76 (2010) ('It is the emergence of this approach in investor-state arbitral jurisprudence that causes concern for the implementation of new environmental protection measures, including new climate change mitigation regulation.').

85 K Gordon and J Pohl, 'Environmental Concerns in International Investment Agreements: A Survey', OECD Working Papers on International Investment (2011), at 5.

86 K Gordon, J Pohl and M Bouchard, 'Investment Treaty law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey', OECD Working Papers on International Investment (2014), at 5.

investment.[87] Admittedly, despite the growing popularity of these provisions in new BITs, and particularly trade agreements with investment protection clauses, most BITs and other investment agreements still do not include any provisions mentioning the environment.[88]

Nonetheless, the case of *Eco Oro v. Colombia* provides a useful case study of tribunals interpreting these new provisions.[89] Eco Oro Minerals Corporation (Eco Oro) obtained a mining concession from Colombia in 2007 after beginning its exploration activities in the 1990s.[90] Colombia subsequently passed new environmental regulations and, after finding that a portion of its concession was within the Santurbán Páramo (now protected by the regulation), reduced Eco Oro's concession by about 50 per cent.[91] Eco Oro then brought its claims against Colombia pursuant to the Canada–Colombia FTA.[92]

Annex 811 of the Canada–Colombia FTA provides as follows:

> *Indirect Expropriation*
> *The Parties confirm their shared understanding that:*
> 1 *Paragraph 1 of Article 811 [regarding expropriation] addresses two situations. The first situation is direct expropriation, where an investment is nationalized or otherwise directly expropriated as provided for under international law.*
> 2 *The second situation is indirect expropriation, which results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure.*
> *a. The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:*

87 C Beharry and M Kuritzky, 'Going Green: Managing the Environment Through International Investment Arbitration', 30 *Am. U. Int'l L. R.* 383, 389–395 (2015); Y Zhu, 'Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?', 60 *Harv. Int'l L.J.* 377, 402–411 (2019).

88 K Gordon et al., footnote 86, at 5, 10. Some scholars have also questioned the prudence of these provisions, arguing that they may open the door for states to abuse environmental regulation to expropriate foreign investors' property. See, e.g., J Marlles, 'Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law', 16 *J. Transnat'l L. & Pol'y* 275, 329–335 (2007).

89 *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 10 September 2021.

90 *Eco Oro v. Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum, at Paragraphs 96–104.

91 id. at Paragraphs 110–173.

92 id. at Paragraph 1.

> *ii. the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,*
>
> *iii. the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations, and*
>
> *iv. the character of the measure or series of measures;*
>
> *b. Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation.*[93]

The tribunal began its analysis by examining whether Eco Oro had rights that were capable of being expropriated, namely, the right to explore and exploit and the right to extend its concession.[94] After an examination of the status of concession rights under Colombian law, the tribunal found there was such a property right.

The tribunal then considered whether the challenged measures were a legitimate exercise of Colombia's police powers in accordance with Annex 811.[95] Acknowledging that there was 'no clear consensus' on the order of analysis, the tribunal evaluated (1) whether the criteria for indirect expropriation are met, and (2) whether an exception applies.[96] Specifically here, the tribunal analysed whether the challenged measures were 'non-discriminatory' as 'designed *and* applied to protect the environment'.[97] Using this analysis, the tribunal found that Eco Oro's loss of its 'right to exploit' was 'capable of being considered to

93 Canada–Colombia Free Trade Agreement, Chapter Eight, Annex 811 (2008) (emphasis added).

94 *Eco Oro v. Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum, Paragraphs 440, 623.

95 id. at Paragraph 624.

96 ibid.

97 id. at Paragraphs 627, 635 (emphasis added).

be a substantial deprivation, such as to amount to an indirect expropriation'.[98] Nevertheless, the tribunal concluded that Colombia's measures were not discriminatory, were designed and applied to protect a legitimate public welfare objective (the environment), and were adopted in good faith, thereby a legitimate exercise of police powers and not an indirect expropriation.

The *Eco Oro* tribunal interpreted Annex 811(2)(b) of the Canada–Colombia FTA as '[a]n assessment of whether there has been interference "*with distinct, reasonable investment-backed measures*" and "*the character of the measure or series of measures*" . . . can only take place with reference to whether those measures "*are designed and applied to protect legitimate welfare objectives*"'.[99] The tribunal 'further [found] that the question of whether the measure has been adopted in good faith or bona fides is the same for both the inquiry into expropriation and that into police powers and necessitates consideration of the purpose of the measures and the degree to which the State's public policy concern is genuine as opposed to the process by which the measures were created'.[100]

Although the tribunal rejected Eco Oro's indirect expropriation claim, the tribunal did find a breach of Article 805 regarding the minimum standard of treatment (MST).[101] This decision is in line with other recent trends, most notably for the myriad of cases brought under the ECT for changes in renewable energy schemes where 'indirect expropriation has played a subordinate or non-existent role in resolving those disputes', with claimants instead relying on FET.[102]

Notably, both party-appointed arbitrators filed a partial dissent. Professor Horacio A Grigera Naón, appointed by Eco Oro, argued that exceptional circumstances had been met in this case because of the retroactive effect of Colombia's environmental regulations.[103] Therefore, according to Professor Naón, there was

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98 id. at Paragraph 634; see also *Tecnicas Medioambiaentales Tecmed SA v. United Mexican States*, ICSID Case No. ARB (AF)/00/2 l, Award, 29 May 2003 (the tribunal awarded compensation under a BIT between Mexico and Spain, in respect of a refusal by a Mexican state agency, the National Institute of Ecology, to renew a licence to operate a landfill site).

99 *Eco Oro v. Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum, Paragraph 629 (emphasis added).

100 ibid.

101 id. at Paragraph 821.

102 I Timofeyev et al., 'Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty', *Global Arbitration Review*, 10 November 2020, https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/4th-edition/article/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty.

103 *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Partial Dissenting Opinion (Horacio A Grigera Naón).

an indirect expropriation in accordance with Annex 811 of the Canada–Colombia FTA.[104] In regards to the environmental motivations of the measures, Professor Naón emphasised that 'the unilateral pursuit of such objectives by the State without the payment of compensation cannot be privileged without ignoring the reference to *rare circumstances* because an interpretation of this provision ignoring such express qualification of the State's rights to protect the public welfare would be incorrect . . .'.[105] Professor Philippe Sands QC, appointed by Colombia, argued that Colombia had not breached MST.[106] Professor Sands made clear that his view was motivated by the reasons for the regulation:

> *This case turns on a struggle between competing societal objectives which pull in opposite directions: on the one hand, the protection of the treaty rights of an international investor; on the other hand, the ability of a community to take legitimate measures to conserve its environment.*[107]
>
> *Like many governments around the world, Colombia has found the challenge of taking reasonable measures to protect its environment to be daunting, one that takes time and is often composed of a multitude of decisions that apparently take contrary directions. . . . In the age of climate change and significant loss of biological diversity, it is clear that society finds itself in a state of transition. The law – including international law – must take account of that state of transition, which gives rise to numerous uncertainties.*[108]
>
> *[T]he Majority has taken the evidence before the Tribunal and concluded that the Respondent was somehow not truly motivated by the aim of environmental protection. This conclusion is difficult to comprehend, given the evidence and the finding in the context of the expropriation claim that the Respondent's actions were motivated by a desire to protect the environment.*[109]

In sum, the decision of tribunals regarding whether an environmental regulation constitutes an indirect expropriation may be motivated by not only the specific provisions of the applicable treaty, but also the arbitrators' view regarding the importance of the regulation implemented.

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104 id. at Paragraphs 31–32.

105 id. at Paragraph 28 (emphasis in original).

106 *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Partial Dissent of Professor Philippe Sands QC, 9 September 2021.

107 id. at Paragraph 1.

108 id. at Paragraphs 32–33.

109 id. at Paragraph 34.

CHAPTER 15

Substantive Protections: Obligations

Babatunde O Fagbohunlu, SAN and Hamid Abdulkareem[1]

This chapter discusses three distinct substantive protections: umbrella clauses, transfer of funds clauses and prohibitions of performance requirements. For each substantive protection, we provide an overview and treaty examples, and discuss the relevant case law, identifying (where applicable) the jurisprudential debates that have emerged.

Umbrella clauses

Introduction to umbrella clauses

The violation by a state of a contract between itself and an investor of another state is not generally considered to be a violation of international law.[2] Yet almost all foreign investments operate within the framework of contracts entered into between investors and host states. An umbrella clause (or an observance of undertakings clause) is a provision in a bilateral or multilateral investment agreement that aims to provide some measure of protection in international law to an investor when a host state or an emanation of it violates obligations contained in an investor–state contractual arrangement or other domestic instrument

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2 *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, Paragraph 167 (arbitrators: Feliciano, Faurès and Thomas); *Supervisión y Control SA v. The Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, Paragraph 279 (arbitrators: Wobeser, Klock Jr and Romero).

pertaining to the investment. Whether, and to what extent, an umbrella clause is effective to provide this protection has been the subject of intense debate between arbitrators and scholars.

A typical umbrella clause provides that 'each contracting party shall observe the obligation it may have entered into with regard to the investments of nationals and companies of the other contracting party'.[3] This typical formulation stands in the middle of a spectrum, and on either side of it there are other formulations that provide less or more clarity as to what is intended. Moreover, the concept of an umbrella clause has its origins in intense debates between international law scholars, jurists and arbitrators over the question of whether a treaty can accord standing in international law and before international investment tribunals to purely contractual arrangements between a state and an investor.

The discussion that follows highlights the significant differences in the formulations adopted by different umbrella clauses in bilateral investment treaties (BITs) and preferential trade and investment agreements (PTIAs), as well as model templates of these agreements. Also, the differing positions taken by international investment arbitration tribunals sometimes turn upon the language of the relevant clause. At other times, decisions can only be explained by the philosophical leaning of the tribunal regarding the right balance to be maintained between protecting the rights of foreign investors, on the one hand, and preserving the sovereign authority of the host state, on the other.

Treaty examples

The Energy Charter Treaty and the Philippines–Switzerland BIT

Article 10(1) of the Energy Charter Treaty[4] provides that '[e]ach Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party'. By contrast, Article X(2) of the Philippines–Switzerland BIT[5] provides that 'Each Contracting Party shall

3 Agreement Between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments (2001) (the China–Nigeria BIT), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3366/download.

4 The Energy Charter Treaty (1994), available at www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf and https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/download.

5 Agreement between the Republic of the Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (1997) (the Philippines–Switzerland BIT), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2174/download.

observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party'. As discussed below, the choice between the phrase 'entered into' as opposed to 'has assumed' has been considered to be significant by a number of investment arbitration tribunals.

The Pakistan–Switzerland BIT and the Italy–Jordan BIT

By further contrast with treaties worded similarly to the Energy Charter Treaty or the Philippines–Switzerland BIT,[6] Article 11 of the Pakistan–Switzerland BIT provides that '[e]ach Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party'. Article 2(4) of the Italy–Jordan BIT[7] requires each contracting party to 'create and maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance in good faith of all undertakings assumed with regard to each specific investor'. As discussed below, tribunals have attributed significance to the words 'guarantee the observance' and 'maintain a legal framework' used in these treaties, when contrasted with the words 'shall observe' used in BITs such as the Energy Charter Treaty.

The Austrian Model BIT

The Austrian Model BIT[8] is significant for the clarity it offers in relation to some of the issues that have engaged investment arbitral tribunals. It first sets out the standard formulation, and then clarifies that 'this means, inter alia, that the breach of a contract between the investor and the host state or one of its entities will amount to a violation of this treaty'.

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6 Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments (1995) (the Pakistan–Switzerland BIT), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2130/download.

7 Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments (1996) (the Italy–Jordan BIT), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3379/download.

8 Austria Model BIT (2008), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4770/download.

Case law

Claims under umbrella clauses have arisen in different contexts, including in relation to contracts for pre-shipment inspection,[9] construction contracts,[10] promissory notes[11] and regimes established under domestic laws and regulations.[12] In these cases, tribunals have had to decide whether a state's breach of a contract or a domestic law or regulation affecting the investment also amounts to a violation of an umbrella clause contained in a BIT or a multilateral investment treaty. There is no consistent pattern emerging from the body of decisions. Some decisions have outrightly rejected the notion that umbrella clauses have any autonomous character that is capable of according significance in international law to obligations assumed by states under state commercial contracts or domestic legislation. Others, while recognising that an umbrella clause may equate a breach of a state contract to a breach of the relevant treaty, have sought to curtail the scope of umbrella clauses by interpreting them as being applicable only: where the contract is made or breached by the state in the exercise of its sovereign authority; where there is privity between the entity breaching the obligation and the entity to which the obligation is owed; or if the obligation arises from a contractual obligation but not from a unilateral act of the state such as domestic legislation or regulations.

No autonomous character, merely declaratory or aspirational

SGS v. Pakistan[13] exemplifies the decisions in this category. The tribunal in this case considered the umbrella clause in the Pakistan–Switzerland BIT, which reads: 'Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.' The tribunal rejected the argument that the umbrella clause (Article 11) had 'elevated' a contractual breach by a state to a breach of the treaty, on the bases that: (1) this 'elevation' will make Article 11 'susceptible of almost indefinite expansion' given that the clause refers to commitments

9 *SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003.

10 *Strabag SE v. Libya*, Award, ICSID Case No. ARB(AF)15/1, Award, 29 June 2020 (arbitrators: Crook, Crivellaro and Ziadé).

11 *Fedax NV v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Award, 9 March 1998 (arbitrators: Vicuña, Heth and Owen).

12 *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (arbitrators: Maekelt, Rezek and van den Berg).

13 *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003.

in general, not only to contractual commitments, and all claims based on any commitment in legislative or administrative or other unilateral acts of the state or one of its entities or subdivisions will be considered as treaty claims; (2) to give this expansive effect to the clause will 'render useless all substantive standards of protection of the Treaty'; and (3) the language of the clause ('constantly [to] guarantee the observance') did not provide clear and persuasive evidence that Switzerland and Pakistan intended that all breaches of each state's contracts with investors of the other state were to be treated as breaches of the BIT.[14]

Not long after this, in *SGS v. Philippines*,[15] another investment tribunal deciding a claim by the same investor considered Article X(2) of the Philippines–Switzerland BIT, which offered treaty protection to 'any obligation [each Contracting Party] has assumed with regard to specific investments in its territory by investors of the other Contracting Party' and reached a different conclusion from the *SGS v. Pakistan* tribunal. Specifically, the *SGS v. Philippines* tribunal found the terms of Article X(2) of the Philippines–Switzerland BIT to be 'clear and categorical' and to require an 'effective interpretation' consistent with the object and purpose of the treaty, which was made for the promotion and reciprocal protection of investments. Although it also found that the umbrella clause in the Philippines–Switzerland BIT was 'vaguer' than the corresponding clause in the Philippines–Switzerland BIT, the *SGS v. Philippines* tribunal was critical of the *SGS v. Pakistan* decision, describing it as 'unconvincing' given its failure 'to give any clear meaning to the "umbrella clause"' in the Philippines–Switzerland BIT.[16]

The tribunal in *Strabag v. Libya*[17] was also critical of the *SGS v. Pakistan* decision for not applying the principles of the Vienna Convention on the Law of Treaties when considering the umbrella clause in the Philippines–Switzerland BIT:

14 In *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction, 9 November 2004 (arbitrators: Guillaume, Cremades and Sinclair), the tribunal also relied on the generality of the language used in the Article 2(4) of the Italy–Jordan BIT to reject the claim. The clause states that 'each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor'.

15 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on Jurisdiction, 29 January 2004 (arbitrators: El-Kosheri, Crawford and Crivellaro).

16 id., Paragraph 125.

17 *Strabag v. Libya*, Award, 29 June 2020.

> *[a]t the Hearing, Respondent argued that interpreting Article 8(1) of the Treaty as urged by Claimant would 'open the floodgates to allow every commercial dispute in contracts with States or State entities to find its way to an international tribunal convened under a bilateral investment treaty'. As noted supra this is similar to the view of the tribunal in SGS v. Pakistan. However, such policy-based arguments do not fit into the VCLT's rubric of treaty interpretation. These are policy issues for treaty-makers to consider in selecting the words of their treaty; they cannot later be imported to limit the meaning of the chosen words.*[18]

Contracts made or breached by the state in the exercise of sovereign authority

The policy against 'opening the floodgates'[19] has inspired another constraint imposed on umbrella clauses. In *El Paso v. Argentina*,[20] an International Centre for Settlement of Investment Disputes tribunal held that 'it is necessary to distinguish the state as a merchant from the state as a sovereign', and for the tribunal to have jurisdiction under the umbrella clause, either: (1) the subject contract must be 'an investment agreement entered into by the state as a sovereign'; or (2) the state must have interfered with contractual rights by a unilateral act in such a way that the state's action can be analysed as a violation of the standards of protection embodied in a BIT.[21]

Other tribunals disagree with this approach. In *Strabag SE v. Libya*,[22] the tribunal dismissed the notion that the requirement for the exercise of sovereign

18 id., Paragraph 163.

19 Also expressed in the dissent of arbitrator Rajski, in *Eureko B. V. v. Poland*, Partial Award, 19 August 2005 (arbitrators Fortier and Schwebel forming the majority): 'foreign parties to commercial contracts . . . [would] switch their contractual disputes from normal jurisdiction of international commercial arbitration tribunals or state courts to BIT Tribunals . . .'.

20 *El Paso Energy International Company v. The Argentine Republic*, Decision on Jurisdiction, 27 April 2006 (arbitrators: Caflisch, Stern and Bernardini), which considered Article II(2)(c) of the US–Argentina BIT ('Each Party shall observe any obligation it may have entered into with regard to investments').

21 See also *Joy Mining v. Egypt*, Award on Jurisdiction, 6 August 2004 (arbitrators: Vicuna, Graig and Weeramantry), which involved a dispute about the release of bank guarantees under a contract for the supply, installation and testing of mining equipment. An ICSID tribunal dismissed a claim based on an umbrella clause on the basis that the claims were purely contractual and it had not been 'credibly alleged that there was Egyptian State interference with the Company's contract rights'.

22 *Strabag SE v. Libya*, Award, 29 June 2020.

authority as a condition for international jurisdiction can circumscribe the plain language of the umbrella clause.[23]

Privity

Some tribunals have held that umbrella clauses are effective only if there is privity between the entity breaching the obligation and the entity to which the obligation is owed.[24] Other tribunals, focusing on the specific wording of the particular treaties, have dismissed this requirement.[25]

Unilateral acts

In some cases, such as *Oxus v. Uzbekistan*,[26] *Noble Ventures v. Romania*[27] and *CMS v. Argentina*,[28] tribunals have held that the umbrella clause formulations that adopt the phrase 'entered into' apply only to contractual obligations and not to

23 Article 8(I) of the Agreement between the Republic of Austria and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments (2002) (the Austria–Libya BIT), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/199/download.

24 *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007 (arbitrators: Sureda, Brower and Janeiro); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007 (arbitrators: Guillaume, Elaraby and Crawford); *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 25 July 2018 (arbitrators: Pryles, Alexandrov and Thomas); *WNC Factoring Limited v. The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017 (arbitrators: Griffith, Volterra and Crawford).

25 *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (arbitrators: Kaufmann-Kohler, Pinzón and van den Berg); *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 (arbitrators: Sacerdoti, Veeder and Nader); *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017; *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020 (arbitrators: Alvarez, Pryles and Chazournes); *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019 (arbitrators: Kalicki, Hobér and Khehar).

26 *Oxus Gold v. The Republic of Uzbekistan*, Award, 17 December 2015 (arbitrators: Tercier, Stern and Lalonde).

27 *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (arbitrators: Böckstiegel, Lever and Dupuy).

28 *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007.

unilateral obligations such as those contained in domestic legislation.[29] In another set of decisions, including *Plama v. Bulgaria*,[30] *Enron v. Argentina*[31] and *Noble Energy v. Ecuador*,[32] tribunals have held that umbrella clauses are applicable to unilateral obligations contained in legislation, notwithstanding that the umbrella clause formulation adopted the phrase 'entered into'.

Some decisions contemplate that obligations contained in legislation may be covered by an umbrella clause if the legislation addresses the relevant investment with sufficient specificity. The tribunal in *Continental Casualty v. Argentina*[33] provided some insight as to what may be considered to be sufficiently specific, referring to provisions 'regulating a particular business sector and addressed specifically to the foreign investors in relation to their investments therein . . .'. Other decisions, such as *OI European Group v. Venezuela*, consider that an umbrella clause creates an obligation to 'fulfil all of the legal obligations established in the legal system'.[34]

The result in practice is that tribunals considering similar legislation have reached different conclusions on the question of whether such legislation can create obligations that validly give rise to umbrella clause claims. Thus, while the *Oxus v. Uzbekistan* tribunal characterised the Uzbekistan Law on Foreign Investments as a 'law of a general nature setting out the obligations of the State in a general way' and held therefore that the umbrella clause was inapplicable,[35]

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29 See also *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Award, 17 July 2016 (arbitrators: Derains, Tawil and Wobeser); *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Award, 15 February 2018 (arbitrators: Sidklev, Crivellaro and Sepúlveda-Amor) and discussion of these decisions by August Reinisch and Christoph Schreuer, *International Protection of Investments: the Substantive Standards* (Cambridge University Press, 2020), pp. 900–901.

30 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (arbitrators: Salans, van den Berg and Veeder); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (arbitrators: Vicuña, van den Berg and Tschanz); *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008 (arbitrators: Kaufmann-Kohler, Cremades and Alvarez).

31 *Enron v. Argentina*, Award, 22 May 2007.

32 *Noble Energy v. Ecuador*, Decision on Jurisdiction, 5 March 2008.

33 *Continental Casualty v. Argentina*, Award, 5 September 2008.

34 *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 (arbitrators: Fernández-Armesto, Vicuña and Mourre), p. 128.

35 *Oxus Gold v. Uzbekistan*, Final Award, 17 December 2015; according to the tribunal: '[a]s concerns the reference to paragraph 4 of Article 12 of the Law on Foreign Investments,

another tribunal, considering the similar Venezuelan Foreign Investments Law, held that the law was within the umbrella clause.[36]

In all, the foregoing discussion demonstrates that the results in the umbrella clause debates cannot always be fully explained by the terms of relevant clauses. In a system in which there is no binding doctrine of precedent, it is inevitable that decisions are often influenced by the philosophical leaning of tribunal members regarding the right balance to be maintained between protecting the rights of foreign investors, on the one hand, and preserving the sovereign authority of the host state, on the other.

Transfer of funds clauses

Overview of transfer of funds clauses

Customary international law recognises the concept of monetary sovereignty – the right that each state has to regulate its own currency.[37] According to F A Mann:

> *To the power granted by municipal law there corresponds an international right, to the exercise of which other states cannot, as a rule, object. . . . It must follow that, subject to such exceptions as customary international law or treaties have grafted upon this rule, the municipal legislator … enjoys sovereignty over its currency and monetary system.*[38]

However, a state's monetary sovereignty may be circumscribed by international arrangements that it has itself entered into, such as those that come with membership of the International Monetary Fund and limits to the right to transfer funds relating to an investment that many states agree under investment treaties.

Different BIT formulations of transfer of funds clauses reflect the competing priorities of investors and host states. On the one hand, investors have to transfer funds into the host country to make the investment, and then subsequently to repatriate home the profits, investment value and any capital gain. The ability of an investor to transfer these monies, including for the purpose of reimbursing

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this paragraph provides as follows: "the enterprises with foreign investments on their own account execute export-import operations observing the demands of the legislation of the Republic of Uzbekistan. Export of indigenously produced output is not liable to licensing and allocation." However, as mentioned above, obligations contained in Law on Foreign Investments are general obligations not specifically entered into with Claimant. As such, they may not trigger Respondent's liability under the umbrella clause.'

36 *OI European Group v. Venezuela*, Award, 10 March 2015.

37 Claus D Zimmermann, The Concept of Monetary Sovereignty Revisited, *EJIL* 24 (2013), 797 at 799.

38 C Proctor, *Mann on the Legal Aspects of Money* (Oxford University Press, 2005), p. 500.

any financing or making any royalty payments, has been described as an essential element of the promotional role of BITs.[39] On the other hand, host states need to exercise their monetary sovereignty to control outward flow of capital and payments and thereby prevent capital flight that might deplete foreign reserves. They also need to control massive inward flows that could cause inflation.[40] It is in the context of this tension between investor and state risks and motivations that BITs must be interpreted and applied.

Treaty examples

A standard transfer clause in a BIT protects the investor's right to: (1) transfer funds for purposes connected with the investment, (2) without delay, (3) in convertible currency and (4) at a rate of exchange prevailing at date of transfer.[41] Variations in the formulation of transfer clauses in individual BITs typically involve features such as:

- whether the right is set out in general terms, or as an illustrative or exhaustive list of specific categories;
- whether only outward flows are protected, or both inward and outward flows are covered (e.g., '[i]n relation to investments . . .');
- the language employed in describing the type of payments that are protected; for example, whether the right relates to 'payments resulting from investment activities' or 'related to an investment' or 'in connection with an investment';
- convertibility;
- exchange rates; and
- the nature of any limitations on the right to transfer.

Format: general protection versus list of items

Many BITs and multilateral agreements adopt a non-exhaustive list of what funds can be transferred by an investor. For example, Article 15 of the Draft Pan-African Investment Code[42] provides that 'transfers may include':

- profits, capital gains, dividends, royalties, interests and other current income accruing from an investment;

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39 *Continental Casualty v. Argentina*, Award, 5 September 2008.

40 Reinisch and Schreuer (footnote 29), p. 979.

41 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (arbitrators: Fernández-Armesto, Vicuña and Simma).

42 Draft Pan-African Investment Code, African Union Commission Economic Affairs Department, Draft, December 2016, available at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf.

- the proceeds of the total or partial liquidation of an investment;
- repayments made pursuant to a loan agreement in connection with an investment;
- licence fees in relation to investment;
- payments in respect of technical assistance, technical service and management fees;
- payments in connection with contracting projects;
- earnings of Member State nationals who work in connection with an investment in the territory of the other Member State; and
- compensation, restitution, indemnification or other settlement pursuant to the investments.

An example of an exhaustive list is provided by the Southern African Development Community (SADC) Model Bilateral Investment Treaty Template. It provides that a state party shall accord investors with the right to:

- repatriate the capital invested and the investment returns;
- repatriate funds for repayment of loans;
- repatriate proceeds from compensation upon expropriation, the liquidation or sale of the whole or part of the investment including an appreciation or increase of the value of the investment capital;
- transfer payments for maintaining or developing the investment project, such as funds for acquiring raw or auxiliary materials and semi-finished products, as well as replacing capital assets;
- remit the unspent earnings of expatriate staff of the investment project;
- any compensation to the investor paid pursuant to this agreement; and
- make payments arising out of the settlement of a dispute by any means, including adjudication, arbitration or the agreement of the state party to the dispute.[43]

Article 6 of the United Kingdom Model Investment Promotion and Protection Agreement (2008) simply guarantees investors 'the unrestricted transfer of their investments and returns', without setting out a list.

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43 See also Article 11(1), Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (2016) (the Morocco–Nigeria BIT): 'Each party shall in accordance with [its] legal system and its international obligations, allow the free transfer of funds related to an investment, namely . . .', available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download.

Continental Casualty v. Argentina illustrates a situation where a tribunal had to determine whether a particular transfer was within the protective scope of a non-exhaustive list, the transfer in question not being specifically mentioned in the list. The claim involved short-term dollar deposits held by the investor's subsidiary. To determine whether these deposits were within the scope of the transfer of funds guarantee, the tribunal sought guidance from: (1) the detailed, although non-exclusive, list in Article V(1) of the Argentina–United States BIT[44] (the transfer of funds clause); (2) the purpose of such transfer of funds clauses; and (3) the definitions of 'investment' and 'associated activities' in Article I of the BIT.[45]

'Outflows only' versus 'inflows and outflows'

Some treaties explicitly state that the guarantee relates to both inflows and outflows.[46] Others use a formulation according to which the host state guarantees investors of the other contracting party the transfer of their 'investments and returns held in its territory',[47] suggesting that only outflows are covered. Others are silent on the subject, and the question may turn on what is to be inferred from the language of the guarantee. Where broad language is used to define the type of payments that enjoy the guarantee, such as 'transfers relating to an investment', both inflows and outflows are likely to be covered.

Currency of transfer

There are also variations in treaty practice when referring to the currency in which the guaranteed transfer may be made. The usual format is to guarantee that the payment will be made in 'freely usable currency' or 'freely convertible currency'.[48]

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44 Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (1991) (the Argentina–United States BIT), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/127/download.

45 *Continental Casualty v. Argentina*, Award, 5 September 2008.

46 Article 14, Canada Model BIT (2021), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6341/download; Article 9, Austrian Model BIT (2008); Article 14, Energy Charter Treaty (1994).

47 Article V, Argentina–United States BIT (1991).

48 ibid.; Article V, Agreement between the Republic of Korea and the Republic of Austria for the Encouragement and Protection of Investments (1991) (the Austria–Korea BIT), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/195/download; Article 8, Agreement between the Government of the Republic of Mauritius and the Government of the Republic of Singapore for the Promotion and Protection of

One variation guarantees the transfer 'in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned'.[49]

Exchange rates

The usual formulation in treaty practice guarantees the right to transfer 'at the rate of exchange applicable on the date of the transfer' or 'at the market rate of exchange existing on the date of the transfer with respect to spot transactions'.[50] Variations to this include 'at the prevailing market rate of exchange applicable within the Contracting Party accepting the investment and on the date of transfer',[51] and 'at the rate of exchange applicable on each case . . . such exchange rate shall not differ substantially from the cross rate resulting from the exchange rate that the International Monetary Fund would apply if the currencies of the countries concerned were converted to special drawing rights on the date of payment'.[52]

Restrictions

BITs, PTIAs and model agreements also differ in some respects as to whether and in what manner they circumscribe the guarantee of free transfer, reflecting different priorities in the exercise of monetary sovereignty. Most international investment agreements (IIAs) require that transfers must be done in accordance with relevant domestic legislation and procedures of the host state, and reserve to the host state the right to 'prevent a transfer through the equitable, non-discriminatory and good faith application of laws and regulations' on various matters of regulatory interest, such as bankruptcy, dealings in securities and criminal offences. Article 16.3 of the Draft Pan-African Investment Code goes

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Investments (2000) (the Mauritius–Singapore BIT), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1990/download.

49 Article VIII, Agreement between the Government of Canada and the Government of the Republic of Argentina for The Promotion and Protection of Investment (1991) (the Argentina–Canada BIT), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/77/download.

50 ibid.; Article V, Argentina–United States BIT (1991); Article 1109, North American Free Trade Agreement (1992); Article 14, Energy Charter Treaty (1994).

51 Article 6, China Model BIT (1997); see Reinisch and Schreuer (footnote 29), p. 973.

52 Article 5, Treaty between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments (1991) (the Argentina–Germany BIT), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/92/download.

further to permit exceptions to the transfer of funds, namely: (1) capital can only be transferred after a period of five years after full operation of the investment in a Member State unless its national legislation provides for more favourable treatment; and (2) proceeds of the investment can be transferred one year after the investment entered the territory of a Member State unless its national legislation provides for more favourable treatment.[53]

Case law

On many occasions, investment arbitration tribunals have declined claims asserting a breach of transfer of funds clauses under IIAs. These include:

- a claim concerning short-term dollar deposits held by the investor's subsidiary;[54]
- claims considered by the tribunals to be based on purely contractual acts of a contracting state entity;[55] and
- claims seeking to extend the free transfer clause to acts alleged to constitute violations of other protections in the IIA.[56]

In other cases, the tribunals found a violation of the right of free transfer. Thus, in *Achmea v. Slovak Republic*,[57] the Permanent Court of Arbitration tribunal decided that 'the ban on profits was inconsistent with Respondent's obligations' under the applicable transfer provision. Another investment tribunal held that Zimbabwe

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53 Draft Pan-African Investment Code, African Union Commission Economic Affairs Department, Draft, December 2016 available at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf.

54 *Continental Casualty Company v. Argentine Republic*, Award, 5 September 2008: 'The type of transfer at issue here does not fall into any of these categories, nor specifically does it represent the "proceeds from the sale or liquidation of all or any part of an investment." It was merely a change of type, location and currency of part of an investor's existing investment, namely a part of the freely disposable funds, held short term at its banks by CNA, in order to protect them from the impending devaluation, by transferring them to bank accounts outside Argentina.'

55 *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (arbitrators: Brower, Lau and Rowley); *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016 (arbitrators: Sureda, Gaillard and Stern).

56 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (arbitrators: Born, Landau and Hanotiau); *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008 (arbitrators: Fortier, Tawil and Nikken).

57 7 December 2012.

had violated the transfer clauses of the relevant BITs by taking the following measures: (1) refusing to release foreign currency for the transfer of profits and for the repayment of the claimants' loans to a foreign creditor; and (2) forcing the investors to accept payments in Zimbabwean dollars and to exchange US dollars proceeds to Zimbabwean dollars.[58]

Performance requirements

Introduction to performance requirements

Performance requirements are stipulations imposed on investors, requiring them to meet certain specified economic or non-economic goals with respect to their operations in the host country.[59] The most common examples are measures relating to local content, export performance, domestic equity, joint ventures, technology transfer and employment of nationals.[60] While some view performance requirements as a useful tool to ensure that investments make an effective contribution to the development of the host country, others see them as ineffective or counterproductive.[61] The latter view is reflected in the prohibition or limitation of performance requirements in some IIAs.[62]

It is useful to distinguish between mandatory and non-mandatory performance requirements.[63] Mandatory requirements are those linked to the conditions for entry and operation of an investment – they must be complied with before the investor can establish or operate the investment.[64] Non-mandatory requirements

58 *Bernhard Friedrich Arnd Rüdiger von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (arbitrators: Fortier, Williams and Hwang).

59 United Nations Conference on Trade and Development (UNCTAD), 'Foreign Direct Investment and Performance Requirements, New Evidence from Selected countries' (UNCTAD, 2003), p. 2 http://unctad.org/en/docs/iteiia20037_en.pdf. Also, S Nikiema, *Performance Requirements in Investment Treaties*, IISD Best Practice Series, December 2014, p. 1, available at https://www.iisd.org/system/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf.

60 UNCTAD, 2003 (footnote 59), p. 119.

61 ibid.

62 S Nikiema (footnote 59), p. 1.

63 See also UNCTAD, 2003 (footnote 59), p. 119, which characterises performance requirements into: (1) those explicitly prohibited at the multilateral level; (2) those prohibited, conditioned or discouraged by interregional, regional or bilateral (but not by multilateral) agreements; and (3) those not subject to control by any international agreement.

64 S Nikiema (footnote 59), p. 2.

are conditions to advantages provided by the host state, such as tax exemptions – they must be complied with before the investor can benefit from those advantages.[65]

Treaty examples

Performance requirements have been used by both developed and emerging economies at different times in their history.[66] In the 1980s, the United States began to press for their prohibition, on the basis that they distorted trade.[67] This posture was reflected in US Model BITs,[68] ultimately influencing the North American Free Trade Agreement (NAFTA),[69] which was one of the first investment protection agreements to include a specific list of prohibited performance requirements.[70]

Article 1106(1) of NAFTA sets out a list of seven specific types of measures that '[n]o Party may impose or enforce . . . in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment'.[71]

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65 ibid.

66 M Kinnear, A Kay Bjorklund, et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. 1* (Kluwer International 2006), pp. 1106-1–1108-18. See also, Treaty between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments (1985) (Morocco–United States BIT), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2052/download.

67 M Kinnear, A Kay Bjorklund, et al. (footnote 66), pp. 1106–1108.

68 ibid.

69 ibid.

70 Barton Legum and Ioanna Petculescu, 'Performance Requirements', in M Kinnear, G R Fischer, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015), p. 416.

71 North American Free Trade Agreement (NAFTA), US–Canada–Mexico, 17 December 1992, 32 I.L.M. 289 (1993), Article 1106(1), pp. 266–267. The measures include stipulations: 'to (a) export a given level or percentage of goods or services; (b) to achieve a given level or percentage of domestic content; (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory; (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings; (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or (g) to act as the

Article 1106(3) lists specific requirements that cannot be imposed as a condition for the 'receipt or continued receipt of an advantage' or as an incentive from the host state.[72] Article 1106(4) carves out a set of exceptions from this list, allowing a party to condition the receipt or continued receipt of an advantage in compliance with certain requirements, including the obligation to train and employ local workers or carry out research and development activities in its territory. Lastly, Article 1108 permits the parties to enter reservations in respect of 'non-conforming' government measures that existed at the time of the treaty's entry into force, and any renewals of, and amendments to, these measures.[73] Further reservations are permitted for laws not yet enacted in connection with various sectors, sub-sectors and activities.[74] As discussed below, most of the case law on performance requirements has arisen in the context of NAFTA.

Performance requirements may also be couched as prohibited restrictions to substantive treaty protections in certain BITs. For instance, the French Model BIT considers performance requirements to be impediments to the fair and equitable treatment standard contained in the BIT.[75] Performance requirements such as export quotas on foreign investments and investors may also be considered a

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exclusive supplier of the goods it produces or services it provides to a specific region or world market'.

72 NAFTA, Article 1106(3), p. 267. The four specific requirements listed therein are 'to (a) achieve a given level or percentage of domestic content; (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory; (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings'.

73 Exemptions set out in the Schedule to Annexes I and III of NAFTA.

74 M Kinnear, G R Fischer, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015), p. 417; NAFTA Article 1108, Schedule to Annex II of NAFTA.

75 France Model BIT 2006, Article 3, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5874/download. Article 3 reads: 'In particular though not exclusively, shall be considered as de jure or de facto impediments to fair and equitable treatment any restriction on the purchase or transport of raw materials and auxiliary materials, energy and fuels, as well as the means of production and operation of all types, any hindrance of the sale or transport of products within the country and abroad, as well as any other measures that have a similar effect.'

violation of the national treatment standard, when they are not similarly imposed on local investors.[76] This has been the basis of a number of investor–state dispute settlement claims.[77]

Recently, there has been a welcome attempt to rebalance the developmental and capacity-building goals of states and the protections to be afforded to foreign investors. For instance, the national treatment provision contained in the 2016 Morocco–Nigeria BIT[78] expressly permits differentiation between local and foreign investors on grounds of national security or public order.[79] The objective is to balance the interests of foreign investors with the host state's right to regulate.[80] The SADC Model BIT Template and Commentary contains a number of provisions intended to reject prohibitions on performance requirements by host states, with the overarching objective of encouraging and increasing investments that support the sustainable development of each party, in particular that of the host state.[81] Part 2, which deals with 'Investor Rights Post-Establishment', contains a non-discrimination provision.[82] This is, however, qualified by Article 4.3(a), which provides that the non-discrimination provision shall not apply to measures

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76 M Sornarajah, *The International Law on Foreign Investment*, Fourth edition (Cambridge University Press, 2017), pp. 238, 239.

77 See *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, 12 October 2002 (arbitrators: Hunter, Schwartz and Chiasson); *United Parcel Service of America Inc v. Government of Canada*, UNCITRAL, Award, 24 May 2007 (arbitrators: Cass, Fortier and Keith); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No ARB/06/11, Award, 5 October 2012 (arbitrators: Fortier, Williams and Stern).

78 Article 6.2, Morocco–Nigeria BIT.

79 Article 6.5, Morocco–Nigeria BIT. The national treatment exceptions are as follows: 'treatment granted under 1, 2, 3, 4 of this article shall not be construed as to preclude national security or public order'. It has been argued that this provision may also be construed to include measures to salvage economic crisis and prevent public health risks; David Collins, *An Introduction to International Investment Law* (Cambridge University Press, 2017), pp. 284–289.

80 Okechukwu Ejims, 'The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?' *ICSID Review – Foreign Investment Law Journal*, Volume 34, Issue 1, p. 62, 82, https://doi.org/10.1093/icsidreview/siz001. See also Makane Moïse Mbengue and Stefanie Schacherer, 'The "Africanization" of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime', *The Journal of World Investment & Trade*, 2017, Volume 18, No. 3, 414–448.

81 The Southern African Development Community (SADC) Model Bilateral Investment Treaty Template and Commentary (the SADC Model BIT), https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf; Part 1, Article 1.

82 See SADC Model BIT Template and Commentary, Article 4.

such as performance requirements imposed by governments. Article 21 further provides a 'right to pursue development goals'.[83] Under this provision, performance requirements may be imposed on foreign investors to promote the social and economic benefits of foreign direct investment.[84]

Tribunal decisions on substantive claims

Most of the case law on performance requirements has arisen in the context of NAFTA. The claims have usually concerned measures by states that claimants contended had violated the prohibition of performance requirements. Tribunals have not always considered these arguments favourably.[85]

For instance, in *S.D. Myers, Inc. v. Canada*, the tribunal accepted that the purpose of a Canadian ban on the export of polychlorinated biphenyl (PCB) was to protect the Canadian PCB industry from competition by US companies. Nonetheless, the tribunal rejected the claimant's argument that the ban amounted to a prohibited performance requirement because its effect was that the claimant was compelled to conduct its treatment of PCB waste solely in Canada (and therefore consume goods and services in Canada). The majority considered that the restriction had to fall squarely within the ambit of the prohibited performance requirements listed in Article 1106(1) and (3) of NAFTA,[86] and in this case, no requirement prohibited in that list had been imposed on the investor.[87] In *Pope & Talbot, Inc v. Canada*, Canada had imposed a tariff-rate export restraint on exports of softwood lumber to the United States. The tribunal held that while the measure undoubtedly deterred increased exports to the US, that deterrence was not a 'requirement' for establishing, acquiring, managing, conducting or operating a foreign-owned business in Canada.[88] In *Merrill and Ring v. Canada*, the tribunal found that none of the measures complained of by the claimant – including requirements relating to cutting and sorting timber as per 'normal market practices', scaling timber rafts in accordance with the metric system of measurement and additional stipulations for lumber produced from remote regions – fell within

83 See SADC Model BIT, Paragraph 21.2.

84 See SADC Model BIT, Commentary to Article 21.

85 Note that Article 1106(5) of NAFTA provides that: 'Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.' See also Barton Legum and Ioanna Petculescu (footnote 70), p. 421.

86 See *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (arbitrators: Hunter, Schwartz and Chiasson), Paragraph 275.

87 id., Paragraph 277; see the opinion of dissenting arbitrator, Professor Bryan Schwartz.

88 See *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 (arbitrators: Dervaird, Greenberg and Belman), Paragraph 75.

the ordinary meaning of Article 1106 (i.e., involved the imposition or enforcement of a requirement, commitment or undertaking).[89] The tribunal considered the effects on the investment at issue not to be 'directly and specifically connected to exports'.[90]

The cases above are to be contrasted with *ADM and Tate & Lyle v. Mexico*, where the respondent levied a 20 per cent tax on soft drinks and syrups that used any sweetener other than cane sugar, such as high fructose corn syrup. Claimants successfully argued that the tax amounted to a prohibited performance requirement under Article 1106(3) of NAFTA, because it conferred an advantage (i.e., tax exemption) conditioned on the exclusive use of cane sugar, in circumstances where cane sugar was primarily produced in Mexico.[91] A similar decision was reached in respect of the same measure in *Cargill v. Mexico*.[92] However, the tribunal in *Corn Products v. Mexico* found that the measure was not a prohibited performance requirement, as it was not a requirement imposed on the claimant itself.[93] Regrettably, it is not possible to discern whether the arguments advanced by the *ADM* and *Cargill* claimants were made by those in *Corn Products*, regarding the unique breadth of the prohibition contained in Article 1106(3) of NAFTA, which (according to the *ADM* and *Cargill* tribunals) made it possible for a measure to be 'connected with' a claimant's investment for the purpose of the provision even though no requirement was made of the claimant.

The decision in *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*[94] is considered the most detailed consideration of performance requirements to date.[95] The dispute concerned research and development spending requirements imposed by the Province of Newfoundland and Labrador (the Province) in Canada on two US oil companies that had invested in oil production

89 See *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, Award, 31 March 2010 (arbitrators: Orrego Vicuña, Dam and Rowley), Paragraph 120.

90 id., Paragraph 117.

91 *Archer Daniels Midland Company (ADM) and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (arbitrators: Cremades, Rovine and Siqueiros T), Paragraph 227.

92 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (arbitrators: Pryles, Caron and McRae), Paragraph 319.

93 *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008 (arbitrators: Greenwood, Lowenfeld and Serrano de la Vega), Paragraph 80.

94 *Mobil v. Canada*, ICSID Case No. ARB(AF)/07/4 (arbitrators: van Houtte, Janow and Sands).

95 See Barton Legum and Ioanna Petculescu (footnote 70), p. 417.

projects. Since 1986, the Province had been issuing guidelines on research and development expenditure under both provincial and federal legislation. Guidelines issued in 2004, which set a fixed amount for research and development expenditure based on average expenditures by sector, formed the root of the case. The claimants alleged, inter alia, that the setting of a fixed amount for research and development, and the obligation to purchase goods and services in the Province, breached Article 1106(1)(c) of NAFTA and thereby the prohibition of performance requirements.[96] Canada asserted that research and development did not constitute a 'service', and that even if it did, Canada would still have immunity by virtue of a Canadian reservation under Article 1108. Canada's list of reservations included the federal law under which the 2004 guidelines were enacted. In consequence, the tribunal (by a majority) upheld the claim. First, the tribunal found that the term 'service' in Article 1106 of NAFTA was 'broad enough to encompass research and development'.[97] Second, the majority found that the Canadian reservation under Article 1108 did not cover the 2004 guidelines. It concluded that to benefit from reservations, the new measure must not 'unduly expand the nonconforming features of the reservation'.[98] The majority opined that the 2004 guidelines had introduced an additional spending requirement and a different form of board oversight that did not previously exist. Consequently, it concluded that the 2004 guidelines were inconsistent with the exceptions under Article 1108(1) and therefore constituted an impermissible performance requirement.[99]

96 Article 1106(1)(c) of NAFTA reads as follows: '1106(1) No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory: . . . (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory.'

97 *Mobil Oil v. Canada*, Paragraph 216.

98 id., Paragraphs 336, 341.

99 id., Paragraph 411, 413. See also *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016 (arbitrators: Kaufmann-Kohler, Brower and Landau), Paragraph 466, in which the tribunal upheld the procurement exception in Article 1108 of NAFTA in respect of an allegation that domestic content restrictions contained in Ontario's fee-in-tariff programme violated Article 1106 of NAFTA.

Outside the NAFTA context, there is the case of *Lemire v. Ukraine*, which was brought under the US–Ukraine BIT.[100] The claimant had invested in the Ukrainian broadcasting industry by launching a radio station. Subsequently, Ukraine imposed a requirement that at least 50 per cent of the music broadcast by all radio stations must be produced in Ukraine. The claimant contended that this measure breached Article II.6 of the BIT, which prohibited performance requirements. The tribunal rejected this claim, finding that the 'object and purpose' of Article II.6 – in line with the interpretative approach in Article 31.1 of the Vienna Convention on the Law of Treaties – was to prevent states from imposing local content requirements as a protection of local industries against competing imports. However, the underlying reason for Ukraine's measure was to protect Ukraine's cultural inheritance.[101]

Conclusion

The above discussion, although dealing with three distinct topics, illustrates the tension between arbitral tribunals' impulse to follow the wording of IIAs, wherever that might lead, and the desire to preserve states' sovereignty and regulatory space. The continuing debate in respect of umbrella clauses is emblematic of this phenomenon. Practitioners can do little about the wording of specific IIAs – where the relevant wording is unfavourable, or where most of the case law has taken a particular view on that wording, the fate of a given argument may be sealed. There, however, remains one lever: the choice of arbitrator. As highlighted above, in the absence of a binding doctrine of precedent, arbitral tribunals are at liberty to depart from the interpretations adopted, and conclusions reached, in earlier decisions. Arbitrator selection is therefore key. Of course, except perhaps where an arbitrator has previously issued a sharp dissent on a point of principle, it is not always possible to divine in advance how an arbitrator might decide a particular dispute, as no two cases are the same. However, an arbitrator's track record may provide a helpful hint as to his or her openness (or otherwise) to entertain certain lines of argument. In most cases, this is all that can be hoped for.

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100 Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment (1994) (Ukraine–United States BIT), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2366/download.

101 *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (arbitrators: Fernández-Armesto, Paulsson and Voss), Paragraph 510.

CHAPTER 16

Suitability of ISDS for Societal Challenges

Amanda Lees, Wilson Antoon, Erin Eckhoff and Jack McNally[1]

Introduction

Scientists are observing changes in the Earth's climate in every region, with some of these changes irreversible.[2] Indigenous communities have resisted the development of mines and pipelines to protect the environment.[3] The covid-19 pandemic has brought both health and economic crises, with collapsing health systems and lockdowns of economies across the globe.

Societal challenges, domestic and international, demand action and institutional responses. Yet, what if that response affects the value of existing investments? Should investors be entitled to bring claims? Should arbitration tribunals be assessing the actions of states to arrest or slow down climate change? What tests and defences should apply? Who has the right to address tribunals on these important public policy issues?

As societal challenges necessarily impact the development of investor–state dispute settlement (ISDS), it is incumbent upon both practitioners and tribunals to consider how best to deal with the consequences of these challenges. This

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2 Intergovernmental Panel on Climate Change, 'Climate Change Widespread, Rapid and Intensifying' (Press Release, 9 August 2021), https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/ (last accessed 13 September 2019).

3 For instance, in *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21. See also the cancellation of plans for the Keystone XL pipeline: Reuters, 'Owner Cancels Keystone XL Pipeline Months after Biden Revoked Permit', *The Guardian*, 10 June 2021, www.theguardian.com/environment/2021/jun/09/keystone-xl-pipeline-canceled (last accessed 10 June 2021).

chapter examines the interaction of international investment law with some of these fundamental social issues of our time, including the suitability of investment treaties to confront issues of environmental damage, climate change, public health, human rights and corruption.

Corruption issues are of overriding importance to the rule of law

What is a tribunal's duty when it is faced with evidence of corruption?

Unlike the judiciary, which is an organ of the state and thus owes duties to the public, the primary duty of international arbitrators is generally seen as owed to the parties who appointed them. It is an oft-cited principle that party autonomy is of foundational importance in arbitration. Parties appoint the arbitrators pursuant to an agreement and so, parties have a right to define the jurisdiction of an arbitral tribunal. Apart from mandatory rules contained in the applicable procedural law, parties are generally free to agree on the procedures that will govern the arbitration. This orthodox thinking is strained, though, where evidence of corruption surfaces.

Is there a limit to the consensual nature of arbitration? What happens if parties enter into an agreement precluding an arbitral tribunal from considering evidence of corruption?

Investor–state tribunals and courts have consistently found that arbitral tribunals, like judges, have a public duty to consider evidence of possible corruption, regardless of any agreements between the parties to the contrary. This should not be surprising. Any arbitrator who sees such evidence will instinctively feel that such matters should not be swept under the carpet.

Tribunals have to carefully consider the evidence and decide what effect, if any, the evidence has on the case at hand. After all, corruption issues, in general, are of overriding importance to the rule of law and the integrity of the arbitration process. This rings especially true in the context of investor–state disputes. It would be repugnant and antithetical to the rule of law if parties could force arbitral tribunals to turn a blind eye to evidence of corruption and bribery, with the effect that arbitral tribunals might make awards supporting or enforcing corruption.

– Cavinder Bull SC, Drew & Napier LLC

Environmental damage

Increasingly, states are aware of their duties under international law to cause no harm to other states,[4] including on matters relating to the environment. Indeed, there has been discussion of the crystallisation of environmental protection as a

4 The existence of a 'no-harm' rule was first found in *Trail Smelter (United States v. Canada)*, Award, 16 April 1948 and 11 March 1941 (1941) 3 RIAA 1905. See also *Gabčíkovo-Nagymaros*

peremptory, or *jus cogens*, norm of international law.[5] While this chapter is not concerned with such questions, which have been debated elsewhere,[6] they are part of the context within which concerns for the environment are having an impact on ISDS. It is estimated that between 2012 and 2017, over 60 investment disputes had an environmental component to them, with both investors and states raising the issue in disputes.[7]

The use of ISDS by investors to confront issues of environmental damage

Investors are increasingly bringing claims in relation to environmental matters. In *Allard v. Barbados*,[8] the investor, which operated an 'eco-tourism' site, argued that Barbados had failed to take 'reasonable and necessary environmental protection measures and, through its organs and agents, has directly contributed to the contamination of [Barbados'] eco-tourism site, thereby destroying the value of [the] investment'.[9] The investor argued that a failure at a sewage treatment plant operated by the state affected his investment by destroying the swamp around the site, in effect expropriating his investment, or in the alternative failing to afford him fair and equitable treatment (FET) of his investment with the requisite level of protection and security, in violation of the Canada–Barbados Bilateral Investment Treaty (BIT).[10] While the investor was unsuccessful, the

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Project (Hungary v. Slovakia), Judgment, 25 September 1997, 1997 ICJ Rep 7; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, 2010 ICJ Rep 14.

5 Maria José Alarcon, 'Consequences of Recognizing Environmental Protection as an Emerging Erga Omnes Obligation in the ISDS Context', *Kluwer Arbitration Blog*, 31 August 2021, http://arbitrationblog.kluwerarbitration.com/2021/08/31/consequences-of-recognizing-environmental-protection-as-an-emerging-erga-omnes-obligation-in-the-isds-context/ (last accessed 13 September 2021).

6 See, e.g., Tom Sparks, 'Judging Climate Change Obligations: Can the World Court Rise to the Occasion?', *Völkerrechtsblog*, 30 April 2020, https://voelkerrechtsblog.org/judging-climate-change-obligations-can-the-world-court-raise-the-occasion/ (last accessed 13 September 2021); Joyeeta Gupta and Susanne Schmeier, 'Future Proofing the Principle of No Significant Harm' (2020) 20 *International Environmental Agreements: Politics, Law and Economics* [731].

7 Kate Partlett and Sara Ewad, 'Protection of the Environment in Investment Arbitration – A Double-Edged Sword', *Kluwer Arbitration Blog*, 22 August 2017, http://arbitrationblog.kluwerarbitration.com/2017/08/22/protection-environment-investment-arbitration-double-edged-sword/ (last accessed 13 September 2021).

8 *Peter A Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016.

9 id. [3].

10 The Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments, signed 29 May 1996, requires

International Centre for Settlement of Investment Disputes (ICSID) tribunal found that states could, under the right circumstances, be under an obligation to protect investments against environmental damage.[11]

The use of ISDS by states to confront issues of environmental damage

As a 'shield' by states

Some states have sought to rebalance their obligations to foreign investors by inserting provisions in investment treaties allowing them to take steps to protect their environment from damage.[12] In theory, these provisions enable the state to regulate investors to ensure that the environment of the host state is protected without this intervention giving rise to a breach of the state's obligations under the relevant investment treaty. Such carve-outs have been successful in establishing that a contracting state was entitled to place a premium on environmental sustainability and defeat claims by investors alleging indirect expropriation.[13] Questions have recently been raised as to whether these carve-outs are enough to 'shield' states, given that in *Eco Oro Minerals v. Colombia*, the majority of the ICSID

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states at Article II(2) to 'accord investments or returns of investors of the other Contracting Party . . . fair and equitable treatment in accordance with the principles of International Law' as well as 'full protection and security'.

11 *Peter A Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016 [244]. See also Joshua Paine, 'Failure to Take Reasonable Environmental Measures as a Breach of Investment Treaty?' (2017) 17 *Journal of World Investment and Trade*, 745, 746 (noting that '[t]he Award raises the possibility that, as a matter of principle, a state could violate its investment treaty obligations through a failure to take sufficient environmental measures, although such cases are likely to remain rare').

12 Key examples include the Agreement between the Government of the Republic of Singapore and the Government of the Republic of Indonesia on the Promotion and Protection of Investments, signed 11 October 2018; Netherlands Model Investment Agreement; Indian Model Investment Agreement; Southern African Development Community Protocol on Finance and Investment, signed 18 August 2006; Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, signed 3 December 2016; Canada–China Promotion and Reciprocal Protection of Investments Agreement, signed 9 September 2012.

13 Such as in *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015; see also *David R Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018 (where a provision in the Dominican Republic–Central America–United States Free Trade Agreement, signed 5 August 2004, provided that '[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns'. That clause was held to have, at least to some extent, subordinated the rights of investors to environmental concerns).

tribunal held that the existence of an environmental carve-out in an investment treaty may allow the host state to 'adopt or enforce an [environmental protection] measure . . . without finding itself in breach of the FTA, [but] this does not prevent an investor claiming . . . that such a measure entitles it to payment of compensation'.[14] In any event, most current ISDS environmental claims are being brought under 'old-generation' investment treaties, which do not reflect this new language.[15] A 2011 survey found that a little over 8 per cent of investment treaties contained references to the environment.[16]

It is an open question whether more general provisions within an investment treaty, such as those allowing a state to take measures to protect the public interest or its essential security interests, could extend to protection of the environment. Others have contended that these commitments could be imported into a treaty through a most-favoured nation clause or customary international law (see the examples below of environmental carve-outs in the context of climate change).

As a 'sword' by states

States may also seek to force investors to comply with their environmental protection obligations by using the ISDS process to their advantage. While states have an established right to impose environmental regulation on investors,[17] states are now filing counterclaims against investors to seek compensation for any environmental damage they have caused. Traditionally, investment treaty tribunals

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14 *Eco Oro Minerals Corp v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Award, 9 September 2021 [830]. This decision was released at the time of writing. It has provoked debate among international investment law scholars as to its implications. For one example of commentary, see Simon Lester, 'The Eco Oro Minerals v. Colombia Award: More Evidence that MST/FET Can't Be Salvaged', *International Economic Law and Policy Blog*, 19 September 2021, https://ielp.worldtradelaw.net/2021/09/the-eco-oro-minerals-v-colombia-award-more-evidence-mst-fet-cant-be-salvaged.html (last accessed 21 September 2021).

15 Magali Garin Respaut, 'Environmental Issues in ISDS', Jus Mundi (22 July 2021), https://jusmundi.com/en/document/wiki/en-environmental-issues-in-isds (last accessed 13 September 2021).

16 Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements' (OECD Working Papers on international Investment No. 2011/01, 2011) [3].

17 '[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this': *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 [103].

did not admit counterclaims absent clear language in the relevant investment treaty.[18] However, a recent spate of ISDS cases involving questions of environmental damage have resulted in state counterclaims not only being heard but succeeding. For instance, in *Burlington Resources v. Ecuador*, Ecuador counterclaimed US$2.8 billion in compensation for breach of its environmental laws by an investor. The ICSID tribunal awarded US$31.19 million to Ecuador for environmental harm caused by the investor in breach of the Ecuadorian statutory environmental regulation regime.[19] Other cases have considered similar questions,[20] indicating a growing willingness of investment treaty tribunals to allow states to use the ISDS process as a sword for seeking compensation for and mitigation of the environmental harm caused, or contributed to, by investors.

Practical difficulties remain for states to effectively use the ISDS process as a sword in this way. First, there are still questions as to what constitutes 'environmental damage', as well as threshold questions of liability.[21] Second, as opposed to the growing corpus of cases in other international forums relating to questions involving the environment,[22] such as those heard at the International Court

18 See Jeff Sullivan and Valeriya Kirsey, 'Environmental Policies: A Shield or Sword in Investment Arbitration?' (2017) 18 *Journal of World Investment & Trade*, 100.

19 *Burlington Resources Inc v. The Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, 7 February 2017.

20 e.g., *Perenco Ecuador Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Award, 27 September 2019 (where Ecuador's takeover of oil extraction activities in the Amazon out of concern for their environmental impact were found to violate the Agreement between the Republic of France and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, but that Ecuador could successfully counterclaim for Perenco's environmental damage, for which it received US$54 million).

21 Alan Boyle and James Harrison, 'Judicial Settlement of International Environmental Disputes: Current Problems' (2013) 4 *Journal of International Dispute Settlement*, 245, 249; Albert C Lin, 'The Unifying Role of Harm in International Environmental Law' (2006) 3 *Wisconsin Law Review*, 897, 900–1; Philippe Sands, *Principles of International Environmental Law*, Second edition (Cambridge University Press, 2012) [876–881].

22 See generally Natalie Klein and Danielle Kroon, 'Settlement of International Environmental Law Disputes' in Malgosia Fitzmaurice, Marcel Brus and Panos Merkouris (eds), *Research Handbook on International Environmental Law*, Second edition (Edward Elgar, 2021) [231]; Natalie Klein, 'International Environmental Law Disputes before International Courts and Tribunals' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law*, Second edition (Oxford University Press, 2021) [1038].

of Justice,[23] the International Tribunal for the Law of the Sea[24] and the World Trade Organization Dispute Settlement Body,[25] all of which have grappled with difficult questions of the assessment and quantification of compensation for environmental damage,[26] precedent on environmental counterclaims before investment treaty tribunals is limited. Accordingly, at least for now, the sword wielded by states in ISDS proceedings may be a blunt one.

ISDS as a regulatory chill on environmental protection

On the other hand, the threat of having an investment treaty dispute lodged against a state for environmental regulation may lead to the state failing to take action to regulate. Commentators have discussed the existence of a 'regulatory chill' effect, defined by Tienhaara as the hypothesis that 'governments will fail to regulate in the public interest in a timely and effective manner because of concerns about ISDS'.[27] In particular, due to the threat of ISDS, some states

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23 See, e.g., *Certain Activities Carried Out By Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment on Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, 7 February 2018, 2018 ICJ Rep 15; *Whaling in the Antarctic (Australia v. Japan)*, Judgment, 31 March 2014, 2014 ICJ Rep 226; *Legality of the Treat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, 8 July 1996, 1996 ICJ Rep 226.

24 See, e.g., *Mox Plant (Ireland v. United Kingdom)*, Order, 3 December 2001, 2001 ITLOS Rep 95; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures Order, 27 August 1999, 1999 ICJ Rep 280.

25 See, e.g., Appellate Body Report, 'United States — Import Prohibition of Certain Shrimp and Shrimp Products', WTO Doc WT/DS58/23 (26 November 2001). For further discussion of the intersection of international environmental law and international trade/competition disputes, see Philippe Sands, *Principles of International Environmental Law*, Second edition (Cambridge University Press, 2012), 940 ff.

26 See James Crawford, *Brownlie's Principles of Public International Law*, Ninth edition (Oxford University Press, 2019) 344–45. In a recent landmark decision, the International Court of Justice found environmental damage to be compensable under general principles of international law: *Certain Activities Carried Out By Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment on Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, 7 February 2018, 2018 ICJ Rep 15.

27 Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2017) 7(2) *Transnational Environmental Law*, 229. See also Luke Eric Peterson, 'All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties' (Report, International Sustainable and Ethical Investment Rules Project, November 2002), 20 (arguing that 'practicing lawyers do admit that they hear rumours of investors applying informal pressure upon host states while brandishing an investment treaty as a potential legal stick', citing Canadian attempts to introduce plain packaging).

may fail to advance their environmental laws,[28] leading to continued poor quality environmental protection regulations to the disadvantage of their populaces and environment.[29] Low income states may lack the resources to hire the highest quality counsel or be concerned at the prospect of paying not only an award for damages but also legal costs,[30] which in ISDS proceedings can be high.[31]

28 'When faced with a decision on whether to risk millions of dollars for an unknown outcome, many countries may opt instead to retract, amend or fail to enforce an environmental regulation', Kyla Tienhaara, 'What You Don't Know Can't Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries' (2006) 6(4) *Global Environmental Politics*, 75, 96.

29 Jennifer Clapp, 'What the Pollution Haven Debate Overlooks' (2002) 2(2) *Global Environmental Politics*, 11, 17, cited in Kyla Tienhaara, 'What You Don't Know Can't Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries' (2006) 6(4) *Global Environmental Politics*, 75, 97. For an excellent example of the Third World Approaches to International Law (TWAIL) discourse surrounding ISDS and the scheme of foreign investment, see generally M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015).

30 Luke Eric Peterson, 'UK Bilateral Investment Treaty Programme and Sustainable Development: Implications of Bilateral Negotiations on Investment Regulation at a Time When Multilateral Talks are Faltering' (Royal Institute of International Affairs Sustainable Development Programme Briefing Paper No. 10, February 2004) 10 (arguing that 'questions can be raised about the capacity of the poorest developing countries to defend against this type of specialized international arbitration, given the costs and uncertainty entailed by the process'); Kyla Tienhaara, 'What You Don't Know Can't Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries' (2006) 6(4) *Global Environmental Politics*, 75, 95 (noting in relation to the example of mining in protected forests in Indonesia that '[t]he lack of available funds to pay compensation contributed to the [Indonesian government's] desire to avoid arbitration').

31 For instance, the cost of Australia's legal fees in its ISDS proceedings against Philip Morris have been estimated as at least AU$24 million. Uruguay, in its similar proceedings against Philip Morris, relied on the Bloomberg Foundation to fund its costs. See Pat Ranald, 'The Cost of Defeating Philip Morris over Cigarette Plain Packaging', *Sydney Morning Herald*, 2 April 2019, https://www.smh.com.au/national/the-cost-of-defeating-philip-morris-over-cigarette-plain-packaging-20190327-p5182i.html.

This effect may be difficult to prove,[32] but there are cases pointing towards its existence. In *Vattenfall v. Germany*,[33] Vattenfall, which had an agreement with the regional government of Hamburg, Germany, to develop a coal-fired power plant, commenced an investment treaty dispute due to Hamburg's environmental protection restrictions on its water-use permit. To settle the litigation, Hamburg eased the environmental restrictions attached to the water-use permit.[34] Some were of the view that this settlement effectively watered down German and European environmental law, demonstrating the regulatory chill effect in action,[35] and led to popular calls for Germany to abandon its use of ISDS.[36] Similar comments have

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32 Kyla Tienhaara, 'Investor-State Dispute Settlement' in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) [675, 683]. Some also doubt whether such an effect exists. See, e.g., Stephan W Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24(5) *Journal of International Arbitration*, 469 (arguing that the international investment law framework does not 'lead to a chill on environmental regulation nor obstruct measures that are introduced in an attempt to mitigate climate change'); Nikos Lavranos, 'After Phillip Morris II: The 'Regulatory Chill' Argument Failed – Yet Again', *Kluwer Arbitration Blog*, 18 August 2016, http://arbitrationblog.kluwerarbitration.com/2016/08/18/after-philipp-morris-ii-the-regulatory-chill-argument-failed-yet-again/ (last accessed 13 September 2021).

33 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Award, 11 March 2011.

34 The agreement to withdraw the proceedings from the ICSID tribunal notes that the parties agreed to the issue of a 'modified water use permit' and the termination of the previous permit: id. at 33.

35 See, e.g., Laurens Ankersmit, 'Case C 142/16 Commission v. Germany: The Habitats Directive Meets ISDS?', *European Law Blog*, 6 September 2017, https://europeanlawblog.eu/2017/09/06/case-c-14216-commission-v-germany-the-habitats-directive-meets-isds/ (last accessed 13 September 2021); 'Investor-State Dispute Settlement Must Go to Protect our Environment', *ClientEarth* (Media Release, 17 May 2019) https://www.clientearth.org/latest/latest-updates/opinions/investor-state-dispute-settlement-must-go-to-protect-our-environment.

36 Public opposition to ISDS following the *Vattenfall* case has been described as 'a turning point in the geopolitical landscape of ISDS': Vera Weghmann and David Hall, 'The Unsustainable Political Economy of Investor-State Dispute Settlement Mechanisms' (2021) 87(3) *International Review of Administrative Sciences*, 480. Sornarajah discusses the downfall of ISDS in relation to members of the Bolivarian Alliance for the Americas: M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015), 402. Australia, under the Gillard Labor government, chose to terminate its use of ISDS provisions in all investment and trade agreements in 2011: Leon E Trakman, 'Investor-State Arbitration: Evaluating Australia's Evolving Position' (2014) 15 *The Journal of World Investment and Trade*, 152. Australia's position has, however, been more nuanced in practice, with ISDS provisions appearing in its proposed free trade agreement with the United Kingdom: Patricia Ranald, 'A Clause in the UK-Australia Trade Deal Could Let Companies Sue Governments. We Have Been Here Before', *The Guardian*, 1 June 2021,

been made following *Ethyl Corp v. Canada*,[37] an ISDS claim under the former North American Free Trade Agreement (NAFTA) wherein Canada settled a dispute arising from its banning of a petrol additive by reversing the ban, as well as later disputes involving Canada.[38]

Climate change

The climate crisis requires concerted action globally to reduce reliance on fossil fuels.[39] There has been an exponential growth in new renewable energy projects and foreign investment in them,[40] and that growth is set to accelerate in the decades to come.[41] As public sentiment continues to build in favour of a decarbonised future, states are coming under increasing domestic and international pressure to move away from fossil-fuel intensive industries and towards renewable energy sources. These societal pressures and obligations on states create new challenges for investors and states, evidenced by the significant number of ICSID cases constituted pursuant to the Energy Charter Treaty,[42] as well as the diverse range of states against whom renewable energy ISDS disputes have been filed.[43]

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www.theguardian.com/commentisfree/2021/jun/01/a-clause-in-the-uk-australia-trade-deal-could-let-companies-sue-governments-we-have-been-here-before.

37 *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998.

38 Christina L Beharry and Melinda E Kuritzky, 'Going Green: Managing the Environment Through International Investment Arbitration' (2015) 30(3) *American University International Law Review*, 383, 422. See the discussion of Ethyl and other NAFTA cases in Philippe Sands, *Principles of International Environmental Law*, Second edition (Cambridge University Press, 2012) [1064–1071]. See also, e.g., *Lone Pine Resources Inc v. The Government of Canada*, ICSID Case No. UNCT/15/2 (a dispute brought against Canada in relation to the Province of Quebec's moratorium on fracking).

39 The Intergovernmental Panel on Climate Change (IPCC) has found that '[p]athways limiting global warming to 1.5°C with no or limited overshoot would require rapid and far-reaching transitions in energy, land, urban and infrastructure (including transport and buildings), and industrial systems': IPCC, 'Summary for Policy Makers' in 'Global Warming of 1.5°C' (Report, 2018), 15.

40 UN Environment Programme, 'Global Trends in Renewable Energy Investment' (Report, 2019).

41 The International Energy Agency estimates that US$44 trillion in investment will be required to decarbonise the global energy system: IEA, 'Energy Technology Perspectives 2014: Harnessing Electricity's Potential' (Report, 2014), 14.

42 ICSID, 'The ICSID Caseload – Statistics' (Issue 2021–2, 30 June 2021) [11, 23].

43 Magali Garin Respaut, 'Environmental Issues in ISDS', Jus Mundi, 22 July 2021, https://jusmundi.com/en/document/wiki/en-environmental-issues-in-isds (last accessed 13 September 2021) [4].

ISDS and regulatory compliance – a challenge for the future

In recent years, ISDS had to grapple with a variety of societal challenges, including, increasingly, issues of regulatory compliance.

These can be specific to a particular area (such as environmental protection) or industry (e.g., regulation of financial service providers) or more all-encompassing, such as money laundering, sanctions, and bribery and corruption.

These issues are here to stay, and will only increase in the years to come. They are often highly factual in nature. Some reflect global public policy choices, others more local regulatory preferences. They may come into play at all stages of a proceeding – at the jurisdictional stage, particularly if they concern the making of the investment, and the treaty in question contains an 'in accordance with law' requirement (or one is implied); when the admissibility of particular claims is discussed; or at the merits stage. They can also occur at the damages stage when issues of contributory fault must be quantified.

The nature, clarity and application of these rules are issues to be explained by the parties and parsed and distilled by the arbitral tribunals. Experts who can assist in clarifying the picture without introducing unnecessary density or complexity will be at a premium. Arbitral tribunals may need to assess the relevance of local regulatory enforcement actions or court judgments. Although they are not as equipped as national enforcement authorities to investigate regulatory non-compliance, they will nonetheless need to develop comfort with these questions and an ability to navigate them effectively, deploying the standards and tools of the arbitral process as appropriate for the context.

As part of this mix, the issue of corporate compliance efforts (i.e., programmes to prevent, detect and remediate non-compliance in key regulatory areas) is likely to receive increasing attention from arbitral tribunals as standards and expectations for such programmes grow internationally.

It will be important for tribunals and counsel to distinguish between *ex ante* risk management exercises, which may rely on a different quality of information, and *ex post* liability assessments that look for proof of non-compliance in a specific case. ISDS is in many ways still in the early stages of grappling with these issues and determining how they should play out in the context of a specific dispute.

– Lucinda A Low, Steptoe & Johnson LLP

ISDS as complementing action on climate change

The existing international legal framework governing climate change, while containing commitments by states to combat climate change, is yet to include

formal dispute resolution mechanisms.[44] ISDS may therefore be called upon as a mechanism to fill a 'governance gap' in the international legal framework for climate change dispute settlement.[45] The large number of renewable energy investment treaty disputes arbitrated against Spain illustrate this argument.[46] Spain had a renewable energy subsidy framework that attracted a great deal of foreign investment, including allowing owners of renewable energy resources to sell power back to the grid at a feed-in-tariff. The popularity of the subsidies caused a fiscal imbalance and, in 2013, Spain altered the subsidy regime, with this change applying to both new and existing projects.[47] Investors have filed at least 50 treaty cases against Spain, alleging that the government's actions were in breach of its obligations under the Energy Charter Treaty and effectively amounted to expropriation,[48] or that Spain had otherwise violated its duty to afford the investors FET by undermining their legitimate expectations. These arbitrations have resulted in awards of significant sums in favour of the claimants.[49] In response, Spain has now reintroduced incentives for the renewable energy sector in exchange for investors withdrawing pending arbitral or judicial proceedings.[50]

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44 For instance, the arbitration annex to the United Nations Framework Convention on Climate Change, opened for signature on 4 June 1992, has not yet been determined.

45 Valentina Vadi, 'Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?' (2015) 48 *Vanderbilt Journal of Transnational Law*, 1285, 1317.

46 For a general background to the Kingdom of Spain litigation, see Igor V Timofeyev, Joseph R Profaizer and Adam J Weiss, 'Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty', in J William Rowley, Doak Bishop and Gordon E Kaiser (eds), *The Guide to Energy Arbitrations*, Fourth edition (Global Arbitration Review, 2020), 45. See also Andie Altchiler, 'Using Investor-State Dispute Settlement to Enforce International Environmental Commitments' (2021) 42(1) *Pace Law Review*, 256, 266 ff.

47 Pablo del Rio and Pere Mir-Artigues, 'A Cautionary Tale: Spain's Solar PV Investment Bubble' (Report, International Institute for Sustainable Development, February 2014).

48 Energy Charter Treaty, opened for signature 17 December 1994, 2080 UNTS 95.

49 For instance, in *Eiser*, which is currently subject to enforcement proceedings before the Federal Court of Australia (see *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3), the tribunal awarded the investor €128 million for failing to accord fair and equitable treatment to the investors: *Eiser Infrastructure Ltd and Energia Solar Luxembourg S.à r.l. v. Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017.

50 Pablo Pérez-Salido, 'Royal Decree-Law 17/2019: An Opportunity for Spain to Leave Behind the Renewable Energy Arbitrations?', *Kluwer Arbitration Blog*, 30 December 2019, http://arbitrationblog.kluwerarbitration.com/2019/12/30/royal-decree-law-17-2019-an-opportunity-for-spain-to-leave-behind-the-renewable-energy-arbitrations/.

Similar cases have been brought against Italy[51] and the Czech Republic,[52] as well as against Canada under the NAFTA.[53] While the investors in these cases have not necessarily set out to use investment treaty dispute resolution mechanisms as a means of forcing states to take action on climate change, the disputes send a powerful message to governments that investors can and will take action if renewable energy incentives are wound back.[54] Using the framework established by the Spanish arbitrations, investors could bring claims against states where states backtrack on public commitments to combat climate change, where those commitments have been relied upon by investors at the time at which they made their investment, and where the revision of the state's policy causes that investor harm.[55]

ISDS could be used as a mechanism for advancing action on climate change where the investor is deprived of their investment by virtue of the impacts of climate change. The impacts of climate change have the potential to cause enormous harm to investments in fishing, agriculture and horticulture, food and beverage, coastal land, eco-tourism sites and wineries. An investor, in much the same way as the investor's complaint in *Allard v. Barbados*,[56] could potentially claim against a state alleging breach of its obligations under relevant BITs for failing to take steps to reduce the impact of anthropogenic climate change on their investment. ISDS claims may incentivise states to comply with international environmental obligations given the enforceability of these awards under the New

51 See, e.g., *Greentech Energy Systems A/S, et al v. Italian Republic*, SCC Case No. V 2015/095, Final Award, 23 December 2018.

52 See, e.g., *G.I.H.G. Limited, Natland Group Limited, Natland Investment Group NV, and Radiance Energy Holding S.A.R.L. v. Czech Republic*, PCA Case No. 2013-35 (ongoing).

53 *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016 (in relation to the Canadian province of Ontario's feed-in tariff programme).

54 Valentina Vadi, 'Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?' (2015) 48 *Vanderbilt Journal of Transnational Law*, 1285, 1317 (arguing that 'the effects of a given dispute reverberate beyond the parties to the same and can shape future decision making of governments, pressure corporations to invest in (or divest themselves of) a given sector activities, and reconfigure the public discourse').

55 This idea has also been explored in, for example, Andie Altchiler, 'Using Investor-State Dispute Settlement to Enforce International Environmental Commitments' (2021) 42(1) *Pace Law Review* [256, 276].

56 PCA Case No. 2012-06, Award, 27 June 2016.

York Convention[57] and the Washington Convention,[58] as opposed to action in other international forums, such as state–state proceedings, which do not necessarily carry the same compliance incentives.

These claims face significant challenges. Questions of causation are particularly complex when it comes to climate change. The damage complained of is cumulative such that it takes time for the impact of actions (or lack thereof) to manifest and there are a number of potential contributors to the damage.[59] Further, there are complex questions of mitigation, contributory negligence, quantum and valuation arising from climate change arbitrations.[60] Nonetheless, climate litigation is having increasing success before international and domestic courts.[61] The extent to which these successes can be reproduced under investment treaties to force states or corporate actors to take action on climate change is yet to be determined.

ISDS as an impediment to action on climate change

There are concerns that ISDS disputes could generate a regulatory chill effect on domestic (and international) climate change and renewable energy policies.[62] For example, Alberta, Canada, pledged to phase out coal-fired power by 2030.[63] The Albertan policy decision led to the institution of an ICSID case under NAFTA

57 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 3 (the New York Convention).

58 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 575 UNTS 159 (the Washington Convention).

59 On this point generally see Alexandre Kiss and Dinah Shelton, *International Environmental Law*, Third edition (Transnational Publishers, 2004) [352].

60 Alain de Bossart, 'Initial Views on Approaches to Quantum in Climate Change-Related Arbitrations', in *The Arbitration Review of the Americas* 2021 (Global Arbitration Review, 2020) [24].

61 On the domestic point, see, e.g., *R (on the application of Friends of the Earth Ltd) v. Heathrow Airport Ltd* [2020] UKSC 52 (United Kingdom, Supreme Court); *Sharma v. Minister for the Environment* [2021] FCA 560 (Australia, Federal Court); *Commune de Grande-Synthe v. France* (France, Council of State); *Milieudefensie et al v. Royal Dutch Shell* (Netherlands, District Court of The Hague).

62 See, e.g., Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2017) 7(2) *Transnational Environmental Law*, 229.

63 Kyla Tienhaara, 'The Fossil Fuel Era is Coming to an End, but the Lawsuits are Just Beginning', *The Conversation*, 19 December 2018, https://theconversation.com/the-fossil-fuel-era-is-coming-to-an-end-but-the-lawsuits-are-just-beginning-107512 (last accessed 13 September 2021).

by Westmoreland Coal,[64] a US company with coal interests in Alberta. While a decision has not yet been made in that case, the quantum of compensation claimed by Westmoreland – US$470 million – could deter other jurisdictions from advancing decarbonisation efforts. As ISDS claimants are typically from high-income states,[65] an uncomfortable reality may come into existence wherein investors from the wealthiest states challenge policies of low-income states designed to alleviate the impacts of climate change on that state.

States are now, in response to such litigation and out of a growing awareness of their obligations, including carve-outs for the preservation of the environment in their investment treaties. Notably, the Netherlands Model Investment Agreement includes reference to the Paris Agreement and reaffirms the commitment of the parties to Dutch investment treaties to their obligations under international environmental law,[66] and the Morocco–Nigeria BIT contains binding provisions that requires parties to 'apply the precautionary principle'.[67] The extent to which these provisions are effective to shield states against ISDS such as that commenced by Westmoreland Coal is unclear. Accordingly, there is a clear 'grey zone' at the

64 *Westmoreland Coal Company v. Government of Canada*, ICSID Case No. UNCT/20/3. Other cases have been instituted against Canada seeking to challenge its environmental policies; see, e.g., *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04; *Mobil Investments Canada Inc and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4. Similar cases have been instituted against the Dutch government for its plan to phase out coal-fired power generation by 2030: *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4; *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22. In the former case, RWE claims damages of €1.4 billion. See also *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14 (arising from Italy's moratorium on oil and gas projects in coastal areas, in which claimed damages for loss of future profits could reach up to US$300 million).

65 UNCTAD, 'Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outmarks in 2019' (IIA Issues Note Issue 2, July 2020).

66 Netherlands Model Investment Agreement, Article 6(6).

67 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, signed 3 December 2016; Canada–China Promotion and Reciprocal Protection of Investments Agreement, signed 9 September 2012, Articles 13, 14. Note that the 'precautionary principle' is a key principle of international environmental law, which, though difficult to define, effectively requires (and empowers) states to prevent serious or irreversible environmental degradation to their environments. For further discussion, see James Crawford, *Brownlie's Principles of Public International Law*, Ninth edition (Oxford University Press, 2019) [341–342].

intersection of international environmental law and international investment law. The need for clarity may lead to renewed efforts to form an international agreement at the intersection of these two bodies of law.[68] In the meantime, climate change-related disputes are likely to grow in number, complexity and size as the impacts of the climate crisis become more pronounced, raising thorny questions for investment treaty tribunals.

Public health

The power of states to regulate for public health came to the fore with the claims made by subsidiaries of Philip Morris International Inc (PMI) against Uruguay[69] and Australia.[70] Both Uruguay (in 2008 and 2009) and Australia (in 2011) introduced tobacco control regulations that controlled how cigarettes could be packaged and increased the health warnings on packets. PMI claimed that these had expropriated its intellectual property and breached the FET standard, among other claims. While unsuccessful,[71] PMI's claims were controversial and heightened questions around the legitimacy of ISDS. They were also expensive to defend and led to the formation of the Anti-Tobacco Trade Litigation Fund in 2015 to support low- and middle-income countries sued by tobacco companies under international trade agreements.[72] The claims may also have led to regulatory chill as other states adopted a wait-and-see approach pending the results in the arbitrations.

Questions have been raised again in the wake of the covid-19 pandemic as to how ISDS responds to public health challenges. The covid-19 pandemic caused states to introduce onerous regulations that restricted movement and the ability of many private enterprises to function. These restrictions could potentially give rise to claims of indirect expropriation or violation of the FET standard. Conversely, a failure of a state to act could lead to a claim of a breach of the full protection and

68 For instance, the proposed Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation. See also the discussion of a 'green treaty model' in Daniel B Magraw and Sergio Puig, 'Greening Investor-State Dispute Settlement' (2018) 59(8) *Boston College Law Review*, 2717.

69 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7.

70 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

71 In the case of Uruguay, on the merits, and in the case of Australia, on jurisdictional grounds.

72 See 'The Anti-Tobacco Trade Litigation Fund', Campaign for Tobacco-Free Kids, https://www.tobaccofreekids.org/what-we-do/global/legal/trade-litigation-fund (last accessed 13 September 2021).

security clause, which requires a state to provide physical security to investments. Economic stimulus measures by states, if they discriminate between foreign and local investors, could also lead to claims.

In August 2021, ICSID registered claims raised by Vinci Airports SAS and ADP International SA against Chile under the Chile–France BIT[73] following Chile's reported refusal to renegotiate concession terms for Santiago's Arturo Merino Benitez International Airport following the disruption caused by Chile's response to the pandemic.[74] These are the first reported ISDS claims in response to the covid-19 pandemic. In this section, we look at how states may respond to such claims.

Exceptions for public health measures

Concerns about whether ISDS has restricted states from legitimately regulating in the public interest have led to a new generation of treaties in which the language of the substantive treaty protections have been clarified (given the arguably expansive interpretation of the FET standard adopted by some tribunals)[75] and exceptions to the protections enlarged.

Notably, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[76] explicitly recognises the right of state parties to regulate with respect to public health in the preamble, providing that non-discriminatory regulatory actions to protect public welfare objectives do not constitute indirect expropriation except in rare circumstances[77] and that investment protections should not be construed to prevent a state from ensuring that investment activity is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[78] Given the controversy over PMI's claims, Australia insisted

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73 Agreement between the Government of the Republic of Chile and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments, signed 14 July 1992.

74 *ADP International SA and Vinci Airports SAS v. Republic of Chile*, ICSID Case No. ARB/21/40.

75 For a history of the FET standard, see Bondy, 'Fair and Equitable Treatment – Ten Years On', *Evolution and Adaption: The Future of International Arbitration*, ICCA Congress Series No. 20, Sydney 2018 [198].

76 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, opened for signature 8 March 2018.

77 id., Annex 9B[3(b)] states: 'Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.'

78 id., Article 9.15 states: 'Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that

on Article 29.5, which allows a state party to the CPTPP to elect to deny the use of ISDS for claims challenging a tobacco control measure.[79] This clause is unprecedented.[80]

Other examples of agreements containing public health carve-outs include the China–Australia Free Trade Agreement,[81] the Comprehensive Economic and Trade Agreement[82] and the EU–Singapore Investment Protection Agreement.[83] Nevertheless, only a minority of BITs have exceptions in relation to measures for the protection of public health[84] or include a mention of the right to regulate, or both.[85] Accordingly, states may have to turn to other exceptions and defences to defend covid-19 claims.

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it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives'.

79 id., Article 29.5.

80 Andrew Stephenson and Lee Carroll, 'The Trans-Pacific Partnership: Lessons Learned for ISDS', in Barton Legum (ed.), *The Investment Treaty Arbitration Review*, Second edition (Global Arbitration Review, 2016) [301, 312].

81 'Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section': China–Australia Free Trade Agreement, signed 17 June 2015, Article 9.10(4).

82 'For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section': Comprehensive Economic and Trade Agreement (Canada–EU) (CETA), signed 30 October 2016, Article 8.9(1)–(2).

83 Article 2.2(1) and (2) of the EU–Singapore Investment Protection Agreement, signed 15 October 2018, is phrased in similar terms to Article 8.9 of the CETA. Article 2.3 on National Treatment has an exception for measures necessary to protect human, animal or plant life or health.

84 A search on the International Investment Agreements Navigator found on the UNCTAD Investment Policy Hub indicated that 317 out of 2,574 mapped treaties include a mention of health and environment and 241 have exceptions for public health and environment measures.

85 A search on the International Investment Agreements Navigator found on the UNCTAD Investment Policy Hub indicated that 135 out of 2,574 mapped treaties include a mention of the right to regulate.

National security exception

While there are different formulations and the precise wording will be critical, some treaties include an exception to investor protection for measures the state takes to protect its essential security interests.[86] The threat of the covid-19 pandemic could be judged to fall within an essential security interest.[87] Some treaties leave it to the state itself to judge if the measures are necessary although those measures still need to be taken in good faith.[88] Even where the exception clause is not self-judging, arbitrators may still exercise significant deference to a state's own assessment of the threat and necessity of the measures taken.[89]

The challenge to using this exception is illustrated by the experience of Argentina following its wave of claims under the US–Argentina BIT. Different tribunals came to differing decisions as to whether Argentina's economic crisis was sufficiently severe for Argentina to be able to invoke the same national security exception.[90]

Police powers under customary international law

Under customary international law, the state is able to exercise its police powers (regulatory powers) in the maintenance of public order, health or morality.[91] For the state's action not to constitute indirect expropriation, the action must be taken bona fide for the purpose of protecting the public welfare and must be non-discriminatory and proportionate.[92]

In *Philip Morris v. Uruguay*, the tribunal held that Uruguay's disputed tobacco control regulations were a reasonable bona fide exercise of police powers as they were taken by Uruguay with a view to protect public health in fulfilment of its national and international obligations, were adopted in good faith, were non-discriminatory and were proportionate to the objective they were meant to

86 A search on the International Investment Agreements Navigator found on the UNCTAD Investment Policy Hub indicated that 394 out of 2,574 mapped treaties include a national security exception.

87 UNCTAD cited the threat in connection with spreading of diseases as being encompassed within a threat to national security. 'The Protection of National Security in IIAs', UNCTAD Series on International Investment Policies for Development, 2009, United Nations Doc UNCTAD/DIAE/IA/2008/5 [7].

88 id. [40].

89 id. [41].

90 id. [8–10], [42–43].

91 *Philip Morris Brands SARL and others v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 [291]–[301].

92 id. [305].

achieve (in this respect, the tribunal noted the limited adverse financial effects felt by the PMI group).[93] The majority of the tribunal held that the measures were reasonable and not arbitrary and therefore not in breach of the FET standard. Furthermore, the tribunal majority found that it was appropriate to recognise a 'margin of appreciation' to regulatory authorities when making public policy determinations – in other words, that tribunals should pay deference to governmental judgments of national needs in matters such as the protection of public health.[94] This was a controversial adoption of a doctrine used by the European Court of Human Rights.

Other public health measures upheld by tribunals on the basis of the exercise of police powers include the banning of fuel additives harmful to public health and the prohibition of the sale of a harmful agricultural insecticide.[95] Relevantly, in the 1903 *Bischoff* case, the German–Venezuelan Commission held that 'during an epidemic of an infectious disease there can be no liability for the reasonable exercise of [a state's] police powers'.[96]

Other customary international law defences

The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts codifies the customary international law defences.[97] Argentina invoked the defence of necessity in Article 25 in defence of the measures it took during its economic crisis (mostly unsuccessfully). One of the challenges with Article 25 is that the measure must be 'the only way for the State to safeguard an essential interest against a grave and imminent peril'.[98]

Other defences that could be invoked are *force majeure*, which requires that the unforeseen event made it materially impossible for the state to perform an obligation, and distress, which applies when there is a threat to life. To invoke the defence of distress, the state will need to show that there was no other reasonable way to deal with the threat and that the measure was proportionate.

93 id. [306].

94 id. [399].

95 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 [7]; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010 [266].

96 *Bischoff*, German–Venezuelan Commission, Decision (1903) 10 RIAA 420.

97 International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' (2001) II(2) *Yearbook of the International Law Commission* [31].

98 id., 80 (commentary [1] on Article 25).

The future of public health and ISDS

Claims arising from the covid-19 pandemic will raise novel issues to be grappled with by claimants, states and tribunals given that states have had to adopt measures quickly while the threat of covid-19 is still evolving. The approach of tribunals is likely to vary as to the application of the customary law defences and the degree of deference they accord to the judgements of governments as to what was and is necessary to protect public health. Widespread claims against states by investors could bring a new backlash against ISDS and in turn damage the reputation of the investors bringing claims.

Human rights

Each of the societal challenges discussed in this chapter necessarily involve questions of human rights; the right to live in a healthy environment,[99] the right to the 'highest attainable standard of physical and mental health',[100] and the various human rights violated by acts of corruption.[101] Investment treaty tribunals have also been called upon to specifically determine questions of human rights, paving the way for further litigation of human rights issues.

Human rights in international investment treaties and agreements

Many of the protections in BITs are protections of the civil and political rights of foreign investors, such as property rights and the right to justice. What has been more challenging is balancing the human rights of investors with the human rights of other stakeholders in the host state.

Some model BITs now recognise human rights standards or provide carve-outs to allow states to enforce non-discriminatory human rights standards.[102]

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99 Though not explicitly incorporated into a binding international convention; see, e.g., the 1992 Rio Declaration, which provides that 'human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'.

100 International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 993 UNTS 3, Article 12(1).

101 See generally Anne Peters, 'Corruption as a Violation of International Human Rights' (2018) 29(4) *European Journal of International Law*, 1251.

102 The Investment Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Chile, signed 18 November 2016, is instructive, providing that '[t]he Parties reaffirm the importance of each Party encouraging enterprises operation within its area to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party': at Article 16. See also Agreement Between the

Conversely, investment agreements may contain stabilisation clauses, such as economic equilibrium clauses, which require states to indemnify investors against changes to their legislation – including human rights law – that affect the profitability of their investment. Stabilisation clauses have come under fire as impeding the advancement of human rights norms, including labour law and safety standards.[103] For instance, the stabilisation clause relating to the Baku–Tbilisi–Ceyhan pipeline required Azerbaijan (among others) to indemnify the consortium of investors in relation to new domestic regulation, including environmental, human rights and tax, which negatively impacted the investment for a period of 60 years.[104] This clause caused a great backlash,[105] leading the investor to

Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, signed 9 January 2013, which lists 'corporate social responsibility' as one of its guiding principles: at Article 4; Indian Model Bilateral Investment Treaty, Article 12; Cooperation and Investment Facilitation Agreement between the Government of the Federative Republic of Brazil and the Government of the Republic of Mozambique, signed 30 March 2015, Annex II(ii) ('[r]especting human rights of those involved in the activities of the companies, consistent with the international obligations and commitments of the host Party').

103 Sornarajah, a TWAIL scholar, has argued that such clauses are an impermissible incursion into state sovereignty and, accordingly, are invalid: M Sornarajah, 'The Myth of International Contract Law' (1981) 15 *Journal of World Trade Law*, 187. It is argued that developing states accept these clauses, notwithstanding the effective erosion of their sovereignty, due to their 'weak bargaining position at the initial phase of natural resources development, which compels them to accept such protective undertakings in order to develop scarce resources and accelerate economic development and public welfare': Abdullah Faruque, 'Validity and Efficacy of Stabilisation Clauses: Legal Protection vs Functional Value' (2006) 23(4) *Journal of International Arbitration*, 317, 335.

104 The stabilisation clause relevantly provided that: 'The State Authorities shall take all actions available to them to restore the Economic Equilibrium established under the Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change (whether the change is specific to the Project or of general application) in Azerbaijan Law (including any Azerbaijan Laws regarding Taxes, health, safety and the environment)': Host Government Agreement between and among the Government of the Azerbaijan Republic and the State Oil Company of the Azerbaijan Republic BP Exploration (Caspian Sea) Ltd, State BTC Caspian AS, Ramco Hazar Energy Limited, Turkiye Petrolleri A.O., Unocal BTC Pipeline Ltd, Itochu Oil Exploration (Azerbaijan) Inc, Delta Hess (BTC) Limited, signed 17 October 2000.

105 See, e.g., Amnesty International, 'Human Rights on the Line: The Baku-Tbilisi-Ceyhan Pipeline Project' (May 2003) (in relation to the impacts of the pipeline on human rights in Turkey).

engage directly with Amnesty International and the host states to create a legally binding contract in relation to the human rights and environmental aspects of its investment.[106]

Towards an obligation for investors to respect human rights?

The regulatory chill threat recounted in this chapter could equally apply to questions of human rights. In this section, we consider whether states could use the ISDS process as a mechanism for forcing investors to comply with international human rights law. The critical flaw in these discussions is that international human rights law only binds states and not private enterprises without the enactment of further domestic legislation.[107] However, investment treaty tribunals have begun to exercise jurisdiction over human rights-related investment treaty disputes. The decision by the tribunal in the ICSID case of *Urbaser v. Argentina* was the first of its kind. The case involved a counterclaim by Argentina on the basis that the investor, by failing to properly maintain its investment in Buenos Aires' water and sewage system, breached the human right to water.[108] The counterclaim ultimately failed as Argentina could not demonstrate that the investor had an independent obligation under international law to protect the human right to water.[109] *Urbaser* therefore exemplifies the inherent difficulty in enforcing human rights law against investors and non-state entities.[110] Nonetheless, *Urbaser* was a first and necessary step towards investment treaty tribunals recognising counterclaims by states on the basis of human rights as justiciable.[111]

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106 Business Leaders Initiative on Human Rights (OCHCR), 'A Guide for Integrating Human Rights into Business Management', 27.

107 See generally Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights*, Second edition (Oxford University Press, 2017), 420; Justine Nolan and David Kinley, 'Trading and Aiding Human Rights: Corporations in the Global Economy' (2007) 25(4) *Nordic Journal of Human Rights*, 353, 359.

108 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016 (*Urbaser*).

109 id. [1206]–[1210].

110 See also Megan Wells Sheffer, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights' (2011) 39(3) *Denver Journal of International Law and Policy*, 483, 493–494 (noting that '[h]uman rights and broader public interest considerations typically have little if any role' in investment treaty arbitration).

111 The tribunal, while holding it not to be an issue of concern in *Urbaser*, noted its decision may have been different 'in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties', at [1210].

A further step towards an obligation for investors to respect human rights – perhaps the most innovative to date – emerged from the partial dissenting opinion of Professor Sands in *Bear Creek Mining Corporation v. Republic of Peru*.[112] In that case, a Canadian investor sought to develop a mining project in Peru, a project that caused significant community opposition and violent protest, with the government then preventing the project from proceeding.[113] Peru argued that the investor had contributed to the social unrest and did not hold a 'social licence' to go ahead with the project by failing to consult with the local indigenous community,[114] an argument that the majority rejected on the basis that Peru was unable to demonstrate causation.[115] However, Professor Sands found that the need to gain a social licence from the Aymara peoples was 'blindingly obvious',[116] citing *Urbaser* as authority for the proposition that investors may be required to consider international human rights law (including the rights of indigenous peoples) in the conduct of their investment.[117] Finding that the investor 'did not do all it could have done to engage with all the affected communities',[118] Professor Sands would have reduced the damages awarded to the investor by half in recognition of its contributory fault and liability.[119]

While neither *Urbaser* nor *Bear Creek* serve as authority for finding an explicit obligation for investors to consider and implement international human rights obligations, they lay the groundwork for a future tribunal to do so. Tribunals may be assisted in finding such an obligation by accepting petitions for *amicus curiae* status by human rights non-governmental organisations and other non-state

112 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (*Bear Creek*, Award).

113 For background, see Joshua Paine, 'Bear Creek Mining Corporation v. Republic of Peru' (2018) 33(2) *ICSID Review*, 340.

114 *Bear Creek*, Award [218]–[230].

115 id. [412].

116 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands, 30 November 2017, [6]–[9].

117 id. [10].

118 id. [35].

119 id. [39].

actors,[120] which not only provide their unique expertise and insight into human rights issues considered by investment treaty tribunals, but also increase public confidence in the ISDS process through their participation.[121]

Corruption

Bribery and corruption have been widely condemned by the international community and investment tribunals. Corruption allegations feature in ISDS in one of two main ways. Most commonly, they are raised by states as a defence to investor claims. Less frequently, they have been used as a 'sword' by investors that claim that corruption by state actors breached investment protections.

Corruption as a defence

Tribunals have recognised that investors that have engaged in corrupt activities should be denied access to ISDS. They have dismissed claims based on investments acquired or established through corruption either by declining jurisdiction or declaring the claims inadmissible. The 'corruption defence' is increasingly being raised by respondent states based on the following arguments.

- Express legality requirement: many investment instruments contain an express 'legality' requirement that qualifies covered investments as those made 'in accordance with law'. As corruption is unlawful under most legal systems, tribunals have affirmed that they lack jurisdiction where investments are procured with corruption.[122]
- Implicit legality requirement: even where the instrument does not contain an express legality requirement, some tribunals have found the requirement to be implicit. In *Phoenix v. Czech Republic*, the tribunal said that 'conformity of the establishment of the investment with the national laws . . . is implicit even when not expressly stated in the relevant BIT'.[123]

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120 See generally Chester Brown, 'The Contribution of Non-State Actors to the Development of Transparency Regimes in Investment Treaty Arbitration' in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration* (Wolters Kluwer, 2018), 653.

121 As recognised in *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae of 19 May 2005 [22].

122 *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [372]. See also *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019 [665].

123 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 [101]; see also *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the*

- International public policy: investment tribunals have recognised that corruption and bribery are contrary to international public policy and have found they have a duty to decline jurisdiction or declare claims inadmissible if they are tainted by corruption.[124]
- 'Unclean hands': the existence of a doctrine of 'unclean hands' under international law is controversial. In *Yukos v. Russia*, the tribunal concluded that 'unclean hands' does not exist as a general principle of international law that would bar a claim by investors.[125] In *Littop v. Ukraine*, the tribunal reached the opposite conclusion and applied the unclean hands doctrine in dismissing the investor's claims due to admitted corruption.[126]

Philippines [II] (Fraport II), ICSID Case No. ARB/11/12, Award, 10 December 2014 [332]; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24 (Energy Charter Treaty), Award, 27 August 2008 [138]–[139].

124 *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 [157], [179]; *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award, 27 December 2016 [818], cited in K Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration* (Cambridge University Press, 2017), 130; *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Award, 4 February 2021 [529]. See also *Vladislav Kim v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 [593]; *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of Award, 2 July 2018 [385]–[386]; *The Kyrgyz Republic v. Mr Valeriy Belokon*, Ruling of the Paris Court of Appeal, RG No. 15/01650, 21 February 2017 [8], [15] (annulling the award on international public policy grounds based on evidence of money laundering and corruption rejected by the tribunal).

125 *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014 [1362–1363]; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014 [1362–1363]; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Final Award, 18 July 2014 [1362]–[1363].

126 *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Award, 4 February 2021 [438]–[441]. See also *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award, 27 December 2016 [819] et seq., cited in K Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration* (Cambridge University Press, 2017) [130]; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 [492] ('it is undisputed that claimants with "dirty hands" have no standing in investment arbitration'); *Fraport II* [328].

Corruption allegations may also be relevant to the merits stage. This is especially where corruption is alleged to have occurred not in the initiation but in the operation of the investment, in which case the corruption allegations may form part of the state's defence to the substantive violations of the instrument.[127]

While raised frequently as a defence, there are only four investor–state cases in which corruption was determinative in dismissing the claims: *World Duty Free v. Kenya* (2006); *Metal-Tech v. Uzbekistan* (2013); *Spentex v. Uzbekistan* (2016); and *Littop v. Ukraine* (2021). In other cases, tribunals have dismissed the corruption allegations due to insufficient evidence.[128]

Corruption allegations raised by investors

Investors may also raise corruption allegations as a 'sword'. This has occurred less frequently as investors will usually not seek to implicate themselves in corrupt activities (*World Duty Free v. Kenya* being the obvious exception). Instead, investors are more likely to raise corruption allegations where state officials have attempted to solicit a bribe or where corruption favoured third parties at the investor's expense. This kind of nefarious activity may violate the FET standard and similar protections.

In *EDF v. Romania*, the investor alleged that the state's officials requested bribes and because the investor refused to pay them, the contract was not extended. The claimant alleged that the state's action breached the FET standard.[129] The tribunal applied a heightened standard of proof, and the claim was unsuccessful due to insufficient evidence.

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127 *Lao Holdings N.V. v. The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Award, 6 August 2019 [162], [278] (corruption found to be relevant to the legitimacy of the investor's alleged legitimate expectations and investor's bad faith). See also *Lao Holdings NV v. The Government of the Lao People's Democratic Republic; Sanum Investments Limited v. The Government of the Lao People's Democratic Republic* [2021] SGHC(I) 10 (the Singapore International Commercial Court dismissed the investors' set-aside application and affirmed the tribunal's duty to consider corruption).

128 See, e.g., *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 [77], [116], [117]; *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Decision on Jurisdiction, 19 December 2008 [173]; *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 [545]; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019 [736].

129 *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 [69 and 105]. See also *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 [425] (investor alleged bribery of a judge); *Methanex Corporation v. United States of America*,

The high standard of proof applied by some tribunals, as discussed below, coupled with the asymmetric investigative tools available to investors, may explain the relative dearth of claims by investors in this area. In this respect, ISDS appears to have had little impact in reducing corruption.

Proving corruption

Investor–state tribunals have diverged in their approach to the standard of proof applicable to corruption allegations, with decisions split between the balance of probabilities and a higher standard.

Some investment tribunals have found a heightened standard of proof applies to corruption allegations because corruption is a serious allegation with severe consequences. The *EDF v. Romania* tribunal said there was 'a need for a high standard of proof of corruption' of 'clear and convincing evidence'.[130]

In other decisions, investment tribunals have rejected the use of a heightened standard of proof.[131] The balance of probabilities approach is promoted, in part, because of strong public policy arguments for deterring corruption and because the hidden nature of nefarious dealings often denies a party clear evidence. In cases where direct evidence of corruption is unavailable or limited, tribunals have been willing to rely on circumstantial evidence, adverse inferences, indicia of corruption (or 'red flags') and 'connecting the dots'.[132]

UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (investor alleged corruption due to campaign contribution leading to executive order prejudicing investor).

130 *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 [221]. See also *H&H Enterprises Investments Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014 [390] (the evidentiary threshold is high); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 [492] (clear and convincing evidence).

131 *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 [7.52] (applying the balance of probabilities standard); *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Columbia*, ICSID ARB/16/6, Award, 27 August 2019 [669] (the tribunal saw 'no reason to depart from the traditional standard of preponderance of the evidence').

132 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [245, 293] (red flags and adverse inferences); *Rumeli Telekom A.S. and Telsim Mobil, Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 [709]; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 [303]; *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award, 27 December 2016 [934], cited in K Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration* (Cambridge University Press, 2017) [134] (corruption established by connecting the dots); *Union Fenosa*

Greater consistency and predictability are needed.[133] The high standard of proof applied by some tribunals, or uncertainty over the applicable standard, may encourage tribunals to sidestep corruption allegations while allowing them to colour their ruling on other issues. This presents a challenge to the contribution of ISDS to anti-corruption efforts.

Consequences of a finding of corruption

The traditional approach to investments initiated through bribery or corruption is a complete dismissal of the claim. This 'all or nothing' approach has been justified by the seriousness and grave effects of corruption. In *Metal-Tech*, the tribunal said it was 'to ensure the promotion of the rule of law, which entails that a court of tribunal cannot grant assistance to a party that has engaged in a corrupt act'.[134] In other words, let the loss lie where it falls.

Some commentators have criticised this as unfair because all the consequences fall on the investor. Host states are immunised from liability even where they have taken no or inadequate action to investigate or punish the state officials involved in the allegedly corrupt act. However, host states should bear in mind that their inaction is not entirely irrelevant. Tribunals may take into consideration a host state's inaction when assessing whether the corruption allegations are proven.[135]

Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, 31 August 2018 [7.113]–[7.114] (finding there were 'insufficient dots'); *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019 [736] ('The dots simply do not connect'); *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part III, Chapter B, Page 2 [3] (connecting the dots).

133 In 2019, the Competence Centre Arbitration and Crime and Basel Institute on Governance released a toolkit to assist arbitrators to navigate issues of corruption, including matters of evidence. This is a helpful step-by-step guide and a good first step. See 'Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators' (29 April 2019).

134 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [389].

135 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 [116] (the tribunal was 'reluctant to immunize Egypt from liability' given Egypt's failure to prosecute the allegedly corrupt official); *Lao Holdings N.V. v. The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Award, 6 August 2019 [111]–[112] (the tribunal found the state's failure to investigate or prosecute state officials was relevant to the credibility of the state's allegations).

Should tribunals investigate corruption in investment treaty cases sua sponte?

What is a tribunal's duty when it is faced with evidence of corruption?

It is surprising that the above question, which to many allows only a positive answer, continues to remain an open issue. Briefly, the controversy is whether, if neither party raises the issue of corruption, the tribunal should nevertheless make an independent investigation within the arbitral process to ascertain:

- whether corruption has occurred in the transaction in dispute; and
- what the effect of such corruption (if found to exist) would have on the outcome.

Many observers thought that the question *had* been answered, clearly in the affirmative, by the groundbreaking decision of the ICSID tribunal in *Metal Tech Ltd v. Republic of Uzbekistan* (Case No. ARB/10/3, Award, 3 October 2013) where the tribunal, chaired by Gabrielle Kaufmann-Kohler, took its own initiative to explore corruption, which was not an issue raised by either party. There, the claimant had paid US$4 million for consulting services when the total value of the project was US$20 million. The tribunal ordered the parties to produce additional information and documents under Article 43 of the ICSID Convention. The ultimate finding was that these payments constituted corruption under Uzbek law, and the claimant's BIT claim was dismissed because it only protected investments implemented in accordance with laws and regulations of the host state. But the tribunal further acknowledged that the Uzbek authorities' conduct in accepting or soliciting bribes was also to blame. Therefore, each party was ordered to pay its own costs.

This approach had been followed in *Niko Resources (Bangladesh) Ltd v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation (Petrobangla)* (ICSID Cases Nos. ARB/10/11 and ARB/10/18, Procedural Order 13, 26 May 2016). Nevertheless, there remains a more conservative view that enquiring into corruption and ruling on its consequences may be *ultra petita* if such issues are not raised by the parties, and the award could be at risk of being set aside or refused enforcement.

But turning a blind eye to corruption may also result in annulment if it amounts to endorsing corruption, especially if the transaction breaches anti-money laundering legislation, and also if the offending acts provide a legitimate basis for challenging the award pursuant to the public policy provisions in Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the UNCITRAL Model Law.

But the more positive view of the tribunal's duty has very recently been confirmed by a decision of the Singapore International Commercial Court, *Lao Holdings NV v. Government of the Lao People's Democratic Republic* ([2021] SGHC(I) 10), consisting of a panel of three judges (from Singapore, England and Australia) where the Court, cited a number of cases (both Singapore and international) as well as international articles to reaffirm that:

arbitral tribunals and particularly arbitral tribunals dealing with investor–State disputes, have a duty to consider corruption, which includes illegal conduct, bribery and fraud. That duty arises not only where the tribunal has to deal with allegations of corruption in the dispute between the parties, but also where the evidence in the case indicates possible corruption. This shows that, as with national courts, arbitral tribunals have a pro-active role and cannot simply ignore evidence of corruption. Where, therefore, a party seeks to put before an arbitral tribunal evidence of corruption, we are of the clear view that no agreement between the parties can prevent the arbitral tribunal from reviewing and, where appropriate, admitting that evidence. This is consistent with . . . the public duty which, we find, applies as much to arbitrators as it does to judges. Otherwise parties could enter into procedural agreements deliberately or unintentionally precluding evidence of corruption and arbitral tribunals might make awards supporting or enforcing that corruption.

I make only one caveat on this decision. While the principle is clear, its execution might be a matter of debate, if the tribunal:

- acts as an investigator to direct that certain documents evidencing possible corruption, which neither party has asked for, be produced;
- then proceeds to call witnesses whom neither party has called and interrogates such witnesses; and
- with that evidence, then makes a finding of corruption.

There *is* a danger that due process might not be observed and that the ultimate finding of the tribunal might be set aside for this reason.

My own view is that tribunals are watchdogs not bloodhounds – we don't go sniffing around for corruption, but when a stench emerges that is too pungent to ignore, we need to make appropriate inquiries. And when we do feel compelled to inquire further into plausible evidence of corruption, we cannot play Sherlock Holmes and launch into an independent investigation of our own, but have to allow (and even direct) parties to define the parameters of such an inquiry and then present the case for and against a specific finding of corruption.

Twice in my experience, where I have seen evidence strongly suggesting possible corruption, but neither party has raised corruption as an issue, I have raised strong suggestions to at least one of the parties to consider amending its pleadings or memorials to specifically include allegations of corruption. In both cases my suggestions were accepted and amendments to the pleadings were duly made to raise the issue. However, in each case the party raising the issue pursued the corruption plea with a singular lack of enthusiasm, and my tribunal in both cases was unable to make any positive findings of corruption without the active prosecution of the existence of corruption by the party making the allegation. But at least I had fulfilled my duty to the best of my ability.

– Michael Hwang SC, Michael Hwang Chambers LLC

Conclusion

In this chapter, we have expounded on some of the key societal challenges confronting the international investment law framework and investor–state dispute settlement today. ISDS has been criticised for causing a regulatory chill due to the risk of treaty claims in response to new regulations in the areas of environment and public health. On the other hand, some investors and states have used ISDS to confront these societal challenges.

The task for investment tribunals is to find the right balance between protecting investments, allowing sovereign states to take the necessary regulatory action on key social challenges, and holding states responsible where they have failed to do so or have done so in an arbitrary and discriminatory fashion.

CHAPTER 17

Quantification of ISDS Claims: Theory

Mino Han, Konstantin Christie and Charis Tan[1]

Under international law, a state responsible for the breach of an international obligation is under a duty to make reparation. This general principle, well established as a rule of customary international law, was summarised by the Permanent Court of International Justice (PCIJ) in the often-cited *Factory at Chorzów* case:

> *It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.*[2]

This chapter provides an overview of the various approaches to the quantification of damages in investor–state dispute settlement (ISDS), from historical roots to some of the recent issues that the users of ISDS have encountered in seeking reparation for unlawful conduct by a state.

The obligation of reparation

A state's obligation of reparation for a breach of its obligations has been confirmed by the International Law Commission (ILC) in the Draft Articles on

1 Mino Han, Konstantin Christie and Charis Tan are partners at Peter & Kim. The authors express their gratitude to Sophie Oh and Francesca Dal Poggetto of Peter & Kim for their assistance and contributions to this chapter.

2 *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, PCIJ Series A, No. 9, p. 21.

Responsibility of States for Internationally Wrongful Acts (the Draft Articles on State Responsibility)[3] at Article 31 (Reparation), which states as follows:

> *1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*
> *2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*

It is important to note that despite formally being a soft law instrument (because they were not reduced to treaty form), the Draft Articles on State Responsibility are deemed to be authoritative to the extent that they reflect customary international law and have often been referred to by various international investment tribunals.[4]

The principle of full reparation

The obligation placed on the responsible state is to make 'full reparation'. As expressed by the PCIJ in *Factory at Chorzów*, 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[5]

Under Article 31(1) of the Draft Articles on State Responsibility, the state's obligation to make full reparation relates to the 'injury caused'. Thus, reparation is full, in whatever its form, if it covers all injuries caused by the internationally wrongful act.[6] As recognised in the recent award in *Greentech and NovEnergia v. Italy*, an arbitral tribunal must do whatever it can to ensure that the injured party is made whole.[7]

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3 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries', *Yearbook of the International Law Commission*, Volume II, 2001, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. The Draft Articles on State Responsibility were adopted by the United Nations General Assembly in Resolution 56/83 of 12 December 2001.

4 G Boas, *Public International Law – Contemporary Principles and Perspectives* (Edward Elgar, 2021), p. 350 and pp. 282–283. See also S Ripinsky and K Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2015), pp. 32–33.

5 *Factory at Chorzów*, footnote 2, p. 47.

6 C Breton, 'Damages: General Concept', Jus Mundi, Paragraph 2, available at https://jusmundi.com/en/document/wiki/en-damages-general-concept.

7 *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic*, SCC Case No. V 2015/095, Award of 23 December 2018, Paragraph 548.

Article 31(2) of the Draft Articles on State Responsibility addresses a further issue, that of causation. It states that injury includes any damage 'caused by' the internationally wrongful act. It is therefore only where there is a causal link between the wrongful act and the injury that full reparation must be made. In other words, Paragraph 2 makes clear that the subject matter of reparation would be the injury directly resulting from and attributable to the wrongful act, not any and all consequences flowing from the act.[8] In practice, as one tribunal noted, this Article has been equated with the principle that damages that were too remote, speculative or uncertain may not be awarded.[9]

Forms of reparation

Article 34 of the Draft Articles on State Responsibility identifies three forms of reparation: restitution, compensation and satisfaction. Article 34 (Forms of Reparation) states:

> *Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.*

Thus, full reparation may take the form of restitution, compensation or satisfaction, as required by the circumstances, and a combination of different forms of reparation may be required.[10]

In addition, Article 38(1) of the Draft Articles on State Responsibility expressly provides for the payment of interest 'on any principle sum due . . . when necessary in order to ensure full reparation'.[11] In the absence of a uniform international approach to questions of quantification and assessment of amounts of interest payable,[12] Article 38 does not offer any specific guidance about the interest rate or the mode of calculation, but simply advises that these shall be set to achieve full reparation.

8 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, footnote 3, Article 31, Paragraph 9.

9 *BG Group Plc. v. Argentina*, UNCITRAL, Award of 24 December 2007, Paragraphs 428–429.

10 id., Article 34, Paragraph 2.

11 id., Article 38.

12 id., Article 38, Paragraph 10.

Restitution

Restitution is the re-establishment as far as possible of the situation that existed prior to the commission of the internationally wrongful act. This involves re-establishing the original situation to the extent that any changes that occurred in that situation may be traced to the wrongful act.[13]

Importantly, restitution comes first among the forms of reparation because it most closely conforms to the general principle that the responsible state is bound to wipe out the legal and material consequences of its wrongful act.[14] In practice, however, this is challenging to achieve because undoing a wrongful act may be difficult, if not impossible, and because a simple change of policy or a return of expropriated or seized property by way of restitution may cause other damage.

Compensation

Therefore, where damage cannot be adequately redressed by restitution, compensation for that damage is granted.[15] Compensation generally consists of a monetary payment that is intended to offset the damage suffered by the injured person as a result of the breach.[16] Article 36(2) of the Draft Articles on State Responsibility elaborates that 'compensation shall cover any financially assessable damage including loss of profits'.

It is well established that an international court or tribunal that has jurisdiction with respect to a claim of state responsibility also has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.[17] In practice, compensation is the most prevalent form of reparation in investor–state arbitration, although non-pecuniary remedies remain possible, such as specific performance and injunctive relief.[18]

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13 id., Article 35, Paragraph 1.

14 id., Article 35, Paragraph 3.

15 id., Article 36(1).

16 id., Article 36, Paragraph 4.

17 id., Article 36, Paragraph 2, citing *Factory at Chorzów*, footnote 2, p. 21; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, Paragraphs 71–76; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, Paragraph 283.

18 B Sabahi, N Rubins, et al., *Investor-State Arbitration*, Second edition (Oxford University Press, 2019), Paragraph 21.13.

Three pitfalls to avoid on quantum

Presenting your client's case on quantum in a clear and convincing manner is a fundamental part of good advocacy in investment cases.

Quantum issues, particularly in valuation matters using discounted cash flow calculations or other loss assessment methods such as comparable transactions, can be highly complex and technical, and they do not often receive enough attention in the parties' memorials. Three pitfalls need to be avoided.

First, it is not infrequent to see parties rely on their quantum expert's report with little, if not very little, explanation on quantum in their memorials. In fact, some parties tend to present their case as if their quantum arguments were essentially delegated to the quantum experts. Quantum experts, however, are not advocates, and have the duty to present an independent and impartial assessment of the losses. Memorials, for their part, should not be a short summary of the quantum expert reports, but rather a didactic, pedagogical and step-by-step roadmap presenting the party's case and introducing the expert's conclusions.

Second, parties should refrain from submitting expert evidence that is too speculative, or valuations that are clearly inflated. Arbitrators are sometimes confronted with opposed expert evidence reaching completely incompatible results. I once had a case in which the claimant's expert had assessed the net present-value of a company at more than US$1 billion while the respondent's expert opined it had negative value of more than US$500 million! Such a gap between independent experts can only raise eyebrows and weaken each party's case. Fair-minded and independent experts should have at least some points of common ground on valuation matters; unfortunately that is not always the case.

Third, there should be more coordination between the parties in the presentation of their expert evidence. More effort should be made in agreeing the issues that the experts will have to address, and possibly in agreeing on a common format for their reports. Joint reports, identifying issues of agreement and disagreement with short explanations for the differences between the experts and cross-references to the main reports, are also helpful to the tribunal. In conclusion, the guiding principle for the parties in presenting their quantum case should be: help your tribunal!

– Alexis Mourre, MGC Arbitration

With respect to the determination of compensation, the reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of

damage relating to (1) compensation for capital value, (2) compensation for loss of profits, and (3) incidental expenses.[19]

Satisfaction

Satisfaction is addressed under Article 37 of the Draft Articles on State Responsibility, which states that:

> *1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.*
> *2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.*
> *3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.*

Satisfaction is not a standard form of reparation; in most cases, the injury caused is fully repaired by restitution or compensation, or both. Article 37 makes clear that satisfaction is an exception, and may be required only where restitution and compensation have not provided full reparation.[20]

Proportionality

Finally, a point to emphasise is that the principle of proportionality is an aspect of all three forms of reparation (i.e., restitution, compensation and satisfaction). Restitution is excluded if it would involve a disproportionate burden (on a state) to the benefit gained by the injured party. In accordance with this principle, compensation is limited to damage actually suffered as a result of the internationally wrongful act and excludes damage that is indirect or remote. Satisfaction must not be out of proportion to the injury suffered.[21]

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19 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, footnote 3, Article 36, Paragraph 21.

20 id., Article 37, Paragraph 1.

21 id., Article 34, Paragraph 5.

Relevance of the underlying legal obligation that was breached

For completeness, we observe that in international investment law, the obligation to pay compensation or damages may be based on different legal claims: expropriation or breaches of international law.[22]

Expropriation

A state's right to expropriate is generally recognised as part of its sovereignty. Nevertheless, there has not always been consensus about the standard of compensation that shall apply in expropriation under international law. A triggering event in this respect is considered to be the nationalisation by Mexico in the 1930s of businesses in the domain of oil and agriculture without distinction as to whether they were held by nationals or foreigners.[23] The episode received the attention of the Secretary of State of the United States, Cordell Hull, who exchanged a series of diplomatic correspondences with the Mexican Ambassador Castillo Nájera about the treatment that Mexico had reserved to US nationals holding businesses in its territory.[24] In one of these exchanges, Mr Hull wrote:

> *The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.*[25]

The standard of 'prompt, adequate, and effective' compensation became thus known, and is still today referred to, as the 'Hull formula'.[26]

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22 I Marboe, *Calculation of Compensation and Damages in International Investment Law*, Second edition (Oxford University Press, 2017), Paragraph 2.03.

23 R Dolzer and C Schreuer, *Principles of International Investment Law*, Second edition (Oxford University Press, 2012), p. 2.

24 ibid.

25 *Foreign Relations of the United States Diplomatic Papers, 1938, The American Republics*, Volume V, Document 665, available at https://history.state.gov/historicaldocuments/frus1938v05/d665.

26 e.g., EU–China Comprehensive Agreement on Investment, European Parliamentary Research Service, September 2020, p. 3, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652066/EPRS_BRI(2020)652066_EN.pdf. See also J Bonnitcha and S Brewin, 'Compensation Under Investment Treaties', International Institute for Sustainable Development Best Practices Series, November 2020, p. 6, available at www.iisd.org/system/files/publications/compensation-treaties-best-practicies-en.pdf.

Most modern bilateral investment treaties (BITs) and multilateral investment treaties (MITs) contain provisions for lawful expropriation, which set out the standard of compensation required for a lawful expropriation. Historically, capital-importing countries considered that compensation should simply be 'appropriate' and awarded on the basis of the domestic law of the host state, without the interference of international law.[27] However, despite the initial opposition of these countries, the vast majority of BITs and MITs currently follow the Hull formula and require compensation to be 'prompt, adequate, and effective'.[28]

Additionally, many BITs and MITs further clarify that the compensation should amount to the 'genuine value', 'market value' or 'fair market value' of the investment expropriated.[29] Thus, for a lawful expropriation, the standard of compensation usually falls to be determined by the treaty's provisions.

The use of the fair market value as a basis for compensation for expropriation reflects the standard adopted by the ILC in its commentaries to the Draft Articles on State Responsibility, according to which 'compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the "fair market value" of the property loss'.[30] In reaching this conclusion, the ILC referred to the awards of investment tribunals, as well as to the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment, which considered compensation to be 'adequate' if 'based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known'.[31]

Breaches of international law

For other breaches of international law related to investment protection, such as breaches of the obligations to provide fair and equitable treatment (FET), full protection and security or most-favoured nation treatment, the default standard of full reparation under customary international law would apply, absent any *lex specialis* provision on reparation in the applicable treaty.[32]

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27 S Ripinsky, K Williams, footnote 4, p. 72.

28 C McLachlan, L Shore, et al., *International Investment Arbitration: Substantive Principles*, Second edition (Oxford University Press, 2017), Paragraph 9.09.

29 id., Paragraph 9.10.

30 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, footnote 3, Article 36, Paragraph 22.

31 id., at footnote 550.

32 S Ripinsky, K Williams, footnote 4, p. 89.

Similarly, compensation for unlawful expropriation would in principle follow the same standard as other breaches of international law. This approach was adopted, for example, by the arbitral tribunal in *ADC v. Hungary*, which emphasised that the difference between lawful and unlawful expropriation entailed financial consequences in the following terms:

> *The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation.*[33]

Based on this reasoning, the tribunal applied the standard of the *Factory at Chorzów* case to grant compensation for the unlawful expropriation of the investor.[34] Although a minority of arbitral tribunals considered the distinction between lawful and unlawful expropriation to be irrelevant as regards the applicable standard of compensation, it is possible to identify a growing trend in arbitral practice towards the approach followed in *ADC v. Hungary*.[35]

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33 *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006, Paragraph 481.

34 id., Paragraph 499.

35 See K Christie and R Turtoi, 'Compensation for Expropriation', in B Legum (ed.), *The Investment Treaty Arbitration Review*, Fourth edition (The Law Reviews, 2019) referring to, for example, *Siemens A. G. v. The Argentine Republic*, ICSID Case No. ARB/02/08, Award of 6 February 2007, Paragraph 352; *ConocoPhillips and others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits of 3 September 2013, Paragraphs 342–343; *Hulley Enterprises Limited v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, I, Final Award of 18 July 2014, Paragraphs 1763–1769; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award of 18 July 2014, Paragraphs 1763–1769; *Veteran Petroleum Limited v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award of 18 July 2014, Paragraphs 1763–1769; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award of 13 March 2015, Paragraphs 141–142; *Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award of 16 September 2015, Paragraphs 325–330; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award of 27 September 2017, Paragraphs 1082–1083; *Bear Creek Mining Operation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, Paragraphs 448–449; *UP and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award of 9 October 2018, Paragraphs 511–512.

Valuation methodology

Arbitral tribunals often take the fair market value (FMV) of the lost asset or business as the basis to determine the quantum of the investor's claim.[36] While the term FMV is rarely defined in investment treaties themselves, arbitral tribunals are generally in agreement that the FMV of an asset corresponds to 'the price at which property would change hands between a hypothetical willing and able buyer and [a] hypothetical willing and able seller, absent compulsion to buy or sell, and having the parties reasonable knowledge of the facts, all of it in an open and unrestricted market'.[37] How to calculate the FMV of an asset is not normally stipulated in a treaty; as such, tribunals tend to exercise their discretion in choosing the valuation methodology for FMV.[38]

Introduction of three valuation methods

In practice, three valuation approaches are frequently considered in valuing FMV.[39] A brief description of these approaches is set out below.

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36 See, e.g., *Crystallex International Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, Paragraph 850 ('[I]t is well-accepted that reparation should reflect the "fair market value" of the investment').

37 See, e.g., *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007, Paragraph 361; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011, Paragraph 702; *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Award of 25 February 2016, Paragraph 123; *Bear Creek v. Peru*, footnote 35, Paragraph 597.

38 M W Friedman, F Lavud, 'Damages Principles in Investment Arbitration', in J A Trenor (ed.), *The Guide to Damages in International Arbitration*, Third edition (Global Arbitration Review, 2018), p. 104.

39 The three valuation methods are not an exhaustive list of valuation approaches. For instance, there are cases in which FMV was calculated based on the value of outstanding loan amounts or unpaid tax refunds. See id., p. 107, footnote 65 (citing *British Caribbean Bank Ltd v. Government of Belize*, PCA Case No. 2010-18, Award of 19 December 2014; *Occidental Exploration and Production Co v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award of 1 July 2004, Paragraphs 205–207).

Income-based approach

The income-based approach refers to the valuation of a business based on the 'future income that the owner can expect to obtain from the asset'.[40] Under this approach, FMV is calculated by analysing the financial history of a business to make projections about its future profits.[41] The most commonly applied income-based approach is the discounted cash flow (DCF) analysis. As recognised in *CMS Gas Transmissions Co v. Argentina*, the DCF analysis has been 'universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets'.[42]

The DCF analysis requires two inputs: net future cash flow and the discount rate appropriate for the level of risk of the cash flow.[43] Future cash flow is a projection of cash flow for a business minus expected expenses calculated in the way businesses plan for the future (i.e., by considering certain business plans).[44] A discount rate is estimated by considering the time value of money (i.e., cash receivable in the future is worth less than cash today) and the level of risk (i.e., uncertain cash flows are worth less than certain cash flows).[45] Therefore, where the available data permits reasonable estimation of expected cash flow and risks, the DCF analysis is considered to be the 'almost always suitable' methodology for the quantification of future losses.[46]

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40 P Haberman and L Perks, 'Overview of Methodologies for Assessing Fair Market Value', in J A Trenor (ed.), *The Guide to Damages in International Arbitration*, Fourth edition (Global Arbitration Review, 2020), p. 175.

41 J D Makholm, 'The Discounted Cash Flow Method of Valuing Damages in Arbitration', in B Legum (ed.), *The Investment Treaty Arbitration Review*, Third edition (The Law Reviews, 2018), p. 239.

42 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, Paragraph 416.

43 F Bancel and U R Mittoo, 'The Gap between Theory and Practice of Firm Valuation: Survey of European Valuation Experts' (27 March 2014), p. 10.

44 P Haberman, L Perks, footnote 40, p. 175.

45 See J B Simmons, 'Valuation in Investor-State Arbitration: Toward a More Exact Science', *Berkeley Journal of International Law*, Volume 30, Issue 1 (2012), p. 221.

46 P Haberman, L Perks, footnote 40, p. 178. See also *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014, Paragraph 831 ('The Tribunal notes that the DCF method is a preferred method of valuation where sufficient data is available').

Market-based approach

The market-based approach attempts to value a business by applying market multiples observed from the selling price of comparable assets.[47] A valuation using this approach may provide a realistic snapshot as to what a hypothetical buyer in the market would be willing to pay for a company, as it considers information available from comparable companies or transactions. Therefore, when using the market-based approach it is important to identify a comparable that has similar features and shares economically relevant characteristics – in particular, with respect to risk and growth profiles (i.e., business activities, size, stage of development, financial structure, etc.).[48]

In that regard, applying the market-based approach in an investor–state dispute may prove challenging because these disputes frequently involve unique situations and markets or transactions for which a suitable comparable transaction may not exist.[49] Given this limitation, the market-based approach is often used as a cross-check against the DCF analysis results to ensure that the valuation generated through a cash flow analysis is sound and reasonable.[50] However, in investor–state disputes where tribunals were convinced that an appropriate comparable existed, the market-based approach was relied on as the preferred valuation methodology.[51]

47 S Dellepiane, et al., 'The Applicable Valuation Approach', in J A Trenor (ed.), *The Guide to Damages in International Arbitration*, Fourth edition (Global Arbitration Review, 2020), p. 184.

48 A Wynn and N Matthews, 'Valuation in International Arbitration', *FTI Consulting White Paper*, p. 4, available at https://www.fticonsulting.com/~/media/Files/emea--files/insights/white-papers/valuation-in-international-arbitration.pdf.

49 J D Makholm, footnote 41, p. 240; see also J B Simmons, footnote 45, p. 223.

50 See, e.g., *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016, Paragraph 760.

51 See, e.g., *Yukos v. Russia*, footnote 35, Paragraph 1787 ('By contrast to all of the other methods canvassed above, the Tribunal does have a measure of confidence in the comparable companies method as a means of determining Yukos' value'); *Crystallex International Corporation v. Bolivian Republic of Venezuela*, footnote 36, Paragraph 901 ('[The market-based] method is widely used as a valuation method of business, and can thus be safely resorted to, provided it is correctly applied and, especially, if appropriate comparables are used').

Cost-based approach

The cost-based approach is valuing a business based on the costs incurred in establishing the business.[52] Under this approach, the value of a business can be measured by the difference between total assets and total liabilities (book value) or by ascertaining the cost of replacing the business with a similar asset in an arm's-length transaction (replacement value).[53]

Standard in choosing the proper methodology

The cost-based approach uses actual and contemporaneous cost information. Hence, among the three approaches, the cost-based approach is least suited to estimate the value of future lost profits, which requires assumptions and approximations. As such, the cost-based approach has been applied in relatively few investor–state disputes.

Instead, the preferred valuation method by arbitral tribunals, when determining the quantum to be awarded to an investor's prospective lost profit claim, has been the income-based approach, which is better suited to future projection of profit and risk assessment.[54] In the few instances where the cost-based approach was adopted as the primary valuation methodology, tribunals stated that there was insufficient information to quantify the cash flows that would be necessary to properly employ the income-based approach.[55]

Applying different methodologies and valuation dates can result in drastically different valuation outcomes. In *Tethyan Copper Company PTY Limited v. Islamic Republic of Pakistan*, which involved a mining project at an approval stage, the arbitral tribunal adopted the DCF analysis and calculated the damages by estimating the current market value of the mine (assuming it will be operated

52 M W Friedman, F Lavud, footnote 38, p. 106.

53 B Wasiak, 'Replacement Cost Method', Jus Mundi, available at https://jusmundi.com/en/document/wiki/en-replacement-cost-method.

54 M W Friedman, F Lavud, footnote 38, p. 106.

55 *Siemens A.G. v. Argentina*, footnote 35, Paragraph 355. See also M A Maniatis, et al., 'Accounting-Based Valuation Approach', in J A Trenor (ed.), *The Guide to Damages in International Arbitration*, Fourth edition (Global Arbitration Review, 2020), p. 265.

throughout its entire life span) and deducting relevant costs[56] from that price.[57] The investor was awarded around US$6 billion in damages. In contrast, in *Bear Creek Mining Corporation v. Republic of Peru*,[58] which similarly involved a mining project for which the state had cancelled the investor's licence before the construction of the mine, the arbitral tribunal rejected the application of the DCF analysis and awarded the investor (only) around US$18 million (i.e., the costs actually incurred by the investor prior to the expropriation,[59] also known as 'sunk costs').[60] Specifically, the tribunal reasoned that 'no similar projects operated in the same area, and there was no evidence to support a track record of successful operation or profitability in the future'.[61]

If predictions are too speculative or too uncertain, arbitral tribunals may indeed be reluctant to award damages going beyond the investment's sunk costs, and thus refuse to apply the DCF method.[62] However, even in the absence of a going concern, some arbitral tribunals have considered that it would in principle be possible to quantify future cash flow projections to allow a DCF calculation if the claimant presents sufficient evidence of a proven record of profitability of comparable businesses operating in similar circumstances.[63]

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56 In that case, the investor had committed to spend on a social investment programme, which involved costs that the tribunal considered should be deducted.

57 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award of 12 July 2019, Paragraphs 1177–1178; United Nations, Initial Draft of 'Possible Reform of Investor-State Dispute Settlement (ISDS): Assessment of damages and compensation', footnote 30, p. 7, available at http://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/assessment_of_damages_and_compensation.pdf.

58 *Bear Creek Mining v. Peru*, footnote 35.

59 id., Paragraph 594.

60 J Alberro and G D Ruttinger, '"Going Concern" as a Limiting Factor on Damages in Investor-State Arbitrations', in *The Journal of Damages in International Arbitration*, Volume 2, No. 1 (2015), p. 1, available at https://www.cornerstone.com/Publications/Articles/JDIA-Going-Concern-as-a-Limiting-Factor.pdf.

61 *Tethyan Copper v. Pakistan*, footnote 57, Paragraph 600.

62 id., Paragraph 604. See also, more recently, *William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, Paragraph 278, as well as the decision in *Dominion Minerals Corp. v. Republic of Panama*, ICSID Case No. ARB/16/13, Award of 5 November 2020. The final award is not public, but the outcome of the decision was reported online (T Jones, 'Panama escapes bulk of mining claims', in *Global Arbitration Review*, 9 November 2020).

63 See, e.g., *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V 064/2008, Award of 8 June 2010, Paragraphs 74–75, referring to a similar consideration made in *Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentina*, ICSID Case No ARB/97/3, Award of 20 August 2007, Paragraph 8.3.3.

In short, there is no uniform standard when determining which valuation methodology is appropriate. Arbitral tribunals carry out a case-by-case analysis on which methodology will generate the most appropriate outcome for quantifying the claim sought by the investor.[64] In doing so, tribunals primarily focus on whether one could, with reasonable confidence, reach a reliable conclusion concerning the compensation owed based on a particular valuation method.[65]

Should the DCF analysis be treated as the 'base approach'?

As mentioned above, tribunals have frequently adopted the DCF analysis in investor–state disputes and referred to it as the most reliable valuation methodology.[66] They have preferred the DCF analysis because it can be tailored to the specific nature of the individual enterprise and because the assumptions and calculations are explicitly set out by the experts on both ends. This allows tribunals to accept or deny specific assumptions or applications of multiples as part of their assessment.

However, some practitioners remain sceptical on whether the DCF analysis fully captures the fair value of a business in an investor–state arbitration. This concern has grown over the past few years because the DCF analysis was considered to contribute to the gradual inflation of the amounts awarded by tribunals for projects that were never developed or operated.[67] The above-cited *Tethyan*

64 F Baena, 'Valuation of "Non-operational Projects" in Investment Arbitration: Criteria from the Tethyan Copper Award and from Recent ICSID Case Law', *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Volume 86, Issue 4 (2020), p. 419.

65 See, e.g., *Tethyan Copper v. Pakistan*, footnote 57, Paragraph 298; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award of 28 March 2011, p. 246 ('Once causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss').

66 See Credibility International, 'Study of Damages Awards in Investor-State Cases', Second edition (2021), pp. 47–48. Out of the 122 cases in which Credibility International identified the basis for the award, 37 per cent had adopted a DCF analysis.

67 Note that approximately half of the 30 largest investor–state dispute awards that had been issued by January 2021 were based on DCF analysis. See Credibility International, footnote 66, p. 50.

Copper arbitration is a good example of a case in which an investor was compensated for future loss of a mine that was yet to be built and thus had no actual cash flow record.[68]

As a result, tribunals have repeatedly advised that the DCF analysis be used with caution.[69] The Draft Articles on State Responsibility also specifically note this caution by tribunals in the application of the DCF analysis:

> *The [DCF] method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a cautious approach to the use of the method.*[70]

Against this background, the arbitral tribunal in *Rusoro v. Venezuela* has recently noted that '[i]f the estimation of those parameters [under the DCF method] is incorrect, the results will not represent the actual fair market value of the enterprise' and that '[s]mall adjustments in the estimation can yield significant divergences in the results'.[71] Therefore, it warned that 'valuations made through a DCF analysis must in any case be subjected to a "sanity check" against other valuation methodologies'.[72]

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68 See also *Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, ad hoc arbitration, Award of 31 January 2017. Although this case involved a gas processing project that was yet to be constructed, the arbitral tribunal awarded approximately US$6.6 billion plus interest to the investor. The award is currently being challenged in the English High Court. See 'Corruption and confidentiality in contract-based ISDS: The case of P&ID v Nigeria', *Investment Treaty News*, 23 March 2021, available at https://www.iisd.org/itn/en/2021/03/23/corruption-and-confidentiality-in-contract-based-isds-the-case-of-pid-v-nigeria-jonathan-bonnitcha/.

69 See, e.g., *Siemens A.G. v. Argentina*, footnote 35, Paragraphs 355–357 ('DCF method is applied to ongoing concerns based on the historical data of their revenues and profits; otherwise, it is considered that the data is too speculative to calculate future profits'); *Vivendi v. Argentina*, footnote 63, Paragraph 8.3.3 ('DCF analysis is not always appropriate and becomes less so as the assumptions and projections become increasingly speculative').

70 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, footnote 3, Article 36, Paragraph 26. See, e.g., J B Simmons, footnote 45, for a detailed discussion on why tribunals should not regress from adopting DCF analysis as the basis for quantification and recommendation on enlisting independent financial experts to reduce any uncertainty or speculative aspect of DCF analysis.

71 *Rusoro v. Venezuela*, footnote 50, Paragraph 760.

72 ibid.

Valuation date

The value of an asset fluctuates over time and hence may vary depending on the reference date for calculating the value of that asset. It is therefore crucial to choose an appropriate valuation date. This date will serve as a cut-off point in which factual information that post-dates that date would not ordinarily be considered in the valuation process. That said, experts sometimes consider the factual information available after the valuation date to validate or check their findings or assumptions, but this is done on a case-by-case basis.

In general, selecting a valuation date involves the application of either *ex ante* or *ex post* approaches. Under an *ex ante* approach, an investor is entitled to damages equal to the value of a business at the date of expropriation (which may be further adjusted at the date of the award), and any subsequent information is considered irrelevant in the course of quantification.[73] In contrast, under an *ex post* approach, an investor is entitled to damages equal to the value of a business at a later date, which may roughly coincide with the date of the award.[74]

In the past few decades, it has become widespread practice in investor–state disputes that (1) where a lawful expropriation has occurred, valuation is conducted based on the date set out in the BIT, which generally applies an *ex ante* approach, and (2) where an unlawful expropriation has occurred, the valuation date should be the date of the award (i.e., applying the *ex post* approach) or another date chosen and justified by the investor.[75]

This distinction is based on the idea that any wrongfully obtained gains by the state shall be disgorged. Commentators further point to the moral notion of fairness and deterrence (i.e., that states should be discouraged from unlawfully expropriating a private entity's asset in the future).[76]

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73 F Lavud and G Recena Costa, 'Valuation Date in Investment Arbitration: A Fundamental Examination of Chorzów's Principles', *The Journal of Damages in International Arbitration*, Volume 3, No. 2 (2016), pp. 38–39.

74 id., p. 39.

75 I Marboe, 'Calculation of Damages in the Yukos Award: Highlighting the Valuation Date, Contributory Fault and Interest', *ICSID Review – Foreign Investment Law Journal*, Volume 30, Issue 2 (2015), p. 2. See, in general, *ADC v. Hungary*, footnote 33; *Yukos v. Russia*, footnote 35, at Paragraph 1763 (explaining that 'in the case of an unlawful expropriation . . . claimants are entitled to select either the date of expropriation or the date of the award as the date of valuation').

76 F Lavud, G Recena Costa, footnote 73, pp. 66–67 ('[B]y applying [such] standard, tribunals further different goals, including fairness and deterrence of future illegal conduct. . . . Mandating wrongdoers to disgorge any ill-gotten gains does not, in principle, amount to a punitive measure').

Valuation principles: peculiar considerations in investor–state claims

In the context of investor–state dispute settlement, peculiar considerations may arise in relation to valuation principles and the quantification of claims. Some of those that are of ongoing concern are briefly described below.

Country risk

A discussion unique to investor–state disputes is whether 'country risk' should be accounted for when quantifying damages. In investor–state disputes, country risk can be described as the unforeseeable adverse risk that an investor is inherently exposed to when doing business in a host state that is politically or economically unstable.[77] A common example of a political risk is when a state is exercising its sovereign powers within its national borders against a foreign investor.[78] Economic risks resulting from unexpected changes in the state's economic growth rate, inflation or exchange rate, etc., or cultural risks that may result in increased transaction costs due to different cultural patterns of behaviour, language or religion are also examples of country risks.[79]

Country risk can be generally translated into damage valuation in the form of a risk premium, whereby the value of an asset is discounted at a certain rate to reflect the risk.[80] In practice, there are conflicting views on whether reflecting country risk by way of a discount rate is appropriate – investors frequently complain that states should not be liable for lower damages due to risks created and controlled by the host country themselves.[81] On the other hand, disregarding

77 M D García Domínguez, 'Calculating Damages in Investment Arbitration: Should Tribunals Take Country Risk into Account?', *Arizona Journal of International and Comparative Law*, Volume 34, No. 1 (2016), p. 98.

78 id., p. 99.

79 id., p. 100.

80 F A Dorobantu, et al., 'Country Risk and Damages in Investment Arbitration', *ICSID Review – Foreign Investment Law Journal*, Volume 31, Issue 1 (2016), pp. 220–221.

81 M D García Domínguez, footnote 77, p. 113. See also *Flughafen Zürich AG and Gestión e Inginería IDC SA v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/19, Award of 18 November 2014, Paragraph 905 ('Government that through the adoption of new political attitudes, adopted after the investment was materialised, which increases the country risk, cannot benefit from a wrongful act attributable to it that reduces the compensation payable' [translated]).

country risk entirely may lead to an inaccurate quantification of damages if the investor had indeed assumed such country risk to a certain extent when entering the host state to do business.[82]

The issue of how to deal with country risk in the context of FMV remains currently unsettled. Accordingly, for the time being, arbitral tribunals and quantum experts are encouraged to set out in detail the reasoning on whether or not country risk should be considered when assessing quantum.[83]

Prohibition of double or multiple recovery

The principle that a party is not entitled to double or multiple recovery (i.e., to obtain compensation more than once for the same damage) is widely recognised under international law. In *Factory at Chorzów*, the PCIJ recognised that the calculation of compensation shall 'avoid awarding double damages'.[84]

Such a principle plays a particularly important role in the context of investor–state claims when parallel or multiple proceedings are conducted under different regimes. The most typical example is the existence in parallel (although sometimes at different stages of the proceedings) of treaty claims brought by a shareholder for reflective loss before an investment tribunal and contract claims brought by the company in which it invested before a commercial tribunal or a domestic court pertaining to essentially the same facts or damages, or both.[85]

In these circumstances, investment tribunals shall make sure that no double or multiple damages are awarded. For instance, in *Impregilo v. Argentina*, the arbitral tribunal considered that the prohibition of double recovery would affect the valuation of claims when parallel proceedings are undertaken before different forums:

> *[i]f compensation were granted to [the company] at domestic level, this would affect the claims that [the shareholders] could make under the BIT, and conversely, any compensation granted to [the shareholders] at international level would affect the claims that could be presented by [the company] before Argentine courts.*[86]

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82 M W Friedman, F Lavud, footnote 38, p. 110 (introducing a string of recent cases involving Venezuela that 'have adopted this approach, incorporating different amounts of "confiscation risk" into their country risk figures').

83 F A Dorobantu, footnote 80, p. 231.

84 *Factory at Chorzów*, footnote 2, p. 50.

85 G Bottini, *Admissibility of Shareholder Claims under Investment Treaties* (Cambridge University Press, 2020), pp. 13–14.

86 *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award of 21 June 2011, Paragraph 139.

Valuation in multiple treaty breaches

Similarly, a peculiarity in terms of valuation principles exists for multiple treaty breaches. The amount of compensation that an investor would obtain as a result of a state's violation of its treaty obligations does not depend upon the number of the treaty breaches committed by the state.[87] In other words, there exists an overall practical limit to the amount of compensation that an investor is allowed to obtain as damages, regardless of the nature and the quantity of the state's breaches.

For instance, when expropriation is coupled with the breach of another treaty provision, such as FET, compensation for the violation of the latter is considered to be absorbed by the awarded compensation for expropriation, which – as discussed above – usually corresponds to the FMV of the investment as a going concern.[88] The result is similar in the case of multiple treaty beaches not involving expropriation.[89] This is a logical result of essentially equating multiple breaches of a BIT or international law with a complete loss of the investment. Only in specific and exceptional circumstances, such as in the case of fault liability,[90] have arbitral tribunals acknowledged the possibility to award moral damages to investors, in addition to material damages.

Necessity defence and non-precluded measures provisions

The Draft Articles on State Responsibility recognise that a state's conduct that would in principle be contrary to an international obligation may be excused in certain circumstances and would not invoke liability of a host state.[91] In the context of investor–state disputes, a circumstance that is often relied upon by states is necessity. In short, necessity denotes an exceptional circumstance 'where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency'.[92] The conditions to uphold a plea of

87 S Ripinsky, K Williams, footnote 4, p. 99.

88 ibid.

89 See, e.g., *CMS v. Argentina*, footnote 42, Paragraph 410 ('the Tribunal is persuaded that the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value. While this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses.').

90 See, e.g., *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008, Paragraph 290.

91 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, footnote 3, Chapter V.

92 id., Article 35, Paragraph 1.

necessity under customary international law are multiple and interpreted strictly by international courts and tribunals.[93] In addition, investment treaties increasingly contain non-precluded measures provisions, limiting the applicability of investment protections if an essential interest of the state is at stake.[94]

To the extent that conduct ceases to be wrongful, it does not in principle generate an obligation to make reparation.[95] However, the question of whether compensation may still be payable to the injured investor is not clear cut.[96] Arbitral tribunals that have awarded compensation, despite upholding a plea of necessity, have generally based their reasoning on Article 27(b) of the Draft Articles on State Responsibility,[97] according to which the invocation of a circumstance precluding wrongfulness 'is without prejudice . . . to the question of compensation for any material loss caused by the act in question'.

In either case, assuming that compensation is due, it remains to be seen whether the exceptional circumstances invoked by the state for the protection of its essential interests may have an influence on the valuation of damages and the amount of compensation awarded. This approach was followed, for example, by the arbitral tribunals in *Sempra Energy v. Argentina*,[98] *CMS v. Argentina*[99] and *Enron v. Argentina*.[100] In these cases, although Argentina's plea of necessity was rejected, the tribunals reduced the amount of compensation due to the investor by taking into account the negative impact of Argentina's economic crisis in determining the market value of the investment under the DCF method.[101] Whether downward adjustments in DCF valuations are justified in similar cases is a particularly relevant question at present times. That is especially so in light of the exceptional measures taken by the vast majority of states in response to the current covid-19 pandemic and their adverse effects on businesses worldwide.

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93 id., Paragraph 14.

94 M McLaughlin, 'Non-precluded Measures Clauses: Regime, Trends, and Practice' in *Handbook of International Investment Law and Policy*, 27 February 2020, p. 6, available at https://ssrn.com/abstract=3690358.

95 S Ripinsky, K Williams, footnote 4, p. 341.

96 ibid.

97 See, e.g., *CMS v. Argentina*, footnote 42, Paragraphs 388–389.

98 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, Paragraph 397.

99 *CMS v. Argentina*, footnote 42, Paragraphs 443–446.

100 *Enron v. Argentina*, footnote 37, Paragraph 232.

101 S Ripinsky, K Williams, footnote 4, p. 345.

CHAPTER 18

Quantification of ISDS Claims: Specific Issues

Boaz Moselle, Ruxandra Ciupagea and Juan Carlos Bisso[1]

As discussed in the previous chapter, the relevant standard to assess damages arising from investment treaty violations is usually that of 'full reparation'. This is often defined by reference to the *Factory at Chorzów* case, which says that 'reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed'.[2]

The full reparation standard gives rise to two main questions. The first one relates to the need to compensate for 'all consequences' and identify 'the situation which would, in all probability have existed if that act had not been committed'. To answer this, the expert will often have to identify a causal link between the alleged breaches and the claimed heads of damages. This may give rise to a debate around the level of certainty required for a tribunal to accept that certain heads of damages should be considered as part of 'all consequences'. Expert (and factual) evidence can help the tribunal assess both the causation and the level of certainty for the different heads of damages. However, the cut-off level of uncertainty that would disqualify a claimed consequence from meriting compensation is a question of law, and a matter of judgment by the tribunal.

The second question also relates to identifying 'the situation which would, in all probability have existed if that act had not been committed'. A discounted cash flow model can be used to determine a 'financial value' or 'amount' corresponding

1 Boaz Moselle is an executive vice president, Ruxandra Ciupagea is a senior vice president and Juan Carlos Bisso is a vice president at Compass Lexecon.

2 See *Factory at Chorzów*, Merits, PCIJ, Series A, No. 17, 1928, p. 47.

to this situation (as well as a value or amount for the situation that actually existed (i.e., the actual scenario)). However, that leaves open one important question: what date should be considered in making this determination? In other words, what is the appropriate 'date of assessment'? Does one need to restore the situation that would have existed at the date of the alleged treaty breach, at the date of award or at some other point in time? To our understanding, the applicable standards under public international law do not identify this date, and in our experience different approaches have been adopted by different tribunals.

In this chapter, we first discuss the choice of the date of assessment, focusing on two possible approaches: *ex post* and *ex ante*. We then address a further question that follows on naturally and inevitably from this discussion. Because losses pre-date the award, the injured party will have waited to receive compensation. Under both approaches, it is normally accepted that they should be compensated for that delay by adding on interest. We therefore end this chapter with a discussion of the appropriate interest rate to use to bring historical damages (where applicable) forward to the date of award.

Date of assessment and the use of hindsight in damages estimation

The standard of reparation from *Factory at Chorzów* seeks to leave the injured party in the same position as if no breach had occurred. Translating this into economic terms, and using the language favoured by economists, that implies that a monetary award based on this standard should make the injured party indifferent between the situation where there was a breach and that where there was no breach. However, this leaves open the question of at which date the party should be indifferent.

Suppose, for example, that the alleged breach involved the expropriation of oil and gas assets, and that at the time of the expropriation oil prices were low and the market value of the assets was US$1 billion. As of the date of expropriation, assuming away other possible complications that are not germane to this discussion, an award of US$1 billion would have provided full reparation. However, some years later if oil prices are higher, then the market value of the assets might be considerably higher than US$1 billion, and an award of US$1 billion would not, at that later date, leave the injured party indifferent between breach and no breach (assuming that in the no-breach scenario it would have continued to own the assets, and that their market value would have developed as it did in actuality).

Two dates are most commonly considered for the date of assessment: (1) the date of breach (*ex ante*); and (2) the date of award (*ex post*).

The calculation of the monetary award requires one to calculate, as of either of these two dates, what the financial position of the claimant would have been in the absence of the breach (the 'but-for' financial position), and to compare the but-for to its actual financial position after the breach.

- If the calculation is made as of the date of breach (*ex ante*), then the effect on the injured party should be determined on the basis of information that is known up to the date of the breach and on the parties' expectations about the future as of the date of the breach. In the case of expropriation of a factory, this would imply estimating the factory's performance based on expectations about demand, prices, costs, etc.
- If the calculation is made as of the date of the award, then one can incorporate hindsight to determine how the injured party has effectively been affected by the breach. For example, in the case of expropriation of a factory, one can observe how the factory has financially performed since the breach occurred and base the award on the observed financial performance.

In either case, one uses information that was available up to the date of assessment and no other information.[3] That is not an arbitrary rule. It reflects the underlying idea that the estimation of damages is an objective exercise that generally focuses on the notion of fair market value. The fair market value of an asset will generally reflect the information that is available to market participants, but of course cannot reflect information that is not available to them. So, the fair market value of an asset at the date of breach cannot reflect information that is only available with hindsight.

While the choice to use the date of breach or date of award is, in general, a matter of law, the final choice may give rise to very different values for the compensation. This tends to be the case when the award is dependent on a variable that is highly volatile, as in the example given above of an oil and gas firm. A concrete example is the *Yukos* dispute, where the value of the expropriated asset was highly dependent on the price of oil, which was around US$40/barrel as of the date of breach and US$112/barrel as of the date of award. According to the tribunal's calculations, these figures would give rise to compensations of US$22 billion and US$67 billion, respectively.[4]

3 The situation is different in the case of the 'hybrid' approach that we discuss later in this chapter. Note also the caveat below concerning the use of hindsight as a 'sense check'.

4 *Yukos Universal Ltd (Isle of Man) v. Russian Federation*, Final Award, 18 July 2014.

The choice of the date also gives rise to various quantum issues, as explained below.

Use of the date of breach

As discussed above, the use of the date of breach implies that the calculation of the award is based on expectations about the future. Because expectations about the future often differ from what is eventually realised, the use of the date of breach will generally result in compensation that may leave the claimant better or worse off, as of the date of award, than in the case of no breach. For example, an event that was unexpected at the time of breach and that significantly increased the factory's sales (e.g., a factory that produced sanitary masks and was expropriated prior to the covid-19 pandemic), would not have been incorporated in the calculation of the award, thus leaving the claimant 'under-compensated' (as of the date of award) because it would have been better off without the expropriation than with the award.

This means that the use of the date of breach provides the claimant with a certain fixed (as of that date) compensation that does not depend on the realisation of future events, and at least in the case of expropriation (and assuming the respondent retains ownership following the expropriation) allocates the risks of future events to the respondent, as it is the respondent that will obtain higher or lower payoffs depending on the realisations of events that occur between the dates of breach and award. To give a simplified example, consider a business that is about to engage in exploration for oil and gas at a particular location, which will either be successful, in which case the business will be worth US$1 billion, or unsuccessful, in which case it will be worth zero. The business faces uncertainty: will the exploration succeed, in which case its future value will be US$1 billion, or not, in which case it will be zero? Suppose that just as the exploration begins, the government expropriates the business and continues to operate it, and that its owners seek and obtain compensation under an investment treaty. If, as of the date of breach, geological evidence indicated a 60 per cent chance that the exploration would be successful, then the *ex ante* compensation would be 60 per cent of US$1 billion (i.e., US$600 million), and that figure would apply irrespective of whether or not the exploration had later proved successful.

From the perspective of a quantum expert, obtaining expectations about the future in itself is a task that often presents challenges.

It is usually relatively easy to obtain expectations of macroeconomic or general inputs on which the calculation depends. For example, for variables such as expected inflation, exchange rates or crude oil (or other commodities') prices, there are regular published forecasts from a number of reputable bodies, as well as 'forward prices'.

It is more difficult to obtain expectations of other more specific inputs. For example, one is unlikely to find forecasts for the sales of a specific company as of the date of breach, or of its labour costs, unless one can find and rely on internal forecasts (e.g., from a contemporaneous internal business plan). In the case of regulated assets, one needs to have an assessment of what were reasonable expectations, as of the date of breach, of the future path of regulation (e.g., the future evolution of regulated prices that largely determine the firm's revenues), and finding or making this assessment may also (although not always) be a difficult task.

Finally, we note a caveat (as mentioned above): it is common in this context to use hindsight as a 'sense check'. If the expert says that expectations as of the date of breach were X, but the actual outcome was Y, which is very different from X, then it is reasonable to check that this makes sense (i.e., that there is a sensible explanation for why the actual outcome differed from reasonable expectations at the time).[5]

Use of the date of award

As discussed above, the use of the date of award allows and indeed requires the use of the information that has been observed between the dates of breach and award (i.e., 'hindsight'). It therefore avoids the issue of over or under-compensating the claimant (as of the date of award) that is inherent to the approach of using the date of breach. However, in doing so, it introduces the 'mirror image' problem, in the sense that it can lead to over or under-compensation as of the date of breach, which some commentators consider inherently unattractive. It can be argued that the harm that the respondent caused was the value taken as of the date of breach and any subsequent change in value is simply luck, and there is no reason for the tribunal to reward the claimant for luck (in particular, because that implicitly assumes that the claimant would not have sold the assets at an earlier date).[6]

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5 This will often be the case (in the famous aphorism, 'it's tough to make predictions, especially about the future' (widely attributed; see https://tinyurl.com/fjuvypry)).

6 Franklin M Fisher and R Craig Romaine, 'Janis Joplin's Yearbook and the Theory of Damages', *Journal of Accounting, Auditing and Finance* (1990), p. 155 (their example of two yearbook thefts).

It is sometimes argued that the use of the date of award is unreasonable because it ignores that, in the absence of the breach, the claimant would have borne the risks as well as reaped the rewards associated with the cash flows between breach and award. That is the argument of the classic 'Janis Joplin' article, which says that:

> *The violation did not merely deprive the plaintiff of the stream of returns that would have accompanied the asset. It also relieved the plaintiff of the uncertainty surrounding that stream. To use hindsight is to ignore the latter effect.*[7]

However, we would question (or at least qualify)[8] the assertion that 'The violation . . . relieved the plaintiff of the uncertainty' surrounding its business (e.g., the uncertainty surrounding the future value of an expropriated business). If the award is calculated on an *ex post* basis, the uncertainty remains. In the simplified example from above, on the day before expropriation the claimant faces uncertainty: will the exploration succeed, in which case the future value of its business will be US$1 billion, or not, in which case it will be zero? On the day after the expropriation the owners still face uncertainty: will the exploration succeed, in which case the value of the future award will be US$1 billion, or not, in which case it will be zero?[9]

In terms of risk allocation, this approach is again the mirror image of the first. In other words, contrary to the case of using the date of breach, the use of hindsight allocates the risks associated to the activity, over the period between breach and award, to the claimant (because its compensation will be higher or lower depending on the realisations of events that occur between those two dates). In the example above, the claimant's *ex post* compensation will be US$1 billion or zero, whereas its *ex ante* compensation would be US$600 million.

From a practical perspective, the use of the date of award removes the need to assess expectations as of the date of breach. However, hindsight does not in itself remove all problems, inter alia, because one needs to assess what would

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7 Fisher and Romaine, op cit, p. 154.

8 See footnote 9.

9 There is one caveat to this, which may be important in some circumstances: if the value of the business could be negative (so there are realistic scenarios where the breach will turn out to have been in the interest of the claimant), it is true that the claimant has been saved some risk. This is indeed a point for Fisher and Romaine (op cit, p. 155). Further discussion of this point would require a lengthy excursus. However, we question whether in practice it is likely to be relevant in most cases (notably, the value to an investor of its stake in a limited liability company can generally not be negative).

have happened absent the breach. Hindsight may help shed light on that, but it is not guaranteed to. In many (though not all) cases, the observed events could have been different had the breach not occurred. For example, in the case of the expropriation of the factory, either party could argue that the factory would have performed differently (e.g., had higher or lower sales, saved more or less on costs) if it had remained in the hands of the claimant. Moreover, the use of hindsight does not remove the need to forecast the events that are expected to occur after the date of award (in both actual and but-for scenarios).

A hybrid approach

Some experts argue for a 'hybrid approach', which uses the date of breach as the date of assessment, but nonetheless applies hindsight. Demuth, for example, explains that:

> *In practice, a hybrid approach [combining ex ante and ex post approaches] can sometimes be found 'in which all lost profits are discounted back to the date of the breach, but the practitioner would rely on all information that was available up to the date of trial', thereby using the book of wisdom to eliminate 'some speculation as to what the cash flows would have been'.*[10]

We make two observations in this context. First, proponents of this approach generally make the same objections to the *ex post* approach that we have already discussed, and the same counterarguments therefore apply. Second, it is clear that under the hybrid approach the resulting award will not reflect the fair market value of the asset (at any date). That creates issues of consistency with the principle of full reparation (i.e., *Factory at Chorzów*). For example, in a case of expropriation, as of whatever date one chooses to apply the principle of full reparation, the fair market value of the expropriated assets will provide full reparation.[11]

Finally, we repeat that the choice of the date to use for the calculation of the award is a matter of law. The choice has a significant impact on the allocation of risks between the claimant and the respondent, and more directly, on the value of the final award. Economics does not provide an answer to the question of which

10 Alexander Demuth, 'Income Approach and the Discounted Cash Flow Methodology', in John A Trenor (ed.), *The Guide to Damages in International Arbitration*, Third edition (Global Arbitration Review, 2018).

11 We do not address here the complication that could arise if there is some realistic prospect that the investor might have sold the assets between the date of breach and the date at which full reparation is required.

approach should be followed, and therefore, the job of quantum experts is to be clear about the procedure that they have followed in their calculations, and to be clear about the legal and factual assumptions on which their calculations rely.

Interest rate to bring damages to the date of award

Whether one chooses the *ex ante* approach or the *ex post* approach, or some combination of the two, one needs to consider the question of what interest rate to use to bring (certain) 'parts' of the damages forward to the date of award.

As a starting point, we note that under either approach, some or all of the damages have occurred in the past relative to the date of award.[12] For a given quantum of damages associated with a date in the past, the claimant has therefore been deprived of that quantum between then and the date of the award. Full compensation therefore requires that the claimant also be compensated for that deprival, by applying interest on the amount calculated as of the past date. The amount of interest to be added on must take into consideration both the amount of time between the date of breach and the date of award, and the level of uncertainty for the claimant of actually receiving this money on the date of award.

There are different approaches for determining the interest rate that shall be used to bring damages to the date of award. Below we discuss the use of interest rates that are prescribed in the contract or treaty, and those that are specific to either the claimant or the respondent.

Prescribed interest rates

In certain circumstances, the contract or relevant treaty already specifies the interest rate to use to bring damages to the date of award, or the approach to calculate this rate. For the specific case of investment treaty arbitration, different bilateral investment treaties (BITs) give rise to different principles for the determination of pre-award interest rates. For example, the BIT between the Netherlands and Egypt defines just compensation as including 'interest at a normal commercial rate until the date of payment' (without further specification of the meaning of a 'normal' commercial rate).[13] Instead, the BIT between Georgia and Kazakhstan specifies that compensation for expropriation should include 'interest at the London Inter-Bank Offered Rate (LIBOR)'.[14]

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12 Under the *ex ante* approach, all of the harm is associated to the date of breach. Under the *ex post* approach, some of the lost cash flows would have occurred in the past (i.e., between the date of breach and date of award).

13 See https://investmentpolicyhub.unctad.org/Download/TreatyFile/1094.

14 See https://investmentpolicyhub.unctad.org/Download/TreatyFile/4988.

Don't be an expert who 'jousts'

The adversarial approach to dispute resolution regularly results in cross-examination seeking to demonstrate that the opposing party's witness is either less qualified, less reliable or simply less right than his or her counterpart. It is not unusual for experts themselves to take active part in combat, seeking to demonstrate their own impenetrable 'rightness' and the commensurate wrongness of his or her opposing number.

The arbitrator is not appointed to determine the winner and loser in a jousting contest. The arbitrator's role is to ascertain and assess facts and, where necessary, analyse sometimes complex engineering-, scientific- or valuation-expert opinions about that evidence. Unlike counsel, arbitrators rarely have an expert of their own who can wade through the experts' reports and responses in cross-examination and report on what is hyperbole and what is defensible and grounded in evidence and good practice.

Following a bout of particularly talented and evenly balanced jousting, an arbitral tribunal may well be left with two decimated sets of expert opinions and have the unappetising task of raising an award from the resulting pile of rubble.

An *alternative* approach might be for the expert to seek to position himself or herself as the arbitral tribunal's trusted expert and to be affirmatively helpful to the tribunal – by taking a measured and careful approach. Such an approach, it so happens, was remarkably effective in the English Commercial Court not long ago, where the defendant's witness was invited by the judge to run various scenarios through his valuation model, on his laptop via shared screens, during the taking of his evidence at trial. Some of the scenarios worked in the expert's appointing party's favour and some did not. The expert remained neutral and assisted the judge however he could without advocating for one approach over the other, unless invited to. In the judgment, the defendant's expert's opinion (and model) was wholly accepted, resulting in a finding that even if the claim had succeeded (which it did not) the loss would have been zero, as opposed to the £3 billion originally sought. The judgment is reported at *Automotive Latch Systems v. Honeywell International Inc* ([2008] EWHC 2171 (Comms)). Paragraph 815 sums up the benefit of being the expert of trust as opposed to the champion jouster:

> *I have to say I did not find [the claimant's expert] a satisfactory expert witness. He had a tendency to be argumentative and didactic in the witness box and, on occasions strayed way beyond what could conceivably have been the expertise of a forensic accountant in the opinions he was prepared to express. In marked contrast, [the defendant's expert] was measured and careful in his evidence and as a consequence helpful to the Court in a way in which [the claimant's expert] was not.*

– Wendy Miles QC, Twenty Essex

Where law (or the relevant treaty) determines the approach to interest, the quantum expert's job is simply to perform the calculations required by law (or at most to select an appropriate normal commercial rate). From an economic perspective, however, the appropriate choice of interest rate follows, again, from the requirement for full reparation, as we discuss in the following two approaches that are commonly considered by economic experts.

Claimant-specific interest rates

One commonly used approach by economic experts is to consider what the claimant would have done with the money, had it had access to it at the same time it would have, but for the breach (the 'hypothetical use approach' or the 'claimant's opportunity cost approach'). Here, different options can be considered for the claimant's hypothetical use: (1) assuming the claimant had debt, it could have used the money to reduce existing debt or avoid falling into new debt. In that case, the interest rate relating to these funds corresponds to the rate on the debt that the investor could or would have avoided – most likely, its most expensive debt (or if the investor was going to incur new debt, the rate at which it would be able to secure new financing); (2) alternatively, the claimant could have either kept the money in interest-bearing deposits at the commercial deposit rates in place at the time, or found an alternative use for the money, such as investing it in its own business or in any alternative investment. There is also a theoretical question as to whether this analysis should be specific to the claimant's financial arrangements or should start from an 'objective' standard.[15] While that is mainly a legal question, we note that from an economic perspective it may be hard to explain why the claimant would have the ability to earn an above-market return. If it did have such an opportunity, then why did it not find funding to exploit it from some other source?

It is also sometimes argued that, under the hypothetical use approach, the option that yields the highest interest rate should be chosen, because, had it had access to the money, the claimant would have chosen to use it in the most 'lucrative' way possible (i.e., in the way leading to the highest return). For example, one

15 In the latter case, this approach would be 'claimant-specific' in the sense that it would derive from the general circumstances facing the claimant, but it would not take into account any unique characteristics of the claimant that would differ from those of a typical market participant in those circumstances. So, for example, if one assumed that the loss of cash flows gave rise to higher levels of debt for the claimant, one would assume a cost of debt that would typically apply in that situation, even if the claimant's actual cost of debt was lower or higher.

could compare reinvesting the money in the claimant's own line of business (with a corresponding rate of return equal to the cost of capital that is relevant to that business)[16] to any alternative uses or projects that might have been available to the claimant, and choose the option providing the highest return on the understanding that the claimant would have also done so.

However, the hypothetical use approach, and in particular with respect to assuming that the claimant would have invested the money, either in its own line of business or in some alternative project, is affected by a number of issues, which may make it unsuitable to be used for choosing the appropriate interest rate from an economic (and sometimes legal or factual) perspective. First, finding and proving the 'most lucrative' alternative may not be straightforward.

To begin with, it can be speculative to assume that the investment would have occurred in absence of the breach. Even proponents of using the claimant's opportunity cost as an interest rate emphasise that the difficulty of this approach is to prove the opportunity cost:[17]

> *The difficulty for the claimant is to prove its lost opportunity cost. For example, if the claimant can show that it regularly placed its cash surpluses in a standard investment vehicle paying market rates, then it should be entitled to interest at such rates. A business may alternatively reinvest its earning in the business itself or pay excess cash out to its shareholders in the form of dividends. The claimant should be entitled to this amount if it can prove its lost opportunity cost. A claimant may be able to do so by producing historical financial records and through expert testimony to show the rate of its return on investment during the relevant time period.*

Furthermore, it is generally not reasonable to argue that the breach prevented the claimant from engaging in profitable investments in their line of business or in any other line of business. This is because the parties in international arbitration cases are large (often publicly traded) companies, which have access to capital markets, hence it is not realistic to claim that the suffered damages have prevented them from making profitable investments.[18] For that matter, if the claimant could

16 The claimant's cost of capital represents its opportunity cost of investment (i.e., the expected return that the claimant would require (and expect to obtain) from an alternative, equally risky investment).

17 See J Gotanda, 'A Study of Interest' (2007), Villanova University School of Law Public Law and Legal Theory Working Paper Series 83, 2007, pp. 35–36.

18 See J M Colon and M S Knoll, 'Prejudgement interest in International Arbitration', *Faculty Scholarship at Penn. Law*, 2007, pp. 12–13. See also M A Maniatis, F Dorobantu and F Nunez,

have raised capital to finance these alternative lucrative investments, it would have simply done so, therefore the cost to the claimant of not having access to the damages amount would turn out to be the relevant cost of capital.

Second, and most importantly, even if the claimant can show that in the absence of the breach it would have invested in a certain activity with a certain expected rate of return, and that the breach prevented it from doing so, determining interest on the basis of the hypothetical use approach could overcompensate the claimant from an economic perspective. The reason for this is that usually, an investment with a high expected rate of return also entails high risk, due to the economic principle of aligning risk and return.[19] However, if, as a consequence of the breach, the claimant was deprived of the opportunity of investing in a certain alternative investment as we discuss above, it was also 'deprived' of the risk associated with investing in that alternative investment. Therefore, using the rate of return that the claimant would have expected from the alternative investment would overcompensate it by compensating it for a risk it did not actually take. To determine a correct interest rate using the hypothetical use approach, one would have to determine or measure an appropriate reduction in the rate of return expected from the alternative investment based on the specific risk associated with the investment that has been removed. This can often be a very complex task.

Respondent-specific interest rates

Many economic experts take another route that is based on the situation of the respondent rather than the claimant: the 'forced loan' approach. Under this approach, the amount of the award is interpreted as a forced loan from the claimant to the respondent. The idea is that as of the moment of the loss arising from the breach, the claimant has been waiting for the respondent to pay it the amount of the award. The claimant has therefore been in the same financial position as if it had lent that amount of money to the respondent. The only difference,

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'A Framework for Interest Awards in International Arbitration', *Fordham International Law Journal*, Volume 41, Issue 4, 2018, pp. 829, 836–837.

19 The economic principle of aligning risk and return implies that for investments of higher risk (measured as variance in the cash flows generated by the investment), investors require higher returns, and therefore these investments have higher cost of capital as opposed to investments of lower risk (e.g., fixed payments). The variance in the cash flows generated by the investment implies that the investors could either obtain a return higher or lower than their expected (required) return, thus, obtaining this required return (equivalent to the cost of capital in a firm) is not certain. Riskier investments have higher cost of capital (required returns) because investors require a compensation for bearing the risk (i.e., the variance), and the cost of capital reflects that.

on this account, is that the loan was involuntary (hence, 'forced'). Between the moment when the damages were incurred by the claimant and the date of award, the claimant was deprived of, and the respondent was able to use, that amount of money (the damages amount).

Under this approach, the appropriate interest rate is equal to the borrowing rate of the respondent because that is the rate that the respondent would have had to pay if it had wished to borrow money from the claimant in a voluntary market transaction.

The interest rate in forced loans is usually determined by several factors; for example, the respondent's location or the currency of the damages award. In particular, the appropriate interest rate here would compensate the claimant not only for the time value of money, but also for the default risk of the respondent as the claimant was subject to this default risk while it was forced to loan money to the respondent.

Determining the interest rate based on the forced loan theory tends to be significantly simpler than the hypothetical use approach for the reasons explained above. More importantly, determining interest based on the forced loan theory respects both the standard of full reparation and the economic principle of aligning risk and return as it provides the claimant with an interest rate that reflects the risks that it bore. Because the claimant was deprived of the money by 'lending' it to the respondent, the only risk the claimant actually took is the risk related to not being able to 'recover' the loan (i.e., the risk associated with the default risk of the respondent).[20] This risk is correctly reflected by the respondent's borrowing rate.

It could be similarly 'simple' to determine the interest rate based on the hypothetical-use approach, but assuming that the claimant would have kept the money in interest-bearing deposits, or would have used it to reduce its (present or future, or both) level of debt. Moreover, the principle of aligning risk and return would arguably be respected when determining the interest rate, assuming that the claimant would have kept the money in interest-bearing deposits, because, if these interest-bearing deposits yielded a lower interest rate than a forced loan to the respondent, it would be because they were also lower risk (so the claimant would, in principle, be indifferent between lending to the respondent at the respondent's borrowing risk or 'lending' to another party at a different interest

20 In other words, the risk in question is the risk that the award will prove unenforceable in practice, in the same way that ownership of a bond requiring the respondent to repay a certain sum may prove unenforceable in practice (i.e., the respondent may default). This approach ignores the risks around any imperfections in the investor–state dispute settlement mechanism itself.

rate by holding the money in deposits, as long as the interest rate reflects the risk of the other party). From an economic perspective, therefore, the claimant would be adequately compensated in any of these cases. We note, however, that choosing an interest rate lower than the respondent's borrowing cost would imply that the respondent has been able to benefit from its wrongdoing by having been able to 'borrow' money (in this case, the damages amount) at a rate lower than its borrowing cost. Whether that is appropriate or not is a matter of law.

CHAPTER 19

The Courts

Nicholas Lingard and Samantha Tan[1]

There is a constantly evolving debate about the role that courts play, or should play, with regard to arbitration. Minimal curial intervention is the usual guiding philosophy. Thus, for example, in his much-publicised opening address at the 2012 International Council for Commercial Arbitration Congress, Singapore's Chief Justice Sundaresh Menon SC described the 'golden age' of arbitration, identifiable by 'the degree of judicial deference accorded to arbitration in the name of party autonomy'.[2] He quoted from an August 2009 decision of Singapore's apex court, declaring that 'the role of the court is now to support, and not to displace, the arbitral process'.[3] This, Menon said, was the 'prevailing mainstream philosophy' of the courts around the world then towards arbitration, but was also a 'relatively recent phenomenon'.[4]

But Menon also foreshadowed the potential need for the see-saw of judicial interference in arbitration to pivot back, from the light touch to a heavier handed approach. A major context in which he envisaged this need was investment treaty arbitration, a system of arbitration that has been likened by some to a form of

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1 Nicholas Lingard is a partner and Samantha Tan is a senior associate at Freshfields Bruckhaus Deringer. The authors wish to thank Sheares Tiong, LLB candidate at the National University of Singapore, for his assistance with research for this chapter.

2 S Menon SC, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)', International Council for Commercial Arbitration (ICCA) Congress 2012, Opening Plenary Session (available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ags_opening_speech_icca_congress_2012.pdf), Paragraph 4.

3 *Tjong Very Sumito and others v. Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 (Singapore Court of Appeal), Paragraph 29.

4 S Menon SC, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)', ICCA Congress 2012, Opening Plenary Session (footnote 2), Paragraph 5.

'global administrative law',[5] and in which privately appointed foreign nationals are empowered to review states' regulatory actions and, on one view, may have a 'weighty hand' in shaping domestic policy.[6]

So it is that at the time of writing, the texts of international instruments and national laws that prescribe the role of courts in International Centre for Settlement of Investment Disputes (ICSID) and non-ICSID investment treaty arbitration reflect the philosophy of 'minimal curial intervention', but there are growing instances of tension between those texts and actions by national courts – particularly those of state respondents to investment treaty arbitration.

Against this context, in this chapter, we consider:

- the role of national courts in non-ICSID arbitration;
- the role of national courts in ICSID arbitration; and
- some other instances of interaction between national courts and investment arbitration, particularly concerning courts of the state respondent.

The powers of the courts in non-ICSID arbitration

The vast majority of investment arbitrations are under either the ICSID or United Nations Commission on International Trade Law (UNCITRAL) rules.[7] When under the UNCITRAL Arbitration Rules, investment arbitrations are frequently administered by the Permanent Court of Arbitration (PCA). Other institutions, notably the Stockholm Chamber of Commerce and the International Chamber of Commerce (ICC), also administer investment arbitrations under their own rules.

Outside of ICSID, none of these administering institutions nor the appointed arbitrators themselves have authority to review the arbitral award for procedural irregularities or to review the jurisdiction of the arbitral tribunal itself, or coercive powers to compel parties to comply with the agreement to arbitrate or to require non-parties to participate. Thus, it is necessary to draw upon the powers and

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5 See B Kingsbury and S Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2 September 2009), NYU School of Law, Public Law Research Paper No. 09-46 (available at: https://ssrn.com/abstract=1466980), and G V Harten and M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) Volume 17(1), *European Journal of International Law*, 121–150 (available at: http://www.ejil.org/pdfs/17/1/65.pdf), both cited in S Menon SC, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)', ICCA Congress 2012, Opening Plenary Session (footnote 2), Paragraph 19.

6 S Menon SC, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)', ICCA Congress 2012, Opening Plenary Session (footnote 2), Paragraph 22.

7 See, e.g., J Commission and R Moloo, *Procedural Issues in International Investment Arbitration* (Oxford University Press, 2018), Preface, pp. xi–xii.

jurisdiction of national courts to perform these roles in support of non-ICSID arbitration by assigning each arbitration a legal seat: a national jurisdiction whose laws would govern the procedure of the arbitration and whose courts would have supervisory jurisdiction over the arbitration.

National courts outside the seat also play a role: they may be called upon to enforce an arbitral award or to grant injunctions or stays to address competing litigation and arbitration proceedings.

Below, we examine courts' roles broadly chronologically over the lifeline of an arbitration and their powers for performing these roles. As national courts, their powers are derived from national laws, which in turn implement international conventions and model laws to which the state subscribes.

Appointing and deciding challenges to arbitrators

Today, in practice, national courts play a limited 'backup' role in the appointment (and removal) of arbitrators. Even in ad hoc non-ICSID arbitration where no institution is appointed to administer the arbitration, parties are entitled to designate an appointing authority to help them appoint their arbitrators and decide any challenges to arbitrators.[8] The appointing authority could be, for example, the Secretary General of the PCA or the Secretary General of ICSID (even if the case is non-ICSID).

National laws provide for a default mechanism where national courts would support the arbitrator appointment process in the absence of any other agreed procedure or appointing authority. For example, Section 18 of the English Arbitration Act confers power on the English courts 'to give directions as to the making of any necessary appointments', 'to revoke any appointments already made' and 'to make any necessary appointments itself', if or to the extent there is no party agreement to any procedure for the appointment of the arbitral tribunal. This provision applies equally to commercial and investment arbitration seated in the UK.

Further, under the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), which many states have adopted into their own laws as applying to both commercial and investment arbitrations, national courts have the ultimate say in deciding challenges to arbitrators. Article 11(3) of the Model Law provides that if any arbitrator challenge under any procedure agreed

8 See, e.g., UNCITRAL Arbitration Rules 2013, Article 6.

by the parties or under Article 11(2) of the Model Law is not successful, the challenging party may request that the court decide on the challenge. The court's decision then would be subject to no appeal.

Deciding appeals to arbitral tribunals' rulings on jurisdiction

More commonly, national courts serve as avenues for appeal against arbitral tribunals' rulings on jurisdiction. Most developed jurisdictions, including those following the Model Law, permit parties to apply to court immediately after an arbitral tribunal has ruled on its own jurisdiction, whether as a preliminary question or in an award on the merits.[9] Under English, Singaporean, French, Swiss and US federal law, for example, both positive and negative rulings on jurisdiction may be reviewed by courts.[10] The standard of review may be *de novo*, as is the case in England and Singapore,[11] such that the courts are at liberty to consider the issues afresh and are not bound by the arbitral tribunals' findings, although they will accord the appropriate respect to those findings.

More and more national courts have been reviewing the jurisdictional rulings of investment tribunals. One example is the Singapore courts' determination of the jurisdiction of the arbitral tribunal constituted to decide Macanese casino investor Sanum's claim against Laos under the PRC–Laos Bilateral Investment Treaty (BIT).[12] In investor–state arbitration, the arbitral tribunal's jurisdiction derives from the investment treaty between the investor's home state and the host state in which the investment was made. The tribunal constituted to hear Sanum's claim against Laos found that it had jurisdiction to hear that claim, contrary to Laos' objections that, inter alia, the PRC–Laos BIT did not apply to Macau. Singapore was the seat of the arbitration. Laos appealed the tribunal's ruling on jurisdiction to the Singapore courts under Section 10(3) of Singapore's International Arbitration Act. As the Singapore Court of Appeal explained,

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9 See, e.g., Model Law, Article 16(3).

10 See, e.g., English Arbitration Act 1996, Sections 32, 67; Singapore International Arbitration Act, Section 10(3); French Code of Civil Procedure, Article 1520; Swiss Law on Private International Law, Article 190; US Federal Arbitration Act, § 10(a)(4).

11 See, e.g., *GPF GP S.á.r.l. v. The Republic of Poland* [2018] EWHC 409 (Comm), Paragraphs 64–70; *Dallah Real Estate and Tourism v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, Paragraphs 26, 96 and 160; *CBX and another v. CBZ and others* [2021] SGCA(I) 3, Paragraph 11; *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 (Singapore Court of Appeal), Paragraph 163.

12 *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 (Singapore Court of Appeal).

under this provision, 'the Tribunal's determination that it has jurisdiction remains subject to overriding court supervision in the form of an appeal to the High Court of Singapore'.[13] The Court held that it was 'not only competent to consider these issues [of the interpretation and application of the PRC–Laos BIT], but in the circumstances, it was *obliged* to do so . . . because the parties have designated Singapore as the seat of the Arbitration'.[14] The Singapore courts considered the question of the tribunal's jurisdiction *de novo*[15] and ultimately upheld the tribunal's finding of jurisdiction over Sanum's claim.

The English courts have also undertaken *de novo* reviews of investment tribunals' rulings on jurisdiction in recent years.[16] For example, in 2019, the Commercial Court considered whether an arbitral tribunal had jurisdiction over an UNCITRAL arbitration brought against the Republic of Korea under the Korea–Iran BIT by members of the Iranian Dayyani family.[17] The Court considered whether a share purchase agreement or a deposit paid pursuant to that agreement before the closing of the share purchase transaction constituted an 'investment' under the BIT, and whether the Dayyanis constituted 'investors' under the BIT when the contracting party and payor of the deposit was a Singaporean company instead of the Dayyanis themselves. The Court upheld the UNCITRAL tribunal's finding of jurisdiction.

The US courts, too, have been asked to review rulings by investment tribunals that were characterised as 'jurisdictional'. In *BG Group v. Argentina*, the US Supreme Court, by a 7-2 majority, refused to review *de novo* the question of whether British BG Group had fulfilled the requirement in Article 8 of the UK–Argentina BIT that disputes first be submitted for 18 months to the Argentine courts before investor–state arbitration may be initiated.[18] BG Group had brought UNCITRAL arbitration against Argentina (as did hundreds of other foreign investors) for damage to its investment in Argentine gas distributor MetroGAS, caused by the emergency laws that Argentina enacted in 2001 and 2002 to try to curb its economic crisis. In finding for BG Group, the UNCITRAL tribunal dismissed Argentina's objection that BG Group's claims were inadmissible because BG Group had not sought relief from Argentine courts for a period

13 id., Paragraph 9.

14 id., Paragraph 38 (emphasis in original).

15 id., Paragraphs 40–42.

16 See, e.g., *GPF GP S.á.r.l. v. The Republic of Poland* [2018] EWHC 409 (Comm); *Republic of Korea v. Dayyani and others* [2019] EWHC 3580 (Comm).

17 *Republic of Korea v. Dayyani and others* [2019] EWHC 3580 (Comm).

18 *BG Group plc v. Republic of Argentina*, 572 US 25, 134 S. Ct. 1198 (2014).

of 18 months before resorting to arbitration.[19] Before the US Supreme Court, Argentina argued that the UNCITRAL tribunal had lacked 'jurisdiction' because BG Group initiated arbitration without first litigating its claims in Argentina's courts despite Article 8's requirement, and 'failure by BG to bring its grievance to Argentine courts for 18 months render[ed] its claims in [the] arbitration inadmissible'.[20] While the Court implicitly accepted that a jurisdictional question such as Argentina's substantive consent to arbitrate would be reviewed *de novo*,[21] it characterised the local litigation requirement in Article 8 of the BIT as a 'procedural condition precedent to arbitration' only, and held that reviewing courts could not review arbitrators' decisions on such procedural conditions *de novo*, but could only do so with 'considerable deference'.[22]

Granting interim measures in support of arbitration

Generally, arbitral tribunals are empowered – either by party agreement through their chosen arbitration rules or the curial law – to grant the interim measures or provisional relief that parties may require. Exceptionally, however, parties may address requests for interim measures to national courts. Arbitration rules commonly adopted in non-ICSID investment arbitration do not preclude parties from doing so,[23] and national laws generally afford courts certain powers exercisable in support of arbitral proceedings 'only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively'.[24]

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19 *BG Group Plc. v. The Republic of Argentina* (UNCITRAL), Final Award, 24 December 2007, Paragraphs 140–157.

20 *BG Group plc v. Republic of Argentina*, 572 US 25, 134 S. Ct. 1198 (2014).

21 See Justice Sotomayor's partial concurring opinion ('I agree with the Court that the local litigation requirement at issue in this case is a procedural precondition to arbitration (which the arbitrators are to interpret), not a condition on Argentina's consent to arbitrate (which a court would review de novo).').

22 *BG Group plc v. Republic of Argentina*, 572 US 25, 134 S. Ct. 1198 (2014).

23 See, e.g., UNCITRAL Arbitration Rules 2013, Article 26(9); SIAC Investment Arbitration Rules 2017, Rule 27.2.

24 See, e.g., English Arbitration Act 1996, Section 44(5); Singapore International Arbitration Act, Section 12A(6).

Courts at the seat of arbitration can usually exercise powers in relation to:

- the taking of witness evidence;[25]
- the preservation of evidence;[26]
- property that is the subject of the arbitral proceedings or as to which any question arises in the proceedings (e.g., for its preservation, interim custody or sale, or for samples, observations or experiments to be taken upon it);[27] and
- the granting of interim injunctions.[28]

Courts' powers extend to non-parties to the arbitration as long as they fall within the court's jurisdiction (e.g., are within the territory). For example, the Singapore courts have power to order that a subpoena to testify or to produce documents shall be issued to compel the attendance before an arbitral tribunal of a witness wherever they may be in Singapore.[29]

The US courts have the power, under Section 1782 of Title 28 of the United States Code, to order persons within their jurisdiction to give testimony or statement (e.g., by deposition) or to produce documents for use in investor–state arbitration under an investment treaty – regardless of whether those persons are parties to the arbitration. This has been confirmed by the Court of Appeals for the Second Circuit and several district courts,[30] though not yet by the US

25 See, e.g., English Arbitration Act 1996, Section 44(2)(a); Singapore International Arbitration Act, Section 12(1)(c) read with Section 12A(2). See also Model Law, Article 27 ('The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence'), which applies to both investment and commercial disputes. J Commission and R Moloo, *Procedural Issues in International Investment Arbitration* (Oxford University Press, 2018), Paragraph 7.46.

26 See, e.g., English Arbitration Act 1996, Section 44(2)(b); Singapore International Arbitration Act, Section 12(1)(f) read with Section 12A(2).

27 See, e.g., English Arbitration Act 1996, Section 44(2)(c)–(d); Singapore International Arbitration Act, Section 12(1)(d)–(e) read with Section 12A(2).

28 See, e.g., English Arbitration Act 1996, Section 44(2)(e); Singapore International Arbitration Act, Section 12(1)(i) read with Section 12A(2).

29 Singapore International Arbitration Act, Section 13(2).

30 See, e.g., *In re Fund for the Protection of Investor Rights in Foreign States v. AlixPartners, LLP* (2d Cir. 15 July 2021); *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010); *In re Chevron Corp.*, 753 F. Supp. 2d 536, 539 (D. Md. 2010); *Republic of Ecuador v. Bjorkman*, 801 F. Supp. 2d 1121, 1124 n. 1 (D.C. Colo. 2011); *In re Mesa Power Grp., LLC*, No. 2:11-MC-270-ES, 2013 WL 1890222, at *1 (D.N.J. 19 April 2013). See also L V M Bento, *The Globalization of Discovery: The Law and Practice under 28 U.S.C. § 1782* (Wolters Kluwer, 2019), p. 126 ('a majority of courts have held that international treaty arbitrations, such as those arising under a Bilateral Investment Treaty (BIT) or a multilateral

Supreme Court (before which there is a pending application concerning the use of Section 1782 in international commercial arbitration, not implicating investment arbitration).[31] For example, in 2010, Chevron successfully applied to the Southern District of New York under Section 1782 to subpoena, from an award-winning producer and filmmaker located in the district, the out-takes from a documentary he had made depicting the alleged environmental contamination at issue in Chevron's arbitration against Ecuador under the US–Ecuador BIT.[32]

Section 1782 calls neatly into focus the intersection between international arbitral tribunals and the US courts. A court order that testimony or documents be produced pursuant to Section 1782 could undermine an arbitral tribunal's refusal to make similar orders in the arbitration, perhaps because they do not consider the evidence relevant or material to the dispute. Thus, US courts faced with a Section 1782 application must consider the degree of deference they ought to accord to the views of the arbitral tribunal on the discovery sought. As Justice Ruth Bader Ginsberg held in her majority opinion for the court in *Intel v. Advanced Micro Devices*, the second and third of the four discretionary factors to be considered in an application for Section 1782 discovery are: 'the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance', and 'whether the §1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States'.[33]

Deciding applications to set aside or annul arbitral awards

Perhaps the most important role of courts in non-ICSID arbitration is to determine whether awards should be set aside or annulled. As with commercial arbitrations, courts of the seat of investment arbitrations are empowered to set aside or annul awards if the grounds for doing so under national law are met. These grounds tend to be very limited: under the Model Law, awards may be set aside only if a party was under some incapacity, the arbitration agreement was invalid, there was an excess of jurisdiction or serious procedural irregularity, the subject matter of the dispute was non-arbitrable or the award conflicted with public policy. These are discussed in greater detail in Chapter 20.

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treaty qualify as a "foreign or international tribunal" under Section 1782. . . . There appears to be "significant agreement" at the district court level in this connection.').

31 *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794.

32 *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010).

33 *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 US 241, at 264–265, 124 S. Ct. 2466 (2004).

In this chapter, we highlight one prominent example of a national court setting aside an investment arbitration award. In the landmark decision of *Swissbourgh Diamond Minds v. Kingdom of Lesotho*, the Singapore courts set aside an arbitral award that had found the Kingdom of Lesotho liable for breaching its obligations to South African mining investors.[34] The Singapore Court of Appeal confirmed that, as part of the supervisory role of Singapore courts over Singapore-seated arbitrations, it had power to set aside an investment arbitration award under the Model Law (which has the force of law in Singapore). It did so on the ground that the award dealt with issues falling outside the scope of the agreement to arbitrate in the relevant treaty.

Enforcing arbitral awards

National courts – not just of the seat – also serve the critical function of enforcing compliance with arbitral awards. Under the New York Convention, contracting states' courts are required to recognise arbitral awards made (or seated) in other contracting states as binding and to enforce them, except on very limited grounds, which mirror the Model Law grounds for setting aside awards. This also applies to non-ICSID investment arbitration awards.

While the data show that more states have complied with adverse awards than not, the instances of state noncompliance with adverse awards are significant and often result in investors having to pursue formal enforcement proceedings.[35] These tend to be before the courts of any New York Convention jurisdiction where the state may have assets; recourse to formal enforcement proceedings is not limited to the courts of the seat or the state itself.

For example, in 2018, US independent oil and gas major ConocoPhillips commenced enforcement actions in Jamaica and the Dutch Caribbean to seize and sell assets of Venezuelan state-owned oil company Petróleos de Venezuela, SA (PdVSA) to satisfy a US$2 billion ICC award that ConocoPhillips had obtained against PdVSA. Although not an investor–state arbitration per se, this case illustrates the breadth of enforcement jurisdictions and measures available to satisfy awards against states (or state-owned entities). ConocoPhillips managed

34 *Swissbourgh Diamond Mines (Pty) Ltd and others v. Kingdom of Lesotho* [2019] 1 SLR 263 (Singapore Court of Appeal).

35 See E Gaillard, I M Penushliski, 'State Compliance with Investment Awards', *ICSID Review – Foreign Investment Law Journal*, 2021 (available at: https://doi.org/10.1093/icsidreview/siaa034).

to obtain court orders allowing it to garnish PdVSA's proceeds from oil exports produced in facilities in the Caribbean. PdVSA eventually entered into a settlement agreement with ConocoPhillips, agreeing to pay the award sum in full.

Enforcement proceedings may put further pressure on the respondent state to withdraw or change the measures for which it was penalised in the award being enforced. In December 2020, Scottish energy investors Cairn Energy and Cairn UK Holdings successfully obtained an award of some US$1.2 billion against India in UNCITRAL arbitration under the UK–India BIT for India's retroactive amendment to its Income Tax Act and thus the claimants' tax assessments.[36] In early 2021, Cairn actively pursued recognition and enforcement proceedings before the US courts, including, in May 2021, asking that Air India be held jointly and severally liable for the award, as the 'alter ego' of the Republic of India.[37] In August 2021, the Indian government moved to amend the Income Tax Act so as to reverse its retroactive effect and to withdraw retrospective tax demands such as those that had been levied against Cairn.[38]

Recognition and enforcement of non-ICSID (and ICSID) awards are discussed in greater detail in Chapters 21 and 22.

The powers of the courts in ICSID arbitration

In ICSID arbitration,[39] national courts have a significantly reduced role. The ICSID Convention established an almost exclusively self-contained and autonomous system for investment arbitration. ICSID Convention signatories agree to arbitrate within this system; accordingly, no domestic seat is necessary for

36 *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India* (PCA Case No. 201607), Final Award, 21 December 2020.

37 See, e.g., Petition to Confirm Foreign Arbitration Award, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, in the United States District Court for the District of Columbia (Case 1:21-cv-00396-RJL), 12 February 2021; Complaint, *Cairn Energy PLC and Cairn UK Holdings Limited v. Air India, Ltd*, in the United States District Court for the Southern District of New York (Case 1:21cv04375), 14 May 2021.

38 See, e.g., 'Govt to amend Income Tax Act to nullify retrospective tax demands', *Business Standard*, 5 August 2021 (available at: www.business-standard.com/article/economy-policy/govt-to-amend-income-tax-act-to-nullify-retrospective-tax-demands-121080501146_1.html); 'Govt to amend Income Tax Act, no provision for retrospective tax', *Hindustan Times*, 5 August 2021 (available at: www.hindustantimes.com/india-news/centre-to-amend-income-tax-act-no-provision-for-retrospective-tax-101628167762474.html).

39 The discussion here does not extend to additional facility arbitrations.

supervision or support to ICSID arbitration. ICSID arbitration is delocalised and independent of judicial control in the country where the proceedings take place and the award is rendered.[40] For example:

- all matters relating to the constitution of an ICSID arbitral tribunal, including proposals to disqualify arbitrators, are supported by the Secretary General and resolved by the chairman of the Administrative Council of ICSID;[41]
- ICSID tribunals' decisions on their jurisdiction are not subject to review by domestic courts and are only subject to review by an ad hoc committee of three persons appointed by ICSID after the tribunal has issued its final award (even if the tribunal had made a preliminary decision upholding jurisdiction);[42]
- ICSID awards are not subject to set aside proceedings before domestic courts – only an ad hoc committee may decide whether to annul an ICSID award;[43] and
- ICSID awards are not subject to review by courts of ICSID contracting states when they are asked to enforce these awards,[44] as further discussed below.

In exceptional circumstances, however, parties to ICSID arbitration may still require recourse to national courts. Some of these circumstances are discussed below. Again, we proceed broadly in chronological order through the life of an investment arbitration.

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40 C H Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary*, Second edition (Cambridge University Press, 2009), p. 1103.

41 ICSID Convention, Articles 37 to 40; ICSID Arbitration Rules 2 to 12.

42 ICSID Convention, Article 52; C H Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary*, Second edition (Cambridge University Press, 2009), pp. 523–524. See also, ICSID Convention, Article 48(3) (requiring an award to 'deal with every question submitted to the Tribunal') and ICSID Arbitration Rule 41(6) (requiring negative rulings on jurisdiction to be recorded in an award to that effect).

43 ICSID Convention, Article 52; C H Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary*, Second edition (Cambridge University Press, 2009), p. 899.

44 See ICSID Convention, Article 54.

Compelling attendance of witnesses or production of documents through subpoena

ICSID tribunals do not have the power to compel the appearance of witnesses – who are not parties to the arbitration – before them. Article 43 of the ICSID Convention only empowers tribunals to 'call upon *the parties* to produce documents or other evidence'.[45]

In addition, the ICSID Convention does not entitle ICSID tribunals to enlist the assistance of national courts to obtain evidence, although parties may agree that provisional measures may be requested from domestic courts.[46] In that event, a party may, for example, apply to the Singapore courts for an order that a subpoena to testify or to produce documents shall be issued to compel the attendance before an ICSID tribunal of a witness located in Singapore.[47]

Enforcing or complying with provisional measures ordered by ICSID tribunals

National courts may be asked to enforce, or be required to comply with, provisional measures ordered by an ICSID tribunal. Under Article 47 of the ICSID Convention, a tribunal may, 'if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party'. The procedural framework for provisional measures is in ICSID Arbitration Rule 39.

Despite the use of the word 'recommend', ICSID tribunals are empowered to order provisional measures.[48] However, there is no penalty for non-compliance with such provisional measures, except that a tribunal would take the fact and effects of noncompliance into account in its award.[49]

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45 id., Article 43(a) (emphasis added). See also C H Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary*, Second edition (Cambridge University Press, 2009), pp. 653–654.

46 ICSID Arbitration Rules, Rule 39(6); C H Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary*, Second edition (Cambridge University Press, 2009), p. 653.

47 Singapore International Arbitration Act, Section 13.

48 See C H Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary*, Second edition (Cambridge University Press, 2009), p. 765, citing *Tokios Tokelés v. Ukraine*, Procedural Order No. 1, 1 July 2003, Paragraph 4 and *Occidental v. Ecuador*, Decision on Provisional Measures, 17 August 2007, Paragraph 58.

49 See C H Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary*, Second edition (Cambridge University Press, 2009), pp. 765–766, 768–769 (explaining that during the drafting of the Convention, a second paragraph to Article 47 providing that 'The Tribunal may fix a penalty for failure to comply with such provisional

Thus, there is a question of whether a national court may be asked to enforce a provisional measure ordered by an ICSID tribunal. The most common manifestation of this is where national courts are the subject of the provisional measures ordered. In this context, because under international law a state's judiciary is also bound by an ICSID tribunal's order against the state, national courts tend to be strongly influenced to comply with the tribunal's orders.[50] Further, courts of an ICSID signatory state would be bound to comply with Article 26 of the Convention, which provides for ICSID arbitration as the exclusive remedy – without recourse to parallel judicial remedies – for parties that have consented to arbitrate under the Convention.

Granting provisional measures in support of ICSID arbitration

National courts also may be asked to grant provisional measures in support of an ICSID arbitration. Article 47 of the ICSID Convention is silent with respect to whether this can be done; it has been a subject of debate whether national courts are entitled to grant provisional measures in connection with ICSID arbitrations.[51] With the addition of Rule 39(6) of the ICSID Arbitration Rules, however, it has become clear that provisional measures by national courts are only permissible where parties have expressly agreed to this option.

Recourse to national courts for provisional measures in the context of ICSID arbitration is therefore only available where parties have expressly agreed to it or where ICSID tribunals have issued recommendations or orders in relation to parallel domestic court proceedings.

Enforcing arbitral awards

As discussed above, non-ICSID awards are enforceable under the New York Convention. ICSID awards are too, but they are also enforceable under the ICSID Convention, which does not provide the limited grounds for refusing recognition

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measures' was deleted by a 'nearly unanimous vote', upon which the Chairman made an unopposed announcement that he 'assumed the majority was opposed to any *specific* mention of the effect of noncompliance with the recommendation, but that naturally the Tribunal would normally have to take account of this fact when it came to make its award' (emphasis in original)).

50 See C H Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary*, Second edition (Cambridge University Press, 2009), pp. 766–767.

51 A L Ortiz, P Ugalde-Revilla, et al., 'Chapter 12: The Role of National Courts in ICSID Arbitration', in C Baltag (ed.), *ICSID Convention after 50 Years: Unsettled Issues* (Wolters Kluwer, 2016), p. 347.

and enforcement that the New York Convention does. The only recourse against an ICSID award is the interpretation, revision and annulment procedures under the ICSID Convention.

The courts of ICSID contracting states are obliged under Article 54 of the Convention to recognise ICSID awards as binding and to enforce the pecuniary obligations imposed by those awards.[52] The enforcement process is mechanistic: the enforcing party need only 'furnish to a competent court or other [designated] authority . . . a copy of the award certified by the Secretary General'.[53] Thereafter, execution of the award takes place according to local laws concerning the execution of judgments.[54] With that said, Article 55 of the Convention clarifies that states may still benefit from sovereign immunity at the execution stage.[55]

Most recently in 2021, Articles 54 and 55 of the ICSID Convention were the subject of debate before the Australian courts. Pursuant to the Convention, the Federal Court of Australia recognised and enforced,[56] in favour of Luxembourg and Dutch claimants, one of the ICSID awards from the long line of cases against Spain relating to its renewable energy regulatory regime.[57] The Court explained that Article 54(1) of the Convention 'is about recognising the award to the point of having an enforceable status',[58] and that '[t]he obligation to recognise an award under article 54 was unequivocal and unaffected by questions of immunity from execution'.[59] These questions about immunity from execution (e.g., what assets may be attached in execution of an award) would be answered by the domestic laws of the state in which execution is sought. For example, in England, only

52 ICSID Convention, Article 54(1).

53 id., Article 54(2).

54 id., Article 54(3).

55 ICSID Convention, Article 55 ('Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.').

56 *Kingdom of Spain v. Infrastructure Services Luxembourg S.á.r.l.* [2021] FCAFC 3, 1 February 2021, as clarified in *Kingdom of Spain v. Infrastructure Services Luxembourg S.á.r.l. (No. 2)* [2021] FCAFC 28, 4 March 2021, with the proper form of the order made further clarified in *Kingdom of Spain v. Infrastructure Services Luxembourg S.á.r.l. (No. 3)* [2021] FCAFC 112, 25 June 2021.

57 *Antin Infrastructure Services Luxembourg S.á.r.l. and Antin Energia Termosolar B.V. v. The Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018.

58 *Kingdom of Spain v. Infrastructure Services Luxembourg S.á.r.l. (No. 3)* [2021] FCAFC 112, 25 June 2021, Paragraph 10.

59 *Kingdom of Spain v. Infrastructure Services Luxembourg S.á.r.l.* [2021] FCAFC 3, 1 February 2021, Paragraph 6. See also *Kingdom of Spain v. Infrastructure Services Luxembourg S.á.r.l. (No. 3)* [2021] FCAFC 112, 25 June 2021, Paragraph 7.

assets in use or intended for use for commercial purposes may be enforced against. The House of Lords has refused to grant attachment of funds in a bank account where they were used for both commercial and sovereign expenditures.[60]

In exceptional cases, it may be necessary to enforce an ICSID award in a state that is not a party to the ICSID Convention but is a party to the New York Convention (for example, if the state respondent refuses to comply with the award and has assets located in a non-ICSID contracting state). Alternatively, it may be necessary to enforce non-pecuniary obligations in an ICSID award.[61]

In such a case, the ICSID award would be treated no differently than non-ICSID or commercial arbitral awards, and its enforcement would be governed by the New York Convention (with its limited grounds for refusing enforcement) and the national laws of the jurisdictions in which enforcement is sought. Enforcement and execution of awards are discussed in greater detail in Chapters 21 and 22.

Other interactions between courts and investment arbitration

We turn, finally, to some observations on other possible interactions between courts and investment arbitration. The above instances are not exhaustive. In particular, there is potential for tension between courts and investment arbitration when the courts of the state respondent are involved. In this final section to this chapter, we discuss just a few.

Denial of justice, a substantive ground for investment treaty protection, is beyond the scope of this chapter and is discussed in Chapter 13. But it is an obvious instance of interplay between national courts and investment arbitration: it is founded upon unfair treatment by state judiciaries and requires claimants to have exhausted all remedies before domestic courts.

Similarly, court actions have founded unlawful expropriation claims against states. For example, in 2009, Italian subsidiary of Eni, Saipem, was successful in its ICSID claim of unlawful expropriation against Bangladesh based on the Bangladeshi courts' decision to revoke the authority of an arbitral tribunal in a prior ICC arbitration between Saipem and Petrobangla, and the Bangladeshi Supreme Court's decision that the ICC award later issued was 'non-existent'.[62] In May 2021, Mauritian shareholders of Indian telecommunications company Devas Multimedia issued a trigger letter notifying India of a new claim under

60 *Alcom Ltd v. Republic of Colombia* [1984] 2 WLR 750.

61 See C H Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary*, Second edition (Cambridge University Press, 2009), p. 1118.

62 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, Paragraphs 161, 167, 170, 173.

the Mauritius–India BIT based on, among other things, an order by a provincial companies tribunal in India appointing a provisional liquidator to wind up Devas. The wind-up petition allegedly was filed with the Indian government's permission while proceedings were ongoing to enforce an ICC award and an UNCITRAL award (from an earlier arbitration between the Devas shareholders and India under the Mauritius–India BIT) against India.[63]

National court proceedings and arbitration also collide when parties invoke domestic proceedings in procedural applications to an arbitral tribunal.

Investment tribunals have encountered requests for production of documents relating to pending domestic court proceedings.

- For example, in *BSG Resources v. Guinea*, the claimants requested from Guinea the production of documents essentially from their public prosecutors' files relating to pending domestic criminal prosecutions against parties associated with the claimant.[64] Their requests were not granted. Among other reasons, the ICSID tribunal accepted Guinea's objections based on the principle of secrecy of criminal proceedings.[65]
- Relatedly, the ICSID tribunal in *Libananco v. Turkey* was asked to grant provisional relief in response to claims that the Turkish authorities had, in connection with criminal investigations into money laundering, held Libananco's legal representatives and potential witnesses under surveillance and intercepted thousands of their communications, including privileged and confidential emails.[66] Libananco had initially asked the tribunal to direct Turkey to produce documents related to that alleged surveillance, but later withdrew that request,[67] and the tribunal instead made orders restricting the use of documents and information from the criminal investigations as evidence in the arbitration.[68]

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63 Notice of Intent to Initiate Arbitration for BIT Claims Arising From India's Treatment of CC/Devas (Mauritius) Ltd., Telcom Devas Mauritius Limited and Devas Employees Mauritius Private Limited, 6 May 2021 (available at: https://www.iareporter.com/articles/india-is-put-on-notice-of-treaty-based-dispute-over-alleged-retaliatory-actions-against-claimants-in-billion-dollar-satellite-awards/).

64 *BSG Resources Limited and others v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 7, 5 September 2016, Requests Nos. 37 and 40.

65 id., pp. 106, 114.

66 *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, Paragraphs 42–49, 72–81.

67 id., Paragraphs 10, 12.

68 id., pp. 40–42.

As also mentioned above, investment tribunals have been asked to order provisional measures requiring state respondents to suspend domestic court proceedings – most of these criminal – to protect the integrity of the international arbitral proceedings.

- For example, heir to the 300-year-old Gavrilović meat processing enterprise, Georg Gavrilović, sought in his ICSID arbitration against Croatia, provisional measures to suspend the Croatian police's criminal investigations against him as well as health and safety inspections conducted at the factories of his company and co-claimant, Gavrilović d.o.o.[69] The tribunal refused the request, finding, among other things, that the allegation that the investigations were intended to advantage Croatia in the arbitration and deprive Mr Gavrilović and Gavrilović d.o.o. of a fair hearing was not supported by the evidence.[70]
- Similarly, but with an opposite result, the ICSID tribunal in *Quiborax and Non Metallic Minerals v. Bolivia* ordered Bolivian authorities to suspend their criminal proceedings against persons associated with the claimants, on the basis of evidence that the criminal proceedings were initiated in retaliation for the claimants' initiation of the ICSID arbitration.[71]

In each of these instances of interaction between domestic proceedings and investment arbitration, international tribunals have the unenviable task of balancing the claimants' rights under international law against states' sovereign rights and duties to investigate and prosecute crimes within their territories.[72]

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69 See *Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Claimants' Request for Provisional Measures, 30 April 2015.

70 id., Paragraph 195.

71 See *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, Paragraphs 119–121.

72 See, e.g., *BSG Resources Limited and others v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 7, 5 September 2016, Requests Nos. 37 and 40, pp. 106, 114; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, Paragraph 79; *Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Claimants' Request for Provisional Measures, 30 April 2015, Paragraphs 191, 216, 219; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, Paragraphs 121, 123, 164, 165.

The tension between national courts and international arbitral tribunals has been alleviated in one respect, with the now internationally 'mainstream' consensus that courts should support, rather than 'displace' or interfere with, the arbitral process. However, other aspects of the court-arbitration dichotomy remain relatively unsatisfactory and difficult to resolve, particularly when states are torn between their national interests and their international obligations, and private tribunals are asked essentially to intervene in domestic proceedings.

CHAPTER 20

Annulment and Vacatur

Vijayendra Pratap Singh and Roopali Singh[1]

Introduction

Finality of an award is not just a desired but an essential feature of international arbitration. However, such finality must be balanced with the need to ensure the sanctity and integrity of the arbitral process.[2] Accordingly, as considered in this chapter, both International Centre for Settlement of Investment Disputes (ICSID) and non-ICSID treaty awards are subjected to limited grounds for challenge within fixed limits.[3]

Annulment and vacatur; ICSID and non-ICSID awards

The scope of the grounds for challenging an investment treaty award depends on whether the arbitration is governed by the ICSID Convention[4] or not.

There is a distinction between a challenge to the award in the nature of a vacatur/setting aside of the award and a challenge to the enforcement of the award. While the enforcement of the award may be sought and resisted at any place where the assets of the award debtor may be located, including at the seat of the arbitration, an award can be set aside only at the seat of the arbitration.[5]

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1 Vijayendra Pratap Singh and Roopali Singh are partners at AZB & Partners. The authors gratefully acknowledge the contribution of Paresh B Lal, Durga Priya Manda and Ravilochan Daliparthi to this chapter.

2 Report of the International Law Commission to the General Assembly [1953] 2 *Yearbook of the International Law Commission* 211, U.N.Doc. A/CN.4/SER.A/1953/Add.1.

3 id., p. 205.

4 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (International Centre for Settlement of Investment Disputes, 575 UNTS 159 (the ICSID Convention)).

5 C L Lim et al., *International Investment Law and Arbitration, Commentary, Awards and Other Materials*, First edition, Cambridge University Press (2018), p. 448 (Lim).

In the case of a non-ICSID award or an award under the ICSID Additional Facility Rules 2006, enforcement would, depending on the laws of the particular state concerned, generally be sought and resisted under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),[6] which has been adopted by 168 states, whereas the vacatur of an award can be sought under the relevant national laws of the seat of the arbitration.[7] The 1985 UNCITRAL Model Law (the Model Law), which has been adopted by multiple countries, prescribes certain rules for setting aside/seeking a vacatur of a non-ICSID award.[8]

In the case of an ICSID award, the ICSID Convention is a self-contained code, governing the enforcement of the award and the challenge to the finality of the award. The ICSID Convention imposes an obligation to recognise and enforce ICSID awards on the Member States as a treaty obligation.[9] It contains two provisions to engender compliance with arbitral awards. Article 53(1) requires the disputing parties to 'abide by and comply with the terms of the award', and Article 54(1) obliges every contracting party to the ICSID Convention to recognise ICSID awards as binding.

ICSID awards are not subject to an appeal or to other remedies except those provided under the ICSID Convention.[10] The ICSID Convention allows a party to make an application for annulment of the award on limited grounds.[11] An

6 Article III, New York Convention. It should be noted that the New York Convention deals with recognition and enforcement of arbitral awards and does not deal with setting aside of arbitral awards.

7 Article V(1)(e), New York Convention, which notes that a signatory state may refuse to recognise or enforce an award that has 'been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'; also see Lim, footnote 5.

8 Lim, footnote 5, p. 450.

9 *S.A.R.L. Benvenuti & Bonfant v. Gouvernement de Republique du Congo*, 20 ILM 877 (1981); this was the first decision of a national court granting recognition and enforcing an ICSID arbitral award. The Paris Court of Appeal noted that the provisions of the ICSID Convention 'offer a simplified procedure for recognition and enforcement and restrict the function of the court designated by each Contracting State to ascertain the authenticity of the award certified by the Secretary General of the International Centre for Settlement of International Disputes'.

10 Hi Taek Shin, 'Annulment', in Meg Kinnear et al. (eds), *Building International Investment Law: The First 50 years of ICSID*, Wolters Kluwer (2015), p. 699.

11 Article 52, ICSID Convention.

ICSID annulment application is heard and decided by a three-member ad hoc committee, which is constituted by the chair of the Administrative Council from the ICSID Panel of Arbitrators.[12]

This chapter discusses challenges to the finality of ICSID and non-ICSID awards. Matters concerning enforcement and execution of awards are dealt with in the subsequent chapters.

Annulment of awards under the ICSID Convention

Article 52 of the ICSID Convention provides either party the right to seek an annulment of the award. Article 52 read with Rule 52 of the ICSID Rules of Procedure for Arbitration (the ICSID Arbitration Rules), which details the procedural aspects, is a complete code governing the annulment proceedings.

Nature of annulment

Article 52 provides an exhaustive list of grounds[13] on which an award may be annulled. The grounds enumerated in Article 52 provide a limited exception to the finality of awards contemplated in Article 53 of the ICSID Convention,[14] and the decision to annul cannot be made on grounds other than those listed in Article 52.[15]

The annulment proceeding is not an appeal[16] or a recourse against an incorrect decision of a tribunal.[17] It is in the nature of a limited review of the award.[18] Under the ICSID Convention, annulment is an exceptional remedy with a

12 Rule 52(1), ICSID Rules of Procedure for Arbitration read with Article 52(3), ICSID Convention.

13 Discussed in detail in the following section.

14 *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, 15 January 2016, ¶ 28.

15 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, 1 February 2016, ¶ 163; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 73.

16 *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 19.

17 *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Partial Annulment, 22 December 1989, ¶ 4.04 (*Maritime International*).

18 *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, ¶ 43.

limited purpose. The decision of the ad hoc committee on the annulment request in *CDC Group PLC v. Seychelles*[19] is seminal to the essence of the ICSID annulment mechanism and notes as under:

> *The ICSID annulment procedure is concerned with determining whether the underlying proceeding was fundamentally fair: Article 52(1) looks not to the merits of the underlying dispute as such, but rather is concerned with the fundamental integrity of the tribunal, whether basic procedural guarantees were largely observed, whether the tribunal exceeded the bounds of the parties' consent, and whether the tribunal's reasoning is both coherent and displayed. To borrow Caron's terminology, annulment is concerned with the "'legitimacy" of the process of decision' rather than with the 'substantive correctness of decision.' Because of its focus on procedural legitimacy, annulment is an 'extraordinary remedy for unusual and important cases.'*

What may be annulled

The ICSID Convention allows the parties to seek annulment of an 'award'. The term award covers decisions that contain the final disposition on all the matters submitted by the parties that have the characteristics of an award contained in Article 48 of the ICSID Convention read with Rule 47 of the Arbitration Rules.

Procedural decisions or provisional measures cannot be annulled under Article 52 of the ICSID Convention.[20] A preliminary decision on jurisdiction is not an 'award' that can be challenged in an annulment proceeding.[21] The aggrieved party needs to wait until the decision on jurisdiction, even if it raises issues that may be the basis of annulment, becomes part of the dispositive award before it can be sought to be annulled.[22]

Decisions on annulment are themselves not subject to annulment. This is a further illustration of the different use of the word 'award' in Articles 52 and 53. An ad hoc committee is an invigilator of last recourse. Its decision is not subject

19 ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, ¶ 34.

20 R Dolzer and C Schreuer, *Principles of International Investment Law*, Second edition, Oxford University Press (2012), p. 301 (Dolzer and Schreuer); see also *Holiday Inns v. Morocco*, ICSID Case No. ARB 72/1, where, as per ICSID Twelfth Annual Report 1977/78, p. 5, the registration of the request to annul the procedural order was declined on the ground that the same did not constitute an award.

21 *Southern Pacific Properties v. Arab Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction II, 14 April 1988.

22 Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016 (Updated Background Paper), p. 10.

to any formal process of review by way of annulment or otherwise.[23] Having said that, it is possible for similar issues to be referred to a different ad hoc committee if an annulled award leads to a new ICSID arbitration and a subsequent annulment application.

Finally, Article 52(3) of the ICSID Convention specifically provides that the ad hoc committee shall have the authority to annul the award or any part thereof.

Grounds of annulment

Article 52(1) of the ICSID Convention provides an exhaustive list of grounds[24] on which a party to an ICSID award may seek annulment. These grounds include:

- the tribunal was not properly constituted (Article 52(1)(a));
- the tribunal manifestly exceeded its powers (Article 52(1)(b));
- there was corruption on the part of a member of the tribunal (Article 52(1)(c));
- there has been a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and
- the award has failed to state the reasons on which it is based (Article 52(1)(e)).

The burden of proof lies on the party requesting an annulment to show that one or more grounds in Article 52 apply to the facts and circumstances of the case.[25] There is no presumption for or against the annulment.[26] Similarly, in determining whether the grounds invoked by the requesting party are made out, the grounds of Article 52 are neither to be interpreted strictly or broadly.[27] They should be interpreted in accordance with their scope and object.[28] This implies exclusion of a review on the merits of the award and conversely includes the power to refuse to annul the award where there is no procedural injustice.[29]

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23 Christoph H Schreuer, et al., *The ICSID Convention: A Commentary*, Second edition, Cambridge University Press (2009), p. 925 (Schreuer on ICSID Convention).

24 Dolzer and Schreuer, footnote 20, p. 303.

25 *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, 22 August 2018, ¶ 461; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 160.

26 *Klockner Industrie-Anlagen GmbH et al v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, ¶ 3.

27 *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the ad hoc committee on Annulment, 18 January 2006, ¶ 220.

28 Updated Background Paper, footnote 22, p. 49.

29 *Maritime International*, footnote 17, ¶ 4.10.

A closer look at the individual grounds on which an annulment may be sought is presented below.

Article 52(1)(a): the tribunal was not properly constituted

Article 52(1)(a) covers challenges relating to: (1) the procedure for the appointment of arbitrators; and (2) the qualifications of the tribunal. This ground is the second least invoked for annulment applications, having been invoked on 13 occasions and prevailed only once.[30] The fact that the ICSID Secretariat carefully monitors this stage of the proceeding making procedural irregularities unlikely may explain the lack of annulment requests under this ground.[31] The first category of challenge encompasses cases concerning a departure from the procedure or eligibility agreed to by the parties for the appointment of the tribunal.[32] The bulk of the 13 challenges raised under this ground have been in the second category (i.e., regarding the qualification of the tribunal).

In that regard, Article 14 of the ICSID Convention describes the qualitative criteria for the members of the tribunal, including independence, competence and high moral integrity. If a member of the tribunal is not, or fails to remain, compliant with Article 14, a party may propose his or her disqualification under Article 57 of the ICSID Convention.[33]

The right of a party to raise this disqualification challenge before the tribunal does not bar the issue from being raised as a ground of annulment under Article 52(1)(a).[34] Where a disqualification challenge has been previously filed with the ICSID Secretary General and decided by the other members of the tribunal, the role of the ad hoc committee is limited such that the disqualification

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30 British Institute of International and Comparative Law & Baker Botts LLP, 'Empirical Study: Annulment in ICSID Arbitration', February 2021 (2021 Study) at pp. 22–23.

31 Schreuer on ICSID Convention, footnote 23, p. 935.

32 Updated Background Paper, footnote 22, p. 54; see also *Carnegie Minerals v. Republic of Gamibia*, ICSID Case No. ARB./09/19, Decision on Annulment, 7 July 2020, ¶ 171, where the appointment of the arbitrator by the ICSID, in the absence of a party nominee, was challenged; or see *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Application of Annulment by the Argentine Republic, 1 September 2009, ¶¶ 274–279, where it was alleged by the applicant that the body that took the decision on a challenge by the applicant to the neutrality of the arbitrators was not properly constituted.

33 *Eiser Infrastructure Limited and Energia Solar Luxemborg S.A.R.L. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Kingdom of Spain's Application for Annulment, 11 June 2020, ¶¶ 157, 158 and 168 (*Eiser*).

34 *EDF International S.A. and Ors. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016 (*EDF*).

decision should be accepted unless it was plainly unreasonable.[35] In contrast, where the issue has not been raised by way of a disqualification challenge and there is no evidentiary record, the ad hoc committee may decide the issue *de novo*.[36] The ad hoc committee may annul the award where the facts disclose a manifest (i.e., obvious or evident) appearance of bias.[37]

If a party fails to raise an objection regarding the alleged improper constitution of a tribunal despite having knowledge of the same, it may be treated as having waived its right to raise this as a ground for annulment. However, it is only if the waiver is clear and unequivocal that the party can be treated as having surrendered its right to challenge the award under Article 52 (1)(a) of the ICSID Convention.[38]

Article 52(1)(b): the tribunal manifestly exceeded its power

The most common and successful ground for annulment is an allegation under Article 52(1)(b) that a tribunal has exceeded its powers.

What amounts to an excess of powers in this context has been explained succinctly by the ad hoc committee in the annulment decision in *Helnan v. Egypt*[39] as follows:

> *The concept of the 'powers' of a tribunal goes further than its jurisdiction, and refers to the scope of the task which the parties have charged the tribunal to perform in discharge of its mandate, and the manner in which the parties have agreed that task is to be performed. That is why, for example, a failure to apply the law chosen by the parties (but not a misapplication of it) was accepted by the Contracting States of the ICSID Convention to be an excess of powers, a point also accepted by annulment committees. Further, a failure to decide a question entrusted to the tribunal also constitutes an excess of powers, since the tribunal has also in that event failed to fulfil the mandate entrusted to it by virtue of the parties' agreement.*

The tribunal exceeds its powers where it: (1) incorrectly assumes or fails to assume jurisdiction; (2) fails to apply (as opposed to misapply) the applicable law; and (3) does not fulfil or exceeds its mandate.

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35 ibid.

36 ibid.

37 *Eiser*, footnote 33.

38 id., ¶ 190.

39 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of ad hoc committee, 14 June 2010, ¶ 41.

An award may be annulled only where the tribunal exceeds its powers 'manifestly'. The term 'manifestly' in the context of Article 52(1)(b) means 'plain, clear, obvious and easily understood or recognized by the mind'.[40] This implies that an excess of power is manifest where 'it is discernible with little effort and without deeper analysis'.[41] This view, which has been endorsed by a majority of ad hoc committees,[42] relates to the readiness with which the excess of power is apparent and not to the gravity of the excess of power by the tribunal.[43] The term 'manifestly' in Article 52(1)(b) has also been interpreted to include, albeit only by a few ad hoc committees,[44] a requirement that the excess of power by the tribunal be substantially serious. The approach taken by the ad hoc committee in *Soufraki v. UAE*[45] is worth noting in this context, holding that both approaches were harmonious such that for the purposes of Article 52(1)(b) 'the excess of power should at once be textually obvious and substantially serious'.[46]

Article 52(1)(c): corruption on the part of a member of the tribunal

This ground is intended to safeguard the integrity of the tribunal and the arbitral process.[47] The corruption must be established and not merely inferred in order to constitute a ground for annulment.[48]

The ICSID Arbitration Rules provide guidance on what is 'corruption' in this context.[49] They provide that an arbitrator who agrees to serve as a member of a tribunal is required to declare that he or she shall 'not accept any instruction or compensation with regard to the proceeding from any source except as provided

40 Schreuer on ICSID Convention, footnote 23, p. 938.
41 ibid.
42 2021 Study, footnote 30, p. 31.
43 *EDF*, footnote 34, ¶ 192.
44 *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Annulment, 22 September 2014, ¶ 142.
45 *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of Annulment, 5 June 2007.
46 id., ¶ 40.
47 Asian International Arbitration Centre, 'Annulment of Investment Arbitration Awards', in Barton Legum (ed), *The Investment Treaty Arbitration Review*, Fifth edition, Global Arbitration Review (2020), p. 344.
48 Schreuer on ICSID Convention, footnote 23, p. 978.
49 ibid.

in the ICSID Convention'.[50] Accordingly, corruption would be present if biased behaviour is shown to have been caused by an improper compensation or on account of the arbitrator taking unauthorised or improper 'instructions'.[51]

Article 52(1)(c) has never been successfully invoked by a party in annulment proceedings,[52] nor has it been dealt with in any publicly available annulment decision.[53]

Article 52(1)(d): serious departure from a fundamental rule of procedure

The ICSID Convention recognises the importance of preserving the integrity and legitimacy of the arbitral process and thus provides for the annulment of an award under Article 52(1)(d) where the procedural sanctity of the process is violated. An annulment request under Article 52(1)(d) must relate to a fundamental rule of procedure from which there was a serious departure in order to be successful.[54]

Not every procedural rule of the applicable arbitral rules can be treated as being fundamental for the purposes of Article 52(1)(d). Article 52(1)(d) is restricted to a violation of 'a set of minimal standards of procedure to be respected as a matter of international law'.[55] This understanding of the phrase 'fundamental' has widespread acceptance.[56] Ad hoc committees have previously considered the following to constitute fundamental rules of procedure: (1) equal treatment of parties; (2) right to be heard; (3) independence and impartiality of the tribunal; (4) treatment of evidence; and (5) deliberation among members of the tribunal.[57]

A departure from a procedural rule must also be considered 'serious'. This establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection that the

50 Rule 6, ICSID Arbitration Rules.

51 Schreuer on ICSID Convention, footnote 23, pp. 978, 979; 2021 Study, footnote 30, p. 32.

52 2021 Study, footnote 30, p. 32.

53 Updated Background Paper, footnote 22, p. 54.

54 Dolzer and Schreuer, footnote 20, p. 306.

55 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002, ¶ 57 (*Wena Hotels*).

56 2021 Study, footnote 30, at 34.

57 For specific decisions, see 2021 Study, footnote 30, p. 33; also see Updated Background Paper, footnote 22, p. 60.

rule was intended to provide.[58] A violation would be considered to be serious where it 'causes the tribunal to reach a result substantially different from what it would have awarded had the rule been observed'.[59]

The enquiry into whether there is a serious departure from a fundamental rule of procedure is a fact-specific one and may involve examination by the ad hoc committee of the record before the tribunal.

The right to seek an annulment on the basis of this ground does not imply that a party that discovered the procedural irregularity can keep silent. On the contrary, a party is obliged to raise any irregularity at the time it became aware of it. Not doing so may be taken as a waiver and the ad hoc committee may refuse to allow annulment on that basis.[60]

Article 52(1)(e): the award fails to state the reasons on which it is based

Article 48(3) of the ICSID Convention states that the award shall deal with every question submitted to the tribunal and shall state the reasons upon which it is based, thereby helping to preserve the integrity of the arbitral process.

It is 'the tribunal's duty to identify, and to let the parties know, the factual and legal premise leading for its decision'.[61] While evaluating a challenge under this ground, the ad hoc committee does not have the authority to reassess the merits of the dispute or to substitute the tribunal's determination by its own convictions.[62] Its authority is limited to the examination of the award with respect to the alleged failure to state the reasons on which the tribunal has based its decision.[63] The test to be applied by the ad hoc committee for the purposes of this ground may be formulated as follows: whether the reasons developed by the tribunal have enabled the addressees of the award and, for that matter, the committee itself, to understand the process leading to its conclusions and to the determination of the amount of compensation.[64]

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58 *Maritime International*, footnote 17, ¶ 5.05.

59 *CDC Group*, footnote 19, ¶ 49; accepted with approval in *Victor Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment, 8 December 2012, ¶ 203.

60 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Annulment, 8 July 2013, ¶¶ 211–215.

61 *Wena Hotels*, footnote 55, ¶ 79.

62 *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision on Annulment, 24 January 2014, ¶ 181.

63 ibid.

64 *Tidewater Inc. and Ors. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 172.

Application for annulment

An application seeking an annulment of an award must be filed within 120 days of the date of the award. In the case of a request for annulment under Article 52(1)(c), such an application must be filed within 120 days of the discovery of corruption and in any event within three years of the date on which the award was rendered.[65]

An application seeking annulment must identify an award to which it relates and enumerate the grounds upon which the award is sought to be annulled.[66] After the application is registered by the Secretary General of ICSID, the chair of the Administrative Council will be requested to constitute an ad hoc committee that will hear and decide the request for annulment.[67]

Constitution of the ad hoc committee

The ad hoc committee consists of members from the ICSID panel of arbitrators. The panel comprises members appointed either by one of the contracting states or the chair of the Administrative Council.[68] The ICSID Convention stipulates that, to be on the panel, designees must be persons of high moral character and recognised competence in the fields of law, commerce, industry or finance.[69]

Further, to be a member of the ad hoc committee, a person should not have been a member of the tribunal that rendered the award or be of the same nationality as any of the tribunal members.[70] Additionally, the nominee cannot be of the same nationality as the parties, have been appointed to the ICSID panel of arbitrators by either the state party to the dispute or the state whose national is a party to the dispute, or have been a conciliator in the same dispute.[71]

As opposed to the appointment of tribunal members, the chair of the Administrative Council need not consult the parties before making appointments to the ad hoc committee. ICSID merely informs the parties about the proposed appointments and shares each one's curriculum vitae. This gives the parties an opportunity to provide comments to indicate if there is a manifest lack of any of the qualities listed in Article 14 of the ICSID Convention, which would preclude a proposed appointee from serving as a committee member.[72]

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65 Rule 50(3)(b), ICSID Arbitration Rules.
66 Rule 50(1)(a) and (c)(iii), ICSID Arbitration Rules.
67 Rule 52(1), ICSID Arbitration Rules.
68 Articles 12 to 16, ICSID Convention.
69 Article 14(1), ICSID Convention.
70 Article 52(3), ICSID Convention.
71 Updated Background Paper, footnote 22, ¶ 39.
72 id., ¶ 41.

Role of the ad hoc committee in the annulment proceedings

The ad hoc committee does not act as a court of appeal.[73] It cannot consider the substance of the dispute, but can only determine whether the award can be annulled on any of the grounds listed in Article 52 of the ICSID Convention.[74] It cannot substitute its own views on the law or facts.[75] As noted by the ad hoc committee in *MTD Equity Sdn and MTD Chile SA v. Republic of Chile*:[76]

> *The role of the ad-hoc committee is a limited one. It cannot substitute its determination on the merits for that of the tribunal. Nor can it direct a tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a res judicata but on question on merits it cannot create a new one.*

The ad hoc committee enjoys some discretion when it comes to deciding the extent to which the award needs to be annulled. Where a ground for annulment is established, it is for the ad hoc committee and not the requesting party to determine the extent of the annulment.[77] In making this determination the ad hoc committee is not bound by the applicant's characterisation of its request.[78]

Vacatur/setting aside of non-ICSID awards

Non-ICSID arbitrations[79] may be conducted under the aegis of various arbitral institutions, such as the Permanent Court of Arbitration (PCA) or the International Chamber of Commerce, or as an ad hoc arbitration under the UNCITRAL Rules.[80]

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73 *Enron Creditors Recovery Corporation v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment, 30 July 2010, ¶ 63.

74 ibid.

75 *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007, ¶ 136.

76 ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, ¶ 54.

77 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Génér)*, ICSID Case No. ARB/97/3, 10 August 2010.

78 ibid.

79 This would include an award rendered under an investment treaty where at least one of the signatories is not a member of the ICSID Convention. 'The Award and Enforcement Issues', in Josefa Sicard-Mirabal and Yves Derains, *Introduction to Investor-State Arbitration*, Wolters Kluwer (2018), p. 237.

80 Norbert Horn, 'Current Use of the UNCITRAL Arbitration Rules in the Context of Investment Arbitration', in William W Park (ed), *Arbitration International*, Oxford University Press (2008), Volume 24, Issue 4, pp. 587–590.

Non-ICSID awards can be set aside by the courts of the seat of arbitration.[81] The relevant national legislation will govern the grounds and the procedure for setting aside the award. Many states, but not all, have adopted the Model Law as the basis of their national legislation for regulating arbitration.

The grounds available under the Model Law to set aside an award are broadly divided into two categories: (1) party proven grounds in Section 34(2)(a) (which are often considered as procedural or jurisdictional grounds of review); and (2) grounds in Section 34(2)(b) (which are often considered substantive grounds of review).[82] While parties can agitate grounds under both provisions, courts are empowered under Section 34(2)(b) to scrutinise awards against the specified grounds on their own.

The grounds of review under Section 34 of the Model Law are as follows.

A party was under some incapacity or the arbitration agreement is invalid as per the applicable law (Article 34(2)(a)(i))

This ground is premised on the principle of consent – which is fundamental to any arbitration.[83] If the arbitration agreement in question (even when contained in a treaty) was not validly entered, the resultant award can be set aside as the very basis for parties arbitrating their disputes is called into question.

This ground was analysed by the *US Supreme Court in BG Group v. Argentina*.[84] This dispute involved an investment treaty claim for losses arising out of certain Argentine economic reforms. The seat of arbitration was Washington, DC, and the BG Group initiated arbitration under the BIT without litigating the matter in local courts (as was required by the treaty). The tribunal assumed jurisdiction and issued an award against Argentina, noting that the requirement to exhaust local remedies was not an impediment to arbitrate disputes. The award was challenged by Argentina before the US courts on the ground that there was no valid agreement to arbitrate since the prerequisite to exhaust local remedies was never fulfilled by the investor. The US Supreme Court upheld the tribunal's jurisdiction

81 'Annulment, Set Aside, and Refusal to Enforce', in Borzu Sabahi, Noah Rubins and Don Wallace, Jr, *Investor-State Arbitration*, Second edition, Oxford University Press (2019), p. 796 (Sabahi, Rubins and Wallace).

82 'Article 34: Application for Setting Aside', in Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, Fourth edition (2019), pp. 449–450.

83 ibid.

84 *BG Group v. Argentina*, UNCITRAL/BIT Arbitration, Final Award of 24 December 2007.

and ruled that it was for the tribunal to determine its own jurisdiction because the relevant provision in the treaty only governed when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate at all.[85]

A party was not given sufficient notice of the appointment of an arbitrator or arbitral proceedings or was otherwise unable to present its case (Article 34(2)(a)(ii))

This is a 'due process' or 'denial of natural justice' ground meant to ensure that a party to an arbitration is given a fair chance to present its case before a tribunal. The Singapore High Court has held that parties must meet a high threshold to dislodge an award on the basis that a party was denied a principle of natural justice.[86]

When reviewing an award rejecting the tribunal's jurisdiction to hear a claim against Mexico, a Canadian court held that a court cannot undertake a *de novo* review to determine whether any natural justice principles were violated.[87] As per Canadian practice, the courts deferred to the tribunal's assessment and concluded (after reviewing the materials of the case) that the tribunal had rightfully determined it had no jurisdiction.

The award deals with a dispute not contemplated by or within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission (Article 34(2)(a)(iii))

This ground is also premised on the principle that consent is fundamental to an arbitration. If a tribunal rules on an issue that is beyond the scope of the parties' submission to the tribunal, then such ruling may be set aside.

A Canadian court partially vacated an ICSID Additional Facility award under the North American Free Trade Agreement (NAFTA) since the tribunal in question had read into the NAFTA treaty an obligation to maintain transparency.[88] The court held that the tribunal had exceeded its mandate and vacated that portion of the award and reduced the computation of damages payable by the

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85 *BG Grp. PLC v. Republic of Argentina*, 134 S.Ct. 1198 (2014), pp. 1207–1208. The US Supreme Court's decision was recently applied by the English High Court in *Republic of Sierra Leone v. SL Mining Ltd* [2021] EWHC 286, ¶¶ 15 and 16.

86 *Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services (Private) Ltd* [2018] SGHC 78, ¶¶ 75–76.

87 *Bayview Irrigation District No 11 and others v. Mexico*, Case No. 07-CV-340139-PD2 (Judicial Review Decision of the Ontario Court of 25 March 2008), ¶¶ 60–62.

88 *Mexico v. Metalclad Corporation*, 2001 BCSC 664, ¶ 70.

host state. The ground that the tribunal had exceeded its mandate was agitated under Canadian law, which has adopted the Model Law. In another challenge to a NAFTA award on the basis that the tribunal had awarded damages for loss suffered outside the territory of Mexico, a Canadian court ruled that courts are to be circumspect in their approach to determining whether an error alleged under Article 34(2)(a)(iii) properly falls within that provision and is a true question of jurisdiction. They are obliged to take a narrow view of the extent of any such question.[89]

Singapore is a Model Law jurisdiction that has reviewed investment treaty awards in the past. The Singapore Court of Appeal upheld the judgement of the High Court that set aside an award passed by a tribunal seated in Singapore in an arbitration initiated under the Treaty of the Southern African Development Community. The Court of Appeal dismissed the appellant's contention that the High Court had incorrectly set aside the award on the ground that the tribunal did not have jurisdiction because the investor had not exhausted local remedies before approaching the Court.[90] Interestingly, the Court reviewed the award against, inter alia, Article 34(2)(a)(iii) of the Model Law and held that the exhaustion of local remedies is an issue that relates to the jurisdiction of the tribunal, and the burden of proof was on the party that made the positive claim that it had satisfied the requirement of exhaustion of local remedies.[91]

The composition of the tribunal was not in accordance with the parties' agreement (Article 34(2)(a)(iv))

As arbitration is ultimately a creature of contract, parties to an arbitration expect the tribunal to be composed in accordance with their agreement. The parties' agreement, of course, is naturally subject to the mandatory rules of the seat (which is clear from the wording of Section 34(2)(a)(iv) itself).

An English court has ruled that this ground (which falls within the scope of Section 67 of the English Arbitration Act 1996) can be applied when there has been a substantial failure to apply the procedure agreed by the parties for composing a tribunal.[92]

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89 *Mexico v. Cargill*, 2011 ONCA 622 (Decision of Ontario Court of Appeal of 4 October 2011), ¶ 47.

90 *Swissbourgh Diamond Mines (Pty) Ltd and others v. Kingdom of Lesotho* [2018] SGCA 81.

91 ibid.

92 *Sumukan Ltd v. Commonwealth Secretariat* [2007] EWCA Civ 1148, ¶ 23.

In France, a prominent non-Model Law jurisdiction, the Paris Court of Appeal has annulled a partial award constituting a tribunal in an arbitration between a UAE investor and Libya under the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organization of Islamic Cooperation (the OIC Investment Agreement).[93] The tribunal was constituted with the intervention of the PCA Secretary General, whose intervention was sought to be justified by a most-favoured-nation clause present in the OIC Investment Agreement. The Court held that the Secretary General had no legal basis to intervene and therefore the composition of the tribunal was not in accordance with the parties' agreement.[94]

The subject matter is incapable of being settled by arbitration

The 'arbitrability' ground tests an award as to whether the issues it dealt with are capable of being settled by arbitration in accordance with the law of the seat. Countries differ widely as to what is considered arbitrable, and this issue is intertwined with that of public policy because a country's policies often inform whether certain disputes can be referred to a private forum of dispute resolution.[95] For instance, some jurisdictions have declared antitrust, securities and intellectual property disputes to be non-arbitrable.[96]

This ground is rarely relied on to challenge investment treaty awards as such arbitrations are typically seated in jurisdictions such as the Netherlands and Canada, which have broad rules on arbitrability.[97] This may, however, change if countries take a strict position on the arbitrability of government disputes.[98]

The award conflicts with the public policy of the seat

The concept of 'public policy' is difficult to define as each country's legal system has its own interpretation of 'public policy' and how an award can be set aside on this basis. Courts of Model Law countries have considered an award to be against public policy if it permits acts that are against public good or injurious to

93 Michael Ostrove et al., 'Paris Court of Appeal finds PCA lacked power to intervene in OIC investor-state arbitration' (DLA Piper, 2021) available at www.dlapiper.com/en/latinamerica/insights/publications/2021/04/paris-court-finds-pca-lacked-power-to-intervene-oic-investor-state-arbitration/ (last accessed on 1 August 2021).

94 ibid.

95 Sabahi, Rubins and Wallace, footnote 81, pp. 819, 820.

96 ibid.

97 ibid.

98 ibid.

the public;[99] if it is against the most basic notions of justice;[100] or if it is contrary to the fundamental principles of the country's laws.[101] In most jurisdictions, mere violations of local law or procedural defects are not sufficient to warrant setting aside an award on the basis that it violates public policy.[102] A Singapore court has ruled that the public policy ground should be limited to a tribunal's findings of law and must not concern the underlying facts of the dispute (even if dealing with an illegality) unless there is proof of fraud or a violation of natural justice.[103]

A Swedish court refused to set aside the award in *Stati v. Kazakhstan*.[104] Kazakhstan argued that the award must be set aside as the tribunal was presented with fabricated evidence.[105] The court ruled that the evidence that was claimed to be false was not the primary basis of the tribunal's final ruling in its award, and therefore the award must not be set aside.[106] Elaborating on the ground of public policy, the court also ruled that there is '[n]o question of declaring an arbitral award invalid solely on the ground that false evidence or untrue testimony has occurred when it is not clear that such have been directly decisive for the outcome'.[107] The court also ruled that there should be '[n]o question of allowing such an indirect impact on the arbitral tribunal to result in the arbitral award being deemed invalid, except when it appears to be obvious that such indirect influence has been of decisive significance for the outcome in the case'.[108]

French courts also rely on the principle of 'international public policy' to scrutinise arbitral awards. In *Venezuela v. Gold Reserve*, the Paris Court of Appeal set aside an award on the basis that it violated international public policy as construed

99 *Egerton v. Brownlow* [1843 to 1860] All ER Rep 970, p. 995.

100 *Parsons and Whittemore Overseas v. Société Générale*, 508 F.2d. 969, p. 74 (US); 'Legal Framework for Arbitration in Singapore', in John Choong, Mark Mangan and Nicholas Lingard, *A Guide to the SIAC Arbitration Rules*, Second edition, Oxford University Press (2018), pp. 48 and 49 at ¶¶ 2.109–2.111.

101 'Awards: Challenges', Michael Ostrove, James Carter and Ben Sanderson, in J William Rowley QC (ed), *The Guide to Challenging and Enforcing Arbitration Awards*, Global Arbitration Review (2019), p. 22.

102 Sabahi, Rubins and Wallace, footnote 81, p. 820.

103 *AJT v. AJU*, Court of Appeal, [2011] SGCA 41, ¶¶ 65 and 69.

104 Award dated 19 December 2013 in *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010.

105 *Kazakhstan v. Ascom Group, Anatoli Stati et al.*, Case No. T 2675-14, Svea Court of Appeal, 9 December 2016, English version available at www.italaw.com/sites/default/files/case-documents/italaw8791.PDF (last accessed on 2 August 2021).

106 id., pp. 44–46.

107 ibid.

108 ibid.

by the French courts.[109] The arbitration concerned an investor's investment in a Kyrgyz bank that was under investigation. The tribunal dismissed the contention that the bank indulged in illegal activities and awarded compensation. In challenge proceedings, the Paris Court of Appeal set aside the award because it found that the compensation awarded to the investor concerned illegal activities, which, as per the Paris Court of Appeal, violated international public policy.

Some practical considerations

Article 36 of the Model Law specifies that parties have three months from the date of delivery of the award to file a motion to challenge it.

Many non-Model Law states, including the US,[110] have adopted the same timelines. Additionally, in the US, an application to set aside an award is decided as a motion. Typically, US courts decide such motions based on documents submitted by the parties and retain the discretion to direct further fact-finding inquiries if necessary.[111]

In the UK, Section 70(2) and 70(3) of the English Arbitration Act 1996 first require a party to exhaust any internal review mechanism for the award, and thereafter, prescribe a 28-day limit to file a challenge to an award before the courts. Section 70(6) and 70(7) also empower a court to direct a party challenging the award to furnish security for the award amount, as well as for the costs of challenge proceedings.

In France, Articles 1494 and 1519 of the French Code of Civil Procedure provide that a challenge to an international arbitration (which refers to arbitrations with an international character) must be filed within a month of the date the award was notified (which can be extended to up to two months if a party is abroad). If the stipulated deadlines are not complied with, the motion to challenge the award will not be admissible. Further, as per Article 902, once a respondent has been served with an application to set aside an award, it must appoint counsel within 15 days, failing which the request to set aside the award will be decided on the contents of the application alone.

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109 'The Award and Enforcement Issues', in Josefa Sicard-Mirabal and Yves Derains, *Introduction to Investor-State Arbitration*, Wolters Kluwer (2018), pp. 237–264 at 250.

110 Federal Arbitration Act, Title 9, USC § 12.

111 'United States', Eliot Friedman, David Livshiz and Shannon M Leitner, in J William Rowley QC (ed), *The Guide to Challenging and Enforcing Arbitration Awards*, Global Arbitration Review (2019), p. 734.

In Singapore, applications for setting aside an award are taken up by a judge who has arbitration experience.[112] The relevant court will typically hear the application within 12 to 18 weeks of the date of filing.[113] A court hearing a setting aside application has no power to review the merits of the case, or to review any decision of law or fact made by the tribunal. In fact, the court does not even have the power to extend the three-month deadline under Article 36 to file an application to set aside the award.[114]

Conclusion

Annulment or vacatur of an investment treaty award is an exceptional remedy that is available to applicants on limited grounds, whether under the ICSID Convention or national laws. While there are disagreements between commentators regarding whether an application for annulment in relation to a particular investment treaty award has been correctly decided or not, there is consensus that investment treaty awards should only be annulled or vacated in exceptional cases where there is procedural injustice.[115]

It is vital for the integrity and finality of investment treaty awards that ad hoc annulment committees and municipal courts continue to ensure that the remedy of annulment is not exercised by parties as a quasi-appeal on the merits of the tribunal's decision. However, despite the differences in the grounds available for annulment of an investment treaty award under the ICSID Convention and national laws, there is consensus and uniformity in how ad hoc committees and national courts have ensured that the remedy of annulment is not abused by unsuccessful parties.

112 Kohe Hasan and Shourav Lahiri, 'Singapore', in J William Rowley QC (ed), *The Guide to Challenging and Enforcing Arbitration Awards*, Global Arbitration Review (2019), pp. 609–610.

113 ibid.

114 ibid.

115 Updated Background Paper, footnote 22, ¶¶ 109 and 110.

CHAPTER 21

Enforcement and Recovery: Theory

Andrew Battisson and Tamlyn Mills[1]

Introduction

This chapter considers the theory of enforcement and recovery of both International Centre for Settlement of Investment Disputes (ICSID) and non-ICSID awards in municipal courts in disputes involving states. As the number of investor–state disputes and resulting awards continues to grow,[2] the existence of an effective enforcement regime remains critical to ensuring the legitimacy and utility of investment treaty protection for both states and investors.

This chapter addresses:

- the enforcement framework for ICSID awards under the 1965 Convention on the Settlement of Disputes between States and Nationals of Other States (the ICSID Convention);
- the enforcement framework for non-ICSID awards, particularly under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);
- recent developments affecting the recognition of intra-EU investor–state awards;
- the availability of jurisdictional immunity in applications for recognition of investor–state awards; and
- the availability of execution immunity in respect of state property.

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2 The number of cases registered by ICSID under the ICSID Convention and Additional Facility Rules has increased from between one and four cases per year between 1972 and 1996, to 58 cases in 2020, the highest number recorded by ICSID in any year (see 'The ICSID Caseload – Statistics', Issue 2021–2 at https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The%20ICSID%20Caseload%20Statistics%202021-2%20Edition%20ENG.pdf).

Investor–state dispute settlement provides foreign investors with a right to commence arbitration against a host state directly for a breach of investment protections afforded by bilateral or multilateral investment treaties entered into between states. In doing so, investor–state disputes are governed by international rather than domestic legal norms. However, when it comes to enforcement and recovery, arbitral awards must be incorporated into domestic legal systems for award creditors to avail themselves of the coercive power of states and recover against state property. Therefore, it is at the point of enforcement and recovery that municipal laws most clearly intersect with investor–state dispute settlement.

As this chapter explores, the terms 'recognition', 'enforcement' and 'execution' have been the subject of both academic and judicial consideration, and their meaning is not without controversy. For the sake of clarity, this chapter uses the term 'recognition' to refer to the process of incorporating awards into the domestic legal order up to the point where measures of execution are available (akin to exequatur in the civil tradition). The term 'execution' is used to refer to recovery against property of an award debtor. The term 'enforcement' is used generally to refer to a spectrum of activity, capable of encompassing either or both recognition and execution.

Enforcement of ICSID awards in municipal courts

The ICSID Convention has been ratified by 155 contracting states.[3] It provides the framework for the enforcement of ICSID awards[4] in the municipal courts of contracting states. The key provisions dealing with recognition and enforcement of ICSID awards are found in Section 6 of the ICSID Convention.

Recognition

Article 53(1) provides that '[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention' and requires each party to abide by and comply with the terms of the award, except to the extent enforcement has been stayed pursuant to the Convention.

3 ICSID, 'List of Contracting States and Other Signatories of the Convention' at https://icsid.worldbank.org/sites/default/files/documents/2021_Sep.ICSID.ENG.pdf.

4 That is, awards rendered under the ICSID Convention. Awards issued under the ICSID Additional Facility Rules or administered by ICSID under the UNCITRAL Rules are not, strictly, ICSID awards.

Article 53 gives effect to the 'closed-loop' or 'self-contained' system of the ICSID Convention, which precludes any recourse against an award other than through the mechanisms available under the Convention itself.[5] These mechanisms are contained in Section 5 of the ICSID Convention and provide for parties to request interpretation of an award (Article 50), revision of an award (Article 51) and annulment of an award on certain prescribed grounds (Article 52).

Article 54(1) imposes an obligation on contracting states to 'recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State'. The requirements for seeking recognition or enforcement are set out in Article 54(2), which provides that '[a] party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority . . . a copy of the award certified by the Secretary-General . . .'.

Article 54(1) refers only to enforcement of 'pecuniary obligations' imposed by an award. Thus, it does not apply to other types of relief, such as an order for specific performance or a declaration.

Although procedural requirements differ between municipal courts, together Articles 53 and 54 enable an award creditor to obtain recognition of an ICSID award in the designated municipal courts of any contracting state on presentation of a certified copy of the award, subject only to the remedies provided for in Section 5 of the ICSID Convention. There is no scope under the enforcement framework of the ICSID Convention for municipal courts to refuse recognition on other grounds, be they jurisdictional, procedural, public policy or merits-based. Accordingly, the ICSID Convention provides for a comprehensive, self-sufficient system of international arbitration in the area of investment disputes.[6]

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5 Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution', *ICSID Review – Foreign Investment Law Journal* at p. 288, where the architect of the ICSID Convention describes it as establishing 'a complete, exclusive and closed jurisdictional system, insulated from national law'.

6 A J van den Berg, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions', (1987) 2 *ICSID Review – Foreign Investment Law Journal* 439, at p. 441.

This distinguishing feature of the ICSID Convention was described in the following terms by the United Kingdom Supreme Court in *Micula and others v. Romania*[7] (*Micula*):

> *[I]t is a notable feature of the scheme of the ICSID Convention that once the authenticity of an award is established, a domestic court before which recognition is sought may not re-examine the award on its merits. Similarly, a domestic court may not refuse to enforce an authenticated ICSID award on grounds of national or international public policy. In this respect, the ICSID Convention differs significantly from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.*

However, in *Micula*, the Supreme Court acknowledged the possibility of additional defences against enforcement in certain exceptional or extraordinary circumstances if (1) national law recognises such defences in respect of final judgments of domestic courts and (2) they do not directly overlap with the grounds of challenge under Articles 50 to 52 of the ICSID Convention.[8] This possibility arises because the obligation under the Article 54(1) is to enforce an ICSID award 'as if it were a final judgment of a local court'. Proponents of the principle of equivalence argue that it follows from the equivalence between ICSID awards and final judgments of local courts that any remedies against final judgments must also be available against ICSID awards. However, the Supreme Court in *Micula* acknowledged the 'countervailing force' of the contrary argument that this reading of Article 54(1) fails to take proper account of the self-contained scheme of the ICSID Convention.[9] For proponents of this latter view, the purpose of equating an award with a final judgment is limited to giving legal force to the award for the purpose of executing it and to provide machinery for that purpose.[10]

Ultimately, the Supreme Court in *Micula* did not need to determine the question and noted that the different interpretations of the ICSID Convention could only be authoritatively resolved by the International Court of Justice, there being valid arguments on both sides.[11]

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7 [2020] UKSC 5 at Paragraph 68.
8 id. at Paragraph 78.
9 id. at Paragraph 81.
10 ibid.
11 id. at Paragraph 83.

Execution

The matter of execution is dealt with in Articles 54(3) and 55 of the ICSID Convention. The same insulation from municipal law does not apply at the stage of execution. Article 54(3) provides that '[e]xecution of the award shall be governed by the laws concerning execution of judgments in force in the State in whose territories such execution is sought'. Article 55 clarifies that '[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution'.

Notably, in the French and Spanish language versions of the ICSID Convention (which are equally authentic), the same word is used for 'enforce' or 'enforcement' in Articles 53 and 54(1)–(2) and for 'execution' in Articles 54(3) and 55, whereas the English language text appears to denote three distinct juridical concepts – recognition, enforcement and execution.

Reconciliation of the French and Spanish language versions of the ICSID Convention with the English version is considered by Professor Schreuer in his leading commentary on the Convention:[12]

> *Art. 54(1) uses the word 'enforce' twice. Art. 54(2) also refers to 'enforcement'. By contrast, Art. 54(3) uses the word 'execution' twice. This would suggest that the words 'enforcement' and 'execution' stand for different concepts. But a look at the equally authentic French and Spanish texts of the Convention yields a different picture. The French text consistently uses 'l'exécution' five times in paras. 1, 2 and 3 of Art. 54. Similarly, the Spanish text is consistent in using 'ejecutar' and 'ejecuten' in Art. 54(1), 'ejecución' in Art. 54(2) and 'ejecutará' and 'ejecución' in Art. 54(3). This means that a distinction between enforcement and execution cannot be sustained on the basis of the French and Spanish texts.*

Referring to Article 33(4) of the 1969 Vienna Convention on the Law of Treaties, Professor Schreuer concludes, '[i]n the case of Art. 54 of the ICSID Convention, the interpretation that best reconciles the three texts would appear to be that the words "enforcement" and "execution" are identical in meaning'.[13]

12 Christoph Schreuer, *The ICSID Convention: a Commentary* (Cambridge University Press, 2010) at p. 1134.

13 id. at p. 1135.

This issue and the juridical content of the terms 'recognition', 'enforcement' and 'execution' were recently considered by the Australian courts in *Kingdom of Spain v. Infrastructure Services Luxembourg Sàrl*[14] in the context of whether or not the Kingdom of Spain had submitted to the jurisdiction of the Australian court and thereby waived sovereign immunity by reason of its ratification of the ICSID Convention.

At first instance, the Federal Court of Australia found that the English text of the ICSID Convention draws a clear distinction between recognition and enforcement on one hand and execution on the other, preserving foreign state immunity only in relation to execution.[15] The Kingdom of Spain argued, relying on the Spanish and French texts, that there is in fact no distinction between enforcement and execution in the ICSID Convention. In reconciling the different language versions of the ICSID Convention, Justice Stewart came to a different conclusion from Professor Schreuer, holding 'the only way of reading the three texts consistently with each other is to give those words the meaning of the English word "execution" where they are used in Art 54(3) and Art 55'.[16] As a consequence, the preservation of foreign state immunity in Article 55 is limited to immunity 'from execution in the sense of post-judgment execution and not the broader concept of enforcement'.[17]

On appeal, the Full Federal Court approached the issue differently. It accepted the Kingdom of Spain's submission that the distinction in the ICSID Convention is between 'recognition' on the one hand and 'enforcement/execution' on the other.[18] However, the Full Federal Court reached the same conclusion as the first instance decision because it characterised the proceedings as an application for recognition only, and therefore held that the preservation of foreign state immunity in Article 55 did not apply.[19]

The question then became what form of orders gives effect to an application for recognition. This question was determined in a further judgment of the Full Federal Court,[20] which held that 'the order to which the party is entitled is one which gives the award the recognised status of a judgment and is enforceable

14 [2021] FCAFC 3.

15 *Eiser Infrastructure Limited Ltd v. Kingdom of Spain* [2020] FCA 157 at Paragraph 98.

16 id. at Paragraph 142. See also Paragraph 153.

17 id. at Paragraph 144.

18 *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3 per Perram J at Paragraphs 75–97.

19 id. at Paragraphs 22–25.

20 *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l. (No. 3)* [2021] FCAFC 112.

as such'.[21] Turning to the content of the phrase, 'as if it were a final judgment' in Article 54(1), the Full Federal Court described the obligation on contracting states in the following terms:[22]

> *There is to be no difference in consequence and status between an award and a judgment. Thus, it is legitimate to perfect this statutory command to 'enforce as if', by entering judgment for the award debtor's pecuniary obligations under the award and thereby creating a judgment debt . . . such an approach 'gives the required recognised status to the award in the domestic firmament: It is to be seen as (recognised as) equivalent to a domestic judgment and is to be enforceable as such.'*

At present, the Federal Court of Australia's approach is consistent with that of other jurisdictions, both common law and civil law, as demonstrated by the decision of the United States District Court for the Southern District of New York in *Liberian Eastern Timber Corporation v. Government of the Republic of Liberia*[23] and the decisions of the French courts in *Benvenuti & Bonfant Co v. People's Republic of Congo*[24] and *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal*.[25]

Recognition of non-ICSID awards in municipal courts

Not all investor–state arbitrations are conducted under the ICSID Convention. Investor–state disputes are also commonly determined under different rules (such as the UNCITRAL Rules) or under the auspices of the Permanent Court of Arbitration, the International Chamber of Commerce (ICC) or the Stockholm Chamber of Commerce. Awards arising from these cases can be enforced in municipal courts either under the New York Convention (where it applies) or the municipal law of the forum (where it does not). Given the wide scope of the New York Convention and its ratification by a large number of states, this chapter considers the recognition of non-ICSID awards in municipal courts under the provisions of the New York Convention.

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21 id. per Allsop C J at Paragraph 7.

22 id. at Paragraph 9. The Kingdom of Spain has applied for special leave to the High Court of Australia. As at November 2021, that application remains pending.

23 650 F Supp 73 (SDNY 1986).

24 Court of Appeal, Paris (26 June 1981) 1 ICSID Reports 368 at 371; 108 *Journal du Droit International* 843 at 845.

25 Court of Cassation (11 June 1991) 2 ICSID Reports 341; 118 *Journal du Droit International* 1005.

Although the New York Convention does not contain any express provision with respect to awards to which a state is party, it has been applied to such awards.[26]

Article III of the New York Convention requires that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon' under the conditions laid down in the Convention.

Under Article IV, to obtain recognition and enforcement, the applicant must supply a duly authenticated original award or a duly certified copy thereof and the original arbitration agreement or a duly certified copy thereof. Further, if the award or agreement is not made in the official language of the country where recognition and enforcement is sought, a certified translation into that language must also be produced.

As noted above, the key difference between enforcement under the ICSID Convention and the New York Convention is the availability of grounds on which a party can resist enforcement in municipal courts. Unlike the ICSID Convention, the New York Convention does not establish a 'closed-loop' or 'self-contained' system. The grounds on which recognition and enforcement of a non-ICSID award may be refused by a municipal court on application of the party against whom it is invoked are set out in Article V(1). In summary, that party must be able to prove that:

- the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid;
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement was not in accordance with the law of the country where the arbitration took place; or

26 A J van den Berg, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions', (1987) 2 *ICSID Review – Foreign Investment Law Journal* 439 at pp. 447–448.

- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

Article VI provides that if an application for setting aside of the award has been made, the municipal court before which recognition and enforcement is sought may, if it considers it proper, adjourn the decision on enforcement and may, on the application of the award debtor, order the other party to give suitable security.

In addition, under Article V(2), the enforcing court may also refuse recognition and enforcement of a non-ICSID award where it finds that:

- the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- the recognition or enforcement of the award would be contrary to the public policy of that country.

The scope afforded to these grounds, particularly the public policy ground, differs between jurisdictions. While many take a 'pro-arbitration' stance and afford the Article V grounds a narrow construction, others subject awards to more scrutiny, including by reference to municipal concepts of arbitrability and public policy.

Recognition of investor–state awards in the European Union

No discussion of recognition and the impact of concepts of arbitrability and public policy is complete without consideration of the position of investor–state awards under EU law, which has in recent years undergone considerable, albeit controversial, development. In March 2018, in *Slovak Republic v. Achmea BV* (*Achmea*),[27] the Court of Justice of the European Union (CJEU) denied the arbitrability of investment disputes between EU Member States and investors from EU states 'which may concern the application or interpretation of EU law'.[28] *Achmea* held that submitting such disputes to a body that is not part of the judicial system of the EU (such as an investor–state arbitral tribunal) would 'have an adverse effect on the autonomy of EU law'.[29]

Achmea arose in the context of a bilateral investment treaty between two EU Member States. Whether *Achmea's* reasoning also applies to a multilateral treaty such as the Energy Charter Treaty, to which the EU itself and a number of

27 Case C-284/16, EU:C:2018:158 (CJEU).

28 id. at Paragraph 55.

29 id. at Paragraph 59.

EU Member States and non-EU Member States are party, has been a matter of debate. In September 2021, the CJEU answered the question in the affirmative in its ruling in the *Republic of Moldova v. Komstroy* (*Komstroy*),[30] concluding that, as a matter of EU law, Article 26 of the Energy Charter Treaty is not applicable to 'intra-EU' disputes.[31]

Thus, in light of the CJEU's rulings in *Achmea* and *Komstroy*, any intra-EU investor–state award (i.e., between an investor of an EU Member State on the one hand and an EU Member State on the other) will face serious obstacles for recognition and enforcement before courts in EU Member States.

Foreign state immunity

Introduction

The doctrine of foreign state immunity occupies a fundamental place in international law and international relations. In 2012, the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* opined that:[32]

> *The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.*

Some 200 years earlier, in 1812, the United States Supreme Court in *The Schooner Exchange v. M'Faddon*,[33] recognised foreign state immunity in what is regarded as a foundational decision in the development of the doctrine. The Supreme Court in *The Schooner Exchange* drew on reasoning from general principles of territorial

30 Case C-741/19 (2019/C 413/41) (CJEU).

31 id. at Paragraphs 60–66.

32 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* Judgment [2012] ICJ Rep 99, at Paragraph 57.

33 7 Cranch 116 (1812).

sovereignty, the equality and independence of states, and notions of implied consent, personal immunities of heads of state, of ambassadors, of visiting forces and by reference to treaty and other practice.[34]

Foreign state immunity comprises two related concepts relevant at two stages of the enforcement process: (1) immunity from suit (i.e., immunity of foreign states from the jurisdiction of municipal courts) (jurisdictional immunity); and (2) immunity from execution (i.e., immunity of a foreign state's property from execution of a judgment or award against such property) (execution immunity).[35] This distinction finds support in customary international law and international treaties on immunity.[36] However, there is no single international treaty regime in force governing foreign state immunity.[37]

Accordingly, the application of the doctrine of foreign state immunity has primarily been subject to each state's municipal laws. In practice, this has resulted in a lack of uniformity in the development and application of the rules of foreign state immunity as between states.[38] Unsurprisingly, foreign state immunity and

34 7 Cranch 116, 137–143 (1812); The Law Reform Commission, 'Foreign State Immunity', Report No. 24, Australian Government Publishing Service (1984) per Professor Crawford (the ALRC Report) at Paragraph 8.

35 Andrea K Bjorkland, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes', 21 *Am. Rev. Int'l Arb.* (2010) 211 at p. 211.

36 id. at p. 212; Hazel Fox and Philippa Webb, *The Law of State Immunity*, Third edition (Oxford University Press, 2013) at p. 13, citing *Al-Adsani v. UK* (2002) 24 EHRR 11; *Jones v. Minister of Interior of Saudi Arabia & Ors* [2006] UKHL 26. See also *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* Judgment [2012] ICJ Rep 99 at Paragraph 56; 'Report of the International Law Commission on the work of its Thirty-second session', UN GAOR, 35th Session, Supp. No 10, UN Doc A/35/10 (5 May–25 July 1980), p. 147 at Paragraph 26. See, also, International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, opened for signature 10 April 1926 (1937) 179 LNTS 199 (entered into force 8 January 1936), dealing with the immunity and liability of state ships in commercial use; European Convention on State Immunity, opened for signature 16 May 1972 (1972) 74 ETS 16 (entered into force 11 June 1976), a treaty in force between eight European states (Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland and the United Kingdom).

37 The United Nations Convention on Jurisdictional Immunities of States and Their Property (opened for signature 2 December 2004) is not yet in force.

38 P D Winch, 'State Immunity and Execution of Investment Arbitration Awards: A Review of the Plea of Sovereign Immunity and the Execution of Investment Arbitration Awards from the Viewpoint of the Forum State', in C Titi (ed.), *European Yearbook of International Economic Law: Public Actors in International Investment Law* (Springer, 2021), at pp. 57–77.

its limits and exceptions has generated considerable controversy over time.[39] Practitioners are well advised to consider closely the specific laws of the jurisdictions in which they are engaged.

In its original conception, foreign state immunity was (broadly) absolute.[40] A small minority of states today maintain a doctrine of absolute foreign state immunity.[41] However, over the past several decades a majority of states have accepted into their municipal legal systems a concept of restrictive immunity through state practice, statutory enactment or by case law.[42] In broad terms, restrictive jurisdictional immunity applies in respect of a state's sovereign as opposed to commercial acts, while restrictive execution immunity serves to protect state property that is sovereign in nature rather than commercial.[43] As a general rule, states with a doctrine of restrictive immunity provide for a general immunity, subject to a number of exceptions.[44] The balance of this chapter addresses the restrictive immunity context.

The two most common frameworks through which arbitral awards are sought to be recognised and enforced against states are the ICSID Convention and the New York Convention. As noted above, the ICSID Convention has been found to remove jurisdictional immunity in respect of recognition proceedings, while

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39 See, e.g., Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 *British Yearbook of International Law* 220 at p. 247; *Eiser Infrastructure Limited Ltd v. Kingdom of Spain* [2020] FCA 157 at Paragraph 64, citing the ALRC Report at p. xxi, Paragraph 32.

40 See, e.g., *The Cristina* [1938] AC 485 at p. 490 per Lord Atkin; the ALRC Report at Paragraph 10.

41 Including, notably, the People's Republic of China and Hong Kong per *Democratic Republic of the Congo & Ors v. FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95; (2011) 14 HKCFAR 395; the ALRC Report at Paragraph 12, footnote 53.

42 The ALRC Report at Paragraphs 13-15; James Crawford, 'Execution of Judgments and Foreign Sovereign Immunity', 75 *Am. J. Int'l L.* 820 at pp. 858–865 (1981). See, e.g., *I Congreso del Partido* [1978] QB 500 (per Robert Goff J); [1980] 1 Lloyd's Rep. 23 (Court of Appeal); and [1983] 1 AC 244 (House of Lords); *Trendtex Trading Corporation v. Central Bank of Nigeria* [1983] 1 AC 244 at p. 261 where Lord Wilberforce opined that Trendtex established 'that as a matter of contemporary international law, the "restrictive" theory should be generally applied'.

43 Andrea K Bjorkland, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes', 21 *Am. Rev. Int'l Arb.* (2010) 211 at p. 213.

44 See, e.g., Foreign Sovereign Immunities Act 1976, Section 1604 (United States); State Immunity Act 1978, Section 1 (United Kingdom); Foreign State Immunities Act, Section 9 (Australia).

expressly reserving execution immunity to the municipal legal system in which execution of an ICSID award is sought. The New York Convention contains no express provisions dealing with foreign state immunity.

Restrictive jurisdictional immunity

Restrictive jurisdictional immunity is a general immunity subject to exceptions. The main exceptions are waiver or submission, or both; and engaging in a commercial activity.

Waiver or submission

A foreign state cannot rely on jurisdictional immunity to the extent that it has been waived by a submission to jurisdiction.[45] A waiver can be express or implied but must be clear and unequivocal. It is trite that an appearance before a court merely to assert immunity is not a waiver.[46] Equally, it is uncontroversial to treat as binding a submission to jurisdiction implied when a state appears before a court and takes active steps to defend the merits of a dispute.[47]

However, waiver by prior agreement is a common source of contention and is addressed in greater detail below.

Arbitration agreement

The International Law Commission's Special Rapporteur, Sompong Sucharitkul, in his sixth report stated:[48]

> *Once a State agrees in a written instrument to submit disputes which have arisen or may arise between it and other private parties to a transaction, there is an irresistible implication, if not an almost irrebuttable presumption, that it has waived its jurisdictional immunity in relation to all pertinent questions arising out of the arbitral process, from its initiation, judicial confirmation and enforcement of the arbitral award.*

45 See, e.g., Foreign Sovereign Immunities Act 1976, Section 1605(1) (United States); Foreign States Immunities Act 1985, Section 10 (Australia); State Immunity Act 1978, Section 2 (United Kingdom).

46 See, e.g., the ALRC Report at Paragraph 24.

47 ibid; see also *Rights of Minorities in Polish Upper Silesia* case, PCIJ Reports, Series A, No. 15, pp. 24–25 (1928); *Baccus SRL v. Servcio Nacional del Trigo* [1957] 1 QB 438.

48 Sompong Sucharitkul, 'Sixth Report on Jurisdictional Immunities of States and Their Property', 1984 *Yearbook Int'l L. Comm.* 5 at Paragraph 255.

In respect of the courts of the forum in which the arbitration is seated, the above is uncontroversial. However, there are divergent approaches between states as to whether an agreement to arbitrate under the law of one state amounts to an implied waiver of jurisdictional immunity in other states where enforcement of the award is sought.[49]

Thus, Australia has adopted the 'narrower view' and limits the implication of an agreement to arbitrate to a waiver of jurisdictional immunity to the supervisory forum.[50] By contrast and in support of the 'wider view' is a line of United States case law[51] commencing with *Ipitrade International SA v. Federal Republic of Nigeria*,[52] in which the United States District Court of the District of Columbia held that Nigeria, in agreeing to arbitrate, must have contemplated enforcement of arbitral awards in other New York Convention signatory states. Accordingly, Nigeria had implicitly waived its jurisdictional immunity under the US Foreign Sovereign Immunities Act (1976).[53]

In practice, divergence remains between jurisdictions, and practitioners should carefully consider the scope of arbitration agreement exceptions in the jurisdictions in which they are engaged.

New York Convention

It is generally accepted that the combination of (1) an agreement to arbitrate (where such arbitration and award is one to which the New York Convention would apply); and (2) ratification by a state of the New York Convention is sufficient to waive jurisdictional immunity in respect of enforcement of New York Convention awards. This is consistent with Articles III and V of the New York Convention.

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49 The ALRC Report at Paragraph 107.

50 See Foreign State Immunity Act (1985) (Australia) at Section 17.

51 See, e.g., *Birch Shipping Corp v. Embassy of Tanzania* 507 F Supp 311 (1980); the ALRC Report at Paragraph 106.

52 465 F Supp 824 (D.D.C. 1978).

53 The Foreign State Immunities Act (1976) (United States) was amended in 1988 to include a wider view arbitration exception at Section 1605(a)(6), which, at least so far as the United States is concerned, puts the matter beyond doubt.

Professor Schreuer addressed the question of waiver of jurisdictional immunity and the New York Convention as follows:[54]

> *The [New York] Convention by itself would not support a withdrawal of immunity. In fact, it does not even mention that question. Its function in our context is to create an obligation of courts of Parties to the Convention to enforce arbitral agreements and awards rendered in other States Parties to the [New York] Convention. It thereby creates the necessary jurisdictional nexus to the forum State to make submission to arbitration operative as a waiver of immunity. In other words, the combination of an agreement to arbitrate in a State Party to the [New York] Convention and of the obligations under the [New York] Convention should lead to a withdrawal of immunity for purposes of the arbitration in all other Parties to the [New York] Convention. This joint operation of consent to arbitrate and treaty provisions to make it effective in a large number of States is not an undue extension of jurisdiction over States which have submitted to arbitration. It is entirely foreseeable for them and part of the legal framework accepted when consenting to arbitration.*

Similarly, the Federal Court of Canada has held that 'the mere fact' of agreeing to arbitration seated in a state party to the New York Convention is sufficient to waive jurisdictional immunity in Canada.[55]

As to whether the ratification of the New York Convention, without more, is sufficient to amount to an implied waiver of jurisdictional immunity, the courts in the United States have considered the issue in detail. In *Seetransport Wiking Trader v. Navimpex Centrala* (*Seetransport*),[56] the United States Court of Appeals for the Second Circuit found an implied waiver on the basis of the New York Convention. The Court held that: 'when a country becomes a signatory to the [New York] Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states … [the New York Convention] expressly permits recognition and enforcement actions in

54 Christoph Schreuer, *State Immunity: Some Recent Developments* (Cambridge University Press, 1988) at p. 87.

55 *TMR Energy Ltd v. State Property Fund of Ukraine*, 2003 FC 1517, at Paragraph 65.

56 989 F2d 572 (2d Cir. 1993).

Contracting States'.[57] More recently, in *Process and Industrial Developments Ltd v. Federal Republic of Nigeria*, the US District Court for the District of Columbia found that Nigeria had impliedly waived its jurisdictional immunity by signing the New York Convention, holding:[58]

> *This line of authority is unbroken, and for good reason. The New York Convention 'specifically declares that it "shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought"' and 'further provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon[.]"' Seetransport, 989 F2d at 578 (quoting N.Y. Conv., arts. I, III). As the Second Circuit persuasively reasoned in Seetransport, no state could sign such a document without contemplating that it would be subject to actions for enforcement of arbitral awards in the courts of other [New York] Convention signatories, including the U.S. . . .*

As a matter of principle, the US case law on this issue has much to commend it, particularly given the near universal coverage of the New York Convention and the public interest in ensuring effective enforcement of arbitral awards when engaged with state actors and consistent with global economic connectivity.

ICSID Convention

A body of case law also exists supporting the proposition that by becoming a signatory to the ICSID Convention, a state waives jurisdictional immunity in respect of the (designated) courts of other contracting states in relation to an ICSID award, but not in respect of execution immunity. This follows from the language of Article 54 (and Article 55) of the ICSID Convention.

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57 id. at p. 578. See also *Creighton Ltd v. Qatar*, 181 F3d 118, 126 (D.C. Cir. 1999) approving *Seetransport*, but noting that Qatar did not impliedly waive jurisdictional immunity as it had not at the relevant time ratified the New York Convention; and *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019). In 2020, the US Supreme Court denied a petition to appeal this decision: *Ukraine v. Pao Tatneft*, 140 S. Ct. 901 (2020).

58 *Process and Industrial Developments Ltd v. Federal Republic of Nigeria* 506 F Supp 3d 1, 8 (2020).

Thus, in *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal*,[59] the French Court of Cassation observed that a foreign state that has consented to ICSID arbitration has thereby agreed that the award may be granted recognition, meaning that it has waived jurisdictional immunity. Similarly, in *Blue Ridge Investments LLC v. Republic of Argentina*,[60] the United States Court of Appeals for the Second Circuit held that Argentina had waived its jurisdictional immunity by becoming a party to the ICSID Convention. The Court stated: 'In light of the enforcement mechanism provided by the ICSID Convention, we agree with the District Court that Argentina "must have contemplated enforcement actions in other [s]tates including the United States".'[61] The decision in *Blue Ridge Investments* was affirmed more recently in *Mobil Cerro Negro Ltd v. Bolivarian Republic of Venezuela*.[62]

In Australia, the same conclusion was reached by the Federal Court in *Eiser Infrastructure Limited v. Kingdom of Spain*[63] and affirmed at an appellate level in *Kingdom of Spain v. Infrastructure Services Luxembourg Sàrl*,[64] which held that:[65]

> *The question then arises whether Art 54(1) and (2) [of the ICSID Convention] constitute Spain's agreement to submit to the jurisdiction of the [Federal Court of Australia] in a recognition proceeding. The answer is that they do . . . The view that a plea of immunity is not available in recognition proceedings is well-established and Spain's contentions [to the contrary] are notable for their heterodoxy . . .*

The above position represents a principled approach to the question of waiver of jurisdictional immunity in the context of ICSID Convention awards, in light of the plain meaning and effect of Article 54 of the ICSID Convention.

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59 (1991) 30 ILM 1169 at p. 1169. See also *Benvenuti & Bonfant v. People's Republic of the Congo*, Court of Appeal, Paris (26 June 1981) 65 ILR 88 at p. 90.

60 735 F3d 72 (2nd Cir. 2013).

61 id. at p. 84. See also *Liberian Eastern Timber Corporation (LETCO) v. The Government of the Republic of Liberia*, 650 F Supp 73 (SDNY 1986) at p. 76.

62 863 F3d 96 (2nd Cir. 2017).

63 [2020] FCA 157 at Paragraph 98.

64 [2021] FCAFC 157.

65 id. at Paragraphs 37–38 per Perram J. See also *Lahoud v. The Democratic Republic of Congo* [2017] FCA 982 at Paragraph 20 per Gleeson J (as she then was).

Commercial transactions

Under the doctrine of restrictive immunity, the basic principle upon which the commercial transaction exception to jurisdictional immunity rests is that when a foreign state acts in a 'commercial' matter within the ordinary jurisdiction of municipal courts, it should be subject to that jurisdiction. Notoriously, the principle is easy to state at this high level of generality but often difficult to apply to particular fact scenarios. This issue is explored in further detail in relation to execution immunity below.[66]

Restrictive execution immunity

Execution immunity has been described as 'the last fortress, the last bastion of State Immunity'.[67] Execution against a state's property is only permissible in two main scenarios: (1) through an explicit or implied waiver of execution immunity; or (2) through enforcement against a state's commercial property (in restrictive immunity jurisdictions).

Waiver

So far as explicit waivers of execution immunity are concerned, these may be as to general state property or in respect of some specific property earmarked by the state to satisfy a liability or arbitral award.[68]

In respect of implied waivers of execution immunity, generally, and especially so in common law jurisdictions, a waiver of jurisdictional immunity does not extend to a waiver of execution immunity.[69]

No implied waiver of execution immunity is available from the language of the ICSID Convention given that Article 55 of the ICSID Convention expressly preserves execution immunity to the domestic laws of contracting states.

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66 The ALRC Report at Paragraph 90.

67 Sompong Sucharitkul, *Commentary to ILC Draft Articles*, Article 18, 1, C/AN.4/L/452/Add3.

68 Andrea K Bjorkland, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes', 21 *Am. Rev. Int'l Arb.* (2010) 211 at p. 222.

69 See, e.g., European Convention on State Immunity, opened for signature 16 May 1972 (1972) 74 ETS 16 (entered into force 11 June 1976), Article 23; the ALRC Report at Paragraph 29; Andrea K Bjorkland, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes', 21 *Am. Rev. Int'l Arb.* (2010) 211 at p. 223.

The New York Convention contains no express provisions addressing foreign state immunity, whether as to jurisdiction or execution. However, a small number of civil law jurisdictions, principally France and Switzerland,[70] have found that a waiver of jurisdictional immunity through submission to arbitration in a New York Convention state extends to a waiver of execution immunity.[71] Thus, in *Société Creighton v. Qatar*,[72] the French Court of Cassation held that Qatar had impliedly waived its execution immunity by entering into an arbitration agreement providing for the ICC Rules, which proscribe that an award will be binding upon the parties and that the parties are obliged to comply.[73] As a consequence these jurisdictions are considered to be particularly pro-enforcement.

Commercial property

The doctrine of restrictive immunity holds that states are not immune in relation to acts undertaken by a state as a commercial actor in contrast to acts undertaken by a state in a sovereign capacity. As a consequence it is generally accepted that execution immunity does not extend to a state's commercial property.[74]

However, the question as to what is commercial property is complex[75] because there is not always a clear division between acts *jure imperii* and *jure gestionis*.[76] By way of illustration, a contract for the supply of goods or services in return for

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70 Sarah Francois-Poncet et al., 'Enforcement of Foreign Arbitral Awards Against Sovereign States or State Entities – France', in R Doak Bishop (ed.), *Enforcement of Arbitral Awards Against Sovereigns* (Juris, 2009), pp. 355, 369–371; Michael E Schneider and Joachim Knoll, 'Enforcement of Foreign Arbitral Awards Against Sovereigns – Switzerland', in R Doak Bishop (ed.), *Enforcement of Arbitral Awards Against Sovereigns* (Juris, 2009), 311 at pp. 343–345.

71 Jacob A Kuipers, 'Too Big to Nail: How Investor-State Arbitration lacks an Appropriate Execution Mechanism for the Largest Awards', 39 *B.C Int'l & Comp. L. Rev.* 417 (2016) at p. 426.

72 *Société Creighton v. Ministre des Finances de L'Etat du Qatar et autre*, Court of Cassation [Cass.] le civ, 6 July 2000, 127 J.D.I. 1054 (2000).

73 See Article 24(2) of the ICC Rules 1998, now Article 35(6) of the ICC Rules 2021.

74 August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', 17 *European J. Int'l L* 803 (2006) at pp. 813-817; Andrea K Bjorkland, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes', 21 *Am. Rev. Int'l Arb.* (2010) 211 at p. 225.

75 Although falling outside the scope of this chapter, the challenges of identifying and locating state commercial property are considerable.

76 Jack Beatson, 'The Final Chapter of the Demise of the Pure Absolute Doctrine of State Immunity in English Law: A Swedish vignette', *Arbitration International*, 2021, 37, 419 at p. 427.

monies may be commercial in nature but be entered into in furtherance of a sovereign purpose. Similarly, the commercialisation of state-owned natural resources involves both commercial and sovereign acts.

Municipal laws differ in how to address this issue, particularly as to whether the inquiry is focused upon the nature of the act or its purpose.

In some jurisdictions, the law is developing so as to focus on the nature of the act, rather than its purpose.[77] Thus, the US Foreign Sovereign Immunity Act (1976) permits execution against foreign state property in the United States 'used for a commercial activity in the United States'.[78] 'Commercial activity' is defined to mean '[e]ither a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.'[79]

The UK State Immunity Act (1978) provides that a state is not immune in respect of proceedings relating to 'a commercial transaction', where a 'commercial transaction' includes 'any contract for the supply of goods or services'; and 'any loan or other transaction for the provision of finance . . .'.[80] Thus, it distinguishes commercial transactions and contracts from transactions or activity into which a state engages in the exercise of sovereign authority, and requires the conduct in question to be examined to determine into which category conduct falls.[81] Highlighting the intricacies of such inquiries in *Orascom Telecom Holding SAE (Orascom) v. The Republic of Chad*,[82] Chad sold oil via a pipeline constructed with loans extended by the World Bank (among others), with the proceeds from oil sales being held in a bank account in London to facilitate repayment of the loan

77 Cf. the State Immunity Act (Singapore) (Chapter 313, Revised Edition 2014), which includes a commercial exception to execution immunity for property 'which is for the time being in use or intended for use for commercial purposes', per Section 15(4).

78 Section 1610(a).

79 Foreign Sovereignty Immunity Act (1976) (United States) per Section 1603(d).

80 State Immunity Act (1978) (United Kingdom) per Section 3(1) and Section 3(3). The State Immunity Act (Singapore) (Chapter 313, Revised Edition 2014) is modelled closely on the UK State Immunity Act (1978).

81 For a recent detailed discussion of the evolution of English law from absolute to restrictive immunity, and the difficulties of drawing a dividing line between sovereign and commercial purposes and the challenges posed by legal tests that shift the inquiry 'from a status based one turning on the identity of the [state] to a conduct based one founded on the subject matter of the of the proceedings', see generally, Jack Beatson, 'The Final Chapter of the Demise of the Pure Absolute Doctrine of State Immunity in English Law: A Swedish vignette', *Arbitration International*, 2021, 37 at pp. 419–431.

82 [2008] EWHC 1841 (Comm) at Paragraphs 20–25.

monies. The court held that the funds did not have execution immunity from attachment to pay an award arising from a dispute in the telecommunications sector won by Orascom in an ICC arbitration.[83]

In the *Republic of Argentina v. Weltover Inc*, the United States Court of Appeal for the Second Circuit identified that:[84]

> *Conduct that has been held to constitute commercial activity in the United States includes a State's issuance of bonds to U.S. investors, a national space agency's obtaining and assertion of U.S. patents, a national airline's sale of tickets to U.S. passengers, a defense ministry's purchase of military supplies, a State art gallery's publication of books and advertising of exhibitions in the United States, a State commission's entry into a contract with a U.S. company for the sale of an aircraft, and a State instrumentality's sale of spices to, and purchase of supplies from, U.S. companies.*

However, indicative of divergent views between states on this issue, the United Nations Convention on Jurisdictional Immunities of States and Their Property adopts a hybrid nature and purpose approach, providing:[85]

> *In determining whether a contract or transaction is a 'commercial transaction' . . . reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the state of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.*

A further practical issue is that in seeking to establish that state property is not sovereign but commercial, there can often exist information asymmetry as between a state and a private entity in favour of the state, which can make discharging the evidentiary burden challenging.

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83 Andrea K Bjorkland, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes', 21 *Am. Rev. Int'l Arb.* (2010) 211 at p. 227.

84 504 U.S. 607 (1992) at p. 614.

85 United Nations Convention on Jurisdictional Immunities of States and Their Property, GA Res. 59/38 (2 December 2004) per Article 2(2).

Conclusion

As this chapter demonstrates, the legal foundations of investor–state dispute resolution in respect of enforcement and recovery reflect a complex intersection of international law and municipal laws that are subject to varying interpretations across different jurisdictions and legal traditions. Jurisprudence continues to develop in relation to key concepts such as recognition, enforcement and execution, as well as the scope and limitations of arbitrability, public policy and foreign state immunity. This area of the law is dynamic and merits close attention.

CHAPTER 22

Enforcement and Recovery: Practical Steps

Mark Bravin, Tiana A Bey, Theresa B Bowman and Albina Gasanbekova[1]

Introduction

As documented in a recent study of compliance by states with adverse awards in investor–state arbitration, a lot has changed since the architects of the International Centre for Settlement of Investment Disputes (ICSID) system of investor–state treaty arbitration opined in the mid-1960s that 'as long as States would remain under an international obligation to comply with awards, they would generally do so'.[2] Out of the 170 cases surveyed in a recent scholarly assessment in which damages were awarded against the state, the investor commenced enforcement proceedings in domestic courts about 40 per cent of the time, generally because the state refused to pay voluntarily.[3] Those enforcement proceedings typically lasted several years, in addition to an average of four years spent in arbitration, and often cost the investor millions of dollars in legal expenses on top of an average US$6.4 million spent arbitrating the investment dispute.[4]

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2 See Emmanuel Gaillard and Ilija Mitrev Penusliski, 'State Compliance with Investment Awards', *ICSID Review – Foreign Investment Law Journal*, Section 2 (February 2021). The authors assessed the compliance record of the 32 most sued states in 776 investment treaty arbitrations, comprising roughly 70 per cent of all such disputes commenced before 2020.

3 ibid.

4 A recent study of over 400 investor–state arbitrations found that, for investors, the mean cost of an arbitration at ICSID exceeds US$6.4 million and the mean length of proceedings where the investor prevails is about 4.6 years. See Yarik Kryvoi, Matthew Hodgson and

In this chapter, we provide an inside view on how to collect on an investor–state arbitral award without going to court, through negotiations, diplomatic channels and government relations; how to monetise awards in the secondary (litigation funder) market; and provide a practical roadmap for asset tracing and seizure of sovereign assets. These strategies are meant to broaden the reader's understanding of the practical steps available to investors to recover a substantial portion, if not all, of the money awarded to them in a hard-fought investor–state arbitration.

How to collect without going to court: negotiations, diplomacy and government relations

One reason to consider non-litigation strategies for collecting on an investor–state arbitration award is that resort to domestic court litigation to enforce an investor–state arbitral award against a foreign state that refuses to pay voluntarily can be surprisingly complicated, expensive and protracted. This is because states enjoy privileges and immunities under domestic law that are predicated on principles of sovereignty.

The first sovereign-related hurdle faced by an award creditor is compliance with the special rules for effecting service of process on a foreign state. In the United States, those rules are in the Foreign Sovereign Immunities Act (FSIA), which stipulates a hierarchy of methods of service that a litigant must follow scrupulously and in a specified order.[5] Taking a step out of order, or failing to adhere to a step precisely, can result in a lengthy delay in the enforcement proceeding until the error is corrected or dismissal of the case if no correction is made.[6] The

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Daniel Hrcka, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration', British Institute of International and Comparative Law, Allen & Overy, available at https://www.biicl.org/documents/136_isds-costs-damages-duration.pdf.

5 Under FSIA Section 1608(a), the hierarchy of steps are: (1) service in accordance with any special arrangement for service between the foreign state and the plaintiff; (2) if there is no special arrangement, then delivery in accordance with an applicable international convention on service of judicial documents; (3) if the foreign state is not a party to any such convention, then by a form of mail requiring a signed receipt, addressed and dispatched by the clerk of the court to the head of the foreign state's ministry of foreign affairs; and (4) if service under (3) cannot be made within 30 days, then by transmittal through diplomatic channels.

6 In *Hardy Exploration v. India*, an action to enforce an international arbitral award based on a concession agreement was delayed by more than one year because the investor/award creditor misread a contractual provision for service of required notices that did not pertain to service of judicial documents. *Hardy Exploration & Prod. Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas*, 219 F. Supp. 3d 50 (D.D.C. 2016); 314 F. Supp. 3d 95 (D.D.C. 2018); see also Alexander A Yanos and Kristen K Bromberek, 'Enforcement Strategies where the

second and much more difficult hurdle is addressed in Chapter 21, 'Enforcement and Recovery: Theory'. It requires overcoming the immunity of sovereign-owned assets from attachment and execution under the laws of the forum where the assets are located.[7]

However, as the above-cited studies indicate, award creditors avoid the burdens of enforcement litigation in a majority of investor–state arbitrations because states in those cases voluntarily pay some or all of the amounts awarded to the investor. These cases often present unique opportunities that investors can leverage to facilitate a settlement without going through the judicial enforcement process.

There are several driving motivations for sovereign states to pay adverse damages awards in these cases. Foreign direct investment (FDI) is an integral part of economic development and modernisation.[8] While measuring the impact of FDI on economies is not an exact science, studies have shown that FDI contributes to productivity and income growth in host countries beyond what domestic investment normally would trigger.[9] States keen to strengthen their investment competitiveness understand that their national policies and investment laws play a role in attracting FDI and realising its benefits.[10]

Lack of transparency in FDI policies and investment protection practices often will harm the sovereign's reputation for investment competitiveness.[11] As found in a recent World Bank study, foreign investors assessing the regulatory risk of investing in a particular country weigh carefully factors such as transparency in the process of making investment-related laws and regulations; the extent

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Opponent is a Sovereign' in Alan Redfern (ed.), *The Guide To Challenging and Enforcing Arbitration Awards*, pp. 172–173 (Global Arbitration Review, 2021).

7 See also Yanos and Bromberek, footnote 6, pp. 174–175.

8 'Foreign Direct Investment for Development', OECD (2002), available at www.oecd.org/investment/investmentfordevelopment/1959815.pdf; see also World Bank Group, 'Global Investment Competitiveness Report 2019/2020: Rebuilding Investor Confidence in Times of Uncertainty' (World Bank, 2020), 8-18, available at https://openknowledge.worldbank.org/bitstream/handle 10986/33808/9781464815362.pdf?sequence=4&isAllowed=y/.

9 'Foreign Direct Investment for Development', footnote 8, p. 9.

10 World Bank, 2020, footnote 8, pp. 135–136, 148. When in 2017, the government of Kazakhstan adopted its 2018–22 National Investment Strategy laws, it did so to increase FDI inflow by 25 per cent by 2022.

11 Weigel Dale, 'Lessons of Experience No. 5: Foreign Direct Investment', IFC, available at https://www.ifc.org/wps/wcm/connect/publications_ext_content/ifc_external_publication_site/publications_listing_page/lessonsofexperienceno5; 'World Investment Report 2020' (UNCTAD, 2020) available at https://unctad.org/system/files/official-document/wir2020_en.pdf.

of legal protection provided to investors against arbitrary, unpredictable or non-transparent government actions; and access to effective mechanisms for recourse in case of grievances or disputes.[12] Relatedly, host states are mindful that inconsistencies in their international investment regime and practices in enforcement and recognition of arbitral awards – including their failure to honour adverse investment arbitration awards – can substantially undermine the state's desired investor-friendly image, creating an impression of high-risk conditions for foreign investment.[13] Examples of states settling investment disputes with foreign investors out of concern that a failure to do so would discourage future investment are not uncommon.

For example, the Czech Republic – as examined by one study – honoured at least three investment treaty awards against it 'reportedly in order to maintain a reputation of an attractive investment destination'.[14] Similarly, Argentina reportedly settled several awards with foreign energy companies to contribute to 'the restoration of direct investment' as part of Argentine President Mauricio Macri's goal to rehabilitate and strengthen Argentina's reputation with foreign investors.[15]

These examples show that sovereign states – particularly those with poor track records of investment protection that are eager to bolster their competitiveness for investment and improve their foreign relations – might be more inclined to settle and satisfy damages awards. Although the public does not always know the true motivations behind each instance of voluntary compliance, the statistical

12 World Bank, 2020, footnote 8, p. 133. See also *Chevron and TexPet v. Ecuador*, PCA Case No. 2009-23, Final Award, 2011 (holding Ecuador liable in an investor–state treaty arbitration for failing to provide 'effective means' of asserting claims and enforcing rights under the US-Ecuador Bilateral Investment Treaty, available at https://jusmundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-i-final-award-wednesday-31st-august-2011.

13 A state's obligation to respect investor–state arbitral awards comes from multilateral international treaties, such as the ICSID Convention and the New York Convention, as well bilateral investment treaties and arbitration rules and awards. International treaties and arbitration rules oblige states to respect and carry out awards. See Gaillard and Penusliski, footnote 2, p. 55.

14 id. at pp. 24–25.

15 'Argentina enters into an agreement with TOTAL Oil Company within the context of the ICSID', 18 July 2017, available at https://www.economia.gob.ar/en/argentina-enters-into-an-agreement-with-total-oil-company-within-the-context-of-the-icsid/; see also Gaillard and Penusliski, footnote 2, pp. 14–15, Nos. 63, 66; see also *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15 and *BG Group Plc. v. The Republic of Argentina*, UNCITRAL Arbitration, December 2007.

data on arbitration awards also corroborate this notion. Studies and surveys have generally shown that a sizeable majority of sovereign states elected to honour their obligations and pay adverse awards voluntarily.[16]

Nonetheless, cases of non-compliance are not infrequent. Foreign investors have several strategies at their disposal to try to compel payment, including leveraging their home state to espouse the claim on their behalf. These forms of diplomatic and political pressure are known as 'diplomatic protection'. Article 27 of the ICSID Convention explicitly allows for 'diplomatic protection'.[17] Some bilateral treaties also enable a party to exercise diplomatic protection in instances of non-compliance with adverse awards.[18]

There have been a number of examples in investment arbitration where a state's compliance with an adverse award was accomplished by various forms of diplomatic pressure and lobbying. In 2015, after Russia – a host state notorious for its non-compliance with adverse arbitral awards – failed to pay a €10 million award, the Italian investor Valle Esina reportedly 'sought the support' of the Italian government to secure payment.[19] In 2011, after Argentina refused to

16 UNCTAD Publication (2014), p. 156, available at https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf; Gerry Lagerberg and Professor Loukas Mistelis, 'International Arbitration: Corporate Attitudes and Practices' (Queen Mary University of London, 2008), 2, available at www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf (reporting that 'in more than 76% of [corporate counsel's] arbitration proceedings, the non-prevailing party voluntarily complies with the arbitral award; in most cases, according to the interviews, compliance reaches 90%').

17 'No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.' Article 27(1); see also UNCTAD Publication (2014), footnote 16, pp. 156–157.

18 For example, US bilateral treaties based on the 2004 US Model BIT and 2012 US Model BIT provide for the application of other measures if a state party fails to pay an award: 'If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a tribunal shall be established under Article 37. Without prejudice to other remedies available under applicable rules of international law, the requesting Party may seek in such proceedings: (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Treaty; and (b) a recommendation that the respondent abide by or comply with the final award.' 2004 US Model BIT; see Article 34, Uruguay–US BIT (2005); Rwanda–US BIT (2008); United States–Mexico–Canada Agreement (2018).

19 *Valle Esina S.p.A. v. The Russian Federation*, UNCITRAL Arbitration, June 2014 (not public); Gaillard and Penusliski, footnote 2, p. 33. The authors have been unable to identify the details of the 'support' efforts that the investors sought.

honour investment awards totalling about US$300 million, several US investors lobbied the US government to take action against Argentina for not complying with its international obligations.[20] The United States suspended trade benefits to Argentina under the US Generalized System of Preferences regime and voted against proposed loans of over US$230 million for Argentina at the World Bank and Inter-American Development Bank.[21] The tariff suspension measures alone exposed Argentina to approximately US$477 million in new tariffs, 'which was nearly eleven percent of total imports from Argentina'.[22] Ultimately, these measures proved effective, prompting Argentina to settle with US investors that had spent years trying to enforce the awards.[23] Similarly, in 2008, after more than five years of unsuccessful enforcement efforts by investor AIG, Kazakhstan settled and paid an adverse award reportedly only after pressure was applied by the US government on Kazakhstan.[24] In 2005, when a tribunal ordered Kyrgyzstan to pay more than US$1.1 million in damages, Swedish investor Petrobart spent years attempting to enforce the award in courts, to no avail. It was not until 2011 that the parties settled the award, and only after 'Swedish diplomats reportedly raised this matter with the Kyrgyz Government'.[25]

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20 'U.S. Trade Representative Ron Kirk Comments on Presidential Actions Related to the Generalized System of Preferences', Office of United States Trade Representative, 26 March 2012, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2012/march/us-trade-representative-ron-kirk-comments-presidenti; 'Obama says to suspend trade benefits for Argentina', Reuters, 26 March 2012, available at https://www.reuters.com/article/usa-argentinatrade- idAFW1E8DD01J20120326; Gaillard and Penusliski, footnote 2, p. 13.

21 Gaillard and Penusliski, footnote 2, p. 14; see also Sandrine Rastell and Eric Martin, 'U.S. Opposes Loans to Argentina in Bid to Step Up Pressure for Debt Accord', Bloomberg, 28 September 2011, available at https://www.bloomberg.com/news/articles/2011-09-28/u-s-opposes-loans-toargentina-in-bid-to-boost-pressure-for-debt-accord; 'U.S. Suspends Argentina trade benefits over unpaid arbitral awards', *International Comparative Legal Guides*, 28 March 2012, available at https://iclg.com/cdr/usa/ussuspends-argentina-trade-benefits-over-unpaid-arbitral-awards; Gaillard and Penusliski, footnote 2, pp. 13–14.

22 Office of United States Trade Representative, footnote 20.

23 Gaillard and Penusliski, footnote 2, pp. 13–14.

24 *Caratube International Oil Company LLP and Devincci Salah Hourani v. The Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on Stay and Enforcement of the Award, ¶ 21, available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2923/DS13372_En.pdf; see also Gaillard and Penusliski, footnote 2, pp. 6, 35.

25 *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No 126/2003; see also Gaillard and Penusliski, footnote 2, p. 7.

Changes in the regime of a sovereign state – that could lead to the reversal of its policies or economic or diplomatic priorities[26] – can also open the door for settlement of adverse awards. In 2016, Argentina's settlement of a decade-long dispute with a hedge fund, Elliott Management, is one famously reported example of how a change in a host state's administration resulted in a change of policy and settlement of investment awards.[27] The parties settled just months after the election of President Mauricio Macri, who had promised to revitalise Argentina's economy.[28] Similarly, in 2004, Libya's swift settlement of, and agreement to comply with, several arbitral awards and court judgments was reportedly credited to a dramatic shift of Libyan policies that entirely transformed US–Libya foreign relations and ended Libya's long-lasting designation as a state sponsor of terrorism under US law.[29]

While engaging their own state and seeking diplomatic pressure can be an effective tool for investors to incentivise a host state to pay an adverse award, it is important to note that forms of diplomatic support are not equally available to all investors. Investors from home states that are less 'powerful' may have less (if any) leverage against the host state.[30] Political tensions between host and home states can also create significant hurdles in enforcing or settling investment awards, even by means of diplomatic pressure.[31] Yet, at the right time and with the right strategy, sovereign states often can be persuaded to pay adverse arbitral awards.

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26 Yanos and Bromberek, footnote 6, p. 173.

27 Alexandra Stevenson, 'How Argentina Settled a Billion-Dollar Debt Dispute with Hedge Funds', *New York Times*, 25 April 2016, available at https://www.nytimes.com/2016/04/25/business/dealbook/how-argentina-settled-a-billion-dollar-debt-dispute-with-hedge-funds.html; see also Yanos and Bromberek, footnote 6, Chapter 14, p. 173.

28 ibid.

29 Jonathan B Schwartz, 'Dealing with a "Rogue State": The Libya Precedent', 101 *Am. J. Int'l L.*, 553, 554–555, 575–576, 580 (2007); 'Statement by the White House Press Secretary', 20 September 2004, available at https://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040920-8.html; see also Yanos and Bromberek, footnote 6, p. 173. The authors have not identified a source confirming which awards Libya made the payment in relation to.

30 UNCTAD Publication (2014), footnote 16, p. 54.

31 One study observing compliance of investment awards against Russia and Ukraine in relation to the 2014 annexation of Crimea suggest that neither state has any interest in honouring the awards, regardless of any pressure. See Gaillard and Penusliski, footnote 2, pp. 30–33.

Monetising awards in the secondary market

If diplomatic efforts are unavailing, there are additional market-based options for an award creditor to hedge the risk of the host state's non-compliance with an adverse arbitral award.

There are plenty of reasons why an award creditor may wish to liquidate the value of an award before (or in lieu of) investing in enforcement. Sometimes it is to fund the enforcement process itself, sometimes it is because an investment-savvy award creditor believes it can better leverage an early partial payment in the marketplace as compared to later full recovery of the award. Perhaps most commonly, the award creditor, having just invested in the long life of an arbitration to procure an award, is now especially eager to inject new working capital into their business.

Meeting these needs has proven a very attractive investment opportunity for third-party funders in the post-award context. The economics of pre-award funding are such that in most cases a claim must be in the tens of millions of dollars (at the very least) for funding to be financially feasible.[32] Post-award funding provides some additional flexibility given that the arbitration award has already been issued, and there is no uncertainty about the amount of the award.

Funders evaluating the attractiveness of investment in an already-issued award will thus consider, inter alia: the amount of the award (the larger the award, the greater margin for recovery over the costs of any enforcement proceedings); whether post-award interest and enforcement costs are included in the award; the expertise and billing rates of enforcement counsel; the identity of the respondent state; the availability and location of the respondent state's assets; any special legal or practical hurdles to enforcement based on where those assets are located; and the prospects for post-award settlement.[33]

If a third-party funder concludes that it wants to invest in a particular arbitral award, the funding arrangement typically will entail several key investment provisions – and important corresponding decision points for the parties.

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32 International Council for Commercial Arbitration (ICCA), 'Report of the ICCA–Queen Mary task force on third- party funding in international arbitration' (ICCA Reports, 2018), 244 (Annex C).

33 Brooke Guven and Lise Johnson, 'The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement', Columbia Center on Sustainable Investment, A Joint Center of Columbia Law School and the Earth Institute (May 2019), 5.

Basic mechanics of the investment

The funder and award creditor will negotiate an investment contract (i.e., a funding agreement) that lays out the rights and obligations of each party. These will include specific rights the funder may have to receive confidential or proprietary information, as well as rights of involvement in, or decision-making with regard to, any enforcement proceedings or post-award settlement negotiations.[34] The funding agreement typically will also include some form of security interest of the funder in any monies recovered in satisfaction of the award.[35]

Important decision points for both the funder and award creditor will include whether, and how much, the funder will be responsible for bearing the costs of enforcement, as well as whether or not the security interest in the award will be on a 'non-recourse' basis. That is, whether the funder will have a right of action against the award creditor if the amount of eventual recovery does not cover a specified or agreed-upon portion of the funder's investment.[36]

Full versus partial monetisation

Another important decision point is what proportion of the award the award creditor seeks to monetise. A funding agreement may be for partial monetisation, in which the funder advances a discrete payment immediately upon closing in exchange for a percentage of any subsequent recovery on the award or, alternatively, a multiple of the funded amount. Or, it may cover full monetisation, which is the advancement of a payment upon closing in exchange for full economic rights to any monies recovered to satisfy the award.

Funder involvement in decision-making

Especially where full economic rights are transferred, a funder that has agreed to bear the full risks associated with the cost of enforcement will want to negotiate for as much involvement in enforcement or settlement decisions as possible.

In the event that either the funder or award creditor seeks an arrangement that includes funder-side decision-making responsibility for enforcement proceedings, parties should first evaluate whether such an arrangement will cause enforcement problems in any of the jurisdictions where the state's assets are expected to reside. To begin, while the grounds for refusing recognition and enforcement of an arbitration award (under an applicable treaty or convention) are limited,

34 ibid.
35 ibid.
36 id. at 3.

they include a 'public policy' challenge.[37] For example, the New York Convention, Article V(2)(b), provides that enforcement of an award may be refused when it 'would be contrary to the public policy of the forum country'. The funder, and in many instances the award creditor, will hire due diligence counsel to evaluate the enforcement risks, including whether third-party funding is considered to be contrary to public policy in the target domestic enforcement jurisdiction. Notably, however, global efforts to define and categorise 'public policy' violations thus far have conspicuously omitted third-party funding.[38]

Even if funding is found not to pose an enforcement risk on public policy grounds, any ensuing domestic litigation efforts to utilise specific local enforcement mechanisms – such as asset attachment – will be subject to the typical constraints of domestic litigation in the forum where the assets are located. In that context, both parties to a funding agreement will need to evaluate the risk that relevant domestic courts might take issue with funders being involved in litigation or settlement decisions. There is a broad diversity of approach in domestic civil and common law jurisdictions towards whether, and how, to regulate the extent to which a third-party funder may take responsibility for management of an enforcement action. Common law jurisdictions typically feature doctrines against 'champerty' and 'maintenance' while in 'civil law jurisdictions professional attorney ethics rules and ownership of claim constraints take center role in providing any limitations on third-party funding arrangements'.[39] Singapore and Hong Kong have opted to regulate third-party funding in the context of arbitrations through legislation.[40] On balance, both the funder and the award creditor have strong incentives to pursue an arrangement by which the funder is, at least partially, insulated from decision-making by the award creditor and their attorneys.

Award creditors should approach third-party funding opportunities with the aid of counsel experienced in negotiating litigation funding agreements. Assuming both the award creditor and the funder are ably advised by experienced counsel of the risks of third-party funding and can negotiate on the basis of an alignment of interests, the arrangement can provide an attractive win-win. It is an appealing

37 Similarly, if the underlying arbitration was funded by third parties, this could impact recognition of the award in jurisdictions that do not favour third-party funding.

38 International Bar Association's Subcommittee on Recognition and Enforcement of Arbitral Awards, 'Report on the Public Policy Exception in the New York Convention', October 2015.

39 ICCA Reports (2018), footnote 32, p. 43 (Annex C).

40 ibid.

option for award creditors that seek to obtain the certainty of litigation funding as soon as possible and for funders looking to secure what might be viewed as (potentially) outsized investment returns.[41]

Asset tracing and seizure: a practical roadmap

Winning a monetary award in an investor–state arbitration is but the first proverbial step on the road to recovering damages from a losing sovereign. Whether that road is long or short – or leads to collection – will depend, in some part, on the dispute mechanism authorised by the relevant bilateral or multilateral investment treaties and on which the investor bases its arbitration claims.[42] In large part, however, the investor's success in recovering any pecuniary award obtained in an investor–state arbitration will depend on award collection plans the investor had in place prior to initiating the arbitration against a host state. Below is a discussion of factors an investor should consider when devising an asset tracing and seizure plan, the timing to implement such a plan, and the tools potentially available to attach and execute against assets to satisfy an arbitral award or subsequent court judgment.

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41 *Tienver S.A., Transportes de Cercanias S. A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, Award, ICSID Case No. ARB/09/1, 29 July 2017 (third-party funder enjoyed a 700 per cent return on investment).

42 For example, Article 53(1) of the ICSID Convention requires a sovereign party (as well as the claimant) to 'abide by and comply with the terms of the award'. And '[t]he 2010 UNCITRAL Arbitration Rules, the 2017 ICC Rules and the 2017 SCC Rules all require the parties to 'carry out' arbitration awards 'without delay'. Gaillard and Penusliski, footnote 2, p. 5 (citing Arbitration Rules of the United Nations Commission on International Trade Law (2010), Article 34(2); International Chamber of Commerce Court of Arbitration Rules of Arbitration (2017), Article 35(6); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017), Article 46). And some countries' BITs require sovereigns to carry out an award without delay. Gaillard and Penusliski, footnote 2, p. 5, n. 26. Although the 'must comply' rules established by these arbitration mechanisms do not guarantee timely compliance, a recent study has shown that 50 per cent of the examined sovereign losers of arbitrations under these rules eventually complied with the awards. id. at 48 ('The States reviewed in this survey have paid damages in 85 of the 170 cases that they lost'). Additionally, the principal advantage of enforcement of an ICSID award against a contracting state is that under Article 54(1) of the ICSID Convention, if the state fails to comply with the award, the claimant can seek to have the pecuniary obligations recognised and enforced in the courts of any ICSID Member State as though it were a final judgment of the Member State's highest court. If the award is won at ICSID against a non-contracting state, or outside of ICSID under the UNCITRAL or other rules, for example, then recognition and enforcement of the award is governed by the law of the place of arbitration, including any applicable treaties. In most cases, that means resort to the New York Convention, which has defences to enforcement not found in the ICSID Convention.

Tracing a sovereign's assets

Given the increased regularity with which sovereign countries are involved with investor–state disputes brought under investment treaty regimes, some states have found creative ways to hide their commercial assets[43] or to disguise them among their diplomatic endeavours to avoid paying arbitral award or court judgment debts.[44] Thus, a particularly prudent investor will have conducted a preliminary investigation of the host state's commercial assets by the time it contemplates an investment relationship with that state and, more importantly, before the

43 Depending on whether the domestic laws of the country in which a sovereign's assets are located adheres to a restrictive immunity theory of sovereign immunity; a sovereign debtor's commercial assets may be subject to seizure to pay a pecuniary arbitral award or court judgment. 'Commercial assets' are defined by the particular jurisdiction in which the assets are located, but the rule common among countries with a restrictive view of immunity is '[w]hen a State is engaged in a commercial transaction, it acts as a trader, not as an independent sovereign state. Because it has ceased to act in a public capacity, it has no immunity for the commercial transactions'. D Gaukrodger (2010), 'Foreign State Immunity and Foreign Government Controlled Investors', OECD Working Papers on International Investment, at 18, 2010/02, OECD Publishing. Even when the assets are determined by a court to be 'commercial', however, a country's laws may further limit seizure to situations where: (1) the sovereign debtor waived its immunity from judgment execution; (2) the property sought to be seized by a judgment creditor has a direct link to the underlying adjudicated claim; or (3) the property was 'used for a commercial activity' in the territory of the country where the enforcement action is brought. id. at 20–21; see also *TIG Ins. Co. v. Republic of Argentina*, 967 F.3d 778, 786 (D.C. Cir. 2020) (holding that whether a property is 'used for a commercial activity' depends on the totality of the circumstances existing when the motion for a writ of attachment is filed). The investor should also be aware of countries that do not limit seizure of sovereign assets to those used solely for commercial purposes, but allow seizure of assets even if those assets are used for non-commercial purposes. For example, according to an expert on Turkey's sovereign immunity law on attachment and execution: 'Turkey does not differentiate between enforcement immunity [for] commercial and non-commercial actions of a foreign state. According to the precedents of the Court of Cassation, all property and assets of a foreign state would be subject to enforcement or execution except for properties that are used for diplomatic, military and consular purposes.' Orcun Cetinkaya, 'Turkey' in Stephen Jagusch QC and Odysseas G Repousis (eds), *Lexology Getting The Deal Through: Sovereign Immunity* 2020 (Law Business Research, 2020), at 71 (citing Decision of the 12th Civil Chamber of the Court Cassation No. 2004/6469 E 2004/13007 K).

44 e.g., Charlotte Cans, 'Congo (Brazzaville) economy: Court in Paris rules against Brazzaville' (*EIU Views Wire*, 20 April 2006) (describing Congo's prime minister admitting 'that the country had been "hiding" oil revenues to escape from "vulture creditors" and that the government had been forced to use "sometimes rather unorthodox mechanisms"').

time an investment-treaty dispute has arisen.[45] It might also identify assets of state officials that could potentially be the result of corruption, embezzlement or misappropriation of state assets for personal use.

An investigation of the host state's assets would necessarily include a process called 'asset tracing'. Two types of asset tracing are important to finding attachable assets: forward tracing and backwards tracing.[46] Forward tracing starts with assets a sovereign debtor owned in the past and tracks the subsequent ownership of the assets to the present owners. Forward tracing may help an investor or award creditor determine whether a non-commercial asset was turned into a commercial asset or if a commercial asset was fraudulently transferred to a third party or to an alter ego (wholly controlled) entity to avoid satisfying the sovereign's debt obligations.[47] The challenge, however, is if the sovereign debtor becomes aware that the investor or award creditor is tracing assets, it may fraudulently transfer the assets to third parties or legally transfer them to entities that are more difficult to trace. Or worse yet, the sovereign, unbeknown to an award creditor, may sell the asset to a bona fide purchaser and, thus, the asset may no longer be subject to attachment

45 The universe of assets available for enforcement of an arbitral award may include commercial-use real property or tangible and intangible personal property, such as overseas investments held through sovereign wealth funds; aircraft, vehicle, ship and tanker fleets; production equipment; gold reserves; investment funds; bank accounts; trust accounts, shareholdings in foreign companies; accounts payable on goods and services; oil, gas and mining concessions and/or royalty fees; bond interest payments; intellectual property royalties; and unsatisfied judgment debts owed to the sovereign.

46 Michael S Kim and Timothy deSwardt, 'Asset Recovery: Investigation and Foreign Recognition, in Committee Educational Session: Commercial Fraud/International: People and Assets on the Move Overseas: What You Need to Know to Hold Everything Still and Seize the Assets' (ABI Conference, February 2016).

47 e.g., EIU, 'Country Report Congo (Brazzaville): Foreign trade and payments: Agreement w/comm'l creditors outstanding' (1 April 2006) (describing the Congolese government's admission of resorting 'to elaborate and expensive financing deals for its international oil sales, which aim to prevent creditor seizures', including deals that 'involved the establishment of shell companies, some of them personally owned by members of the regime, and the use of multiple and complex transactions or the sale of oil at substantial discounts to market prices').

and execution to satisfy a debt.[48] Nevertheless, forward tracing is a necessary part of investigating a sovereign debtor's assets.

Backwards tracing is not only necessary, it also provides a unique advantage over forward tracing.[49] Backwards tracing requires the investor to analyse the 'debtor's patterns of consumption today and then trace backward to find the source of assets used to fund that consumption'.[50] For example, if a sovereign debtor is found to consume certain commercial goods or services frequently or periodically (e.g., weekly delivery of bottled water for personnel or utilisation of electricity for property), payments for these goods or services might be traced back to a previously unknown bank account that may in turn be traced to the sovereign debtor. Backwards tracing can lead to a strong presumption or direct evidence that the sovereign debtor presently beneficially owns an asset to which a third party holds title. By contrast, forward tracing starts from the past and seeks to catch up to present assets 'through a maze of subsequent transactions and transfers'.[51]

Investigation of assets through public sources and private investigators

Tracing of assets can begin with an investigation using public resources, including the following:

- public records databases, including real estate records, to identify buyer or seller information, attorneys and title companies involved, property tax information, building permit requests and lien information;
- civil court records to identify assets targeted by other creditors, unsatisfied judgments or arbitral awards in favour of a sovereign where the sovereign is owed money, or the attorneys representing the sovereign, which can potentially lead to finding out the monetary source used to pay the sovereign debtor's legal bills;[52]

48 e.g., Donald Manasse, 'Monaco' in Daniel Kadar, Laetitia Gaillard and Stéphanie Abdesselam (eds), *Lexology Getting The Deal Through: Asset Recovery* 2021 (Law Business Research, 2020), at 77 (explaining when property acquired by a third party or close relatives in Monaco): 'It is possible to confiscate property acquired by a third party (whether or not related), but the confiscation must not affect the rights of third parties who legitimately acquired [the property], and the third party . . . must be given the right to oppose the confiscation.'

49 Kim and deSwardt, footnote 46.

50 ibid.

51 ibid.

52 ibid.

- websites of the sovereign debtor's agencies and ministries to identify state-owned enterprises and their assets,[53] and banks with which the sovereign processes commercial transactions;[54] and
- databases or companies that track sovereign tanker and shipping vessels, aircraft and cargo.[55]

In addition, in recent years, some countries have adopted disclosure rules that require public disclosure of asset ownership, making it easier to find a sovereign's assets. For example, in the United Kingdom, the Administrative Division of the English High Court issued an order requiring the UK government to disclose to US judgment creditors details of assets of the Syrian government that

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53 State-owned enterprises (SOEs) may have assets, including subsidiaries, that can be used to pay an arbitration award that has been converted to a domestic judgment. For example, a US Court of Appeals for the Third Circuit concluded that the FSIA's commercial exception provided US courts with authority to attach shares of a US subsidiary of a Venezuelan SOE oil company, Petróleos de Venezuela SA, as a means to pay an arbitration award won by Crystallex, a Canadian company that invested in Venezuela. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 149–151 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2762 (2020). The Court reached this conclusion based on the alter ego doctrine as articulated by the United States Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983) and *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018). Identifying a sovereign's SOEs is not an easy process and can require substantial digging, however. Not all sovereigns publish a list of their SOEs or statistics regarding their SOEs, but some have published this information. For example, the Morocco Ministry of Finance reported that, as at 2019, it owned 225 SOEs in addition to 43 companies in which its treasury had a direct interest, and those companies have 479 subsidiaries, of which Morocco has majority ownership in 54 per cent. Projet de loi de Finances Pour L'Annee 2020, '1ere Partie: Composition et Performances du Portefeuille Public', available at https://www.finances.gov.ma/Publication/depp/2019/depp-plf2020-fr-30-34.pdf. As at 2021, the Ministry of Investment in Egypt held a portfolio of approximately 226 SOEs and over 660 joint ventures between public and private firms as well as an undisclosed number of strategic firms held by sectoral ministries or the military. The Ministry publishes a list of its SOEs on its websites: http://www.mpbs.gov.eg/Arabic/Affiliates/HoldingCcompanies/Pages/default.aspx and http://www.mpbs.gov.eg/Arabic/Affiliates/AffiliateCompanies/Pages/default.aspx. See also Jennifer Bremer, 'Transparency of Egypt's Public-Private Joint Ventures', in *Towards New Arrangements For State Ownership in the Middle East and North Africa* (OECD, 2012), 119.

54 For an example of how a sovereign's published government financial information (including wire payment instructions) can be used to track attachable commercial assets in the United States, including through interbank settlement systems such as the Federal Reserve's Fedwire Funds Service and the Clearing House Interbank Payments System, see Brian Asher, 'Finding Sovereign Assets Through US Banks' (*Law360*, 25 February 2019).

55 Kim and deSwardt, footnote 46.

were frozen by the United Kingdom pursuant to Article 18(1) of EU and UK Sanctions Regulation No. 36/2012 (the EU/UK Regulation).[56] Article 29(1) of the EU/UK Regulation requires that third parties that are in possession of sovereign assets frozen pursuant to applicable sanctions laws and regulations submit to the Treasury reports of location and other details to facilitate compliance with the Regulation.[57] Article 18(1)(a) and (b) of the Regulation provides that holders of judgments and arbitral awards against the sanctioned sovereigns may be entitled to collect from frozen property or funds to satisfy those judgments or awards.[58] Thus, looking to a country's sanctions regime to identify already-seized assets set aside to pay arbitral awards, before getting involved in an arduous, lengthy and costly judicial enforcement proceeding, is a progressive step towards satisfying the award.

Moreover, the World Bank recently reported that over 160 countries have adopted disclosure regimes, such as asset and interest declaration requirements (AID systems), to alert the public as to who beneficially owns or controls particular assets.[59] Robust AID systems require governmental officials, as well as their family members, to disclose assets owned directly or by proxy, and they include a sanctions element attached to non-compliance that is designed to curb corruption among governments and their officials.[60] Depending on the forcefulness and openness of the AID system in place in a particular jurisdiction, public reporting based on the use of that system could be a useful tool for investigating assets.

Award creditors that can afford the additional expense should consider hiring a private investigator or company specialising in asset-tracing services to handle or supplement the public records search. Such investigators may already have used, or can identify, less visible databases (e.g., where access is limited to those with a required subscription or membership). Their expertise may be especially useful in backwards tracing, and, more generally, in applying their specialised knowledge, investigatory skills and relationships to ferret out the location of

56 *Certain Underwriters at Lloyds London, et. al. v. HM Treasure, et al.* [2020] EWHC 2189 (Admin), available at http://www.bailii.org/ew/cases/EWHC/Admin/2020/2189.html.

57 id. at ¶ 4.

58 ibid.

59 World Bank Group, 'Enhancing Government Effectiveness and Transparency: The Fight Against Corruption' (2020), 225–226, available at https://documents1.worldbank.org/curated/en/235541600116631094/pdf/Enhancing-Government-Effectiveness-and-Transparency-The-Fight-Against-Corruption.pdf.

60 id. at 229.

assets owned indirectly or beneficially by the sovereign debtor.[61] However, award creditors should be aware that asset-tracing firms can be enormously expensive and seldom (if ever) guarantee they will find evidence that can be used effectively in an enforcement proceeding. Further, award creditors need to be mindful of the risk that an investigations firm may obtain pertinent, even conclusive evidence by means that are illegal under the laws of the country where the evidence resides. In evaluating that risk, creditors should determine, under the laws of relevant jurisdictions, how illegally obtained evidence is treated in civil litigation.[62]

Timing considerations for investigation of assets through public sources and private investigators

To allow the best chance for asset seizure, efforts to find appropriate assets – including asset tracing – should begin as soon as practically possible. As mentioned above, an informal investigation into a host state's assets could begin as part of the investor's due diligence conducted when contemplating investing abroad or before commencing negotiations over the arbitration clause.[63] Many investors, however,

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61 In proceedings to enforce a final arbitral award against an Indonesian state-owned oil company, the award creditor sought to attach funds derived from oil sales and held in New York trust accounts. A global investigations firm obtained key evidence used by Indonesia to support the district court's determination (affirmed on appeal) that 95 per cent of the funds actually belonged to Indonesia and were immune from attachment and execution under the FSIA. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 313 F.3d 70, 88–93 (2d Cir. 2002).

62 See, e.g., Sara Mansour Fallah, 'The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals', Section 4, 'Deriving a General Principle from National Laws? – A Comparative Study of National Civil Procedure', in *The Law & Practice of International Courts and Tribunals* (2020) 19(2) at 147–176 (surveying the laws of 27 national jurisdictions bearing on the treatment of illegally obtained evidence in civil litigation), available at https://doi.org/10.1163/15718034-12341420.

63 For example, investors may want to have sovereign asset information in hand when negotiating an arbitration agreement as part of the parties' contract. It could be relevant to an investor's position on the seat of arbitration or procedures for arbitration, or both, and whether to argue during contract negotiations that the sovereign must expressly waive execution immunity should the investor prevail in an arbitration dispute. Sally-Ann Underhill and M Cristina Cardenas, 'Awards: Early Stage Considerations of Enforcement Issues', in J William Rowley QC, Emmanuel Gaillard and Gordon E Kaiser (eds), *The Guide to Challenging and Enforcing Arbitration Awards* (Global Arbitration Review, 2020), 5–6 ('The arbitration Clause should ideally include a broad waiver of immunity, including both pre- and post-judgment attachment of assets'). An investor should keep in mind, however, that an immunity waiver from the contracting sovereign does not guarantee that a sovereign's assets can be attached or seized as a means to pay an award. For example, in *Thai-Lao Lignite v. Government of the Lao People's Democratic Republic* [2013] EWHC 2466

begin the search for the sovereign's assets only after an investment dispute has surfaced, or after receiving a final award in the arbitration. An additional reason an investor should conduct host-state asset tracing before initiating an arbitration is that once the sovereign learns it may be liable for damages to an investor, the sovereign will have an incentive to restructure ownership of commercial assets in a way that blocks or impedes their seizure. Identifying those assets and determining their location before the host state moves them could be helpful for tracking them later or for requesting a court or emergency arbitrator to grant emergency interim measures to bar the state from dissipating the assets. Nonetheless, if an investor waits until an award is imminent, or after the arbitral tribunal issues the award, an investor can still successfully pursue seizure of the sovereign's commercial assets. The chances for success are increasingly diminished, however, the longer the investor waits to implement its plan.

Investigation of assets through judicial proceedings

Not infrequently, award creditors will initiate judicial proceedings to engage the help of courts to secure payment of the award. In some jurisdictions, investors can initiate these proceedings while the arbitration is pending, or only when the award is imminent or issued by an arbitration tribunal. Discovery through judicial channels may present the most successful opportunities to ascertain the nature and location of a sovereign's assets.[64] This may include discovery directed to the sovereign[65] or discovery directed to third parties that are presumed to be in possession

(Comm), the Lao government expressly waived immunity to attachment and execution in its agreement to arbitrate disputes arising out of its Production Sharing Contract. However, specific assets were not designated as attachable to satisfy an arbitral award. Thus, when Thai-Lao Lignite sought to attach nearly US$74.5 million of Laos' assets located in England, it was confronted with the Lao Central Bank's unwaived claim to immunity for Central Bank assets. The England and Wales High Court held that, because the Lao Central Bank – a separate Laos state entity – had a beneficial interest in the Lao government's funds held in England and had not waived its immunity from attachment and execution of assets, the Court had no authority to freeze Laos' assets held in the Central Bank because it would affect the Central Bank's assets and harm the functions of the Central Bank.

64 Ascertaining the nature of the sovereign's assets, however, necessarily includes both commercial and non-commercial assets. As explained in footnote 43, some countries (e.g., Turkey) do not make the distinction and allow a debtor to collect from a sovereign's non-commercial assets to satisfy an award or judgment.

65 e.g., *Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov't of the Lao People's Democratic Republic*, No. 10-CV-5256, 2011 WL 4111504, at *7, 10 (S.D.N.Y. 13 September 2011) (awarding nearly US$20,000 in sanctions against Laos for failure to comply with a discovery order).

of a sovereign's assets or information about those assets.[66] The particular discovery practices and remedies available will depend on where the assets are located (or where the sovereign has legal ownership of the asset). Enforcement of an award against a sovereign debtor in that sovereign's courts will likely be difficult due to the state's interest in protecting its assets. Thus, an investment creditor will usually seek enforcement in the courts at the seat of arbitration or in the courts of a third country where attachable assets are located. The available legal tools to find and force a turnover of assets, either pre-award or post-award, will depend on the domestic laws of those third-country courts.

Judicial discovery and attachment of sovereign assets

The availability of judicial assistance with asset discovery and seizure will depend largely on the forum's law on sovereign immunity.[67] An enforcement court whose laws adhere to the principle of restrictive immunity of a sovereign will usually apply its laws on asset discovery and seizure in the same manner as it would apply to a private citizen,[68] although the application of particular procedures might differ depending on whether the procedures themselves would encroach on a sovereign's immunity.[69]

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66 For example, in 2014, the US Supreme Court held that sovereign immunity is not a defence to preclude imposition of post-judgment discovery of a sovereign's commercial assets, even if the assets are located in other countries and for that reason are immune from attachment and execution in United States. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014).

67 For example, a foreign sovereign's assets located in Hong Kong cannot be discovered, attached or turned over with judicial assistance by Hong Kong's courts because Hong Kong is subject to China's absolute immunity law, which does not allow exceptions to jurisdictional or enforcement immunity. So, an award creditor may be out of options if all of the sovereign debtor's commercial assets are held in China or its Special Administrative Regions (Hong Kong and Macau).

68 e.g., Unites States law: Section 1606 of the FSIA, codified at 28 U.S.C. 1606 ('As to any claim for relief with respect to which a foreign state is not entitled to immunity . . . the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . .').

69 For example, *Bankers Trust*, *Anton Piller* and *Mareva* injunction orders available to assist with tracing and seizing assets of private citizens may not be available or effective to compel disclosure or seizure of a sovereign's assets.

Pre-award legal tools

Some jurisdictions have procedures in place that allow courts to order both discovery of the location of attachable assets and seizure of those assets even before an arbitral tribunal issues an award. Pre-award tools that may be available through judicial assistance include *Norwich Pharmacal*[70] orders, interim measures granted by the arbitral tribunal, third-party disclosures based on civil procedure or debt collection rules, and writs of attachment.

Norwich Pharmacal orders

Norwich Pharmacal orders are available in some common law jurisdictions and are useful to assist an investor with gathering information from third parties to which the state fraudulently transferred its assets or that were involved with fraudulently transferring the sovereign's assets.[71] These third parties, however, must not be a party to enforcement of the arbitral award. The beauty of *Norwich Pharmacal* orders is that the 'discovery' of information about the assets can be done without notice to the sovereign. That can avoid the risk of the sovereign dissipating those assets to avoid payment.

Pre-award discovery and seizure granted by arbitration tribunals

Some jurisdictions' domestic laws provide an arbitral tribunal with the authority to issue an order (or request one from an appropriate judicial authority) for a sovereign respondent or a third party to disclose information that would assist the investor in identifying and seizing assets subject to attachment in those jurisdictions.[72]

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70 *Norwich Pharmacal Company v. Commissioner of Custom and Excise*, 3 W.L.R. 164 (H.R. 1973), 2 All E.R. 943 (H.L. 1973).

71 e.g., The Queen's Bench Guide ¶ 4.7 (2021). To the extent exceptions to jurisdictional and enforcement immunity apply, exemplar countries that allow *Norwich Pharmacal* orders to aid in the discovery and seizure of sovereign assets located in their jurisdictions or possessed by citizens of their jurisdictions are: Canada and the United Kingdom. Alison G FitzGerald and Azim Hussain, 'Canada', in Stephen Jagusch QC and Odysseas G Repousis (eds), *Lexology Getting The Deal Through: Sovereign Immunity 2020* (Law Business Research, 2020), at 12 (explaining Canadian courts' competency 'to assist with or otherwise intervene to help identify assets held by states in the territory'); Stephen Jagusch QC and Odysseas Repousis, 'United Kingdom', in Stephen Jagusch QC and Odysseas G Repousis (eds), *Lexology Getting The Deal Through: Sovereign Immunity 2020* (Law Business Research, 2020), at 77 (explaining English courts' competency 'to assist with or otherwise intervene to help identify assets held by states in the territory') .

72 For example, if the seat of arbitration is Malaysia, under the Malaysia Arbitration Act of 2005, the arbitration panel adjudicating the investor–state arbitration claims has the authority

Civil procedure and debt collection rules

Some jurisdictions have rules governing civil procedure and debt enforcement that allow pre-award *ex parte* requests to take evidence from third parties if it can be shown that the assets are at risk of dissipation.[73] Once that risk is established, the investor can seek a remedy to freeze the assets temporarily to secure payment of an imminent award.[74]

Pre-award attachment

Other jurisdictions allow an investor to request attachment of assets already known to the investor, but do not have mechanisms in place to assist the investor to discover assets that may be subject to attachment and execution. This is the case in Denmark and Egypt, for example.[75]

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to compel a sovereign respondent to disclose or turn over assets during the course of the arbitration. Malaysia Arbitration Act of 2005, Article 11 (allowing the arbitration panel to issue interim awards for discovery, security for the amount in dispute 'by way of arrest of property', 'the preservation, interim custody, or sale of any property which is the subject matter of the dispute', 'ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party', and 'an interim injunction or any other interim measure'). Switzerland grants similar authority: 'In arbitration proceedings, by entering into an arbitration agreement, a foreign state waives its right to assert a plea of immunity. Consequently, interim or injunctive relief could be issued by an arbitral tribunal pursuant to the rules applicable to the arbitration proceedings.' Sandrine Giroud, Veijo Heiskanen and Anton Vallélian, 'Switzerland', in Stephen Jagusch QC and Odysseas G Repousis (eds), *Lexology Getting The Deal Through: Sovereign Immunity* 2020 (Law Business Research, 2020), at 63 (explaining available interim measures).

73 Switzerland, for example, has such a rule. See Switzerland Civil Procedure Code, Articles 158, 256. See also Marc Henzelin, Sandrine Giroud and Deborah Hondius, 'Switzerland', in Daniel Kadar, Laetitia Gaillard and Stéphanie Abdesselam (eds), *Lexology Getting The Deal Through: Asset Recovery* 2021 (Law Business Research, 2020), at 106 (explaining available interim measures).

74 Switzerland Debt Enforcement and Bankruptcy Act, Article 272 et. seq. See also Giroud, Heiskanen and Vallélian, footnote 72.

75 In Denmark, investors can request a court's interim assistance with attachment of assets to secure payment of an arbitral award, including attachment of a sovereign's ships or the ships' cargo if certain conditions are met. Danish Administration of Justice Act, Chapter 56; Danish Merchant Act, Chapter 4; Danish Act on Foreign State-owned Vessels; Jacob Skude Rasmussen and Niels Anker Rostock-Jensen, 'Denmark', in Stephen Jagusch QC and Odysseas G Repousis (eds), *Lexology Getting The Deal Through: Sovereign Immunity* 2020 (Law Business Research, 2020), at 16 (explaining available Interim or injunctive relief); id. at 18 (explaining '[t]here is no general access for the Danish courts to help identify assets held by states or other parties'). Similarly, Egypt can provide 'urgent production' by issuing 'orders to secure rights that could be lost by a loss of evidence, to prove a fact that could cease to exist by lapse of time, or to avoid imminent harm' prior to the '[f]inal

Still, some jurisdictions, such as France, have neither pre-award discovery nor seizure available as interim relief unless a sovereign party to the dispute consents to such discovery and seizure.[76]

Post-award legal tools

Jurisdictions that provide pre-award relief tools to investors typically will make those same tools available for post-award/post-judgment relief. Jurisdictions that provide no pre-award relief at all may have more weapons in their arsenal to discover and seize assets once a tribunal issues an award and the award is converted to a domestic judgment. That is because the exceptions to immunity in those jurisdictions are geared particularly towards either enforcing an agreement to arbitrate or recognising already-existing awards (i.e., converting the award to a domestic judgment) and attaching and executing against commercial assets to satisfy those domesticated awards.[77]

When choosing an enforcement court, an essential factor to consider is which jurisdictions are the most pro-enforcement and frequently enjoy deferential treatment by other enforcement courts concerning award confirmation or

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settlement of the dispute (such as an interim award of damages, judicial guardianship, depositing goods in a secure place protective seizure or sale of goods susceptible to damage)'; Mohamed S Abdel Wahab and Omar Abdel Aziz, 'Egypt', in Stephen Jagusch QC and Odysseas G Repousis (eds), *Lexology Getting The Deal Through: Sovereign Immunity* 2020 (Law Business Research, 2020), at 22–23 (explaining available interim or injunctive relief); id. at 25 (explaining Egyptian courts are not 'competent to assist with or otherwise intervene to help identify assets held' in Egypt).

76 Article L111-1-2 of the French Code of Civil Enforcement Proceedings requires that pre-award '[c]onservatory . . . measures over an asset owned by a foreign state can only be authorised by a judge if the state has expressly consented to the performance of such measure [or] the state has allocated or earmarked the asset at stake to satisfy the claim that is the subject-matter of the legal proceedings'.

77 For example, the United States' restrictions on attachment immunity under the FSIA are far more robust post-judgment than prejudgment. Sections 1609 and 1610(d) of the FSIA preclude any prejudgment attachment to secure satisfaction of an ultimate judgment, except where the sovereign party 'explicitly waived its immunity from attachment prior to judgment'. Courts in the United States, however, rarely find that a sovereign has explicitly waived immunity from attachment where the parties' governing arbitration agreement or the governing treaties do not clearly and unambiguously express a waiver, whereas Section 1610(a) of the FSIA – the law governing attachment immunity post-judgment – allows attachment of commercial assets if a sovereign party explicitly or implicitly waived its immunity from attachment.

recognition decisions.[78] Pro-enforcement jurisdictions usually have various judicially compelled disclosure tools[79] and robust authority to enforce the use of those tools should recipients of asset discovery fail to comply.[80]

Post-judgment discovery

Depending on the jurisdiction in which an investor chooses to initiate enforcement proceedings, formal investigation to identify the judgment debtor's assets can occur through judicial discovery proceedings. This type of investigation usually enhances an investor's chances of discovering attachable assets, even if those assets are outside the geographical boundaries of the court's enforcement jurisdiction and spread all over the world. For example, in *NML Capital*, Argentina had no attachable assets in New York or elsewhere in the United States. Yet, the Supreme Court held that the FSIA did not preclude a judgment creditor from using the US court's authority to compel discovery to peer into the sovereign's assets located all over the world – to the extent third parties under the court's jurisdiction had access to that information.[81]

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78 For example, in ongoing cross-border disputes between Thai-Lao Lignite (TLL) and the Laos government in connection with TLL's attempts to enforce a valid Malaysian arbitration award, the English High Court confirmed the award with deference to the US court's judgment confirming the award on res judicata grounds. See *Thai-Lao Lignite (Thailand) Co Ltd & Hongsa-Lignite (Lao PDR) Co Ltd v. The Government of the Lao People's Democratic Republic* [2012] EWHC 3381 (Comm) ('[T]his award is manifestly valid and given what was decided by the U.S. courts any possible objections that might be raised with regard to the enforceability of this award have been determined in the United States . . . and are matters of issue estoppel.'). After the award was set aside in Malaysia, however, the US court vacated its own judgment confirming the award.

79 For example, in the United States, US judgment creditors can subpoena third parties to disclose details about a sovereign's assets that will help them pinpoint which assets are subject to seizure and turnover under any jurisdiction's laws. That disclosure could be in the form of written answers to interrogatories, production of documents in response to a formal document request, or oral or written deposition testimony, under penalty of perjury. See Rules 30, 31, 33 and 34 of the United States Federal Rules of Civil Procedure (FRCP). Court permission is not required to seek such disclosures through subpoenas. If a third party fails to comply with the subpoena, a US court can compel disclosure through additional orders or monetary sanctions, or both. FRCP 37.

80 If a third party refuses to comply with a court order compelling disclosure or sanctions, the court has the power to hold the third party in contempt, subjecting the third party to a fine or jail time, or both, until it complies. See 18 U.S.C. § 401(3).

81 *NML Capital*, footnote 66, at 142.

Post-judgment attachment or seizure

In many jurisdictions, such as the United States,[82] Canada,[83] Egypt,[84] Turkey[85] and the United Kingdom,[86] a court has authority to 'attach', 'arrest' or 'seize'[87] a sovereign debtor's assets, under certain conditions to safeguard them from dissipation and to secure a means of paying the sovereign's obligations under an arbitral award/domestic court judgment. An award creditor looking to initiate such an attachment proceeding must be aware of the threshold requirements for obtaining the relief. In some countries, the federal law provides the jurisdiction for these attachments, but state or provincial law provides the procedures for attachment and execution. For example, in the United States, the FSIA provides both federal and state courts with jurisdiction to attach (prejudgment and post-judgment) before a final ruling on whether those assets can be turned over to the judgment creditor.[88] Rule 69 of the Federal Rules of Civil Procedure, however, requires that the procedural laws of the state forum (where the action will be adjudicated) govern the 'procedure on execution . . . and . . . proceedings supplementary to and in aid of judgment or execution', which includes a request to seize a sovereign's assets.[89] Thus, once an investor is able to meet the thresholds of the FSIA and applicable state law for attachment, a US court can order a sovereign debtor's assets be restrained.

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82 Section 1610(a) of the FSIA.

83 *Canadian Planning and Design Consultants Inc. v. Libya,* 2015 ONCA 661, ¶ 74 (affirming a lower Canadian court's issuance of garnishment notices to Libya's banks by allowing continuance of enforce of those notices while immunity issues were being adjudicated in Libya's Canadian set-aside action).

84 'Private domain assets . . . According to Egyptian jurisprudence, sovereign immunity is limited to the sort of acts and transactions performed by a state in its sovereign capacity. Any other civil or commercial acts are not covered by sovereign immunity', Wahab and Aziz, footnote 75.

85 'There are examples where assets of foreign sovereigns were seized by Turkish Enforcement Offices in connection with the enforcement of the International Centre for Settlement of Investment Disputes (ICSID) awards.' Orcun Cetinkaya, footnote 43, at 72.

86 *Orascom Telecom v. Chad* [2008] EWHC 1841, ¶¶ 1, 3, 51 (Comm) (issuing a third-party freeze order to the sovereign's bank in London to restrain proceeds of oil sales that were reserved to repay oil pipeline project finance loans to the World Bank).

87 The terminology depends on the jurisdiction, but 'attachment' and 'seizure' have the same effect – sequestering a debtor's assets to secure payment of a judgment.

88 See Section 1610(a) and 1610(d) of the FSIA.

89 e.g., *Crystallex*, footnote 53, at 134 (applying FSIA and Delaware law on obtaining a writ of attachment).

Restraining assets, in any jurisdiction, may include, for example, ordering a sovereign or third party in possession of sovereign property to place funds into a court registry, freezing sovereign bank accounts at third-party banks, taking physical custody of a sovereign's real property located within the forum, and restricting transfers of property from a third party to a sovereign or from a sovereign to a third party. A court's restraining of property through applicable attachment procedures, however, does not guarantee that a judgment creditor is entitled to possess such property. A court will still need to decide whether the property seized is subject to execution immunity.[90] Nonetheless, an award creditor's victory in an attachment or seizure proceeding provides a hefty benefit that could lead to settlement on terms favourable to the award creditor,[91] even if the assets ultimately cannot be turned over to the investor to satisfy the judgment.

Conclusion

An investor's plan of asset identification, seizure and ultimate enforcement is completed once payment of the arbitral award is satisfied. As noted above, devising a successful strategy for enforcement of the award starts with understanding the sovereign immunity laws of the jurisdiction where a sovereign's assets are potentially located. Other considerations, such as a court's statutory time limitations on judgment enforcement, or whether there is a notice requirement to be met before initiating adversary proceedings, may be just as important to the success of award enforcement and should be analysed carefully by an investor when investigating a sovereign's assets before a dispute arises and again when seeking seizure and ultimate execution on those assets to pay an award. To understand fully all options available to an investor armed with a favourable arbitration award, the authors recommend to investors wishing to be best prepared to collect on an award within a reasonable period to engage reputable legal counsel in the relevant jurisdictions who are familiar with the specific tools necessary for successful collection of sovereign assets.

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90 *Preble-Rish Haiti, S.A. v. Republic of Haiti*, No. 21-CV-4960 (PKC), 2021 WL 4037860, at *3 (S.D.N.Y. Sept. 3, 2021) (vacating attachment of accounts of the Central Bank of Haiti upon further showing that the initial attachment was improper because the Central Bank was immune).

91 See Julian Schumacher, Christoph Trebesch and Henrik Enderlein, 'Sovereign Defaults in Court, ECB Working Paper Series No. 2135', Appendix 1 (February 2018): 69–70, available at https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp2135.en.pdf.

APPENDIX 1

About the Authors

Hamid Abdulkareem
Three Crowns LLP

Hamid Abdulkareem, counsel in the London office of Three Crowns LLP, is an experienced arbitration practitioner and litigator, having regularly advised multinational companies on an extensive range of disputes, particularly within the energy and natural resources sector. He has played a lead role in multiple disputes arising from Nigeria's deep offshore production-sharing contracts, resulting in successful outcomes for his clients.

Hamid is a current co-chair of the International Bar Association's 'Arb40' subcommittee. He has been recognised in *Who's Who Legal Future Leaders: Arbitration* and as a national leader for arbitration in Nigeria, having been described as 'an exceptional advocate' who is 'sharp as a tack' and 'definitely one to watch'. Hamid is also ranked in *The Legal 500* for dispute resolution. He is qualified in Nigeria and was educated at the London School of Economics and Political Science and the University of Ilorin, Nigeria.

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Wilson Antoon is an international arbitration and cross-border litigation partner with experience acting in large-scale disputes arising out of foreign investment, commercial contracts, M&A, joint ventures, financial services, trade practices, regulatory investigations and fraud. He supports multinationals, financial institutions, governments and high-net-worth individuals across a range of sectors, including banking and financial services, energy and resources, manufacturing and telecoms.

Wilson has a particular focus on commercial and investor–state disputes. He has represented clients as adviser and advocate in complex, high-value disputes under a range of arbitration rules, including those of the United

Nations Commission on International Trade Law, the International Chamber of Commerce, the London Court of International Arbitration and the International Centre for Settlement of Investment Disputes, and has coordinated cross-border recognition and enforcement proceedings across jurisdictions. Wilson has been recognised by *The Legal 500: UK* as a recommended individual for international arbitration, public international law and commercial litigation.

Wilson is qualified as a lawyer in England and Wales and Australia.

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Moiz Mirza Baig is a principal associate with constitutional law expertise, having worked as the associate to the Attorney General for Pakistan and serving as a law clerk at the Supreme Court of Pakistan.

In addition, Moiz has worked on matters involving Pakistan before international forums such as the International Court of Justice.

Moiz holds a masters of laws degree (LLM) from Harvard Law School, prior to which he obtained an undergraduate degree in law from the Lahore University of Management Sciences. He is a member of the Sindh Bar Council in Pakistan and is expected to take oath as a member of the New York Bar later in 2021.

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Andrew Battisson is a dispute resolution partner based in Singapore and Sydney. He leads Norton Rose Fulbright's international arbitration practice in Australia and Indonesia. He specialises in international commercial arbitration, investment treaty arbitration, enforcement and transnational litigation. Andrew has particular experience in energy and infrastructure, natural resources and financial services. He has acted in disputes under national laws and international laws worldwide. Andrew regularly sits as arbitrator in disputes involving a wide variety of parties, laws and industry sectors.

Andrew is highly ranked across the major legal directories, including in Band 1 of *Chambers Asia-Pacific* (for arbitration, Australia) and as a 'National Leader' in *Who's Who Legal: Australia* (for arbitration). He holds a BCL from Oxford University and degrees in law and commerce from the Australian National University. He is an Australian delegate to the International Chamber of Commerce Commission on Arbitration and ADR and an Australian Centre for International Commercial Arbitration Fellow.

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Julia Kalinina Belcher is a dispute resolution counsel based in Pillsbury's London office, focusing on international arbitration. Julia has substantial experience in complex international disputes, having advised clients in the energy, construction, petrochemicals and financial services sectors across various jurisdictions, particularly CIS and MENA countries. Julia has advised clients under the best known arbitration rules (the London Court of International Arbitration, the International Chamber of Commerce, Stockholm Chamber of Commerce, Dubai International Arbitration Centre and the United Nations Commission on International Trade Law) and is a commended advocate at arbitration hearings. She also has experience in investor–state disputes and in international litigation, primarily arbitration-related (interim relief, enforcement).

Julia has been named a 'Rising Star' for international arbitration by *The Legal 500: UK* (2021), is a frequent contributor to publications such as *International Arbitration Report* and is fluent in Russian and French.

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Tiana A Bey's practice includes international arbitration related to bilateral investment treaties, arbitration award enforcement proceedings, international contract disputes and family law implicating international issues. With over 20 years of legal experience, her positions as a paralegal and now attorney have given Tiana a unique and advanced perspective on any case that comes her way.

Tiana has performed all aspects of litigation from case intake to final disposition at trial. She has briefed issues relating to the United States Foreign Sovereign Immunities Act, the Indian Arbitration Act, the Malaysian Arbitration Act, the Singapore International Arbitration Act, the Singapore Sovereign Immunities Act and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards before the United States Court of Appeals for the Second Circuit and the United States District Courts for the Southern District of New York and the District of Columbia, as well as in arbitration and ad hoc proceedings before ICSID arbitration panels under ICSID and UNCITRAL arbitration rules.

Juan Carlos Bisso
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Juan Carlos Bisso is a vice president at Compass Lexecon, based in Madrid. He has more than 10 years of professional experience in energy markets, and specialises in the application of economic analysis and principles to damages estimation, asset valuation and dispute resolution.

Dr Bisso has provided expert support in various disputes related to electricity and gas distribution and transmission, support schemes for renewable generation and other regulatory issues.

Dr Bisso earned his PhD and MA degrees in economics from the University of Virginia. Prior to joining Compass Lexecon, Dr Bisso worked for the Peruvian regulator for telecommunications, providing advice on dispute resolution.

Theresa B Bowman
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Theresa B Bowman has developed her international arbitration and litigation practices in the areas of commercial disputes and obtaining jurisdiction over, and discovery from, foreign sovereigns and transnational corporate entities. A significant portion of Theresa's practice includes representation of clients in their efforts to enforce intellectual property rights worldwide. Theresa has represented several global media companies in connection with multi-jurisdictional content protection disputes that require coordination of a cross-border team and navigation of difficult jurisdictional issues.

Theresa has successfully briefed and argued issues of foreign sovereign immunity as well as contract and intellectual property rights before multiple trial and appellate courts. She has navigated all aspects of complex litigation and arbitration against many foreign sovereign and multinational entities in a wide variety of subject areas, from the pre-filing investigation stage to enforcement and asset recovery.

Theresa has been published in *Global Arbitration Review*, the *National Law Review*, the International Society of Law's *International Legal Materials* and the *World Financial Review*.

Rafael T Boza
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Rafael T Boza focuses his practice on all aspects of international arbitration and dispute resolution. He also practices in transactions and corporate matters.

Rafael has experience in domestic and international litigation and arbitration. He provides his clients with both early identification and mitigation of business risks and a successful plan of action should a dispute occur.

Prior to joining Pillsbury, Rafael served as in-house counsel in the international crane and engineered transportation services sector. In addition to day-to-day legal operations, litigations and arbitrations, Rafael oversaw transactions, compliance, intellectual property and employment matters, and negotiated insurance claims.

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Mark Bravin heads MSK's international dispute resolution practice. He and his team specialise in handling disputes between private parties and sovereign governments in US court litigation and international arbitration. He has a distinctive record of finding effective solutions to intricate, and often cutting-edge, legal problems involving international investments and contracts.

Mark has extensive experience with the Foreign Sovereign Immunities Act, which governs all lawsuits against foreign states and state agencies in US federal and state courts. He has also handled a variety of arbitration-related matters under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, including motions to compel arbitration and petitions to enforce arbitral awards.

He is lead counsel for the award creditor in *TIG Insurance Co v. Republic of Argentina*, which established the test that federal courts in the DC Circuit must follow to determine when sovereign-owned property 'is used for commercial purposes' and may be subject to seizure and sale to enforce a foreign arbitral award.

Sup-Joon Byun
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Sup-Joon Byun is a senior foreign attorney in the international arbitration and cross-border litigation and the merger and acquisitions practice groups at Kim & Chang.

Mr Byun has extensive experience in international arbitrations administered by a wide array of institutions, including the International Chamber of Commerce, the London Court of International Arbitration, the Singapore International Arbitration Centre and the Japan Commercial Arbitration Association, as well as ad hoc arbitration and investment treaty arbitration. He specialises in advising clients involved in cross-border investment and M&A-related disputes.

Mr Byun's recent work include representing the government of Korea in an investment treaty arbitration, representing purchasers in post-M&A disputes and representing construction companies in connection with European public infrastructure projects and power plants in UAE and India.

Prior to joining Kim & Chang in 2004, Mr Byun was an associate of Wachtell, Lipton, Rosen & Katz in New York.

Mr Byun received his JD from Columbia University's School of Law in 2001 and his BA from Duke University in 1997.

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Yadira Castillo Meneses is an external adviser at Colombia's National Agency for Legal Defence of the State. She holds a PhD in law from Los Andes University in Colombia, with an emphasis on international public law, and an LLM in administrative law from the Externado University of Colombia. She teaches domestic and international investment arbitration at Santo Tomas University in specialisation programmes and at Los Andes University in an LLM programme. Yadira publishes essays on international investment arbitration and edits online content on domestic and international commercial arbitration and international investment arbitration. Prior to joining the legal team at Colombia's National Agency for Legal Defence of the State, Yadira served as a human rights prosecutor, acted in advisory roles to various public entities and was involved in litigation proceedings on public issues within domestic courts. In addition to Spanish, she speaks fluent English.

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Emily Choo is a state counsel in the International Affairs Division of the Attorney-General's Chambers (AGC) of Singapore where she provides legal advice to the Singapore government on a wide range of public international law issues, including international trade and investment law. Prior to joining the AGC, Emily was international arbitration law clerk to Mr J Christopher Thomas QC, and assisted Mr Thomas QC on investor–state and commercial arbitrations and matters involving investment law and arbitration issues where he was appointed expert or amicus curiae. She was the lead organiser and part of the faculty of the Singapore International Arbitration Academy, a leading international arbitration training programme for government and private-sector lawyers worldwide. She was also a member of the drafting sub-committee for the CIArb Guidelines

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Chou Sean Yu heads WongPartnership LLP's litigation and dispute resolution group. He is also the head of the banking and financial disputes practice and a partner in the international arbitration, financial services regulatory and Malaysia practices.

His main practice areas are banking and trade finance disputes, insolvency and restructuring, corporate fraud, investigations and asset recovery, financial services regulatory, commercial and corporate disputes, shareholder litigation, tort and contractual claims and domestic and international arbitration.

Sean Yu is a fellow of the Chartered Institute of Arbitrators and past chair of the board of its Singapore branch. He is on the panel of arbitrators of the Singapore International Arbitration Centre, the Asian International Arbitration Centre, the Korean Commercial Arbitration Board, the Maldives International Arbitration Centre, the Japan Commercial Arbitration Association, the Hainan International Arbitration Court and the Russian Arbitration Centre at the Russian Institute of Modern Arbitration.

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Konstantin Christie is a partner at Peter & Kim, who specialises in complex international commercial disputes and arbitration under international treaties. For the past 14 years, his practice has focused on international commercial and investment arbitration, as well as disputes under public international law. A native Russian and English speaker, he regularly handles cases from Eastern Europe, Russia and the former CIS, and more recently stemming from the South East Asian region, seated in Singapore, Seoul and Tokyo.

He has acted in more than 45 arbitrations, stemming from a variety of industries, including oil, gas and electricity (with a particular emphasis on long-term supply agreements), as well as cases arising from extraction of natural resources, M&A and joint ventures. Based in Europe for many years, Konstantin often deals with cases under Swiss and other civil laws under the rules of most leading arbitral institutions, including the International Chamber of Commerce, the London Court of International Arbitration, the Singapore International Arbitration Centre, the International Centre for Settlement of Investment Disputes, the

Swiss Arbitration Centre and the United Nations Commission on International Trade Law. Konstantin has been recommended in *The Legal 500* and *Who's Who Legal*, with peers noting that 'Konstantin Christie boasts outstanding expertise in commercial and investment disputes and is held in particularly high esteem for his work in the energy sector' and that 'he has brilliant legal skills and abilities, and delivers outstanding results'. Konstantin was admitted to the New York Bar and the Massachusetts Bar in 2007, and trained in Geneva and Paris. He has a law degree (JD) from Suffolk University and a Bachelor of Science (criminal justice) degree from Northeastern University in Boston.

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Ms Ciupagea is a recognised expert witness in *Who's Who Legal: Arbitration 2021* and a recognised expert in *Who's Who Legal: Energy 2020*.

Ms Ciupagea is also a guest lecturer in the damages in international arbitration and energy course at the Queen Mary University of London School of Law, and a guest lecturer at the Brussels School of Competition on the regulation of the electric power and natural gas industries (both jointly with Dr Moselle).

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Borna Dejanović is a member of the dispute resolution team in Zagreb. He joined Wolf Theiss as an associate in 2016 after graduating from the University of Zagreb Law School and has since been enthusiastically advising a broad spectrum of international clients. Borna specialises in arbitration and dispute resolution. He has acted as lead counsel and co-counsel in several high-profile commercial, construction and investment arbitration proceedings conducted under major international arbitration rules, as well as represented clients in the local enforcement of arbitral awards. Alongside arbitration matters, Borna regularly advises clients in cross-border commercial disputes, including litigation, enforcement and bankruptcy proceedings, as well as in administrative disputes and white-collar crime controversies. In addition to his primary area of expertise, Borna has gained

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Elodie Dulac is a partner in King & Spalding's international arbitration practice in Singapore. She represents clients in commercial and investment arbitrations around the world, with a particular focus on Asia, where she has been based for 15 years. She has particular expertise in energy, mining and joint venture/shareholder disputes, as well as disputes involving states and state-owned entities. Further, she has particular experience of Asia–Africa disputes, with seats of arbitration in either Asia or Africa. In addition to her work as counsel, Elodie has been appointed as arbitrator in the Singapore International Arbitration Centre, the Asian International Arbitration Centre, the Hong Kong International Arbitration Centre, the International Chamber of Commerce and the Kigali International Arbitration Centre, as well as in ad hoc arbitrations. She has been consistently recognised as a leading individual in all major professional directories, including *Chambers Asia-Pacific* 2021, *Chambers Global* 2021, *Who's Who Legal: Arbitration 2021* and *The Legal 500: Asia-Pacific* 2021. She has been described as 'a class act, with a world of experience and good instincts', an '"outstanding practitioner" who is recognised for her broad knowledge of investment law' and a 'highly intellectual lawyer' who possesses a 'profound understanding of investment arbitration'. Elodie is admitted to practise in Paris, France and England and Wales (solicitor-advocate). She is also a registered foreign lawyer at the Singapore International Commercial Court.

Erin Eckhoff
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Erin Eckhoff has practised in civil and commercial litigation and dispute resolution in London, Sydney, Singapore and Auckland. Her recent experience in environment-related investment treaty disputes includes acting for the Kyrgyz Republic, in defending United Nations Commission on International Trade Law (UNCITRAL) arbitration proceedings in relation to a US$100 million claim by Canadian mining company Centerra Gold arising from environmental fees and penalties. Erin has acted in matters under a number of arbitral institutions and rules including those of UNCITRAL, the Australian Centre for International Commercial Arbitration, the Singapore International Arbitration Centre, the Permanent Court of Arbitration, the International Centre for

Settlement of Investment Disputes, the International Chamber of Commerce, the Hong Kong International Arbitration Centre and the London Court of International Arbitration.

Erin is admitted in England and Wales (with higher rights of audience), New Zealand, New South Wales and the federal and high courts of Australia.

Babatunde O Fagbohunlu, SAN
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Babatunde O Fagbohunlu, SAN is a partner and the head of the litigation, arbitration and ADR practice group at Aluko & Oyebode. In December 2008, Tunde was conferred with the rank of Senior Advocate of Nigeria (SAN) by the Nigerian Legal Practitioners' Privileges Committee (the Nigerian equivalent of Queen's Counsel).

Tunde regularly represents Nigerian, as well as foreign and multinational, clients in ad hoc arbitrations and arbitrations administered by arbitral institutions. He has also acted as an arbitrator at several ad hoc arbitral tribunals as well as arbitrations administered by the Court of Arbitration of the International Chamber of Commerce and the London Court of International Arbitration (LCIA).

He is a member of the Nigerian Bar Association, the International Bar Association, the Body of Senior Advocates of Nigeria, the LCIA (African Users Council) and the International Arbitration Institute in Paris, and has served on the LCIA Court. He is a fellow of the Chartered Institute of Arbitrators and a former chair of the board of directors of the Lagos Chamber of Commerce International Arbitration Centre.

His publications on arbitration include the following: *Arbitration in Africa: A Review of Key Jurisdictions* (Sweet & Maxwell, 2016, co-authored with John Miles and Kamal Shah); 'A Case for a Different Analytical Approach to the Enforcement of International Arbitration Agreements: The MV Lupex in Perspective' (*Appellate Review*, Volume 1, 2009) and 'The Principle of Limited Court Intervention Survives in Nigeria . . . But How Far Will the Courts Go?' (*Kluwer Arbitration Blog*, 2 August 2013).

Kristina Fridman
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Kristina Fridman focuses her practice on international arbitration and complex commercial litigation.

Kristina has significant experience in international arbitration and related litigation. She has represented and counselled both foreign and domestic clients involved in International Chamber of Commerce, JAMS, American Arbitration

Association, International Centre for Settlement of Investment Disputes and United Nations Commission on International Trade Law arbitrations, as well as before New York courts. She has also represented clients in enforcement proceedings, Section 1782 actions and litigation regarding enforcement of an arbitration agreement. In addition to her international arbitration experience, she has experience with complex commercial litigation, including breach of joint venture agreements, earn-out disputes, theft of trade secrets and breach of contract disputes.

While at Columbia Law School, Kristina received the Parker Law School Certificate for her studies in foreign and comparative law.

Albina Gasanbekova
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Albina Gasanbekova's practice focuses on international arbitration and federal litigation matters involving contract disputes, enforcement of arbitral awards, public international law and jurisdictional issues, including the application of the Foreign Sovereign Immunity Act. Albina also represents clients across various industries in connection with intellectual property involving copyright and trademark infringement.

In addition to her work, Albina serves on the editorial board for *ITA in Review*, an e-journal devoted to international arbitration. She was also recognised as a 'Rising Star' in the field of international law by *New York Super Lawyers*. Albina is a native Russian speaker, dual-qualified in both common law and civil law, and can help clients orient and navigate in a wide variety of legal systems and jurisdictions.

Charles Golsong
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Charles Golsong is a dispute resolution counsel in Pillsbury's acclaimed international arbitration team in London. Charles has a wide range of experience in all aspects of international arbitration, across a broad range of industry sectors, including energy, intellectual property, construction, infrastructure and petrochemicals. Charles has advised clients in numerous jurisdictions under the rules of major institutions, including those of the London Court of International Arbitration, the International Chamber of Commerce, Dubai International Arbitration Centre, the Stockholm Chamber of Commerce, Hong Kong International Arbitration Centre and the United Nations Commission on International Trade Law. He also has experience in investor–state disputes, litigation (principally arbitration-related) and regulatory investigations.

Charles has been recognised by *The Legal 500: UK* for his expertise in international arbitration in 2020 and 2021, has published articles on arbitration-related English law developments, and has given firm-wide lectures on international arbitration issues. Charles is fluent in French.

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Mino Han is a partner at Peter & Kim in Seoul. He specialises in construction and engineering disputes and has acted as counsel under the arbitration rules of the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre, the Korean Commercial Arbitration Board (KCAB) and the Japan Commercial Arbitration Association. He has worked on disputes relating to projects based in the Middle East, Asia, Eastern Europe, Africa and Latin America.

Mino is currently the representative of the Chartered Institute of Arbitrators Korea Chapter and a regional representative for the ICC Young Arbitrators Forum. He is a steering committee member of KCAB Next, a platform for younger members of the arbitration committee, and is on the committee of the Korean Committee on International Arbitration. Mino is also on the panel of international arbitrators at KCAB International.

Mino has been recognised as a 'National Leader' by *Who's Who Legal: Arbitration 2021*, which states that he is distinguished as a 'rising star of the Korean arbitration market' and stands out as an 'extremely bright and strong advocate', according to impressed peers.

Mino qualified as a Korean lawyer in 2009 and was admitted as a solicitor in England and Wales in 2019. He received a Master of Laws degree in international arbitration law from Seoul National University in 2012 and an MSc degree in construction law and dispute resolution at King's College London in 2018. He has published more than 15 articles in the past three years, including 'The Application of the United Nations Convention on Contracts for the International Sale of Goods to Manufacturing and Supply Contracts for International Construction Projects', which he co-authored for *The International Construction Law Review* in 2019.

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Kristi How is a state counsel in the International Affairs Division of the Attorney-General's Chambers (AGC) of Singapore where she provides legal advice to the Singapore government on public international law issues and regularly advises on international trade and investment law matters. She has acted as legal counsel in bilateral and multilateral free trade agreement negotiations and investment treaty negotiations. She has also represented Singapore as a third party in various World Trade Organization panel proceedings. Prior to joining the AGC, she was in private practice and acted in commercial disputes before the Singapore courts and international arbitration tribunals. Kristi is an adjunct lecturer at the National University of Singapore Faculty of Law where she teaches a module on international lawmaking.

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Koh Swee Yen is a partner in the commercial and corporate disputes and international arbitration practices at WongPartnership LLP.

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Swee Yen is highly recommended for her expertise in resolving complex international disputes, and is named in various legal publications, including *The Legal 500*, *Chambers Global* and *Who's Who Legal: Arbitration 2021*. Described as being 'in a league of her own', with a 'very deep understanding of the law' and 'razor-sharp' in her advocacy, she is regarded as the 'go-to disputes lawyer in Singapore'.

Kristi holds law degrees from New York University School of Law and the National University of Singapore. She is dual-qualified in Singapore and New York.

Amanda Lees
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Amanda Lees is a cross-border dispute resolution specialist based in the firm's Singapore office.

Having been based in Singapore for 10 years, Amanda is an expert in international arbitration in the Asia-Pacific region, including in Malaysia, Indonesia, Vietnam, Myanmar, India, China, Hong Kong, Singapore and Australia. She also acts as international counsel in complex cross-border litigation.

Amanda is quick to grasp complex and technical contractual disputes across a range of industry sectors, including energy and resources, commodities, construction, finance, insurance, telecommunications, technology, manufacturing and consumer goods. Amanda takes a strategic approach to dispute resolution that keeps her clients' commercial objectives at the fore.

Amanda represented the Republic of Indonesia as advocate in its successful defence of a US$580 million claim under the India–Indonesia BIT, which was arbitrated under the UNCITRAL Rules and administered by the Permanent Court of Arbitration.

Signifying Amanda's expertise and reputation, she is regularly appointed as arbitrator and is on the arbitrator panels of leading arbitral institutions. She is a director of the Singapore branch of the Chartered Institute of Arbitrators and has taught arbitration procedure and law to hundreds of lawyers across the Asia-Pacific region. Amanda is a regular speaker at international conferences and is recognised by *The Legal 500*.

Mollie Lewis
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Mollie Lewis is a principal associate with experience of disputes across a range of industry sectors under the arbitration rules of the London Court of International Arbitration (LCIA), Dubai International Financial Centre-LCIA Arbitration Centre, the International Chamber of Commerce, the United Nations Commission on International Trade Law and the Court of Arbitration for Sport.

She represents international clients in commercial and investment treaty arbitrations and has acquired experience within various leading arbitration practices in firms in Paris and New York, as well as in an arbitral institution.

Mollie studied law in both France and New York. She received a dual master's and bachelor's degree in international business law (French and common law) from the Université Paris Nanterre and an LLM in dispute resolution from the Benjamin N Cardozo Law School in New York.

Mollie is fluent in French and English, is admitted to the New York Bar and is a Young ICCA member.

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Jenna Lim is an associate with Pillsbury's international arbitration group, and is based in the Tokyo office. Her principal area of practice is in international arbitration and commercial disputes involving cross-jurisdictional issues. She regularly acts for clients based in Asia-Pacific and has experience acting in areas such as investment arbitration, construction arbitration, energy and intellectual property. She handles matters under the arbitral rules of the Singapore International Arbitration Centre, the International Chamber of Commerce, the London Court of International Arbitration, the International Centre for Settlement of Investment Disputes and Hong Kong International Arbitration Centre, working closely with Pillsbury's global international arbitration team. Jenna is also an associate member of the Singapore Institute of Arbitrators.

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Nicholas Lingard is an experienced international arbitration counsel and advocate and the head of Freshfields' international arbitration practice in Asia.

He leads one of the most active treaty arbitration practices in Asia, representing both investors and states, in high-profile, politically complex cases around Asia and the world.

Nick also represents clients in commercial and construction disputes across a variety of industries, under all major arbitral rules, including those of the International Centre for Settlement of Investment Disputes, the International Chamber of Commerce, the Singapore International Arbitration Centre, the United Nations Commission on International Trade Law, the Hong Kong International Arbitration Centre, the Kuala Lumpur Regional Centre for Arbitration, the Japan Commercial Arbitration Association, the American Arbitration Association and the Netherlands Arbitration Institute, and under all major systems of law.

He provides public international law advice to government and private clients, and accepts occasional appointments as arbitrator.

Nick is recognised as a leading international arbitration practitioner by all the major directories, including as a Band 1 'Leading Individual' for arbitration in Singapore by *The Legal 500*. In 2018, he was named 'International Arbitration Lawyer of the Year' at the Asia Legal Awards.

A former law clerk to the Chief Justice of Australia, Nick was educated at the University of Queensland, where he graduated top of his class in law and Japanese, and Harvard Law School, where he was a Frank Knox Memorial Fellow.

Jack McNally
King & Wood Mallesons

Jack McNally is a law clerk at King & Wood Mallesons' Sydney office and a research assistant in public international law at the University of New South Wales. Jack's research, for which he was awarded the International Law Association's 2021 Brennan Prize in Public International Law, focuses on all areas of public international law and international dispute resolution. He has particular research interest in the law of the sea, the Pacific Settlement of Disputes and international procedural law. At King & Wood Mallesons, Jack assists with international commercial arbitration and in matters concerning international trade and investment law. In 2022, Jack will take leave from King & Wood Mallesons to undertake an appointment as Tipstaff to a Justice of the Supreme Court of New South Wales.

Mark Mangan
Dechert LLP

Mark Mangan is the head of Dechert LLP's international arbitration practice in Asia and has appeared as counsel in over 50 cases and as arbitrator on more than 25 occasions. Mark and his team were recently awarded 'International Arbitration

Team of the Year' at *The Legal 500: Southeast Asia* Awards 2020/2021, while Mark was runner-up at the same ceremony for the prestigious 'Private Practice Lawyer of the Year' award covering all legal practice areas.

The Legal 500 (2021) ranks Mark as a Band 1 'Leading Individual' for international arbitration in Singapore and observes that he 'is an outstanding lawyer, a great strategist and executes the strategy with his great advocacy skills'. *Chambers* (2021) similarly notes that Mark 'is an "excellent arbitration practitioner" and "a very sharp cross-examiner" who has "an impressive track record acting on a range of arbitration mandates, from commercial and investment treaty to sports arbitrations"'.

Mark represents and advises both investors and states in investment treaty disputes. As well as being co-editor of *The Guide to Investment Treaty Protection and Enforcement*, Mark's academic contributions include being author of the chapter herein on MFN clauses, and editor and author of Global Arbitration Review's online 'Investment Treaty Arbitration Know-how' series. In addition, Mark is a co-author of both editions of a leading book on Singapore arbitration, *A Guide to the SIAC Arbitration Rules* (Oxford University Press), and the author of over 20 published articles and book chapters on international arbitration.

Tamlyn Mills
Norton Rose Fulbright

Tamlyn Mills is a dispute resolution partner based in Norton Rose Fulbright's Sydney office, specialising in international arbitration and investment treaty arbitration. She has acted as counsel to a range of clients in foreign-seated arbitrations under the major arbitral rules as well as in domestic ad hoc arbitrations. Her practice includes the recognition and enforcement of commercial and investment treaty awards in Australia and she has acted in Australia's leading cases in this area. Tamlyn also regularly advises clients on effective dispute structuring and risk mitigation in commercial contracts.

Tamlyn holds a master of laws with distinction from the London School of Economics and Political Science, specialising in international dispute resolution. She is active in the international arbitration community, serving as a member of the NSW State Committee of the Australian Centre for International Commercial Arbitration and a member of ArbitralWomen.

Ananya Mitra
Dechert LLP

Ananya Mitra is an associate with Dechert LLP's international arbitration practice in Asia. She focuses her practice on international commercial and investment arbitration, particularly in oil and gas, renewable energy, decarbonisation, M&A and medical sectors, as well as India-related matters. Prior to joining Dechert, Ananya worked with well-known international arbitration practices in Paris and London, and completed her studies in Geneva.

Boaz Moselle
Compass Lexecon

Boaz Moselle is an executive vice president at Compass Lexecon, based in London. He is an economist who has worked in academia, consulting and government.

Dr Moselle's expertise includes the estimation of damages, with a particular focus on energy, commodities and regulated infrastructure. He has provided expert witness testimony in over 50 international arbitrations, in both commercial and investment treaty disputes. *Who's Who Legal* notes that 'one client describes him as "the best expert I have ever seen under cross-examination, and possibly the brightest I have seen in my whole career"'.

Dr Moselle holds a PhD in economics from Harvard University and an MA and PhD in mathematics from the universities of Cambridge and London. He was previously a managing director of the UK energy regulator Ofgem. He teaches in the Brussels School of Competition and as a guest lecturer at Queen Mary University of London.

Rebeca E Mosquera
Akerman LLP

Rebeca E Mosquera focuses her practice on a variety of cross-border disputes involving sovereigns and companies, mainly in the Americas and Europe. She regularly represents private entities, investors, states, state entities and government instruments in international commercial and investment arbitration disputes under the rules of the International Chambers of Commerce, the American Arbitration Association, the International Centre for the Settlement of Investments Disputes and the United Nations Commission on International Trade Law, as well as ad hoc proceedings.

Rebeca has received several accolades and awards for her work in international arbitration. *Who's Who Legal* notes that 'she is undoubtedly one of the names to be regarded for arbitration in the US'. She has also been recognised by *Latinvex* as one of 'Latin America's Top 100 Female Lawyers' and, more recently,

Rebeca was honoured among the *New York Law Journal*'s 2021 'Rising Stars', which recognises the region's most promising lawyers. She serves as a board member of Arbitral Women and as an International Chamber of Commerce Young Arbitrators Forum regional representative for North America. Rebeca is a dual-qualified attorney in New York and the Republic of Panama.

Patricia Nacimiento
Herbert Smith Freehills LLP

Dr Patricia Nacimiento is the head of the German dispute resolution practice of Herbert Smith Freehills LLP. She has over 20 years of experience as a disputes practitioner. Her practice spans a wide range of disputes work with a special focus on domestic and international arbitration, as well as investor–state disputes. Patricia has significant experience in disputes related to energy, construction and post-M&A. In 2007, the German government appointed her as one of four arbitrators to the panel of arbitrators at the International Centre for Settlement of Investment Disputes (ICSID). As a party representative, she has conducted over 150 arbitration proceedings under the rules of numerous arbitration institutions, including the International Chamber of Commerce (ICC), ICSID, the Stockholm Chamber of Commerce, the China International Economic and Trade Arbitration Commission, the German Arbitration Institute (DIS), the London Court of Interntional Arbitration, the International Centre for Dispute Resolution, the Swiss Chamber of Commerce, the Indian Council of Arbitration and the Danish Institution of Arbitration, as well as ad hoc proceedings. She is also regularly appointed as an arbitrator and has led numerous international ICC, DIS and ad hoc arbitration proceedings as a chairperson, sole arbitrator or party-appointed arbitrator.

For years, Patricia has been listed as a leading disputes expert in the renowned rankings. She publishes regularly on disputes-related subjects and is co-editor of the leading arbitration manuals *Arbitration in Germany – The Model Law in Practice* (Kluwer 2015) and *The New York Convention – a Global Commentary* (Kluwer 2008). Patricia gives lectures on arbitration at the universities of Heidelberg, Frankfurt and Saarbrücken. A native German speaker, Patricia is also fluent in English, Spanish, Italian and French.

Stanley U Nweke-Eze
Templars

Stanley U Nweke-Eze is a senior associate at Templars and is admitted to practise law in Nigeria and the State of New York.

He is recognised as 'one of Africa's 50 Most Promising Young Arbitration Practitioners' by the Association of Young Arbitrators, and his practice primarily focuses on complex and high-value commercial and public law litigation, international and domestic commercial and investment treaty arbitrations, commercial mediation and public international law. He has experience with disputes across a broad range of industries, including construction, energy and natural resources, technology and telecommunications, professional services and general commercial law issues. He is also experienced in transaction advisory as well as investigations, white collar and compliance. Before joining Templars, he worked at international law firms in London.

Stanley holds a Master of Laws degree in international economic law from Harvard Law School and a second Master of Laws degree in commercial law from the University of Cambridge. He graduated with first class honours from Nnamdi Azikwe University and won several top prizes during his academic training, including for advocacy and brief writing.

Stanley has served as an editor of several journals, including the *Cambridge Journal of International and Comparative Law*, *Harvard International Law Journal*, *Harvard Negotiation Law Review* and *Harvard Africa Policy Journal*. He is a member of the Africa Users Council of the Singapore International Arbitration Centre, the Association of Young Arbitrators and the Young International Council for Commercial Arbitration, among others.

Ziad Obeid
Obeid & Partners

Ziad Obeid is a dual-qualified lawyer with a civil engineering background and extensive cross-border experience gained through legal practice in Europe and the Middle East.

Identified among the world's foremost dispute resolution practitioners in *Who's Who Legal Thought Leaders: Arbitration 2021*, Ziad has notable expertise in international arbitration and cross-border dispute resolution proceedings. His experience covers cases brought under bilateral investment treaties, international legal instruments and contractual provisions across the real estate, reinsurance, construction, oil and gas, nuclear, power generation and telecoms sectors. He also advises on diverse public international law issues. He regularly acts as counsel, sole arbitrator, chairperson or co-arbitrator in multifaceted international arbitrations conducted in Arabic, French and English brought both ad hoc and under a variety of institutional rules and subject to a wide range of applicable laws from within the MENA region and beyond.

Ana María Ordoñez Puentes
Colombia's National Agency for Legal Defence of the State

Ana María Ordoñez Puentes is the head of Colombia's international litigation division at Colombia's National Agency for Legal Defence of the State. She is a lawyer at the Pontifical Javeriana University in Colombia, with an LLM from King's College London. She has acquired experience in international arbitration and litigation through her work in local and global law firms. She began her career in public service in Colombia more than eight years ago. As the head of the international litigation division at the Agency, she structured Colombia's legal defence model, and faced the first investment disputes filed against Colombia. For the past four years she has led the Agency's work to consolidate what has been a successful defence model. She also forms part of the Colombian delegation that participates in the reform of investor–state dispute settlement in UNCITRAL's Working Group III and the ICSID rule amendment.

Eun Young Park
Kim & Chang

Dr Eun Young Park is a partner at Kim & Chang and serves as the co-chair of the international arbitration and cross-border litigation practice.

After serving as a judge in the Seoul District Court, Dr Park joined Kim & Chang where he leads the firm's international arbitration and cross-border dispute practice.

Dr Park is a member of the Singapore International Arbitration Centre Court of Arbitration and formerly served as a vice president of the Court of the London Court of International Arbitration, vice chair of the International Bar Association (IBA) Arbitration Committee and a founding co-chair of the IBA's Asia-Pacific Arbitration Group.

Dr Park has earned numerous top rankings as one of the 'leading attorneys' in international arbitration in *Chambers Asia-Pacific*, *Expert Guides: Commercial Arbitration* and *Who's Who Legal: Arbitration*. According to *Chambers Asia-Pacific* 2021, in which he was recognised as an 'eminent practitioner', he is well received as 'a titan of the Korean arbitration Bar, with a fearsome reputation that precedes him'. In 2018, he was officially commended by the Minister of Justice of the Republic of Korea in recognition of his service to the promotion of arbitration practice and the rule of law in Korea.

Shul Park
Kim & Chang

Shul Park is an attorney in the international arbitration and cross-border litigation practice group at Kim & Chang.

Ms Park has experience representing clients on arbitrations governed by a variety of institutional rules, including the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre, the Brazil-Canada Chamber of Commerce and the Korean Commercial Arbitration Board, as well as ad hoc arbitrations in various jurisdictions. She has extensive experience in disputes expanding across several industry sectors, including construction and infrastructure, mining, consumer retail and telecommunications.

Ms Park currently serves as the regional representative of the ICC Young Arbitrators Forum for the North Asia Chapter. Prior to rejoining Kim & Chang in 2019, Ms Park was an international associate in the Washington office of Three Crowns LLP. She received her LLM from Harvard Law School in 2019 and her JD from Seoul National University School of Law in 2015.

Maria Paschou
Obeid & Partners

Maria Paschou is a principal associate with experience in international commercial arbitration and investment treaty arbitration.

Maria advises and represents corporations, states and non-governmental organisations in inter-state, investor–state and international commercial arbitration disputes. She has worked extensively on complex arbitration and litigation matters ranging from investment treaty cases to contractual disputes across the construction, energy and natural resources, retail and consumer goods, and telecoms sectors. On the advisory front, Maria has negotiated and drafted complex commercial contracts and has valuable experience in contract, corporate, IP/IT and privacy law.

Maria holds an LLB from the Democritus University of Thrace, an LLM in public international law from the National and Kapodistrian University of Athens and an MIDS LLM in international dispute settlement from the University of Geneva and the Graduate Institute of International and Development Studies.

Maria is fluent in English and Greek.

Elizabeth Prado López
Colombia's National Agency for Legal Defence of the State

Elizabeth Prado López is an expert counsel at Colombia's National Agency for Legal Defence of the State. She specialises in international commercial and investment arbitration. She has acted as counsel in international arbitrations under the ICSID, ICC and UNCITRAL rules in the mining, energy, infrastructure, financial and information technology sectors. In addition to her activities as counsel, she also advises the Colombian government on the reform of investor–state dispute settlement in UNCITRAL's Working Group III and participates in pre-arbitral negotiations. Prior to joining the international litigation team in 2019, Elizabeth taught international arbitration at a local university and advised international investors and different state agencies on complex disputes. She was also a member of the Colombian negotiating team for the free trade agreement between the EU and Colombia and Peru and worked as an associate lawyer at a local firm. Elizabeth holds an LLM from the University of Geneva (master's degree in international dispute settlement, 2011) and is fluent in Spanish, English, German and French.

Roland Reimers
Pillsbury Winthrop Shaw Pittman LLP

Roland Reimers is an associate in the firm's litigation practice, where he focuses on complex commercial litigation and international arbitration matters.

While at law school, Roland gathered experience in the Civil Division of the US Attorney's Office for the Eastern District of New York, where he supported assistant US attorneys in investigative and prosecutorial work. He also served as a legal intern with the US Commodity Futures Trading Commission's Division of Enforcement in New York.

Prior to law school, Roland worked as a business intelligence analyst in the London office of a major US consulting firm. He was also employed by the US Department of State at the US Embassy in Berlin and spent time with the European Union Delegation to China and Mongolia in Beijing.

Stefan Riegler
Wolf Theiss

Stefan Riegler is a member of the dispute resolution team and heads the arbitration practice. Stefan specialises in advising companies on commercial disputes, especially in the energy, construction and infrastructure sectors; he is also experienced in handling corporate, post-M&A and banking disputes. Stefan has acted as counsel and arbitrator under major arbitration rules, as well as in ad

hoc arbitration proceedings. Stefan is a member of the board of the Austrian Arbitration Association and of the board of the Vienna International Arbitral Centre, as well as a member of the International Chamber of Commerce Commission on Arbitration.

Noah Rubins
Freshfields Bruckhaus Deringer LLP

Noah Rubins QC is a partner and the head of the international arbitration group at Freshfields Bruckhaus Deringer's Paris office. He also leads the firm's CIS/Russia dispute resolution group. Noah has advised and represented clients in arbitrations under the rules of the International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility, the International Chamber of Commerce, the American Arbitration Association, the Stockholm Chamber of Commerce, the London Court of International Arbitration, the International Commercial Arbitration Court and the United Nations Commission on International Trade Law (UNCITRAL). He specialises in investment arbitration, particularly under the auspices of bilateral investment treaties and the Energy Charter Treaty, and has also practised law in New York, Washington, Houston and Istanbul. He has served as arbitrator in nearly 50 cases, including three investment treaty disputes adjudicated under the UNCITRAL Rules and one under the ICSID Rules.

A member of the Paris Bar and the New York Bar, Noah is also a Barrister of England and Wales and a Queen's Counsel.

Deborah Ruff
Pillsbury Winthrop Shaw Pittman LLP

Deborah Ruff is the global head of Pillsbury's international arbitration group and leads a reputable team from the firm's office in London. She has extensive experience acting as counsel with a focus on multi-jurisdictional disputes, investment treaty arbitrations and high-value and complex international commercial arbitration matters. She advises an expansive group of international clients spanning from the Middle East to Asia, and is well trusted for providing excellent guidance and strategies in a broad range of sectors across various governing laws, seats and institutional rules.

Deborah is highly regarded in the international arbitration field and is routinely featured in leading legal directories. She was named in *The Legal 500: UK*'s 'Hall of Fame' in 2021. She is a frequent speaker and contributor on international arbitration topics in the UK and globally. She was named as one of only

12 experts in commercial arbitration in the Women in Business Law Awards and was the first woman invited to speak at Regent's Park mosque on arbitration in the Islamic world. Deborah speaks Spanish, Italian, French and German.

Roopali Singh
AZB & Partners

Roopali Singh is a partner in the litigation and disputes team at AZB & Partners. She has over 17 years of experience in the practice of arbitration, litigation, mergers and acquisitions and insolvency matters. Her clients include some of the world's leading corporations, private equity funds and government/state-owned entities, whom she has represented in international commercial and domestic arbitrations. She has acted in disputes across a broad range of sectors, such as construction, broadcasting, sports, oil and gas and telecom, under all major institutional rules, including those of the Singapore International Arbitration Centre, the International Chamber of Commerce and the London Court of International Arbitration. In addition, she has appeared in leading international seats, such as London, Singapore and Mumbai. Most recently, Roopali was successful in obtaining the first judgment of its kind from the Indian Supreme Court recognising the enforceability of an emergency arbitrator's award in the much-publicised dispute between Amazon and Future Retail Limited. She has successfully acted for Swiss Timing Ltd in establishing the arbitrability of fraud with simultaneous criminal proceedings involving red corner notices issued by Indian government agencies. Roopali has also successfully enforced the right of first refusal obligations in a shareholders' dispute involving Mumbai International Airport Limited.

Vijayendra Pratap Singh
AZB & Partners

Vijayendra Pratap Singh is a partner and head of litigation at AZB & Partners. Vijayendra has spearheaded various arbitrations pertaining to the validity of shareholder agreements, option contracts, long-term supply, claims on account of cancellation of coal blocks, confidentiality and franchising and intellectual property issues. The arbitrations are ad hoc as well as institutional, and seated across multiple jurisdictions. He represented the Singapore International Arbitration Centre in the *BALCO* case before the Supreme Court on the scope and extent of judicial intervention of Indian courts with foreign seated arbitrations. He presently represents Amazon in the much-publicised dispute with Future Retail

Limited. Vijayendra was named the 'Dispute Resolution Star of the Year' in 2013, 2018, 2019, 2020 and 2021 by *Benchmark Litigation Asia Pacific* and has been listed in *Global Arbitration Review* in 2012, 2018, 2019 and 2020.

Derek Soller
Pillsbury Winthrop Shaw Pittman LLP

Derek Soller focuses his practice on international arbitration and cross-border dispute resolution, with particular experience in complex, large-scale energy and infrastructure disputes.

Derek has over 10 years of experience representing both investors and states in investor–state arbitrations, and private parties in international arbitration, under all common arbitration rules (International Chamber of Commerce, American Arbitration Association, JAMS, London Court of International Arbitration, Singapore International Arbitration Centre and the International Centre for Settlement of Investment Disputes). Derek takes a commercially minded approach, focusing on avoiding and favourably settling disputes where it is advantageous to do so.

Charis Tan
Peter & Kim

Charis Tan is a partner at Peter & Kim, who specialises in international commercial and investment treaty arbitration and public international law. She is admitted in three jurisdictions (Singapore, England and Wales, and New York).

Charis's experience includes investment and commercial arbitrations under the rules of major arbitration institutions, such as the International Centre for Settlement of Investment Disputes, the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre and the Stockholm Chamber of Commerce, ad hoc proceedings under United Nations Commission on International Trade Law Rules, and high-profile state-to-state disputes before the International Court of Justice. She also acts for national oil companies and international oil companies in both contentious and non-contentious upstream oil and gas matters. Charis is appointed as counsel and she also sits as an arbitrator in both commercial arbitration and state-to-state cases.

Charis has been recommended by *Who's Who Legal*, *The Legal 500* and *GAR 100* for international arbitration. An initiative she spearheaded for the training of government officials was awarded the Asia Pacific FT Innovative Lawyers (social responsibility) award.

Charis is currently on the *ICC Dispute Resolution Bulletin* editorial board, the ICC's Singapore Arbitration Group core committee and the Council of the International Law Association in Singapore, and is the co-editor of *Investment Protection in Southeast Asia, A Country-by-Country Guide* (Brill, 2017).

Charis previously taught at the National University of Singapore.

Samantha Tan
Freshfields Bruckhaus Deringer

Samantha Tan is a senior associate in Freshfields' international arbitration practice group, based in Singapore. She has extensive experience representing clients in complex, high-profile and politically sensitive disputes.

Samantha's practice includes representing states and investors in investment treaty arbitrations, as well as international commercial and construction arbitrations. She has been involved in several arbitrations relating to oil and gas exploration and development, post-M&A issues, joint ventures, shareholder disputes, real estate investments, and major industry sectors including manufacturing, pharmaceuticals and technology.

Samantha is recognised by *Who's Who Legal* as a 'Future Leader' of the international arbitration community.

She has years of experience acting in commercial litigation before the Singapore High Court and the Court of Appeal, with a top-tier Singapore disputes practice. She also regularly acts as mediator.

Adilbek Tussupov
Herbert Smith Freehills LLP

Adilbek Tussupov is a member of the firm's dispute resolution team based in Frankfurt. He focuses his practice on international dispute resolution matters, with a particular emphasis on investment and commercial arbitration. Adilbek has experience representing governments, sovereign wealth funds and diplomatic missions in arbitration and litigation. His recent work includes defending an Eastern European state in a multimillion dollar investment arbitration under the International Chamber of Commerce Arbitration Rules, as well as representing a government in post-arbitration enforcement proceedings in several jurisdictions.

Adilbek studied international law at Kazguu University in Kazakhstan. He also obtained a Master of Laws degree (LLM) from the Europa-Institut of the University of Saarland, where he focused his studies on international trade and investments. In 2021, he obtained a doctorate degree in law with the highest distinction (*summa cum laude*) from the University of Saarland.

Prior to joining Herbert Smith Freehills, he worked as a senior lecturer at the chair of international law at Kazguu University and held a position with an in-house counsel team of the Kazakh sovereign wealth fund, Samruk-Kazyna JSC. Adilbek is admitted to the Kazakh Bar and regularly lectures in universities in Kazakhstan and Uzbekistan. He is a native speaker of Russian and Kazakh, is fluent in English and has a working knowledge of German.

Dalibor Valinčić
Wolf Theiss

Dalibor Valinčić heads the dispute resolution team in Zagreb. He focuses on investment and commercial arbitration and has extensive experience in energy law. Dalibor combines an international perspective, which comes from advising clients from several different countries, with a very good local rapport. He has successfully represented investors in multimillion-dollar arbitrations under the rules of both the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law. His commercial arbitration experience includes representing and advising clients in arbitrations under the Vienna International Arbitration Centre Rules, the International Chamber of Commerce (ICC) Rules and the local Zagreb Rules. His sector experience covers industries such as oil and gas, hospitality and food manufacturing. Dalibor holds an LLB from the University of Zagreb Law School and an LLM (with distinction) in international and comparative dispute resolution from Queen Mary and Westfield College, University of London. He is a visiting lecturer at the University of Osijek Law School and a regular speaker and panelist at conferences and seminars. Dalibor is a member of the ICC Croatia Arbitration Committee.

Giovanny Vega-Barbos
Colombia's National Agency for Legal Defence of the State

Giovanny Vega-Barbosa is an expert counsel at Colombia's National Agency for Legal Defence of the State. He is a lawyer from the University of Rosario in Colombia, with an LLM from University College London (Chevening scholar). Before joining the investment arbitration group at Colombia's National Agency for Legal Defence of the State, he served in several capacities at the Colombian Ministry of Foreign Affairs, including as legal adviser of the Treaty Section and as chief of the International Legal Advisory Section. Giovanny has also advised the Colombian government and Colombian entities in proceedings before the International Court of Justice, the Inter-American Court of Human Rights and commercial arbitration tribunals. He teaches public international law at the

National University of Colombia and the University of La Sabana in Colombia. He has also published in the field of international human rights law, the law of the sea and international adjudication.

Alvin Yeo
WongPartnership LLP

Alvin Yeo, Senior Counsel, is the chairman of, and a senior partner at, WongPartnership LLP. He was appointed Senior Counsel of the Supreme Court of Singapore in 2000 at the age of 37, the youngest ever person to be so appointed. His main areas of practice are litigation and arbitration in banking, corporate/commercial and infrastructure disputes.

Alvin is a member of the Court of the Singapore International Arbitration Centre and the International Chamber of Commerce Commission, a fellow of the Asian Institute of Alternative Dispute Resolution, the Singapore Institute of Arbitrators and the Singapore Institute of Directors, and a former member of the London Court of International Arbitration and the International Bar Association Arbitration Committee. He is also on the panel of arbitrators in the Hong Kong International Arbitration Centre, the International Centre for Dispute Resolution, the Korean Commercial Arbitration Board, the South China International Economic Trade Arbitration Commission and the Singapore Institute of Arbitrators' Panel for Sports in Singapore.

Alvin is a member of the Disciplinary Tribunal chairman panel of both the Singapore Medical Council and the Supreme Court and of the Appeals Advisory Panel of the Monetary Authority of Singapore, as well as the Governing Board of the Centre for International Law at the National University of Singapore.

Seokchun Yun
Kim & Chang

Seokchun Yun is a senior attorney in Kim & Chang's international arbitration and cross-border litigation practice.

Mr Yun has successfully represented government and domestic and foreign multinational clients at all stages of international arbitrations under the major arbitration rules, including those of the International Centre for Settlement of Investment Disputes, the International Chamber of Commerce, the Singapore International Arbitration Centre, Hong Kong International Arbitration Centre, the International Centre for Dispute Resolution, the Japan Commercial Arbitration Association and the Korean Commercial Arbitration Board, as well as in ad hoc arbitrations. He has also represented clients in international mediations under Singapore International Mediation Centre rules and before the World

Trade Organization (WTO) panel. During his secondment at Kobre & Kim LLP in New York, Mr Yun was involved in the enforcement of arbitral awards and foreign judgments, asset tracing and recovery. He has handled legal matters and issues implicating various governing laws and international investment treaties as well as other international instruments and norms such as the United Nations Convention on Contracts for the International Sale of Goods and International Institute for the Unification of Private Law principles and WTO treaties.

Mr Yun currently serves as a director of the Korean Society of International Economic Law, the Korea International Trade Law Association and the Korea Private International Law Association, and actively publishes articles and authors treatises on various topics including international arbitration and trade. He received his LLM from Harvard Law School and his LLB and LLM from Seoul National University. Mr Yun is admitted to the New York Bar and the Korean Bar.

APPENDIX 2

The Contributing Arbitrators

Albert Jan van den Berg
Hanotiau & van den Berg

Professor Albert Jan van den Berg is a partner at Hanotiau & van den Berg in Brussels, Belgium. He is a sought-after presiding and party-appointed arbitrator in international commercial and investment arbitrations. He also acts as counsel in international commercial arbitrations and in set-aside proceedings. Professor van den Berg is honorary president of the International Council for Commercial Arbitration, having served as president from 2014 to 2016. He is a visiting professor at Georgetown University Law Center, National University of Singapore Faculty of Law, Tsinghua University School of Law and University of Miami School of Law; emeritus professor (arbitration chair) at Erasmus University, Rotterdam; and a member of the faculty and the advisory board of the University of Geneva Master in International Dispute Settlement Programme. He is honorary president of the Netherlands Arbitration Institute, having served as its president and secretary general, and former vice president of the London Court of International Arbitration. Professor van den Berg has published extensively on international arbitration (see www.hvdb.com); in particular, the New York Convention of 1958. His awards include Global Arbitration Review's 'Best Prepared and Most Responsive Arbitrator' in 2013 and *Who's Who Legal*'s 'Arbitration Lawyer of the Year' in 2006, 2011 and 2017.

Karl-Heinz Böckstiegel

Karl-Heinz Böckstiegel is an independent arbitrator and a member of the Law Faculty of the University of Cologne as professor emeritus. Professor Dr Böckstiegel has practised as arbitrator and president of arbitration tribunals in many national and international arbitrations of the ICC, LCIA, ICSID, PCA, NAFTA, the CAFTA, UNCITRAL, AAA, DIS, the Cairo Regional Centre for International Commercial Arbitration, CIETAC, Dubai International Arbitration Centre, the

Arbitration Institute of the Stockholm Chamber of Commerce and the Vienna International Arbitral Centre, as well as under the Swiss Rules of International Arbitration and in ad hoc arbitrations and disputes between states. He has been the appointing authority in several PCA cases. In view of his age, in 2018 he stopped accepting new arbitrator appointments and, at the end of 2019, resigned from those appointments in cases still pending at that time.

Charles N Brower
Twenty Essex

Judge Charles N Brower sits as judge ad hoc of the International Court of Justice in three ongoing contentious cases (the most-appointed US citizen to such office of the only four US citizens ever so appointed). He has been a judge of the Iran–United States Claims Tribunal since 1983, and has sat as judge ad hoc of the Inter-American Court of Human Rights. He is an arbitrator member of Twenty Essex. In 2013, *The American Lawyer* named him 'the reigning king of arbitrators'. From 1969 to 1973, he served in the US Department of State, concluding as acting legal adviser. In 1987, he took leave from the Iran–United States Claims Tribunal to serve in the White House as Deputy Special Counsellor to the President of the United States (rank of Deputy Secretary of a Cabinet Department). Among his many honours, he has been awarded six Lifetime Achievement Awards.

Cavinder Bull
Drew & Napier LLC

Cavinder Bull is the CEO of Drew & Napier, one of the leading law firms in Singapore. He has over 25 years of experience in international arbitration, and acts as counsel and arbitrator in both commercial and investor–state cases.

Cavinder sits on the Governing Board of the ICCA, the World Bank Sanctions Board and the Advisory Board of the AFSA International Arbitration Rules Drafting Committee. He is vice president of the Court of Arbitration of the SIAC and vice president of the Asia Pacific Regional Arbitration Group.

Michael Hwang SC
Michael Hwang Chambers LLC

Dr Michael Hwang SC currently practises as an international arbitrator and mediator based in Singapore with a selective practice as Senior Counsel of the Supreme Court of Singapore. He served as the Chief Justice of the Dubai International Financial Centre Courts from 2010 to 2018.

Michael's other past appointments include: Judicial Commissioner (contract judge for a fixed term) of the Supreme Court of Singapore; Singapore's non-resident ambassador to Switzerland and Argentina; president of the Law Society of Singapore; Commissioner of the United Nations Compensation Commission; vice chairman of the ICC International Court of Arbitration; vice president of the International Council of Commercial Arbitration; and visiting and later adjunct professor of the National University of Singapore.

He was educated at undergraduate and postgraduate levels at Oxford University, where he won a college scholarship by open competitive examination. He has been conferred an honorary LLD by the University of Sydney.

Cavinder is listed by *Asian Legal Business* as one of the 'Top 15 Litigators in Asia'. He is also recommended by *Chambers and Partners* as 'a highly regarded advocate with a strong track record representing investors and sovereign states in commercial and investment treaty arbitrations', and by *The Legal 500* as a 'very astute lawyer on strategy and law'.

Cavinder graduated with first class honours in law from Oxford University and holds a Master of Laws from Harvard Law School. He has been called to the Bar in Singapore, New York and England. He is one of a handful to have been appointed Senior Counsel before the age of 40 by the Chief Justice of Singapore.

Barton Legum
Dentons

Barton Legum is a partner in Dentons' Paris office and head of the firm's investment treaty arbitration practice. Bart has more than 30 years' experience in litigating complex cases before international courts and arbitration tribunals.

He is a member of the board of the Arbitration Institute of the Stockholm Chamber of Commerce, and serves as arbitrator, counsel and conciliator in investment disputes. Bart formerly served as Chief of the North American Free Trade Agreement Arbitration Division in the Office of the Legal Adviser, US Department of State, winning every case.

Bart is an editor of the *Investment Treaty Arbitration Review*, and regularly publishes and speaks on international dispute resolution, arbitration and public international law.

Lucinda A Low
Steptoe & Johnson LLP

Lucinda A Low is a partner in the firm's Washington, DC, office and co-chairs the firm's international arbitration practice group. Over the course of her legal practice, Lucinda has been involved in AAA, ICC, LCIA, ICSID and other

institutional and ad hoc arbitrations. She was one of the first US lawyers to argue a claim before the Iran–US Claims Tribunal. Her arbitration experience encompasses representation of investors and host states, as well as service as an expert witness and an arbitrator.

Lucinda has previously served as an adviser to the government of Canada on trade and investment matters, acting as a reader for the Trade Law Bureau in its successful defence of the *Chemtura v. Canada* case brought under Chapter 11 of NAFTA. She was lead counsel for the claimant in *Corn Products v. United Mexican States* and related matters. She has extensive experience with NAFTA in both trade and investment matters, as well as with treaties and other international agreements more generally. She served on the tribunal in the BSE Chapter 11 case (*Canadian Cattlemen v. United States*), the first class-action type claim under NAFTA Chapter 11, and is currently advising clients on other investor–state disputes.

Lucinda holds a JD from the University of California, Los Angeles School of Law (1977) and a BA from Pomona College (1973).

Fernando Mantilla-Serrano
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Fernando Mantilla-Serrano is a partner and global co-chair of the international arbitration practice at Latham & Watkins. A graduate from the Pontifical Xavierian University in Bogota, where he received his law degree (JD) together with a major in economics, Mr Mantilla-Serrano has also received an MCJ (LLM) from New York University (Fulbright Scholar) and a DEA in international private law and international trade and a DSU in EU law from the University of Paris II.

Mr Mantilla-Serrano has acted as lead counsel in arbitrations conducted under the main institutional arbitration rules (ICC, ICSID, LCIA, SCC and ICDR), as well as under ad hoc rules. He is fluent in English, French, Portuguese and Spanish.

Mr Mantilla-Serrano is a fellow of the Chartered Institute of Arbitrators and a member of the International Law Association and the Court of Arbitration of the Singapore International Arbitration Centre. He is also a member of the Governing Board of the International Council for Commercial Arbitration.

Mr Mantilla-Serrano is admitted to the Colombia Bar, the New York Bar, the Paris Bar and the Madrid Bar.

Wendy Miles QC
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Wendy Miles is a specialist in international arbitration and dispute resolution, with a focus on private and public international law. She brings over 25 years of experience to matters across numerous sectors and has particular expertise in climate change and finance. Clients include a wide range of multinationals, including corporates, sovereign states and state entities, and multilateral state organisations. She accepts arbitral appointments ad hoc and under most major arbitral institutions. She has sat as arbitrator since 2005, as sole arbitrator, co-arbitrator and chair under most major arbitral institutions. Wendy was appointed by the United Kingdom to the ICSID Panel of Arbitrators and the ICSID Panel of Conciliators, effective from 10 November 2020.

Alexis Mourre
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Alexis Mourre has served as parties' counsel, president of the tribunal, co-arbitrator, sole arbitrator or expert in more than 270 international arbitrations, both ad hoc and before most international arbitral institutions (including ICC, ICSID, LCIA, ICDR, SIAC, SCC, DIAC, CRCICA, VIAC, KCAB, the Milan Chamber of Commerce, the Madrid Chamber of Commerce and the Lima Chamber of Commerce Arbitration Centre). He established his own arbitration practice in May 2015 after having founded Castaldi Mourre & Partners in 1996. In October 2021, he created a new international arbitration boutique called Mourre Gutiérrez Chessa Arbitration.

Alexis is the author of numerous books and publications in the field of international business law, private international law and arbitration law. He is founder and former editor in chief of *Les Cahiers de l'Arbitrage*, *The Paris Journal of International Arbitration*, a leading French publication in the field of arbitration. From 1 July 2015 to 30 June 2021, Alexis was the president of the ICC International Court of Arbitration, and was vice president of the Court from 2009 to 2015. He was vice president of the ICC Institute of World Business Law from 2011 to 2015. He has also served as co-chair of the IBA Arbitration Committee (2012–2013), an LCIA Court member (2012–2015) and a council member of the Milan International Chamber of Arbitration (2006–2014). He is a member of a large number of scientific and professional institutions dedicated to arbitration and private international law. He is the founder and former president of Paris Arbitration, the Home of International Arbitration.

He is fluent in French, English, Italian and Spanish, and has a working knowledge of Portuguese.

Philippe Pinsolle
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Philippe Pinsolle is a partner at Quinn Emanuel Urquhart & Sullivan LLP, and is the firm's head of international arbitration for continental Europe. He is based in the Geneva office.

Philippe has over 25 years of experience as counsel, expert and arbitrator in international arbitration. He has acted as counsel in more than 300 international arbitrations, with a particular focus on investor–state arbitrations and commercial disputes involving the energy, power, oil and gas, construction and defence industries. He has been involved in arbitrations under the auspices of virtually all major arbitration institutions, including the ICC, LCIA, ICSID, SCC, AAA, ICDR, the Swiss Chambers of Commerce, AFA and ADCCAC, as well as in ad hoc cases under the UNCITRAL Rules or otherwise. Philippe has also served as arbitrator in more than 60 cases, as well as expert witness on arbitration and French law issues.

He is currently senior co-chair of the IBA arbitration committee. He is a member of the Court of Arbitration of the Singapore International Arbitration Centre and an International Advisory Board adviser for the Thailand Arbitration Center.

J William Rowley QC
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J William Rowley QC is an arbitrator member of Twenty Essex. He is chairman of the board of the LCIA and a member of the LCIA Court, and also serves on the board of LCIA India. Before joining Twenty Essex, he was chairman, and subsequently chairman emeritus, of the Canadian national firm McMillan LLP. He chairs the editorial board of Global Arbitration Review.

Ranked by *Chambers and Partners* as one of the most in-demand arbitrators globally, he is one of a few Canadian practitioners with a truly international arbitral practice and reputation. He has chaired or participated as a tribunal member or counsel in several hundred international arbitrations, involving a variety of national laws and investment treaty systems. Recent arbitrations have included petroleum industry joint ventures (Iraq oil fields, over US$20 billion; offshore Nigerian oil fields, over US$4 billion), gas pricing and repricing formulae, and multiple commercial and investor–state disputes (ICSID, NAFTA, ECT and UNCITRAL).

Mr Rowley is former chairman of the International Bar Association, Section on Business Law, national representative for Canada and co-founder and chairman of the IBA Global Forum on Competition and Trade Policy. He is a

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James Spigelman QC
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The Honourable James Spigelman AC QC served as Chief Justice of New South Wales, Australia's largest state, from 1998 until the end May 2011. From 2013 to 2020, he was a Non-Permanent Judge of the Hong Kong Court of Final Appeal.

After his retirement as Chief Justice, he joined One Essex Court in London as an arbitrator. He has since been appointed as chair of panels with seats in London, Singapore, Dubai, Sydney, Perth and ICSID; as an umpire in Singapore; as sole arbitrator in one case in Singapore, one case in Melbourne, two related disputes in Sydney and to determine a privilege issue in a North American Free Trade Agreement arbitration; and as mediator in an Australian–UK dispute. He has also been a party-appointed arbitrator in London, Singapore, Sydney, Melbourne, Kuala Lumpur, Frankfurt, The Hague and the Court of Arbitration for Sport; and in investment treaty cases at ICSID and at the Permanent Court of Arbitration.

James Spigelman is the author of three books, the co-author of a fourth and the author of some 180 published articles, including on a range of aspects of commercial and corporate law, such as contractual interpretation, insurance law, commercial arbitration, insolvency, international commercial litigation, freezing orders and proof of foreign law. Three volumes of his speeches as Chief Justice have been published.

APPENDIX 3

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The *GAR Guide to Investment Treaty Protection and Enforcement* is a new guide on the practical side of investor–state disputes. It tracks the concept of investment protection throughout its life cycle – from negotiation of the treaty to enforcement of an award and everything in-between. In doing so, it seeks to guide the reader in what to do and think – how to strategise – at every stage of a dispute, focusing on what works. The content is further enriched with a series of contributions from arbitrators, on topics du jour.

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