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This year’s edition of *The Investment Treaty Arbitration Review* goes to press under particular circumstances. Measures to contain the covid-19 pandemic around the world have confined authors to quarters. Despite these constraints, the authors of this volume have delivered their chapters. The result is a new edition providing an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments over the past year.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This fifth edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume under the difficult conditions prevailing today.

**Barton Legum**
Dentons
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Part I

JURISDICTION
Chapter 1

COVERED INVESTMENT

Can Yeğinsu and Ceyda Knoebel

I INTRODUCTION

The definition of a covered ‘investment’ is a key element in determining the applicability of protections under an investment treaty to a covered investor. It delineates the scope of a state’s consent to arbitrate expressed in the dispute settlement provisions of the international instrument containing that consent. Accordingly, the question of what constitutes an investment is often a critical threshold question of jurisdiction.

To date, much of the debate surrounding the definition of a covered investment has centred on whether the term has an objective meaning independent of the wording of the international instrument containing the state’s consent to arbitrate, or whether the meaning is derived purely from the text of the relevant instrument. That question remains unresolved.

There is no uniform definition of investment under customary international law or recognised by states in international instruments. Most investment treaties adopt an asset-based definition expressed with the formula ‘every kind of asset’ followed by an illustrative, non-exhaustive list comprising all types of properties and contractual rights, including, most commonly:

a movable and immovable property, and property rights such as mortgages, liens and pledges;
b equity and debt participation in a company, including shares, debentures and debt instruments;
c intellectual property rights, goodwill and know-how;
d claims to money and performance under a contract having an economic value; and
e concessions or licences granted under public law or contract.

This approach is reflected in a number of different permutations developed by specific treaty language, each of which has been the subject of arbitral jurisprudence that is considered in this chapter.

Any investment dispute submitted to the International Centre for Settlement of Investment Disputes (ICSID) for resolution under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), is subject to a determination of an autonomous notion of investment under Article 25 of the ICSID Convention, and must therefore meet the threshold requirements for a covered investment within the meaning of the ICSID Convention. These requirements are in addition
to the requirements under the investment treaty or agreement at issue containing a state’s consent to arbitrate. This is often referred to as the ‘double-barrel’ test, and has given rise to significant controversy in arbitral jurisprudence, as discussed further below.

II  DEVELOPMENT OF TREATY LANGUAGE

Historically, most definitions of investment in investment treaties (or agreements) were widely drafted and open-ended, allowing for evolving types of investments to be covered by the definition. For example, the Energy Charter Treaty (ECT), which is a sectoral multilateral treaty born from the European Energy Charter between the European Union and the former Soviet Union countries in the 1990s, includes one of the broadest definitions of investment. Other treaties refer extensively to ‘any kind of property invested . . . in the territory of [a Contracting Party]’.

That said, not all earlier treaties adopted such wide language. Some define investment in a circular manner, referring to investment within the definition itself (i.e., ‘investment means any kind of asset or right related to an investment’ or ‘investment means every kind of investment’). Others embrace an exhaustive list. For example, the investment chapter in the original 1994 North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico covers only interests in enterprises and property, other ‘interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory’ and ‘contracts where remuneration depends substantially on the production, revenues or profits of an enterprise’. The NAFTA list also refers to debt securities in, or loans to, a company (not state enterprises) but only if the maturity of the debt is at least three years and the enterprise is an affiliate of an investor. Certain claims to money are also expressly excluded from the definition.

The discrepancy between definitions has given rise to debate as to whether most favoured nation (MFN) treatment clauses in treaties with a narrow definition of investment could be deployed to import a broader definition from other treaties to which the defendant state is a party. However, consistent investment treaty jurisprudence has indicated that tribunals are not willing to widen the application of MFN clauses to import a more favourable definition of ‘investment’ from other treaties, on the basis that the definition is a crucial element of a state’s consent to arbitrate a particular dispute, which goes to the *ratione materiae* jurisdiction of an arbitral tribunal.

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3 See Article 1(6) of the ECT covering every kind of asset owned or controlled by a defined investor followed by a non-exhaustive, generous list of types of assets.
6 See, e.g., Article 1(a) of the Treaty between the United States of America and the Republic of Kazakhstan concerning the Reciprocal Encouragement and Protection of Investment, 19 May 1992. Such circular definitions have caused tribunals to seek to give a distinct and separate meaning to the word ‘investment’.
7 See Article 1139 of NAFTA.
More recently, investment treaties and investment chapters within multinational trade agreements have departed from a purely asset-based definition, and additionally require the investment to display the 'characteristics of an investment.'

For example, the successor to NAFTA, the United States–Mexico–Canada Agreement (USMCA), which is to enter into force on 1 July 2020, defines investment as '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'. While providing a non-exhaustive list of assets, it also excludes certain claims to money, and orders and judgments entered in a judicial or administrative action from the definition of 'investment'. Similarly, the investment chapter of the EU–Canada Comprehensive Economic and Trade Agreement (CETA) agreed in July 2018, the investment chapter of the EU–Canada Comprehensive Economic and Trade Agreement (CETA) and the EU–Singapore Investment Protection Agreement signed on 19 October 2018 all make reference to assets that have the characteristics of an investment, including 'the commitment of capital or other resources, the expectation of gain or profit', 'the assumption of risk' and 'a certain duration'. The investment chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP11), which entered into force on 30 December 2018, adopts a similar construction, save for the reference to 'a certain duration'.

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9 For example, the 2015 India Model BIT defines investment as an 'enterprise', which the investor must have incorporated in the host state and that, together with its assets, must have 'the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made'. The Model BIT proceeds to list the assets that an enterprise may 'possess' to qualify as an 'investment'. See also more recently Article 2.4 of the Investment, Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, signed on 25 January 2020 but not yet in force: 'Investment means an enterprise, including a participation therein'.

10 Such characteristics vary as between treaties. For example, Article 3.3 of the Morocco Model BIT, adopted 1 June 2019, lists: (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. A similar formulation is deployed in the Slovakia Model BIT, also adopted in 2019. By contrast, two treaties that have recently come into force have omitted the requirements that a covered investment be of a certain duration; and contribute to the development of the host state: see, Investment Agreement between the Government of Australia and the Government of Hong Kong Special Region of the People's Republic of China, which entered into force on 17 January 2020; and Agreement between the Government of Republic of Korea and the Government of Republic of Armenia for the Promotion and Reciprocal Protection of Investments which entered into force on 3 October 2019.


12 See Article 14.1 of USMCA.


duration’. Before the political developments of 2016, it was expected that the investment chapter of the EU–US Transatlantic Trade and Investment Partnership agreement under negotiation would follow this trend. However, the negotiations remain suspended following the Trump administration’s voiced scepticism towards multilateral trading blocs. Regardless, we know the United States prefers a formulation similar to those in the recent multilateral trade agreements as reflected in the 2012 US Model Bilateral Investment Treaty (BIT). It is clear that these new generation investment definitions seek to limit or clarify the scope of covered investments, in contrast with the broad, open-ended definitions found in earlier treaties encompassing ‘every kind of asset’.

This recent trend may be explained by states’ desire to exclude expressly one-off commercial transactions for the sale of goods or services, or purely contractual claims, from the scope of investments afforded treaty protections. These types of claims have previously been found by some tribunals to fall within a traditional definition of investment encompassing ‘claims to money and performance under a contract having an economic value’. Unfortunately, there is significant inconsistency in the jurisprudence on this issue, which is difficult to rationalise on the wording of the treaties.

For example, Joy Mining v. Egypt involved the non-performance of a contractual obligation by an Egyptian state entity as the counterparty under a contract for the provision of mining systems and supporting equipment. The definition of investment in the relevant UK–Egypt BIT includes the formulations ‘every kind of asset’ and ‘claims to money or to any other performance under contract having a financial value’. However, the tribunal refused to assume jurisdiction over the claim on the basis that it was necessary to draw a fundamental distinction between ‘ordinary sales contracts, even if complex, and an investment’, as otherwise ‘any sales or procurement contract involving a State agency would qualify as an investment’. The tribunal in Nova Scotia Power v. Venezuela, a case involving contractual rights under a coal supply agreement, reached a similar conclusion under the investment definition in the Canada–Venezuela BIT, which includes ‘money, claims to money, and

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17 See 2012 US Model BIT, Article 1: “investment” means every asset . . . 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.

18 A recent UNCITRAL case, Seo v. South Korea is also of note here, in which the tribunal interpreted South Korea US FTA’s definition of investment incorporating ‘characteristics of investment’. The definition of a covered investment in the FTA was such that it covered ‘every asset that an investor owns, 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’. Yet, focusing on the definition’s connection of the said characteristics with ‘or’, the tribunal concluded that the three listed characteristics are mere examples but none of them is ‘indispensable’. See, Jin Hae Seo v. The Government of the Republic of Korea, HKIAC, No. 18117 (UNCITRAL), Final Decision, 24 September 2019.

19 Joy Mining Machinery Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, para. 58. See also Global Trading Resource Corp and Globex International Inc v. Ukraine, ICSID Case No. ARB/09/11, Award, 1 December 2010, paras 56 to 57.
Claims to performance under contract having a financial value. The tribunal commented that '[n]either the definition of investment, nor the BIT, should function as a Midas touch for every commercial operator doing business in a foreign state who finds himself in a dispute.

In contrast, in Deutsche Bank v. Sri Lanka, the tribunal found that a hedging agreement (under which the Sri Lankan national petroleum corporation contractually failed to make a required payment to the claimant) fell within the investment definition in the Germany–Sri Lanka BIT, which covered ‘claims to money which have been used to create an economic value or claims to any performance having an economic value and associated with an investment’. Similarly, the annulment committee in Malaysian Historical Salvors v. Malaysia found that non-payment under a contract to find and salvage a shipwreck for the government of Malaysia constituted an investment under the UK–Malaysia BIT definition of investment, even though the definition only included ‘claims to money or to any other performance under contract having a financial value.

Perhaps in reaction to the inconsistency of these decisions, the new generation FTAs and BITs tend to adopt more specific wording, indicating expressly when a sale of goods or a purely contractual claim is not included in the definition of investment. For example, the EU–Vietnam FTA, CETA, USMCA and several recently adopted Model BITs categorically exclude sale of goods claims, clarifying that such transactions would not constitute a ‘claim to money’ referred to in the investment definition. The 2012 US Model BIT and the TPP11 text provide that ‘claims to payment that are immediately due and result from the sale of goods or services are less likely to have [the characteristics of an investment]’ without

20 Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)11/1, Award, 30 April 2014, paras 75 to 78.
21 Id., para. 82.
23 Malaysian Historical Salvors v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, paras 61, 73 to 74.
25 See the EU–Vietnam FTA, Chapter 8 – Trade in Services, Investment and E-Commerce, General Provisions, Chapter 1, Article 1.4(p)(v): ‘For greater certainty, “claim to money” does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural or juridical person in the territory of a Party to a natural or juridical person in the territory of the other Party, or financing of such contract other than a loan covered by subparagraph (iii), or any related order, judgment, or arbitral award’; CETA, Chapter 8 – Investment, Section A, Article 8.1: ‘For greater certainty, claims to money does not include: (i) claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party, (ii) the domestic financing of such contracts; or (iii) any order, judgment, or arbitral award related to sub-subparagraph (i) or (ii)’; USMCA, Article 14.1: ‘investment does not mean . . . claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party; and domestic financing of such contracts, or any related order, judgment, or arbitral award.’
26 TPP, Chapter 9 – Investment, Section A, Article 9.1, note 2.
III COVERED INVESTMENT IN ICSID JURISPRUDENCE

Though consent of the parties to resolve their investment disputes before an ICSID tribunal ‘is an essential prerequisite for the jurisdiction of the Centre’,28 Article 25 of the ICSID Convention limits the Centre’s jurisdiction to disputes arising ‘directly out of an investment’:

The jurisdiction of the Centre 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. When the parties have given their consent, no party may withdraw its consent unilaterally.

The term ‘investment’ is not defined in the Convention. In this regard, the World Bank’s Report of the Executive Directors on the Convention states that:

No attempt was made to define the term “investment” given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).29

Suggestions to include a contribution or a duration requirement or an emphasis on host state development in the Article 25 notion of investment were rejected by the negotiating states.30 It was agreed that the precise limitation on jurisdiction of an ICSID tribunal should be determined by the consent of the parties expressed by means of investment agreements, national legislation or investment treaties. This freedom, however, does not mean that parties can submit any dispute for resolution by the Centre. There are ‘outer limits’ to the jurisdiction of an ICSID tribunal, and arbitral tribunals interpreting the Article 25 reference to investment have developed various criteria to define and maintain those limits. It is fair to say that the task of defining those limits has proved to be complex.

With the intention of distinguishing treaty claims from ordinary commercial disputes, the idea that a covered investment must also constitute an investment under the ICSID Convention (independent of the definition of ‘investment’ in the treaty at issue) was first

29 id., para. 27.
propose that the typical characteristics of an investment—later known as the Salini test: (1) contribution; (2) assumption of risk; (3) duration; and (4) contribution to the economic development of the host state. Subsequent ICSID tribunals have had differing opinions on the applicability of these criteria. Some have adopted them fully and applied the test rigidly as a jurisdictional requirement, whereas others have taken a more flexible approach and preferred to apply only some elements of the test, finding that requirements on duration and contribution to economic development of the host state are too subjective to be consistently endorsed. A number of other tribunals have chosen to view the Salini criteria as guidance rather than strict jurisdictional requirements capable of depriving a tribunal of its jurisdiction if they are not fully satisfied. Some tribunals have even refused to apply the test altogether on the basis that, notwithstanding the reference to investment in Article 25 of the ICSID Convention, it is the investment treaty definition that should prevail as the ultimate expression of contracting parties’ consent. At the other end of

31 Fedex NV v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, paras 18–20. The Fedex v. Venezuela tribunal also referred to the ‘basic features of an investment [that] have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State’s development’ citing from an academic source at para. 43 of the award.

32 Salini Costruttori SPA and Italstrade SPA v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, paras 50–52. The Salini tribunal omitted the fifth criteria of a ‘certain regularity of profit and return’ taken by the Fedex tribunal.


34 See, e.g., Pantechniki SA Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009, paras 36, 43; Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, 14 July 2010, paras 110–112; Quiborax SA, Non Metallic Minerals SA and Allan Fok Kaplain v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, paras 220, 235.

35 See, e.g., Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras 479, 481; MCI Power Group LC and New Turbine Inc v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 165.

36 See, e.g., Malaysian Historical Salvors v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, paras 73–79; Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 129; Alpha Projekt Holding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, 8 November 2010, paras 311–312; Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, paras 204–206; Hassan Audi, Enterprise Business Consultants Inc and Alfa El Corporation v. Romania, ICSID Case No. ARB/10/13, Award, 2 March 2015, paras 197–199; SGS Société Générale de Surveillance SA v. Republic of Paraguay, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 93.
the spectrum, one tribunal has added two further criteria to the Salini test, namely that assets be invested in good faith and in accordance with host state law — an expansion criticised by subsequent tribunals.

The Salini test has found little support outside the ICSID framework. Two notable exceptions are Romak v. Uzbekistan and Alps Finance v. Ukraine, in which tribunals constituted under the UNCITRAL Arbitration Rules applied the elements of the Salini test as the ‘objective characteristics of an investment’, declining jurisdiction on both occasions. However, the approach of these tribunals has been attributed to the specific facts of these cases since Romak v. Uzbekistan involved a mere sale of wheat as the alleged investment, and Alps Finance v. Ukraine an assignment of receivables. The definition of investment in both BITs referred only to ‘claims to money or to any other performance having an economic value’ without linking such claims to an overarching economic activity; and a literal interpretation was found insufficient to determine the existence of a protected investment. In both tribunals’ conclusions, the perceived need to exclude one-off commercial transactions from the protection of a BIT was pivotal, while disregarding the four corners of the BITs in question.

IV EXTENT OF PROTECTION

Apart from traditional types of investments involving interests in infrastructure and public projects, tribunals have extended protection to different types of economic activities, including financial instruments (such as promissory notes, hedging agreements and

37 Phoenix Action Ltd v. Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 114.
38 Saba Futes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 112.
39 Romak SA (Switzerland) v. The Republic of Uzbekistan, PCA Case No. AA280 (UNCITRAL Rules), Award, 26 November 2009, paras 205–207; Alps Finance and Trade AG v. The Slovak Republic, UNCITRAL, Award, 5 March 2011, paras 240 to 241.
40 See Guaracachi America Inc and Rurelec PLC v. Plurinational State of Bolivia, PCA Case No. 2011-17, Award, 31 January 2014, para. 364, noting that these two cases are ‘very fact-specific that can partially explain their reasoning’; see also White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award, 30 November 2011, para. 7.4.9.
41 Romak SA (Switzerland) v. The Republic of Uzbekistan, PCA Case No. AA280 (UNCITRAL Rules), Award, 26 November 2009, paras 182, 185; Alps Finance and Trade AG v. The Slovak Republic, UNCITRAL, Award, 5 March 2011, para. 230.
42 Fedax NV v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997.
sovereign bonds\textsuperscript{44}, contracts for the provision of services\textsuperscript{45} and arbitral awards crystallising a party’s rights and obligations.\textsuperscript{46} Some tribunals have preferred to look at the totality of the investment activity rather than individual elements of it to decide whether the entire operation constitutes an investment.\textsuperscript{47} To date, most tribunals have been reluctant to consider pre-investment activities and expenditures, which do not ultimately come to fruition, as covered investments.\textsuperscript{48}

\textsuperscript{44} See the trio of Argentine government bond cases: \textit{Abaclat and Others (Case formerly known as Giovanna a Beccara and Others)} v. \textit{Argentine Republic}, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011; \textit{Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others)} v. \textit{Argentine Republic}, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013; \textit{Giovanni Alemanni and Others v. The Argentine Republic}, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014. Also, the tribunal in the \textit{PoŠtová banka, a.s. and Istrokapital SE v. Hellenic Republic}, ICSID Case No. ARB/13/8, Award, 9 April 2015 decision at paras 318 to 324, concerning the Greek sovereign bonds refused to assume jurisdiction because ‘sovereign debt, as indebtedness of a sovereign state has special features and characteristics’ and ‘cannot be equated to private indebtedness or corporate debt’; so it ruled that the definition of investment referring to ‘loans, claims to money or to any performance under contract having a financial value’ in the relevant BIT could not be extended to sovereign debt. In contrast, the ICSID tribunal in the recent \textit{Theodoros Adamakopoulos and others v. Republic of Cyprus}, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020 decision found jurisdiction for a mass bond claim under the Cyprus–Greece BIT.

\textsuperscript{45} See, e.g., \textit{SGS Société Générale de Surveillance SA v. Republic of Paraguay}, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, where a contract for the pre-shipment inspection services with respect to goods to be exported from the host state were accorded protection; see also \textit{Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia}, ICSID Case No. ARB/05/10, Decision for the Application for Annulment, 16 April 2009 in which the annulment committee held that a contract for the salvage of a shipwreck would qualify as a covered investment under the BIT, criticising the original tribunal in limiting itself to the analysis of the Salini criteria when rejecting jurisdiction.

\textsuperscript{46} In \textit{ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan}, ICSID Case No. ARB/08/2, Award, 18 May 2010, para. 117, the tribunal held that the right to arbitration is a distinct investment based on the BIT definition, ‘claims to . . . any other rights to legitimate performance having financial value related to an investment’.

\textsuperscript{47} See, e.g., \textit{Saipem SpA. v. The People's Republic of Bangladesh}, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 110, which considered that the entire operation including the underlying contract, the construction itself, the retention money, the warranty and the related ICC Arbitration was an investment under Article 25 of the ICSID Convention; see also \textit{White Industries Australia Limited v. The Republic of India}, Final Award, para. 7.6.8, where the tribunal regarded the rights under an ICC award as ‘a continuation or transformation of the original investment’ after India inordinately delayed the enforcement of the arbitral award in India; see also \textit{Chevron Corp & Texaco Petroleum Co v. The Republic of Ecuador}, Third Interim Award on Jurisdiction and Admissibility, PCA Case No, 2009-23, 27 February 2012, paras 4.35–4.36; \textit{Mamidoil Jetoil Greek Petroleum Products Societe Anonyme SA v. Republic of Albania}, ICSID Case No. ARB/11/24, Award, 30 March 2015, paras 285 to 288.

\textsuperscript{48} See \textit{Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka}, ICSID Case No. ARB/00/2, Award, 15 March 2002, paras 48–51, where after extensive negotiations the parties never signed a contract for the construction and operation of a power plant. In \textit{PSEG Global Inc and Konja Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey}, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004; however, the tribunal found jurisdiction because a concession contract was actually signed for a power plant, and was valid and legally binding even though the project was never carried out.
V  IRRELEVANCE OF ORIGIN OF CAPITAL

Unlike some treaties – such as the 1987 Association of Southeast Asian Nations Comprehensive Investment Agreement, which commands that investments are brought into, or derived from investments brought into, the host state territory – most treaties are silent on the origin of capital for the covered investment. In the absence of an express requirement in the treaty, investments made by foreign investors from local funds raised in the host state are treated in the same manner as investments funded with imported capital. Arbitral jurisprudence is settled: the origin of capital is irrelevant for the purposes of finding a covered investment and it is not a requirement that a foreign investor finances the investment from its own resources or that the assets or funds be imported from abroad.

In a well-known dissenting opinion in *Tokios Tokelés*, Professor Weil differed sharply from his co-arbitrators by taking the view that economic reality should prevail over formal legal structure when it comes to the interpretation of both the ICSID Convention and the specific provisions of BITs for the purposes of ascertaining an international investment. In his view, the ICSID system dictates a ‘transborder flux of capital’; for that reason, he disagreed with the majority in *Tokios Tokelés* who permitted claims against Ukraine by a Lithuanian entity wholly owned by Ukrainian nationals, while concluding that the origin of capital is irrelevant. Professor Weil’s opinion advocating the imposition of a jurisdictional requirement without a textual foundation as to the origin of capital is yet to find support in arbitral jurisprudence.

VI  TERRITORIAL LIMITATIONS ON COVERED INVESTMENT

Most treaties place a territorial limit requiring that a covered investment be ‘made in the territory of the host state’. Some do not expressly refer to such territorial limits in the definition of ‘investment’ but instead refer to ‘investments in the territory of a Contracting

49  See *Yaung Chi Oo Trading Pte Ltd v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003, applying the relevant wording in Article II of the treaty providing that: ‘This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.’


51  *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion of Prosper Weil, 29 April 2004, paras 19 and 20.
Party’ within the context of the substantive obligations and protections under the treaty. Either way, arbitral tribunals examine the territorial nexus of an investment to the host state at the jurisdictional stage regardless of where this requirement is postulated.52

Two examples from NAFTA cases illustrate the relevance of territorial connection. Bayview v. Mexico53 was a claim brought by an American claimant in relation to its investment in farm and irrigation facilities in the United States involving alleged deleterious effects of Mexico’s use of the waters of the Rio Grande, on which the claimant’s enterprise was dependent. The NAFTA tribunal did not allow the claim under NAFTA Article 1101 on the basis that the investment in question was wholly confined to the territory of the United States. A similar issue arose in Canadian Cattlemen for Fair Trade v. United States, in which a group of Canadian cattle producers challenged a US prohibition on live-cattle imports from Canada after an outbreak of mad cow disease. The cattle businesses of the claimants were located entirely in Canada and therefore the tribunal dismissed the claim for lack of investment in the territory of the United States.54

Contrary to traditional investments, such as acquisition of interests in immovable property or companies, tribunals draw a distinction for territorial nexus when it comes to investments of a financial nature. It is well established that, with regard to investments of a purely financial nature, the territorial determination should focus on where, or for the benefit of whom, the funds are ultimately used, and not the place where the funds were paid out or transferred. Therefore, the relevant question is whether the benefit is enjoyed in the host state.55

At times, respondent states have questioned whether a portfolio investment bought and paid for outside the host state with no flow of direct funds into the host state can be deemed to be invested ‘in the territory’ of the host state. For example, a trio of cases against Argentina involving bondholders who purchased Argentinian sovereign bonds in the secondary market turned on this question. Argentina argued that these transactions outside Argentina did not involve a direct flow of funds into the territory of Argentina and therefore the claims in relation to these bonds were not claims in relation to a covered investment. The dissenting opinion by Professor Abi-Saab in Abaclat v. Argentina found that submission to be persuasive, stating that ‘such financial products with high velocity of circulation . . . traded within seconds at the touch of a button in capital markets, with no involvement or knowledge of the borrowing country, nor passage through the territory or the legal system of that State’.

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53 Bayview Irrigation District et al v. United Mexican States, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, paras 93 to 108.
55 Fedax NV and The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, paras 41–43; Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 374; Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras 498–499, 508–510; British Caribbean Bank Ltd. v. Government of Belize, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, paras 206 and 207.
lacked the necessary territorial link to the host state. However, most tribunals considering financial investments (such as the Argentinian sovereign bonds or the hedging agreements as in *Deutsche Bank v. Sri Lanka*) have not followed the approach of Professor Abi-Saab in his dissenting opinion. Rather, they have been satisfied that a sufficient territorial nexus exists as long as funds were made available to host states and served to finance their economy or needs. They all assigned weight to the fact that it was the state itself that ultimately benefited from the disbursement of funds even if these funds never entered their territory directly.

**VII COMPLIANCE WITH HOST STATE LAW**

Some treaties expressly require that an investment be made in accordance with host state law, while others are silent on the point. For treaties that include a form of conformity with host state law as part of the covered investment definition, tribunals have accepted that any illegality or breach of local law in the making of the investment would act as a jurisdictional bar. Where the treaty is silent on the issue, however, tribunals have reached different conclusions when addressing questions of non-conformity with local laws. A number of tribunals, such as the *Phoenix* tribunal, have suggested that conformity with host state law is an implied requirement for an investment to be a protected investment under an investment treaty and Article 25 of the ICSID Convention, even if the definition of investment in the treaty is silent on this issue. These tribunals have concluded that a state cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of its own law.

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56 Dissenting Opinion of Abi-Saab in *Abaciat and Others (Case formerly known as Giovanna a Beccana and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, paras 56 and 57, 78, 105. Argentina's appointee in the sister case *Ambiente v. Argentina*, Professor Santiago Torres Bernardez, held a similar opinion to Professor Abi-Saab; see *Dissenting Opinion of Bernardez in *Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras 262 and 263.

57 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, paras 288, 292. See also *Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013.

58 Contrast with *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, paras 293–349, where the opposite conclusion was reached.

59 Some treaties have a specific provision clarifying that the host state shall admit investments made in accordance with its laws from which tribunals have also inferred the same requirement. See, e.g., *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 204.


61 *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 101. The tribunal cited *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, which held that the conformity requirement is implicit even when it is not expressly cited in the BIT (see *Plama v. Bulgaria* at paras 138 to 143).

Other tribunals have, however, disagreed with this rationale, suggesting that states are at liberty (or not) to condition their consent to arbitrate, as well as the protections they offer, on compliance with host state law. If they have not done so, conformity with host state law cannot be part of the objective definition of ‘investment’ or relied upon to deprive the tribunal of its jurisdiction. It may give rise to an admissibility defence or a defence on the merits as recourse to treaty arbitration and substantive treaty protections may in certain circumstances breach the prohibition of abuse of rights that is an emanation of the principle of good faith. However, that does not mean that these elements are part of the definition of ‘investment’. An illegal or bad-faith investment remains an investment.63

Tribunals have not always sought to draw a clear distinction between the different types of non-conformity with local law. In the face of an investor’s non-conformity, some tribunals have only penalised the investor for a breach of domestic regulation relating to the investment activity or admission of the investment.64 Other tribunals have interpreted non-conformity to condemn a wider illegality or iniquity in the investor’s behaviour;65 some have even extended the analysis of non-conformity beyond domestic law to encompass breaches of general principles of international law and international public policy.66

Where arbitral tribunals have resorted to general principles of law or international public policy, they have mostly framed this as an emanation of the clean hands doctrine, on the basis that protection should be denied to investments that are made by way of fraud, corruption or deceitful conduct, and that denial is required to prevent the misuse of the international investment protection system by those who come with unclean hands.67 That

63 See, e.g., Quiborax SA, Non Metallic Minerals SA and Allan Fisk Kaplán v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 226; Metal-Tech Ltd v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 127; Liman Cağpin Oil BV and NCI Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, para. 187; Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, 14 July 2010, paras 114, 119.

64 See, e.g., Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 398; Alasdair Ros Anderson et al. v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, para. 55; Rusoro Mining Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, paras 289–344.


66 See Inceysa Vallisoletana SL v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras 224–227 and Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras 144–146, where both tribunals directed themselves back to international law based on the reference to international law in the applicable substantive law.

67 See, e.g., Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras 141, 143–144; Gustaf F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010, paras 123–124 (an investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention[;] or . . . if it is made in violation of the host State’s law . . . . These are general principles that exist independently of specific language to this effect in the Treaty.”; Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB/12/14 and
means, regardless of whether the treaty includes an express requirement for compliance with domestic or international law, there is the possibility that a tribunal may deny treaty protection to a clearly abusive claim based on general principles of law on its own accord.

Unlawfulness is a difficult issue and one that is potentially open to abuse by states that have been complicit in the alleged wrongdoing on which they rely as a defence to an arbitration claim. There is also the question of degree; tribunals are reluctant to refuse a claim where the contravention of law in question is one of a technical or *de minimis* nature and it is uncertain as to where the line between fundamental versus trivial breaches should be drawn. Even where the contravention is more serious, there remains the issue of whether a state is released from an investment treaty claim if the state itself has required the investor to contravene the laws when making the investment.

**VIII CONCLUSION**

The definition of a covered investment remains one of the most controversial topics in investment law and it is impossible to identify one agreed definition; the wording of international treaties is inconsistent and the arbitral jurisprudence is, in places, contradictory. The preponderance of generic definitions of investment within treaties means that a substantial degree of subjectivity cannot be excluded in their application to the specific facts of each case. The conflicting ways in which arbitral tribunals have construed similar wording do not make the task any more straightforward. Critics of investor–state arbitration find encouragement from the perceived lack of consistency and coherence in arbitral awards. For example, the paucity of tribunal agreement on the precise scope and application of the *Salini* criteria to the definition of investment within the ICSID framework (let alone in general) is cited as one of the principal reasons for questioning the legitimacy of the system and its participants.

That said, there does appear to be a trend emerging in the new generation FTAs and BITs in favour of an objective definition of ‘investment’ whereby states expressly import chosen aspects of the *Salini* criteria directly into their definitions of ‘investment’. It remains to be seen how tribunals interpreting these instruments will contribute to the current debate.

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68 For e.g., the minor defect in company paperwork at issue in *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 297, did not prevent the tribunal from assuming jurisdiction. Similarly, in a recently released award, *Peter A Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award on Jurisdiction, 13 June 2014 at paras 92–94, the tribunal characterised non-compliance with exchange control legislation by the claimant as ‘inadvertent and technical’, and noted that there was nothing offensive to public policy or tainted with criminality. It further concluded that in the absence of the breach of fundamental legal principles of Barbados there is no reason to deny jurisdiction.

69 For example, the UNCITRAL claim filed in June 2016 by US hedge funds, Gramercy Funds Management LLC and Gramercy Peru Holdings LLC, against Peru under the US–Peru Trade Promotion Agreement of 2009 (TPA) is a case to watch. Similar to the new generation FTAs discussed in this chapter, the definition of investment in the TPA incorporates ‘characteristics of investment’ into the definition, including ‘the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk’. See the Statement of Claim as reported in *IA Reporter*, 9 June 2016, available at: www.iareporter.com/articles/analysis-as-gramercy-fund-pursues-1-6-billion-bond-arbitration-against-peru-how-does-its-initial-case-stack-up-on-key-jurisdictional-fronts/ (accessed on 7 April 2020).
Certainly, if states choose to make the *Salini*, or any other, criteria part of the ‘investment’ definition in the text of a treaty, tribunals would be expected to give weight to such express wording when interpreting the treaty’s terms ‘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’ as required under Article 31 of the Vienna Convention on the Law of Treaties.
Chapter 2

COVERED INVESTORS

Mélida Hodgson and David Manners-Weber

I  INTRODUCTION

Who qualifies as a ‘covered investor’ under an international investment agreement? Whether an investor is covered by the state’s offer to arbitrate certain claims is a critical question that often lies at the heart of jurisdictional disputes. If a state has not consented to arbitration with an investor, an arbitral tribunal has no jurisdiction to hear that investor’s claim.

As a general matter, covered investors are (1) persons (either natural or juridical) (2) with the requisite nationality who (3) have control over an investment that is entitled to protection under a given agreement. This chapter addresses common issues concerning such investors; it does not take a position on the proper way to approach or resolve these questions for any particular dispute. Whether an investor is covered in a specific case depends on the specific agreement at issue and the facts underlying the dispute.

II  GENERAL PRINCIPLES RELATED TO NATIONALITY AND CONTROL

i  Nationality

Under most international investment agreements (IIAs), to qualify for protection, an investor must be a national of a contracting state other than the host state in which they are investing. To claim protection, an investor must typically have the relevant nationality at the time of the events giving rise to the claim. Although the investor may be able to preemptively structure its investment to gain an IIA’s protection, tribunals may look unfavourably on an investor’s attempt to manufacture the requisite nationality after an alleged breach solely to bring a claim. Indeed, tribunals have largely rejected such post hoc attempts as ‘forum shopping’.

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1 Mélida Hodgson is head of the New York International Arbitration Practice at Jenner & Block LLP, where David Manners-Weber is an associate.
3 See, e.g., United Utilities (Tallinn) B.V. v. Republic of Estonia, ICSID Case No. ARB/14/24, Award, 21 June 2019, para. 354 (‘Not requiring from a purported foreign investor to demonstrate that it meets the nationality criterion at the time of the alleged breach of the Treaty would run afoul of the clear intent of the BIT’s signatories’).
4 Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 54, 2nd edn, 2012 (‘It appears from these cases that prospective planning within the framework of existing treaties will be accepted by tribunals. . . . What appears to be impossible is to create a remedy for existing grievances, in particular after a dispute has arisen, by arranging for a desirable nationality’).
5 Zachary Douglas, The International Law of Investment Claims 290, 2009 (‘There cannot . . . be a restructuring of the investment in order to resort to the dispute resolution provisions of an investment treaty once a dispute has arisen. Treaty shopping is acceptable; forum shopping is not’). See also Isolux
Tribunals have also confronted the question of how long an investor must retain the requisite nationality. That is, while the investor must be an appropriate national at the date giving rise to the claim, must they also have that nationality later in the proceedings? Must it be continuous? Under the traditional rules of diplomatic protection, whereby a state could bring a claim against another state based on an injury to one of its nationals, nationality must indeed be continuous. In the context of diplomatic protection, the continuous nationality requirement ‘ensures that the State seeking to protect a person has a proper interest in such protection’. The International Law Commission’s Draft Articles on Diplomatic Protection reflect this approach, requiring continuous nationality from the date of the events giving rise to the claim until the date of claim submission. Whether a continuous nationality requirement exists in the context of an IIA, however, will depend on that agreement’s language.

Article 25(2) of the ICSID Convention requires that a juridical person have the requisite nationality on the date of consent to arbitration; a natural person must have the requisite nationality on the date of consent to arbitration.6

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6 Compare Loewen Group, Inc. v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 225. (‘In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the dies a quo, through the date of the resolution of the claim, which date is known as the dies ad quem’) with Waguih Elie George Siag v. Arab Republic of Egypt, Award, ICSID Case No. ARB/05/15, Award, 1 June 2009, paras 497–99 (noting several critiques of Loewen and expressing the tribunal’s view that ‘the ICSID Convention does not require a party to hold constant nationality until the date of the award’).


9 See International Law Commission, footnote 7, at 31, 38–39 (commenting upon the text of Articles 5 and 10).

10 See, e.g., Michael Ballantine v. Dominican Republic, PCA Case No. 2016-17, Award, 3 September 2019, para. 527 (analysing provisions from the Dominican Republic-Central America-United States Free Trade Agreement to conclude that compliance with the treaty’s nationality requirement ‘is fundamental at the moment the claim was submitted . . . and at the moment of the alleged breach’).
nationality on the date of consent and on the date the claim is registered by ICSID. One tribunal interpreted this language to mean that there is no requirement under the ICSID Convention that nationality be continuous from the time the claim arises.\footnote{See also Vladislav Kim v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, paras 190–91 (stating that under the ICSID Convention and the Kazakhstan–Uzbekistan BIT, the natural investor needed to demonstrate nationality on the date of the alleged breach, the date of the claim’s submission to ICSID and the date the claim was registered by ICSID); Waguih Elie George Siag v. Arab Republic of Egypt, Decision on Jurisdiction, 11 April 2007 (Waguih Elie George Siag), para. 206 (‘The Tribunal . . . finds that the relevant dates under the Convention are the date of consent and the date of registration’); Ioan Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 111 (‘Pursuant to Article 25(2)(b) of the ICSID Convention, the relevant date for determining the nationality of the Corporate Claimants is the date of the consent to submit the dispute to ICSID arbitration, i.e., the date of the Request’).}

\section*{ii Control}

To bring a dispute to arbitration, the investor typically must own or have control of the investment.\footnote{See Douglas, footnote 5, at 299–300.} Many IIAs, however, do not define what ‘control’ means.\footnote{Ibid.} One ICSID decision defined it as legal control, rather than ‘actual day-to-day’ control.\footnote{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 (Aguas del Tunari), para. 264.} It found that, generally, ‘legal capacity is to be ascertained with reference to the percentage of shares held’, though minority shareholders could also demonstrate legal control ‘by reason of the percentage of shares held, legal rights conveyed in instruments or agreements such as articles of incorporation or shareholders’ agreements, or a combination of these’.\footnote{Ibid.}

A number of treaties contain language protecting investors that exercise ‘direct or indirect’ control over an investment. The new United States-Mexico-Canada Agreement (USMCA) and the 2012 US Model BIT, for instance, both refer to assets ‘that an investor owns or controls, directly or indirectly’\footnote{USMCA Article 14.1, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf; US 2012 Model BIT Article 1, available at https://ustr.gov/sites/default/files/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.}. Similarly, the BIT between Canada and China protects investments ‘owned or controlled directly or indirectly by an investor’ of the contracting state.\footnote{Available at https://investmentpolicyhub.unctad.org/Download/TreatyFile/3476.} In such cases, it has been argued that nationals of a contracting state who hold their investments through intermediaries can nevertheless bring claims – even if those intermediaries do not have the same nationality.\footnote{See Aguas del Tunari, footnote 15, at para. 236.}

Though it is possible that an investor might be required to continuously retain the requisite nationality, ‘there is no rule of continuous ownership of the investment’.\footnote{El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 (El Paso Energy International Company), para 135. See also Mondev International, Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 91 (applying a similar logic in the context of the NAFTA: ‘To require the claimant to maintain a
confiscation, expropriation and nationalisation of foreign investments. Once the taking has occurred, there is nothing left except the possibility of using the ICSID/BIT mechanism. That purpose would be defeated if continuous ownership were required. Instead, the investor is generally required to control the investment only at the time of the events giving rise to the claim – not before or afterwards.

III NATURAL PERSONS

Generally, a natural person is considered a national under an IIA if he or she is considered a national under the state party’s own law. Tribunals have found, however, that although nationality may be defined by the state party’s own law, ‘where . . . the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue’. Accordingly, in certain circumstances a tribunal may be empowered to determine whether an investor qualifies as a national even in contradiction of that nation’s own findings of fact.

Depending on the IIA, an investor may bring a claim if he or she has dual nationality with both a contracting state and a non-contracting state. Some have opined that there is no issue under the Energy Charter Treaty, for instance, given the ordinary meaning of the treaty’s language: Article 26(1) refers to ‘[d]isputes between a Contracting Party and an Investor of another Contracting Party’. Likewise, several commentators and tribunals have found that dual nationality does not present a problem under the ICSID Convention.

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rejected arguments that a claimant’s nationality must be ‘effective’ — that is, that the claimant must show a genuine link with the contracting state through which he or she brings his or her claim. One tribunal said, ‘[A]s regards dual nationals who do not hold the nationality of the host State . . . the ICSID drafters did not subject their access to ICSID jurisdiction to the effective nationality test’.30

Typically, however, a dual national cannot bring a claim if one of his or her nationalities is that of the host state.31 Article 25(2)(a) of the ICSID Convention specifically excludes ‘any person who [on the relevant dates] also had the nationality of the Contracting State party to the dispute’. One ICSID tribunal found that such dual nationals are excluded even when his or her nationality with the host state is no longer effective.32

It is recommended to always consult the relevant IIA, however, because there is not necessarily a common approach to these questions. The USMCA, for instance, states that ‘a natural person who is a dual citizen is deemed to be exclusively a national of the State of his or her dominant and effective citizenship.’33 Some understand such language to permit a dual national to bring a claim against the host state even if the claimant were also a national of that state, so long as it was not their ‘dominant and effective’ nationality.

IV JURIDICAL PERSONS

Unincorporated entities will generally not enjoy legal protection unless specified by the IIA.34 Article 25(2)(b) of the ICSID Convention, which defines the nationality of juridical persons, requires legal personality — a mere association of individuals or of juridical persons would not qualify.35 As a related point, entities that lack the capacity to sue under the law under which they were formed will not generally be able to sue under an IIA.36

28 Dolzer & Schreuer, footnote 4, at 46 (noting cases).
29 For more on effective nationality, see Nottebohm (Liechtenstein v. Guatemala), 18 November 1953, [1955] ICJ Reports 111.
30 Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 63.
31 Dolzer & Schreuer, footnote 4, at 46; see also Manuel García Armas v. Bolivarian Republic of Venezuela, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019 (stating that the tribunal was not convinced that international law provides that dual nationals can claim without restrictions against a State of their own nationality, although nothing impedes States from choosing to afford such protections in their treaties).
32 Champion Trading Company v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, Section 3.4.1.
34 Dolzer & Schreuer, footnote 4, at 47.
36 Douglas, footnote 5, at 312.
The nationality of juridical persons

Determining the nationality of a corporation can sometimes be more complicated than defining the nationality of a natural person.37 “[T]he ICSID Convention does not impose any particular test for the nationality of juridical persons not having the nationality of the host State,”38 and there are several methods to determine corporate nationality. Sometimes the same IIA may incorporate multiple tests or adopt separate definitions of corporate nationality for each party.39

One of the more common tests to determine a company’s nationality is to look at the law under which the company was incorporated.40 The US Model BIT of 2012, for instance, describes an ‘enterprise of a Party’ as ‘an enterprise constituted or organized under the law of a Party’; the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) does the same.41 Some respondents have objected to this test, arguing that businesses must also show a bona fide connection to the state under which they claim nationality. ICSID tribunals have generally rejected such arguments, finding that contracting state parties ‘should be given the widest possible latitude to agree on the meaning of “nationality”’,42 and that ‘it is not open to the Tribunal to add other requirements which the parties themselves could have added but which they omitted to add.’43

Other treaties’ definitions of nationality may include the corporate seat, or ‘siège social’. The particular meaning of siège social within a given agreement, however, may be the subject of contention: tribunals have found the phrase is not a ‘“legal term of art,” with only one meaning’,44 instead, it can be ‘susceptible of either a formal or substantive meaning’45 – it ‘can

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37 Dolzer & Schreuer, footnote 4, at 47.
39 Dolzer & Schreuer, footnote 4, at 47.
40 ibid.
41 Article 9.1. The CPTPP’s definition of ‘enterprise of a Party’ additionally includes ‘a branch [of an enterprise] located in the territory of a Party and carrying out business activities there’. See also, e.g., Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Award, 26 April 2017, para. 157 (finding the Barbados–Venezuela BIT’s nationality requirement had been satisfied where the claimant company had incorporated under the laws of a contracting state).
42 Tokios Tokelės v Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 (Tokios Tokelės), para. 25.
43 Saluka Investments B.V. v. the Czech Republic, UNCITRAL, Decision on Jurisdiction, 7 May 2004, para. 240. See also Tokios Tokelės, footnote 42, at para. 36 (In our view, it is not for tribunals to impose limits on the scope of BITs not found in the text, much less limits nowhere evident from the negotiating history). In Tokios Tokelės, a Lithuanian company invoked the Lithuania–Ukraine BIT to bring ICSID arbitration proceedings against Ukraine. Ukraine objected, contending that the company was not a ‘genuine entity’ of Lithuania because, among other things, Ukrainian nationals owned 99 percent of the company’s shares and comprised two-thirds of its management. Para. 21. It argued that to allow a suit under these circumstances would thwart the object and purpose of the ICSID Convention by effectively ‘allowing Ukrainian nationals to pursue international arbitration against their own government’. Para. 22. The tribunal rejected Ukraine’s arguments. It noted that Article 1(2) of the BIT defined corporate nationality as ‘any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations’, and so found the company to be a Lithuanian national.
45 ibid., (emphasis in original).
either be statutaire, referring to the seat appearing in the company’s bylaws or statutes, or réel, referring to the effective seat where the company is actually managed. Recent tribunals have diverged when interpreting the term in the context of Belgium–Luxembourg Economic Union (BLEU) BITs.

Some IIAs require a bond of economic substance between the corporate investor and the state of its purported nationality. This bond might consist of ‘effective control’ over the corporation by nationals or the company having ‘genuine economic activity’ within the state. Such a requirement can be designed to prevent ‘treaty shopping’, where investors with no real connection to a country structure their holdings so that they can claim protection under a favourable BIT.

ii Denial of benefits

Some IIAs contain ‘denial of benefits’ clauses to preclude certain investors – typically, those with no meaningful connection to a contracting state – from taking advantage of an IIA’s protections. Under such a clause, states reserve the right to deny a company of another party the benefits of the IIA in certain circumstances, such as if the company has no substantial business activities within the state party of its incorporation. For instance, Article 9.15 of the CPTPP reads, in part:

A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if the enterprise:

(a) is owned or controlled by a person of a non-Party or of the denying Party; and

(b) has no substantial business activities in the territory of any Party other than the denying Party.

46 Orascom TMT Investments S.à r.l. v. People’s Democratic Republic of Algeria, ICSID Case No. ARB/12/35, Final Award, 31 May 2017 (Orascom TMT Investments S.à r.l.), para. 273.

47 In Tenaris S.A. & T alta-Trading, footnote 44, an ICSID tribunal was asked to interpret the term in the context of the BLEU–Venezuela BIT, which coupled a siège social requirement with a law of incorporation requirement. The tribunal found siège social to mean ‘the place of actual or effective management’, para. 154, because, were it to mean the ‘purely formal matter of the address of a registered office or statutory seat’, the term would be superfluous given that relevant laws of incorporation already encompassed a registered office requirement. Para. 150. In Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon, the tribunal followed the same approach. ICSID Case No. ARB/15/18, Award, 22 June 2017, para. 263. In Orascom TMT Investments S.à r.l., footnote 46, however, the tribunal rejected Tenaris S.A. & T alta-Trading’s reasoning, Para. 287. Instead, when interpreting the BLEU–Algeria BIT, it found that siège social referred to a corporation’s ‘registered office’. It found this interpretation did not render the term superfluous under the BIT, even as the relevant law of incorporation already required a registered office; rather, it found that ‘the BIT simply spells out the place of incorporation test by specifying the two elements generally associated with it (constitution in accordance with local law and registered office).’ Para. 298.

48 Dolzer & Schreuer, footnote 4, at 49 (emphasis removed). See, e.g., the 2012 BIT between Egypt and Switzerland, protecting entities ‘which are constituted or otherwise duly organized under the law of that Contracting Party and have their statutory seat, together with real economic activities, in the territory of the same Contracting Party’. Available at https://investmentpolicyhub.unctad.org/Download/TreatyFile/1113.
The Comprehensive Economic and Trade Agreement between the European Union and Canada has a denial of benefits clause allowing contracting states to deny benefits to a corporate investor if the investor’s owners are nationals of a third-party state that is subject to sanctions. Article 8.16 states:

A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:

(a) an investor of a third country owns or controls the enterprise; and

(b) the denying Party adopts or maintains a measure with respect to the third country that:

(i) relates to the maintenance of international peace and security; and

(ii) prohibits transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

Tribunals have differed as to whether a denial of benefits clause needs to be invoked before arbitration has been sought.\(^4^9\) Though a denial of benefits clause may be substantively similar to a restricted definition of ‘investor’ based on bonds of economic substance, the burden of proof can be different – while a claimant generally has the jurisdictional burden of proving that it falls within the definition of ‘investor’, tribunals diverge on who bears the burden of proof once a state invokes a denial of benefit clause.\(^5^0\)

iii Foreign control of local companies

‘Host states often require that investments are made through locally incorporated companies.’\(^5^1\) While such local companies might not otherwise qualify as foreign investors, the ICSID Convention makes special allowance for them should a state agree to it. Under Article 25(2)(b) of the ICSID convention, a ‘National of another Contracting State’ includes:

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.

In other words, some IIAs will treat a local company as a foreign investor – namely, as eligible to bring an international arbitration claim – if they are foreign-controlled and the state consents to it. States may consent in either a direct contract with the investor or by a blanket offer of consent via the IIA. In the latter case, the IIA will usually state more broadly that local companies controlled by nationals of the other state will be treated as nationals of that state.\(^5^2\)

\(^4^9\) Compare, e.g., Guaracachi America, Inc. v. The Plurinational State of Bolivia, UNCITRAL, Award, 31 January 2014 para. 376 (Guaracachi America, Inc.) (finding that ‘it is proper that the denial is “activated” when the benefits are being claimed’, and so the denial of benefits may be invoked at the time the claimant seeks arbitration) with Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 239 (finding that ‘it would contradict the text and the purposes of the ECT to say that a Contracting State may deny benefits retrospectively, after an investment has been made and a dispute has arisen.’).

\(^5^0\) Compare Ulysseas, Inc. v. The Republic of Ecuador, Interim Award, 28 September 2010, para. 166 (finding the burden with the state), with Guaracachi America, Inc., note 47, at para. 370 (finding the burden with the investor).

\(^5^1\) Dolzer & Schreuer, footnote 4, at 50.

\(^5^2\) ibid., at 51.
Tribunals have noted that the ICSID Article 25(2)(b) ‘separately establishes a subjective test and an objective test’. Even where the parties agree ‘to treat the company as a national of another Contracting State for the purposes of this Convention’, ICSID jurisdiction is not satisfied unless the company is actually subject to foreign control – the ‘objective test is not satisfied by mere agreement by the Parties’.

The CPTPP too provides a path to arbitration for local companies controlled by a foreign investor, albeit via a different mechanism. Article 9.19(1)(b) permits claimants to bring a claim ‘on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly’.

Notably, both the ICSID Convention and the CPTPP may require control, and thus the status of minority shareholders remains an open question that needs careful review under the specific facts. One tribunal confronted whether, through a shareholders’ agreement, a foreign investor might aggregate its ownership share of a local company with other investors to achieve the requisite degree of ‘foreign control’ under Article 25(2)(b) of the ICSID Convention. It found such aggregation permissible in some circumstances but not in others.

IIAs may also offer independent standing to shareholders – the shareholding itself becomes the investment. ‘Put differently, even if the local company is not endowed with investor status, the investor’s participation therein is seen as the investment.’ Under this approach, the shareholder, as investor, bring claims in its own name ‘for adverse action by the host state against the company that affects its value and profitability’.

iv State-owned enterprises

Some IIAs explicitly protect entities owned or controlled by a state. Even where IIAs do not, however, state-owned enterprises may in certain circumstances receive investor protection. In ICSID arbitrations, tribunals must decide whether a state enterprise is ‘a national of another Contracting State’ under Article 25. Several tribunals have applied the ‘Broches test’, named after the first ICSID Secretary-General Aron Broches, under which ‘a mixed economy company or government-owned corporation should not be disqualified . . . unless it is acting as an agent for the government or is discharging an essentially governmental function.’
V CONCLUSION

It is axiomatic that if an investor is not covered by an IIA, that IIA generally does not provide the investor with substantive protections. An investor’s status, therefore, is often central to the resolution of the dispute itself. Determining this status requires careful analysis – it will turn both on the particular language of the applicable IIA and on the facts at hand, which can often involve complex corporate structures or searching inquiries into how a person has lived. Should a dispute arise between an investor and a state, both parties should develop a view on the issues early in the proceedings.

Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999; Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000; Rumeli Télékom A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008 (invoking and applying the Broches test).
Chapter 3

REQUIREMENTS OF RATIONE PERSONAE IN A GLOBAL ENVIRONMENT

Huawei Sun and Xingyu Wan

I  INTRODUCTION

Ratione personae, as a threshold jurisdictional requirement in an investment arbitration, has presented complexity in a dynamic global environment. For the purpose of investor-state dispute, an investor is generally defined as a national or an enterprise of a party that makes an investment that is entitled to protection under a given international investment agreement (IIA). Such broad definition triggers multiple issues in practice on the approach to be adopted in understanding the nationality requirement.

Due to lack of a clear guidance in the specific IIA and different facts involved in each case, tribunals differ as to the need to apply a substantive test to find the ‘real and effective nationality’ of a natural person or the real source of control for a juridical person in determining one’s nationality, particularly where the investor concerned has the dual nationality of both the home state and the host state. In contrast, the formalistic approach requires the tribunal not to go beyond the text of the IIA and add additional requirements for the qualification of an investor. In the meantime, out of the concerns for the abuse of process in the corporate restructuring, tribunals often find it necessary to resort to public international law, particularly the principle of good faith to determine the validity of a nationality change. This chapter addresses a variety of considerations taken into account by the tribunals in choosing one approach over the other. In view of the importance of the underlying IIA, this chapter also discusses the IIAs that have incorporated public international law principles in handling the ratione personae requirements.

II  NATURAL PERSONS

The essential character of investment treaty law is to afford protection to investors who are nationals of a contracting state other than the host state in which the investment is made. The ICSID Convention’s definition of nationality has clearly reflected this two-fold test (i.e., for a national to bring a claim against the host country, the person must meet the positive requirement of being a national of a contracting state and the negative requirement of not being a national of the host state). However, depending on the language of the IIA, questions

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1 Huawei Sun is a partner and Xingyu Wan is an associate at Zhong Lun Law Firm.
2 See, e.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 9.1, ‘investor of a Party means a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party’.
3 Campbell McLachlan et al., International Investment Arbitration: Substantive Principles, 2nd edn, 2017, para. 5.01 at 156.

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may arise as to whether the same two-fold test is universally applicable to non-ICSID cases. Further, dual nationality gives rise to a wider range of issues; for example, what is the determining factor in ascertaining a person’s nationality and whether and to what extent the diplomatic protection ‘real and effective nationality’ test is applicable.

i Applicable test – is a substantive test necessary?

In examining an individual case, it is crucial to consider the provision controlling nationality in a particular treaty that may be applicable, as well as the language in Article 25 of the ICSID Convention (if that Convention applies). The starting point is that each state is to determine nationality under its own law. This principle of international law has been widely accepted in the practice of investment treaty arbitration. For example, the ICSID tribunal in Micula noted that this principle was consistent with Article 1(2)(a) of the bilateral investment treaty (BIT) that defined an investor as ‘any natural person who is a citizen of a Contracting Party in accordance with its Laws’.

Absent express provisions in the relevant BIT, respondent states often resort to a search for ‘real and effective nationality’ for nationals of dual nationality, such that lack of a genuine link with the home contracting state will disqualify the claimant from claiming under the BIT. However, the ICSID tribunals have rejected such arguments for the reason that neither the ICSID Convention nor the relevant BIT has included the ‘genuine link’ as an additional requirement to the determination of nationality. As noted by the Fakes tribunal, such additional requirement made sense when the state was asserting a claim on behalf of an individual in the context of diplomatic protection, but in treaty arbitration the state does not assert a claim. Even in the context of diplomatic protection, the additional factor suggested in the Nottebohm case has been used sparingly. As commented by the International Law Commission, in today’s world of economic globalisation and migration, if the genuine link requirement proposed by Nottebohm was strictly applied, it would exclude millions of persons from the benefit of diplomatic protection. As a result, the claim to nationality remains largely formalistic in investment treaty cases and the threshold to prove effectiveness of the home state nationality is relatively low. On the other hand, the Siag majority found that

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4 id., para. 5.38 at 169.
5 Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930), Article 1, ‘It is for each State to determine under its own law who are its nationals’.
6 See, e.g., Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7 (Soufraki), Award, 7 July 2004, para. 55, ‘It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality’; Waguil Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007 (Siag), para 143, ‘It is well established that the domestic laws of each Contracting State determine nationality’; 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, Decision on Jurisdiction and Admissibility, 24 September 2008 (Micula), para. 86, ‘It is not disputed by the Parties that as a general principle it is for each State to decide in accordance with its law who is its national’.
7 Micula, paras 84 and 86.
8 See, e.g., Siag; Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, 14 July 2010 (Fakes).
9 Fakes, para. 68.
10 International Law Commission, Draft Articles on Diplomatic Protection, Article 4, p. 30.
11 See, e.g., Fakes, para. 80, ‘The effectiveness of Mr. Fakes’s Dutch nationality is demonstrated, inter alia, by the fact that both of his parents held Dutch nationality, his wife and three children are also Dutch, he
the claimant individuals had lost their Egyptian (host state) nationality without the need to consider whether either individual had a genuine link to Italian (home state) nationality. In dissent, Professor Francisco Orrego Vicuña provided a compelling argument that upholding Mr Waguih Siag’s standing and denying his Egyptian nationality were at odds with the meaning of the ICSID Convention.12

In non-ICSID cases, arguments have been made for and against applying an ‘effective nationality’ test where claimant individuals are dual home and host state nationals. The better view is that where an IIA does not specifically address the eligibility of dual nationals to bring arbitration proceedings, a tribunal may permit the application of the ‘effective nationality’ test to ‘fill any perceived lacuna’.13 Nevertheless, the UNCITRAL tribunal in Armas was reluctant to apply such test to claimant individuals who were nationals of both Spain and Venezuela, holding that the BIT shall prevail.14

Several IIAs provide better guidance for dual nationals.15 For example, the definition of investor in the Canada-China BIT excludes natural persons having nationality of both Contracting Parties.16 Some treaties have required the dual national to claim his or her dominant and effective nationality, which is understood to mean that a dual national sharing the nationality of the host state may nevertheless bring a claim against the host state so long as it is not his or her ‘dominant and effective’ nationality.17

The increasing incorporation of ‘effective nationality’ test in the IIAs provides greater certainty in handling the issues arising from the growing mobility of nationals in the trend of globalization. Against this background, the principles of diplomatic protection will likely continue to play a role in the jurisprudence of investment treaty arbitration, although investment tribunals are free to develop a distinctive set of rules from those applied in general international law.

has spent a significant part of his childhood and early adulthood in the Netherlands, has studied in the Netherlands, holds a Dutch passport and driver’s licence . . . . Against this background, the tribunal is satisfied in the present case that the Claimant’s links to the Netherlands are genuine and effective’; Siag, para. 200, ‘Italian nationality was also acquired for recognized reasons i.e. marriage to an Italian in the case of Mr Siag and reacquisition following the death of a husband in the case of Ms Vecchi. The tribunal finds that the Claimants possess genuine links to Italy’.

12 Siag (Partial Dissenting Opinion, Professor Francisco Orrego Vicuña), paras 6–23. For comment on this case, see McLachlan et al., pp. 183 and 184.


15 For a discussion of such relevant treaties, see McLachlan et al., pp. 175 and 176.

16 Canada–China BIT, Article 1.2, ‘investor means with regard to either Contracting Party: (a) any natural person who has the citizenship or status of permanent resident of that Contracting Party in accordance with its laws and who does not possess the citizenship of the other Contracting Party.’ See also China–Uruguay BIT, Article 1.2, ‘This Agreement shall not apply to investments made in the Oriental Republic of Uruguay by natural persons who, in accordance with Uruguayan law, are considered double nationals’.

17 See, e.g., Agreement between the United States of America, the United Mexican States, and Canada, Article 14.1, ‘investor of a Party means a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party, provided however that: (a) a natural person who is a dual citizen is deemed to be exclusively a national of the State of his or her dominant and effective citizenship.’ See also similar definition at Article 1 of the 2012 US Model BIT and relevant discussions at Patrick W Pearsall, David Manners-Weber, Covered Investors, The Investment Treaty Arbitration Review, 4th edn, 2019.
ii Burden of proof

Despite the pivotal role of each state in determining nationality, an international tribunal is empowered to decide for itself whether the person, on the facts and the domestic law before it, is in fact a national of the state in question for investment arbitration purposes.\textsuperscript{18}

In assessing nationality, tribunals will generally recognise the certificate of nationality and other official documents as \textit{prima facie} evidence.\textsuperscript{19} There exists a presumption in favour of the validity of a state’s conferment of nationality,\textsuperscript{20} often provided by the claimant. To rebut such presumption, the burden of proof will immediately shift to the respondent state. Fraud or mistake can be a basis for disregarding a nationality at an international level.\textsuperscript{21} As such, tribunals have the power to investigate on the accuracy of the certificates issued by a state and in view of the totality of evidence, may consider the \textit{prima facie} evidence effectively controverted. In such circumstances, the burden will remain on the claimant to prove his or her nationality.\textsuperscript{22} Notably, casting doubt is not sufficient and the threshold to overcome the presumption in favour of the \textit{prima facie} evidence is high.\textsuperscript{23}

When examining whether the nationality requirement under the domestic law has been met, tribunals would ‘pay the utmost regards to the decisions of the municipal courts of a country’, as the decisions represent the rules that are actually applied in that country.\textsuperscript{24} Inevitably, tribunals also find it helpful to rely on expert opinions on the interpretation of domestic laws.\textsuperscript{25}

In the context of satisfying the two-fold test of dual nationality under Article 25(2)(a) of the ICSID Convention, the \textit{Ambiente} tribunal has articulated a rather clear test for allocation

\textsuperscript{18} Soufraki, Award, 7 July 2004, para. 55; Soufraki, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, para. 93.

\textsuperscript{19} See, e.g., Soufraki, Award, 7 July 2004, para. 63; Siag, para. 151.

\textsuperscript{20} International Law Commission, \textit{Draft Articles on Diplomatic Protection}, Article 4, p. 30.

\textsuperscript{21} Flegenheimer Case, 1958, 25 I.L.R., p. 108, ‘From the standpoint of merit, even certificates of nationality the content of which is proof under municipal law of the issuing State, can be examined and, if the case warrants, rejected by international bodies rendering judgment under the Law of Nations, when these certificates are the result of fraud, or have been issued by favour in order to assure a person a diplomatic protection to which he would not otherwise entitled, or when they are impaired by serious errors’. See also Soufraki, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, para. 71.

\textsuperscript{22} Soufraki, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, para. 109.

\textsuperscript{23} RY Jennings and A Watts (eds), \textit{Oppenheim’s International Law}, 9th edn, 1992, p. 855, ‘An international tribunal called upon to apply rules of international law based upon the concept of nationality has the power to investigate the state’s claim that a person has its nationality. However, this power of investigation is one which is only to be exercised if the doubts cast on the alleged nationality are not only not manifestly groundless but are also of such gravity as to cause serious doubts with regard to the truth and reality of that nationality’; See also Micula, paras 87 and 95.

\textsuperscript{24} \textit{Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France}, Permanent Court of International Justice, 12 July 1929, paras 80 and 81.

\textsuperscript{25} For example, the \textit{Siag} tribunal referred to both parties’ expert opinions in reaching the conclusion that Mr Siag did not have Egyptian nationality. \textit{Siag}, paras 156–173.
of burden of proof between the claimant and the respondent state: the burden of showing that the claimants were Italian fell on the claimants, while the burden to ‘disprove the negative elements’ (i.e., prove that the claimants were not Argentinean) fell on the respondent.26

III JURIDICAL PERSONS

Similar to the determination of the nationality of a natural person, it is for each state to define the criterion for determining the nationality of a juridical entity.27

The test of incorporation is the most widely used criterion for the determination of a corporate’s nationality.28 As the International Court of Justice has explained, ‘[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the states under the laws of which it is incorporated and in whose territory it has its registered office’.29 Some IIAs, including those concluded by China, have further required the companies to have economic interests or have the seat in the contracting state.30 As for the meaning of seat, it can either be statutaire, referring to the seat appearing in the company’s bylaws or statutes, or réel, referring to the effective seat where the company is actually managed.31 Other IIAs extend the protections to the companies controlled by the natural persons and juridical persons of

26 McLachlan et al., p. 173, citing Ambiente Ufficio SpA v. Argentina (Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/08/9), paras 312, 314 and 319; Also noting that the Siag tribunal had adopted a different approach that was less clear in allocating the burden of proof yet similarly helpful to the claimant, stating that in relation to a jurisdictional objection, the claimant did not have to disprove Egyptian nationality (i.e., the host state nationality), McLachlan et al., para. 5.52 at 173.

27 Christoph H Schreuer et al., The ICSID Convention: A Commentary, 2nd edn, 2009, p. 287, ‘Definitions of corporate nationality in national legislation or in treaties providing for ICSID’s jurisdiction are . . . part of the legal framework for the host State’s submission to the Centre. Upon acceptance in writing by the investor, they become part of the agreement on consent between the parties’. id., p. 279.


29 See, e.g., China–Swiss BIT, Article 1(2), ‘the term investor refers with regard to either Contracting Party to . . . (b) legal entities . . . which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party’; see also 2012 US Model BIT, Article 1, ‘enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there’; see also China–Netherlands BIT, Article 1.2, ‘The term investor means . . . (b) economic entities, including companies, corporations, associations, partnerships and other organization, incorporated and constituted under the laws and regulations of either Contracting Party and have their seats in that Contracting Party, irrespective of whether or not for profit and whether their liabilities are limited or not’.

a contracting state. Such control test has been incorporated in Article 25(2) of the ICSID Convention to permit the local companies in the host state to claim against the host state if they are foreign-controlled and the host state consents to it.

Due to the complicated ways to structure investments, there were far more cases in which respondent states called for the application of substantive control test to lift the corporate veil of the claimant than if the claim is brought by a natural person. Tribunals in both ICSID and non-ICSID cases, however, seem reluctant to apply this test unless otherwise specified in the relevant BIT, although the company may be owned or controlled by nationals of the host state. In *Tokios*, Ukraine argued that to find jurisdiction to this case would be tantamount to allowing Ukrainian nationals to pursue international arbitration against their own government, which would be inconsistent with the object and purpose of the ICSID Convention. The majority nevertheless refused to pierce the corporate veil and impose an additional control requirement because if the contracting states wanted to impose such ‘denial of benefits’ provision with respect to the entities controlled by nationals

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32 See, e.g., China–Uzbekistan BIT, Article 1.2, ‘The term “investor” means nationals or enterprises of one Contracting Party who are investing or have invested in the territory of the State of other Contracting Party: (a) the term “national” means natural persons who have nationality of either Contracting Party in accordance with the applicable laws of that Contracting Party; (b) the term “enterprise” means any entities . . . incorporated or constituted under the applicable laws and regulations of either Contracting Party and have their seats and substantial business activities in that Contracting Party . . . (c) legal entities constituted under the laws of a non-Contracting Party but directly owned or controlled by nationals in paragraph (a) or enterprises in Paragraph (b)’.  
33 ICSID Convention, Article 25(2)(b), ‘National of another Contracting State means: . . . (b) . . . 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’. This is generally referred to as the second limb of the Article 25(2)(b).  
34 In ICSID cases, the issue is how to interpret the first limb of Article 25(2)(b), which provides that a juridical person must hold the nationality of a contracting state other than the state party to the dispute. See, e.g., *Tokios Tókelés v. Ukraine*, ICSID Case No. ARB/02/18, 29 April 2004 (*Tokios*), paras 28 and 52, ‘We find no basis in the BIT or the Convention to set aside the Contracting Parties’ agreed definition of corporate nationality with respect to investors of either party in favour of a test based on the nationality of the controlling shareholders’. In non-ICSID cases, the issue lies in the interpretation of the relevant BIT. See *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (*Saluka*), paras 240–242, ‘That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add; see also *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras 411–415, ‘Claimant was organised “in accordance with the law applicable” in a Contracting Party. Claimant accordingly qualifies as a company so organized in the instant case. The Tribunal is not entitled, by the terms of the ECT, to find otherwise. In so concluding, the Tribunal follows the holding of the Partial Award in *Saluka*.’ (In a judgment dated 18 February 2020, the Hague Court of Appeal ruled against Russia’s grounds to set aside the award. It is likely that Russia will appeal this ruling to the Netherlands’s Supreme Court, see www.iareporter.com/articles/breaking-yukos-50bn-awards-are-revived-by-dutch-court-of-appeal).  
35 *Tokios*, para. 22. Nationals of Ukraine owned 99 per cent of the claimant, a Lithuanian company, and comprised two-thirds of its management.
of the denying party, they could have done so.\textsuperscript{36} According to the majority, the object and purpose of Article 25(2)(b) of the ICSID Convention is not to limit jurisdiction but to set its outer limits.\textsuperscript{37} The majority’s approach was criticized by the dissenting Chairman Prosper Weil. As noted by the TSA tribunal, such a strict literal interpretation ‘may appear to go against common sense in some circumstances, especially when the formal nationality covers a corporate entity controlled directly or indirectly by persons of the same nationality as the host State’.\textsuperscript{38}

Weil’s dissent identified the origins of capital a highly relevant issue,\textsuperscript{39} but such relevance was only considered by tribunals in interpreting the ‘foreign control’ under the second limb of Article 25(2)(b) of the ICSID Convention. Nevertheless, tribunals differ as to how many corporate layers after the one bearing the nationality of the host state shall be lifted to reach the real source of control. As one of the earliest cases to address this issue, the tribunal in Amco went only one step behind the nationality of the host state in finding jurisdiction over the claimant, which was directly controlled by a US company, but refused to take care of a control at the second, and possibly third, fourth or xth degree.\textsuperscript{40} In contrast, the tribunal in TSA went for the actual controller behind the second corporate layer. Specifically, the tribunal noted that ‘the reasons for piercing of the corporate veil up to the real source of control is \textit{a fortiori} more compelling under the second clause of Article 25(2)(b) when ultimate control is alleged to be in the hands of nationals of the host State’.\textsuperscript{41}

The determination of control itself may be subject to controversy. While 100 per cent foreign ownership almost certainly would result in foreign control, there is no definite formula as to how much shareholding is enough. The tribunal may regard any criterion based on management, voting rights, shareholding or any other reasonable theory.\textsuperscript{42} Notably, in the circumstances where the shareholder cannot exercise affirmative control over the corporate through its shareholding or voting rights, it may nevertheless be treated as a controller if it possesses the capacity for an effective veto.\textsuperscript{43}

In short, the determination of corporate nationality remains to be formalistic despite the respondent states’ calls to take into account the object and purpose of the ICSID Convention. While the search for substantive control seems to be only relevant in the exception under the second limb of Article 25(2)(b) of the ICSID Convention, the debate on the tribunal’s power to investigate into the source of actual control is far from settled. Because of a wide range of commercial arrangements available to structure investments, the investigations on the actual control will continue to present challenges. Unlike the presumption in favour of the

\textsuperscript{36} Tokios, paras 36 and 39. Actually, Article 1(2)(c) of the Ukraine–Lithuania BIT contained an additional category of nationals – any entity established in any third state controlled, directly or indirectly, by nationals of either Ukraine of Lithuania, or by entities with their seat in the contracting party.

\textsuperscript{37} Tokios, para. 49.

\textsuperscript{38} TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, 19 December 2008 (TSA), para. 145.

\textsuperscript{39} Tokios (Dissenting Opinion, Chairman Prosper Weil), para. 19.

\textsuperscript{40} Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983 (Amco), para. 14.

\textsuperscript{41} TSA, paras 152–154.

\textsuperscript{42} Vacuum Salt Products Ltd. v. Republic of Ghana, ICSID Case No. ARB/92/1, Award, 16 February 1994, paras 43 and 44.

\textsuperscript{43} 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, para. 317.
certificate of nationality in proving a natural person’s claim to the home state’s nationality, the formal certificate of incorporation could be easily subject to challenge by various factors pointing to foreign control. As a result, the boundaries of protections afforded to a corporate structure under investment law may become increasingly flexible along with the free movement of capital.

IV ABUSE OF RIGHT

Tribunals often have to look behind the formal requirements of nationality where respondent states object to jurisdiction on the basis of the claimant’s abuse of a corporate structure with the principal aim of gaining access to protection under another country’s treaty. At least 12 tribunals have dismissed the claimant’s claims on the basis of the claimant’s abuse of right.44

The timing of the corporate restructuring is the basis in determining its validity. As the Mobil tribunal recognised, the claimant’s restructuring ‘was a perfect legitimate goal as far as it concerned future disputes’.45 In practice, the dividing line between a valid nationality change and abuse of right may be complicated by factual uncertainties. In the view of the Pac Rim tribunal, this dividing line occurs ‘when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy’.46 In Philip Morris, the tribunal dismissed the claims because the dispute was foreseeable at the time of the restructuring; according to the tribunal, a dispute is foreseeable when there is ‘a reasonable prospect’ that ‘a measure which may give rise to a treaty claim will materialize’.47

In examining the validity of a corporate restructuring, the tribunals are more concerned with substance than formality and frequently adopt public international law, including the principle of good faith to ensure that ‘only investments that are made in compliance with good faith are protected’.48 Tribunals will examine the true nature of the restructuring operation and can only be satisfied with the restructuring that is indeed ‘an economic activity in the market place’ rather than ‘a rearrangement of assets within the family’ to bring a claim that may otherwise be precluded.49

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45 Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (Mobil), paras 190, 204–206. The tribunal accepted that the main, if not the sole purpose of the restructuring was to gain access to ICSID arbitration but held that such purpose is perfectly legitimate as far as it concerned future disputes. The tribunal upheld its jurisdiction over the disputes arising after the restructuring and rejected its jurisdiction over the pre-existing disputes.
46 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 (Pac Rim), para. 2.99.
48 Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009 (Phoenix), paras 100, 106 and 113.
49 Phoenix, para. 140.
In contrast, the challenge to the change of nationality in the case of an individual investor is less prevalent, possibly because of the fact that a corporate structure frequently involves multiple layers rather than a single company directly owned by a natural person. Legitimate grounds may exist to apply the general principle of good faith to look behind an individual’s acquisition of nationality. As the Fakes tribunal acknowledges, the ‘effective nationality’ test could be justified in light of the particular circumstances of a given case; for example, where a nationality of convenience is acquired ‘in exceptional circumstances of speed and accommodation’, for the purpose of bringing a claim or is acquired merely because such nationality has passed over several generations. The need to examine the good faith of an individual to acquire a nationality will be more apparent in cases of dual nationality, particularly in non-ICSID cases where tribunals undertake an ‘effective nationality’ analysis to determine the individual’s dominant nationality.

The concerns for abuse of right frequently arise in the situation of parallel proceedings with overlapping claims. Generally, tribunals have consistently interpreted IIAs to allow shareholder claims for reflective loss, including both direct and indirect shareholders. However, where the shareholder has the same interest as the company it owns or other shareholders in the ownership tree, the shareholder’s double pursuit of reflective loss may be considered as abusive and therefore, precluded from being pursued as a parallel proceeding. Notably, the threshold for a finding of abuse of right is high, which normally requires the 100 per cent ownership. In Eskosol, the tribunal refused to preclude the company from bringing claims after its shareholder who owned 80 per cent of the corporate shares already had done so, holding that it would not be appropriate for tribunals to preclude arbitration by qualified investors, simply because other qualified investors may have proceeded before them without their participation.

To address the concerns of double recovery in parallel proceedings, some treaties have established a distinctive regime for covered shareholder claims. For example, the North American Free Trade Agreement (NAFTA) permits claims by a controlling shareholder on behalf of the company for loss incurred by the company and with recovery that accrues to the company, in addition to claims by shareholders on their own behalf. However, in…

50 As noted by McLachlan, the problem of changing nationality for the purpose of treaty protection has less relevance in the case of an individual investor. McLachlan et al., para. 5.170 at 208.
53 Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Decision on Respondent’s Application Under Rule 41(5), 20 March 2017 (Eskosol), para. 167, ‘there may be certain circumstances in which a foreign shareholder and the local company in which it holds shares have such identical interests that it would be abusive to permit arbitration of a given dispute by one after the other already has concluded an arbitration over the same dispute’.
54 Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, paras 330–333; See also RSM Production Corporation and others v. Grenada, ICSID Case No. ARB/10/6, Award, paras, 7.1.5–7.1.7.
55 Eskosol, paras 167–170.
56 NAFTA Article 1116(1), An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A . . . and that the investor has incurred loss or
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their interpretations, NAFTA-party governments have stated that covered shareholders cannot bring reflective loss claims on their own behalf.\textsuperscript{57} Tribunal decisions have reached varying results, with more recent tribunals concluding in favour of the NAFTA parties’ consistent interpretative statement that NAFTA prohibits reflective loss claims.\textsuperscript{58} With these development, one may wonder whether the dividing line between a legitimate act and an abuse of right is shifting its course towards more regulation and discouragement of forum selection.

V CONCLUSION

While tribunals tend to place primary emphasis on the relevant IIA in making nationality determinations, they differ as to the weight to be applied on previous \textit{ratione personae} decisions. In today’s world of economic globalisation and migration, dual nationality and change of nationality will increasingly present challenges to determine a valid nationality of an investor and its entitlement to protections under a given treaty. The object and purpose of the IIA (and the ICSID Convention if it applies) as well as the principles of public international law will continue to feature in the debate on the interpretation of a qualified investor. In the meantime, the proliferation of the IIAs that have specifically addressed the issue at hand will help formulate a more consistent approach in interpreting the \textit{ratione personae} requirements.

\textsuperscript{57} UNCITRAL Work Group III (Note by the Secretariat), \textit{Shareholder Claims and Reflective Loss} (October 2019), para. 28 at 7.

\textsuperscript{58} id., citing \textit{Bilcon}, para. 389. The tribunal stated: ‘Articles 1116 and 1117 (of NAFTA) are to be interpreted to prevent claims for reflective loss from being brought under Article 1116 . . . Moreover, the Tribunal takes account of the common positions of the NAFTA Parties in their submission to Chapter Eleven tribunals.’

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I  INTRODUCTION

The expression *ratione temporis* denotes the effect of the passage of time on obligations or a tribunal’s power to decide a dispute. Numerous tribunals have dismissed claims on this basis. However, despite its potentially critical impact, this area has received relatively little attention in decisions or commentary. Tribunals frequently disagree on the basic principles or inconsistently apply the same principle.

The starting point in a specific case is the express wording of the treaty, which may determine its temporal scope. In the absence of express provisions, temporal issues are decided by reference to principles contained in the Vienna Convention on the Law of Treaties (VCLT),3 the International Law Commission’s Draft Articles on State Responsibility (the ILC Articles)4 and decisions of international courts and investment treaty tribunals.

This chapter deals with common issues regarding temporal jurisdiction. Section II addresses issues relating to the timing of an ‘investment’. Section III outlines the principle of non-retroactivity, and exceptions to the principle. Section IV examines issues relating to the timing of a ‘dispute’. Section V outlines temporal issues relating to termination of treaties, and Section VI addresses extinctive prescription.

II  TIMING OF AN ‘INVESTMENT’

i  What happens when the investment was made prior to the treaty coming into force?

This question does not feature significantly in cases. This is likely due in large part to the fact that an investment treaty will commonly state that it covers investments made prior to its entry into force.5

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1 Barton Legum is a partner and Obioma Ofoego is an associate at Dentons Europe LLP, and Catherine Gilfedder is a senior associate at Dentons UK and Middle East LLP.
2 This chapter only examines investment treaties, although temporal issues may arise in relation to any consent document.
5 See, for example, the Canadian, Chinese, German, Malaysian and Turkish model bilateral investment treaties (BITs). For further examples, see Zachary Douglas, *The International Law of Investment Claims*, Cambridge: Cambridge University Press, 2009, page 340; or, more recently, *Cortec Mining v. Republic*
If a treaty is silent on the matter, it has been suggested that investments made before the treaty’s entry into force are included within its scope.\(^6\)

ii What happens if the investment occurred after the breach?

It is well settled that a tribunal has no jurisdiction *ratione temporis* to consider allegations of a breach of a treaty in relation to acts that occur prior to the making of an investment. In *Mesa Power Group LLC v. Canada*, the tribunal affirmed that jurisdiction extends only to an investment that existed ‘at the time the challenged measure was adopted’.\(^7\) The same point was made in *Philip Morris v. Australia*.\(^8\) The tribunal found that the claimant had made its investment before the contested measure, albeit it ultimately held that the initiation of the arbitration constituted an abuse of rights, a different principle from *ratione temporis*.\(^9\)

### III NON-RETROACTIVITY OF TREATIES

Tribunals have repeatedly found that treaties, in the absence of clear language to the contrary, will not apply retroactively to acts or facts that occur before they enter into force.\(^10\) They have relied on Article 28 of the VCLT and Article 13 of the ILC Articles\(^11\) in doing so. However, facts occurring before the entry into force of a treaty can be taken into consideration in determining whether the treaty was subsequently breached.\(^12\)

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8 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) (*Philip Morris v. Australia*).
9 id. [527].
11 Crawford (footnote 4) page 131.
12 Aaron C. Berkowitz et al (formerly Spence International Investments et al) *v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017) [217–218] (*Spence v. Costa Rica*); holding that pre-entry into force facts cannot constitute a cause of action, but ‘may’ constitute circumstantial evidence that confirms or vitiates an apparent post-entry into force ‘breach’, and that pre-entry into force facts can be taken into account in assessing the damages. See also *Técnicas Ambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) [68] (*Tecmed v. Mexico*).
Some tribunals have found that it is necessary to ‘distinguish between (1) jurisdiction \textit{ratione temporis} and (2) the applicability \textit{ratione temporis} of the substantive obligations contained in a BIT’.\textsuperscript{13} The \textit{Philip Morris} tribunal stated this distinction was ‘correct in theory’, but was unnecessary when the cause of action was founded upon a treaty breach.\textsuperscript{14}

The principle of non-retroactivity is subject to qualifications where there are continuous and composite acts, and where a treaty is not yet in force, but a state has signed it.

\begin{itemize}
  \item [i] \textbf{Can continuous or composite acts occurring before the treaty enters into force be considered in assessing an alleged breach?}
  \end{itemize}

The principle of non-retroactivity may not apply to state action that is deemed to be a continuous or composite act. In such cases, a tribunal assessing an alleged breach may consider conduct that occurred before the treaty's entry into force.\textsuperscript{15} However, a number of tribunals have been cautious in attributing significant weight to such acts, so as to avoid an overreaching retroactive application of the substantive provisions of a treaty. Some tribunals have stated that continuous or composite acts prior to the treaty's entry into force are relevant only as factual background.\textsuperscript{16} Others have appeared to give them more weight.\textsuperscript{17} Acts constituting a breach, along with damages, may be limited to those that post-date the treaty’s entry into force.\textsuperscript{18}

A continuous act is defined as a single act that extends over time and breaches an international obligation throughout.\textsuperscript{19} Article 28 of the VCLT supports the relevance of continuous acts despite the principle of non-retroactivity.\textsuperscript{20} The same is true of Article 14(2)

\begin{itemize}
  \item [14] \textit{Philip Morris v. Australia} (footnote 8) [528].
  \item [15] Douglas (footnote 5) pages 341–342; \textit{Société Générale} (footnote 10) [94]; \textit{Walter Bau v. Thailand} (footnote 10) [9.84]; \textit{ABCI Investments NV v. Republic of Tunisia}, ICSID Case No. ARB/04/12, Decision on Jurisdiction (18 February 2011) [178]; \textit{Pashok v. Mongolia} (footnote 13) [491].
\end{itemize}
of the ILC Articles. A number of tribunals have taken a similar approach. Acts found to be continuous include the non-payment of a contractually specified amount, the continued withholding of permits and concessions, and a continuing delay by national courts.

A composite act is an act composed of a ‘series of actions or omissions defined in aggregate as wrongful’. A composite act does not ‘occur’ until the completion of the series. Tribunals have found it sufficient that the point of completion takes place after the effective date of the treaty. Tribunals have, however, been reluctant to accept claims of a composite breach whose purpose is to circumvent a limitation period stated to run from the investor’s first knowledge of breach or loss.

ii What happens if a treaty has not come into force, but a state has signed it?

Arguments that a state is bound by a treaty before it enters into force have been made in three contexts. First, where the treaty is provisionally applicable; second, on the basis that states should refrain from committing acts that defeat the object and purpose of the signed treaty; and third, by reference to an estoppel argument that a tribunal has jurisdiction to hear a case against a state that has implicitly consented to its jurisdiction through words, conduct or silence.

First, as specified in the VCLT, the contracting parties may agree to provisionally apply a treaty, or part of a treaty, before it enters into force. In those cases, the treaty will be binding, unless the treaty provides otherwise or it is otherwise agreed.

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21 Crawford (footnote 19) page 259; see also ILC Article 14(2) in Crawford (footnote 4) page 135.
23 SGS v. Philippines (footnote 22) [43, 167].
24 Pac Rim v. El Salvador (footnote 16) [3.43].
25 Chevron v. Ecuador (footnote 17) [298]; see also Rubins and Love (footnote 13) page 484.
26 ILC Article 15, in Crawford (footnote 4) page 141. See also El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award (31 October 2011) [518].
28 Spence v. Costa Rica (footnote 12) [208], holding that composite acts ‘cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims’. See also An sung Housing Co., Ltd v. People’s Republic of China, ICSID Case No. ARB/14/25, Award (9 March 2017) [113]; Ruoro Mining Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) [207-208]. See contra United Parcel Service of America Inc v. Government of Canada, UNCITRAL, Award on the Merits (24 May 2007) [28].
30 Dalton (footnote 29) page 238–239; Denise Mathy, ‘Entry Into Force and Provisional Application of Treaties, Article 25 1969 Vienna Convention’ in Olivier Corten and Pierre Klein (eds), The Vienna
Provisional application has been addressed in cases concerning Article 45 of the Energy Charter Treaty (ECT). Tribunals have repeatedly retained jurisdiction on the basis of Article 45, including in the Yukos cases, where the tribunal found the ECT was provisionally applicable to Russia even though Russia had not ratified the treaty. Ultimately, Russia was held to be liable for breach of the expropriation provision. The tribunals in Petrobart v. Kyrgyzstan and Kardassopoulos v. Georgia took a similar approach.

Second, Article 18 of the VCLT requires a state to refrain from acts that would defeat the object and purpose of a treaty. Legal security and transparency are the aims behind this principle. The tribunal in Tecmed v. Mexico made explicit reference to Article 18, and stated that it would take the principle into consideration in assessing acts enacted by Mexico between


33 Hulley Enterprises Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 226, Award (18 July 2014) [1585]; Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 226, Award (18 July 2014) [1585]; Veteran Petroleum Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 226, Award (18 July 2014) [1585]. The awards referred to in this and in the previous footnote were set aside by The Hague District Court, in its judgment of 20 April 2016 (The Russian Federation v. Yukos Universal Limited et al, joined cases, Case No. C/09/477160 / HA ZA 15-1, available at http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:4230). The court held that the tribunal of the Yukos cases lacked jurisdiction because the Russian Federation had only signed, but never ratified, the ECT. In particular, the court maintained that Article 45 ECT limits provisional application to only those ECT provisions that are compatible with Russian law. The court held that this was a public law dispute, which Russian law did not allow to be resolved by arbitration, so Article 26 ECT was not compatible with Russian law. Because, under Russian law, treaties modifying domestic laws can bind the Russian Federation only if ratified (not just signed), the Court concluded that the Russian Federation was not bound by the ECT jurisdictional provisions, thereby depriving the tribunal of its jurisdiction to hear the cases.

34 Petrobart Limited v. The Kyrgyz Republic, SCC Arbitration No. 126/2003, Award (29 March 2005) [Section VIII.2]. The United Kingdom's signature of the ECT bound Gibraltar, as a British overseas territory, and the provisional application of the treaty was engaged, despite the fact that the United Kingdom's later ratification of the ECT excluded Gibraltar.

35 Ioannis Kardassopoulos v. Republic of Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007) [198–204, 247–248]. The ECT’s provisional application applied to both Georgia and Greece, even though the dispute concerned measures before the entry into force of the ECT. The tribunal found that Georgia directly expropriated the claimant’s investment by means of a decree that was dated more than two years before the ECT entered into force.

the signature and the entry into force of the relevant treaty. However, a more restrictive approach was adopted in *MCI v. Ecuador*, where the tribunal pointed out that Article 18 is an application of the principle of good faith and does not amount to the retroactive application of a treaty’s clauses.

Third, in *Besserglik v. Mozambique*, an arbitration conducted under the ICSID Arbitration Facility Rules, the tribunal held (inter alia) that an estoppel could not found its jurisdiction or give effect to a treaty not in force. It went on to observe, *obiter*, that even if estoppel were capable of giving rise to jurisdiction as a matter of international law, the factual predicates for an estoppel did not exist on the facts before it.

**IV ‘DISPUTES’ ARISING BEFORE THE ENTRY INTO FORCE OF THE TREATY**

Numerous decisions address the meaning of a ‘dispute’ in treaties’ arbitration provisions. Cases in this area have broadly fallen into two categories.

The first category concerns cases where the treaty makes provision, explicitly or implicitly, for the exclusion of disputes that arose prior to the treaty coming into force.

The second comprises cases where the treaty provides no guidance and tribunals have applied general international law principles to determine whether the treaty covers disputes arising before its entry into force. *Ping An v. Belgium* highlighted the divergent views in such cases, noting that some tribunals have applied a presumption of non-retroactivity (with or without reference to VCLT Article 28) to deny jurisdiction, while others have rejected the

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37  *Tecmed v. Mexico* (footnote 12) [70–71].
39  *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award (28 October 2019) [422-423].
40  See the Agreement between the Government of the Republic of Chile and the Government of the Republic of Peru for the Promotion and Reciprocal Protection of Investments (entered into force 11 August 2001) Article 2, which provides that the treaty ‘shall not, however, apply to differences or disputes that arose prior to its entry into force’. See, also, D Charlotin, *Tribunal in Guris v. Libya* award draws contrast with Cengiz award on FPS interpretation and sides with majority of prior Libya awards with respect to war losses clause, *IAR* eporter, 5 March 2020 (referring to Article 10 of the Libya-Turkey BIT); and *Mr Ioan Micula, Mr Viorel Micula and others v. Romania*, ICSID Case ARB 14/29, Award (5 March 2020) [294-301] (referring to Article 9(1) of the Sweden-Romania BIT).
41  In *Salini v. Jordan* (footnote 10), the tribunal interpreted the phrase ‘any dispute which may arise between one of the contracting parties and the investor of the other contracting Party on investments’, holding (at [170]) that ‘[s]uch language does not cover disputes which may have arisen before the entry into force of the BIT’.
42  *Ping An v. Belgium* (footnote 10) [189–191].
existence of any such presumption.43 The Ping An tribunal expressed doubt as to whether *Mavrommatis Palestine Concessions*44 stood for ‘a principle that there is a presumption that the jurisdiction of a tribunal extends to disputes which arose prior to its establishment’.45

Common to both categories is the importance of determining when the dispute ‘arises’. Some tribunals have asserted that the key factor in determining the existence of a dispute is the expression of a disagreement, which in time acquires a precise legal meaning, or the establishment of a ‘conflict of legal views and interests’.46 The identification of when this occurs can give rise to opposing results in apparently similar circumstances. In *Lucchetti v. Peru*, the tribunal outlined what has been coined the ‘subject matter’ test, asking if ‘the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute’47 or if the disputes had the same ‘origin or source’.48 It considered the subject matter, origin and source of both disputes to be insufficiently different for it to accept jurisdiction.49

By contrast, in *Jan de Nul v. Egypt*,50 the tribunal held that the dispute before it, which dealt with treaty violations, was a ‘new dispute’, which crystallised after the treaty came into force.51

This question sharply divided the tribunal regarding the second claimant in *Eurogas*, where the BIT at issue applied only to disputes ‘which [have] arisen not more than three years prior to its entry into force’.52

The majority considered what mattered were ‘the real causes of the dispute’,53 holding that the transgression complained of was the original reassignment of the claimant’s mining rights four years before the BIT took effect, and subsequent actions of the Slovak authorities merely maintained the effects of this. Professor Gaillard’s dissent advocated a broader view, concluding that an analysis of ‘all the factual and legal circumstances leading to the disagreement brought before the tribunal’ revealed that later conduct of the authorities

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43 *Ping An v. Belgium* (footnote 10) [191], considering *Tradex Hellas SA v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction (24 December 1996), page 194, where the tribunal was ‘not convinced’ that there was such a presumption. For further discussion, see Nick Gallus, *The Temporal Scope of Investment Protection Treaties*, BIICL, 2009, pages 132–137.

44 *Mavrommatis Palestine Concessions* (30 August 1924) [90], PCIJ Series A, No. 2, 35 (*Mavrommatis Palestine Concessions*). Commentators have interpreted this case as supporting the view that unless a treaty specifically prevents it, an international tribunal can take jurisdiction over a dispute arising before its entry into force. See Gallus (footnote 43) page 139; Rubins and Love (n 13) page 490.

45 *Ping An v. Belgium* (footnote 10) [174 et seq.].

46 *Mavrommatis Palestine Concessions* (footnote 44) [19]. This formulation has been adopted by investment treaty tribunals; see, for example, *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) [96].

47 *Empresas Lucchetti SA and Lucchetti Peru SA v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award (7 February 2005) [50].

48 id. [53].

49 ibid.


51 *Jan de Nul v. Egypt* (footnote 50) [59, 128]. See also, for example, *Renate Rose Levy and Gremcitel SA v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (9 January 2015) [167], *Philip Morris v. Australia* (footnote 8) [532] and *Lao Holdings NV v. The Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (21 February 2014) [124].

52 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No ARB/14/14), Award (18 August 2017) (*EuroGas v. Slovakia*).

53 id. [453].
(which included ignoring court decisions quashing the reassignment) in fact constituted the ‘definitive reassignment’ and thus formed part of the dispute between the parties, meaning the tribunal should accept jurisdiction.⁵⁴

V IMPACT OF THE TERMINATION OF TREATIES
i Can a claim be initiated after the treaty has been terminated?

Of increasing prominence are temporal issues surrounding termination of BITs. Such terminations have historically been rare,⁵⁵ but a growing number of states have served notices to terminate or threatened to do so, often because of the existence of or preference for multilateral investment protection arrangements.⁵⁶ EU Member States have agreed to terminate their intra-EU BITs by way of a plurilateral treaty, consequent upon the CJEU’s decision in the Achmea case,⁵⁷ which held that the Treaty on the Functioning of the European Union precluded the investor–state arbitration provision of the Netherlands–Slovakia BIT.⁵⁸

BITs tend to contain provisions regulating how they are terminated. Many specify an initial period during which they cannot be terminated except in exceptional circumstances, following which termination is permissible upon a period of written notice. In most BITs, a specific clause (a survival clause) provides for treaty protections to continue after termination for existing investments, usually for between 10 and 15 years.⁵⁹ There are examples of states purporting to disapply survival clauses in cases of termination by mutual consent,⁶⁰ albeit the effectiveness of this appears not to have been tested before any tribunal.⁶¹

⁵⁴ EuroGas v. Slovakia (footnote 52) Dissenting Opinion of Professor Emmanuel Gaillard.
⁵⁶ For instance, reports suggest that in the past five years states, including Ecuador, India, Indonesia and South Africa, have served notices to terminate large proportions of their BITs.
⁵⁷ European Commission Statement, EU Member States agree on a plurilateral treaty to terminate bilateral investment treaties, 24 October 2019.
⁵⁸ Case C-284/16 Slowakische Republik v. Achmea BV, Judgment, 6 March 2018.
⁵⁹ Rudolf Dolzer and Margrete Stevens, Bilateral Investment Treaties, Martinus Nijhoff, 1995, page 47. Of the sample of 2,061 treaties reviewed by Gordon and Pohl (footnote 55), 97 per cent contain provisions extending some or all effects of the treaty beyond termination for a fixed ‘survival’ period, with the average period being 12.5 years. Under the United States–Mexico–Canada Agreement (USMCA), investors will remain able to bring claims relating to investments made under NAFTA for three years following NAFTA’s termination: see USMCA, Annex 14-C, paragraph 3.
⁶⁰ The Czech Republic, Indonesia and Peru have purported to terminate treaties in this way, sometimes first amending the BIT to remove the survival clause before terminating.
⁶¹ In one of a number of ICSID awards that have held Achmea does not affect jurisdiction under the ICSID Convention, a tribunal observed that even if Hungary (as the respondent state) could be said to have implicitly terminated the underlying BIT by acceding to the European Union, the tribunal would still have jurisdiction owing to the survival clause, which neither of the parties had attempted to modify or renegotiate: see UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Award (9 October 2018) [265]. However, under a draft of the plurilateral treaty for the termination of intra-EU BITs leaked on 4 November 2019, sunset clauses would themselves be expressly terminated and would ‘not produce legal effects’, that is agreements to arbitrate in intra-EU BITs

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ii What is the impact of a state’s denunciation of the ICSID Convention?

The withdrawals from the ICSID Convention of Bolivia, Ecuador and Venezuela in 2007, 2009 and 2012, respectively, spurred debate around the effects of withdrawal on consent to jurisdiction given while the treaty was in force. Commentators and tribunals disagree on the effect of Articles 71 and 72, and more specifically, the meaning of ‘consent’ in Article 72, which provides that denunciation does not affect ‘rights or obligations under this Convention ... arising out of consent to the jurisdiction of the Centre given by [a State or investor] before such notice was received by the depositary’. In *Venoklim v. Venezuela*, the tribunal found that during the six-month period after denunciation the state was still a contracting state, whose consent to arbitration subsisted, and that consent could still be accepted and ‘perfected’ by an investor. The *Blue Bank v. Venezuela* tribunal had no hesitation in agreeing. By contrast, the tribunal in *Fábrica de Vidrios Los Andes CA and Owens-Illinois de Venezuela CA v. Venezuela (Favianca)* considered ‘consent’ in Article 72 to mean consent already perfected — Venezuela’s offer to arbitrate in the treaty could not therefore be ‘accepted’ after its denunciation. The tribunal remarked that the ordinary meaning of ‘consent to the jurisdiction’ could encompass either interpretation, but in the context of the Article and Convention as a whole (including the *travaux*) it was ‘quite obvious’ that perfected consent was required. It therefore declined jurisdiction over the dispute, a determination reportedly left intact on 22 November 2019 by the ad hoc Committee hearing the claimants’ annulment application.

The *Favianca* tribunal’s reasoning would logically imply that consent could not be perfected after the six-month period in Article 71. While the *Venoklim* or *Blue Bank* tribunals did not address this broader issue, in his separate opinion in *Blue Bank*, Christer Söderlund would be inapplicable *ab initio* and sunset provisions would not operate to extend them. See D Charlotin, *Previously-unseen Draft Text of EU Termination Treaty Reveals how Intra-EU BITs and Sunset Clauses are to be Terminated*, IAR*Report*, 4 November 2019.


63 *Venoklim Holding BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award (3 April 2015), [63]. The majority of the tribunal declined jurisdiction on the grounds that the Venezuelan Investment Law (VIL), under which Venoklim’s claims were originally brought, could not alone constitute Venezuela’s consent to arbitration and Venoklim was not an international investor under the VIL. Venoklim has since filed a separate claim against Venezuela relating to the same expropriation, this time under the Netherlands–Venezuela BIT (ICSID Case No. ARB(AF)/17/4), in which the tribunal was constituted in March 2018.


66 id. [273].

67 The ad hoc Committee’s decision has not been published: see L. Bohmer, *Reasons Revealed as to why an ad hoc Committee has Upheld Restrictive Reading of ICSID Denunciation Provisions*, IA Reporter, 27 November 2019.
opined that consent in a treaty remained effective even beyond the six months following
denunciation, so ICSID arbitration was in principle available at any time until the treaty’s
termination. Some commentators have concurred with Söderlund’s view on this question.

VI EXTINCTIVE PRESCRIPTION

The principle of extinctive prescription is that a right can be lost, or a claim barred, when
not exercised within a certain amount of time. For extinctive prescription to operate, the
delay must be unreasonable and attributable to the claimant. Prejudice to the respondent
may also be a relevant consideration. Although this principle is recognised in customary
international law, cases applying it are rare and claims are typically time-barred via a specific
 provision in a treaty.

Some treaties provide express time limitations on claims. For example, the NAFTA
provides a three-year limitation 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’. In Ansung Housing v. China, the tribunal summarily dismissed a
claim under a similar provision in a China–Korea BIT as the claim was manifestly time-barred
given the facts stated in the Request for Arbitration. Tribunals can, however, refer to facts
 occurring outside the limitation period, where relevant.

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68 Blue Bank v. Venezuela (n 64) Separate Opinion of Christer Söderlund [45].
69 See, for example, Emmanuel Gaillard and Yas Banifatemi, ‘The Denunciation of the ICSID Convention’
70 Christian J Tams, ‘Waiver, Acquiescence, and Extinctive Prescription’ in James Crawford and others
(eds), The Law of International Responsibility (Oxford University Press 2010) page 1045; Blanchard (n 38)
page 459.
71 Salini Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/15/39, Decision on Jurisdiction and
Admissibility (23 February 2018) [90–91].
72 See ILC Draft Articles on State Responsibility, 2001, YBILC Volume II, Part II, Article 45, page 122, n. 8
(recognising application of a form of laches). But cf. Rubins and Love (footnote 13) page 491; Blanchard
(footnote 38) page 459. See also Joachim Pohl, Kekeletso Mashigo and Alexis Nohen, ‘Dispute settlement
provisions in international investment agreements’, OECD Working Papers on International Investment
2012/2, pages 18–19.
73 North American Free Trade Agreement (entered into force 1 January 1994) Article 1116(2). In William
Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015), the
tribunal observed that Article 1116(2) does not demand a full or precise knowledge of the alleged breach
and loss or damage by the investor (id. [274–275]) and it also maintained that facts that occurred prior to
the time bar can still be considered as background or context (id. [282]); see also the cases cited above in
footnote 28, and Resolute Forest Products Inc. v. Government of Canada, PCA Case No. 2016-13, Decision
regime contained in the USMCA, the limitation period for covered claims is four years: see USMCA,
74 Ansung Housing Co., Ltd. v. People’s Republic of China, ICSID Case No. ARB/14/25, Award
(9 March 2017). See, also, Nissan Motor Co., Ltd v. The Republic of India, PCA Case No. 2017-37, Decision
on Jurisdiction (29 April 2019) [323] (addressing the three-year limitation period under Article 96(9) of the
Comprehensive Economic Partnership Agreement between India and Japan).
75 Eli Lilly and Company v. Government of Canada, ICSID Case No. UNCT/14/2, Final Award
(16 March 2017) [171–173]; Bay View Group LLC and the Spalena Company LLC v. Republic of Rwanda,
Where a treaty does not provide specific time bars, tribunals have generally allowed claims, without rejecting the possibility of time-barring them. In *Wena Hotels v. Egypt*, a lapse of seven years after the expropriation was insufficient to bar the claim because the claimant had diligently pursued its claim and provided sufficient notice.76 Similarly, in *Kardassopoulos v. Georgia*, a delay of 10 years did not prevent the claim from being brought as the claimant had reasonably believed an amicable settlement was possible and Georgia had been given timely notice of the dispute.77
Part II

ADMISSIBILITY AND PROCEDURAL ISSUES
Chapter 5

ADMISSIBILITY

Michael Nolan, Elitza Popova-Talty and Kamel Aitelaj

I INTRODUCTION

Tribunals seized to resolve disputes pursuant to bilateral investment treaties (BITs) under either the ICSID Convention or the UNCITRAL Arbitration Rules draw distinctions between the concepts of ‘jurisdiction’ and ‘admissibility’. The term ‘admissibility’ is not addressed in the ICSID Convention, the UNCITRAL Arbitration Rules or BITs. It has been observed that the concept of admissibility ‘partakes of its generic meaning in the general theory of law’. This chapter explores the genesis of the concept of admissibility and the various contexts in which the concept has been applied by ICSID tribunals.

Even though the concept of admissibility is discussed and has served as a basis for dismissal of BIT claims, at least one tribunal has questioned its power to dismiss the claim based on admissibility. In Methanex v. United States, the tribunal found that it had no power to dismiss a claim based on admissibility, noting the following:

There is here no express power to dismiss a claim on the grounds of “inadmissibility”, as invoked by the USA; and where the UNCITRAL Arbitration Rules are silent, it would be still more inappropriate to imply any such power from Chapter 11 . . . . It is unnecessary to develop these materials further. 3

The Methanex tribunal specifically referred to Article 79(1) of the Rules of Court of the International Court of Justice (ICJ) concerning preliminary objections and referring to ‘admissibility of the application’ before the court, and concluded that it had ‘no express or implied power to reject claims based on inadmissibility’. In Methanex, the respondent argued that the claims were inadmissible on two grounds. First, because under customary international law creditors’ claims are inadmissible if they stem solely from a measure’s effect on the debtor, there must be an action that directly affects the creditor’s right. 6 Second, the

1 Michael Nolan is a partner at Milbank LLP, Elitza Popova-Talty is the founder of EKPT Law and Kamel Aitelaj is a senior associate at Milbank LLP.
2 Abaclat v. Argentine Rep, ICSID Case No. ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility, paragraph 17 (4 August 2011) (‘As with jurisdiction, the concept of admissibility in international law partakes of its generic meaning in the general theory of law, but is further particularized in function of the specificities of international adjudication, including its consensual basis’).
3 Methanex Corp v. US, First Partial Award, paragraphs 124 and 126 (7 August 2002).
4 id. at paragraph 125.
5 id. at paragraph 126.
6 Methanex Corp v. US, Respondent’s Memorial on Jurisdiction and Admissibility, page 26 (13 November 2000). The respondent relied on international customary law authorities for the proposition
respondent argued that the claimants failed to identify an international legal obligation owed to it that was violated. In this regard, the respondent relied on *Barcelona Traction, Light and Power (Belgium v. Spain)* holding that:

[i]n order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions: The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach.\(^7\)

Nonetheless, the concept of admissibility has been applied by a number of tribunals in the context of procedural irregularities, which have been held to prevent the hearing of the case or to be a basis for dismissing claims because of conduct on the part of the claimant. Indeed, it has been observed that the concept of admissibility has become so important that many awards focus more on admissibility than on jurisdiction.\(^8\)

### II THE TERM ‘ADMISSIBILITY’ IN THE PRACTICE OF NON-INVESTMENT TRIBUNALS

The term ‘admissibility’ appears in the rules or procedures of several courts of international law. For example, the Rules of Court of the ICJ\(^9\) Article 79 defines admissibility as follows:

Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial. Any such objection made by a party other than the respondent shall be filed within the time limit fixed for the delivery of that party’s first pleading.

Before deciding the case, the court must determine as a preliminary matter both the issue of jurisdiction and admissibility. Jurisdictional issues in the ICJ practice ‘are those which ultimately derive from whether the Court has the right and power to consider the case brought by a state’, while issues of admissibility determine whether the case itself is one proper for determination when brought before the court.\(^10\) In ICJ practice, the respondent’s
objects to admissibility may be grounded in one or more of the following: (1) lack of locus standi by the applicant, (2) the necessity to join a third party, (3) the mootness of the dispute or (4) the existence of local remedies that have not been exhausted.\(^{11}\)

The Articles on Responsibility of States for Internationally Wrongful Acts similarly provide that a claim is inadmissible if (1) the claim is not brought in accordance with any applicable rule relating to the nationality of claims; or (2) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.\(^{12}\) Another example of definition of the concept of admissibility is contained in Article 35 of the European Convention on Human Rights. Under that provision, the court can reject applications as inadmissible if (1) domestic remedies have not been exhausted; (2) application is anonymous or substantially the same as a matter already examined by the court; (3) the application is incompatible with the provisions of the Convention, manifestly ill-founded or constitutes an abuse of right; or (4) the applicant has not suffered significant disadvantage.\(^{13}\) The obligation to exhaust domestic remedies is based on customary international law and is intended to allow national courts to remedy the violation. The concept of ‘abuse of right’ is understood according to general legal theory, namely the harmful exercise of a right for purposes other than those for which it is designed.\(^{14}\) The European Court of Human Rights has issued a detailed Practical Guide on Admissibility Criteria with explanations and examples of each ground for rejection of an application based on admissibility.\(^{15}\)

The concept of ‘admissibility’ was also recently used in the context of concurrency of proceedings among different UN entities. In the matters of Qatar v. the United Arab Emirates and Qatar v. Saudi Arabia, the ICJ had been seized of a contentious dispute for an alleged violation by Saudi Arabia and the United Arab Emirates of the Convention on the Elimination of Racial Discrimination caused by their ‘blockade’ of Qatar, while at the same time the UN Committee supervising implementation of the same Convention was requested to declare the blockade unlawful. In this instance, however, the Committee declined to dismiss Qatar’s request on admissibility grounds, holding that, because it is a monitoring body, it was ‘not convinced that a principle of lis pendens and electa una via is applicable which should rule out proceedings concerning the same matter by a judicial body entitled to adopt a legally binding judgment’.\(^{16}\)

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14 Cases in which the court has found an abuse of the right include: provision of misleading information; use of offensive language; violation of the obligation to keep friendly settlement proceedings confidential; application manifestly vexatious or devoid of any real purpose. European Court of Human Rights, Practical Guide on Admissibility Criteria 37–39 (2014), available at www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf.

15 ibid.

16 Committee on the Elimination of Racial Discrimination, Admissibility of the Inter-state communication submitted by Qatar against the United Arab Emirates, 30 August 2019, paragraph 49.
III  ADMISSIBILITY AND JURISDICTION IN THE PRACTICE OF ICSID TRIBUNALS

Admissibility has been distinguished from jurisdiction by investment tribunals. It has been accepted by a number of tribunals that, although jurisdictional objections are aimed at the tribunal authority to decide the case, challenges of admissibility are rooted in a defect of the claim.

In Waste Management Inc v. United Mexican States, the dissent summarised the practice as follows:

International decisions are replete with fine distinctions between jurisdiction and admissibility. For the purpose of the present proceedings it will suffice to observe that lack of jurisdiction refers to the jurisdiction of the Tribunal and inadmissibility refers to the admissibility of the case. Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective — whether it is appropriate for the tribunal to hear it. If there is no title of jurisdiction, then the tribunal cannot act. ¹⁷

This definition is reminiscent of Professor Brownlie’s distinction between the two concepts. Professor Brownlie observes that ‘[a]n objection to the admissibility of a claim invites the tribunal to dismiss (or perhaps postpone) the claim on ground which, while it does not exclude its authority in principle, affects the possibility or propriety of its deciding the particular case at the particular time.’ ¹⁸ Under this approach, the tribunal should first determine whether it has jurisdiction over the dispute and, once that jurisdiction has been confirmed, address the admissibility of the claims. However, some tribunals have been less willing to draw a clear distinction between jurisdiction and admissibility. In Consorzio Groupement LESI-DIPENTA v. Algeria, the tribunal acknowledged at the outset that objections of jurisdiction and admissibility ‘must be dealt with separately and successively, because they deal with different questions’. ¹⁹ Nonetheless, because the claimant was not the holder of the rights under the contract, the tribunal found both that its claims were inadmissible and that the tribunal did not have jurisdiction over the claims. ²⁰ In Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic the tribunal held: ‘there is no need to go into the

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¹⁷ ICSID Case No. ARB(AF)/98/2, Dissenting Opinion to Award, paragraphs 57–58 (8 May 2000), 15 ICSID Rev 241, 265 (2000). The distinction was emphasised by Professor Abi-Saab as follows: ‘Generically, the admissibility conditions relate to the claim, and whether it is ripe and capable of being examined judicially, as well as to the claimant, and whether he or she is legally empowered to bring the claim to court.’ Abaclat v. Argentine Rep, ICSID Case No. ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility, paragraph 18 (4 August 2011).

¹⁸ James Crawford, Brownlie’s Principles of Public International Law 693, 8th edn, 2012.

¹⁹ id. at paragraph 40 (‘In the end, because the Claimant was not the holder of the rights and obligations of the Contract under which the investment was made, it follows that its Request for Arbitration is inadmissible and that it cannot claim to be an investor within the meaning of Article 25(1) of the Convention. For this reason, not only is the Request for Arbitration inadmissible but, applying the provisions of the Convention, the Arbitral Tribunal has no jurisdiction, since it can consider the matter only at the request of an investor within the meaning of the Convention.’)

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possible – and somewhat controversial – distinction between jurisdiction and admissibility. Whatever the labelling, the parties have presented their case on the basis of the six objections raised by the Respondent.21

The recent decision in Abaclat v. Argentina demonstrates the challenges associated with determining the nature of the objection. In Abaclat v. Argentina, the first investment dispute dealing with mass claims, the tribunal decided that it had jurisdiction to hear the claims of over 60,000 Italian investors against Argentina under the ICSID Convention and the Argentina–Italy BIT.

Noting that the differences between jurisdiction and admissibility are ‘not always clear’, the majority (Professor Tercier and Professor van den Berg) applied the following criteria in distinguishing the two kinds of objections:

*If there was only one Claimant, what would be the requirements for ICSID’s jurisdiction over its claim? . . . If the issue raised relates to another aspect of the proceedings, which would not apply if there was just one Claimant, then it must be considered a matter of admissibility and not of jurisdiction.*22

In a dissent, Professor Abi-Saab disagreed with the majority conclusion that the number of the claimants was an issue of admissibility and not of jurisdiction. Professor Abi-Saab criticised the majority for adopting an ‘extremely narrow, in fact partial, concept of jurisdiction’.23 Professor Abi-Saab viewed the number of claimants as bearing on the ‘consent to arbitrate’, thus being an issue of jurisdiction. The dissent quoted from the US Supreme Court decision in Stolt-Nielsen SA v. Animal Feeds International Corp holding that ‘class action arbitration changes the nature of arbitration to such degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator’ and that ‘changes brought about by the shift from bilateral arbitration to class action arbitration [are] fundamental’.24

Whether the objection is based on jurisdiction or admissibility has significant practical implications. In bifurcated cases where issues of jurisdiction are separate from issues of liability, tribunals will deal with admissibility issues in the merits rather than the jurisdictional phase. In some cases, issues of jurisdiction are decided at the same time as issues of admissibility as tribunals have broad discretion when to decide on admissibility.25

21 ICSID Case No. ARB/03/13, Decision on Preliminary Objections, paragraph 54 (7 July 2006).
22 Abaclat v. Argentine Rep, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, paragraph 249 (4 August 2011). The tribunal found that the issue was one of admissibility: ‘Assuming the Tribunal has jurisdiction over claims of several individual claimants, it is difficult to conceive why and how the Tribunal could lose jurisdiction where the number of claimants outgrows a certain threshold . . . what is the relevant threshold? . . . and can the Tribunal really “lose” jurisdiction it has when looking at Claimants individually?’ id. at paragraphs 484–490.
23 Abaclat v. Argentine Rep, ICSID Case No. ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility, paragraph 126 (4 August 2011).
24 id. at paragraphs 150–51 (quoting 130 S Ct 1758, 1774 (2010)).
25 In Abaclat, the tribunal issued a decision on jurisdiction and admissibility. Abaclat v. Argentine Rep, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011).
IV DISMISSAL ON THE BASIS THAT THE CLAIMS ARE ‘PREMATURE’

In SGS Société Générale de Surveillance SA v. Philippines, the dispute arose out of a service contract stipulating that disputes should be referred for resolution to the courts of the Philippines. Nonetheless, when the investor sought protection under the BIT between Switzerland and the Philippines, the Philippines objected on the basis that the investor’s claim was for breach of contract and as such should be brought before a Philippines court. The tribunal determined that it had jurisdiction over the dispute because the treaty extended to contractual claims and the investor had expressly asserted breaches of the treaty.

The tribunal, nevertheless, found that it was impeded from hearing the dispute, and the claims were inadmissible:

The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal’s view the answer is that it should not be allowed to do so, unless there are good reasons, such as force majeure, preventing the claimant from complying with its contract. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction.26

The tribunal thus found that until the question of the scope of the respondent’s obligation was clarified by agreement between the parties or by Philippine courts, a decision by an ICSID tribunal would be ‘premature’.27 Citing to Brownlie, the tribunal also observed that ‘the analogous rule of exhaustion of local remedies is normally a matter concerning admissibility rather than jurisdiction in the strict sense’.28

V DISMISSAL ON ADMISSIBILITY BASED ON ALLEGED WRONGDOING BY THE INVESTOR

Perhaps uniquely in the investment treaty context, tribunals have applied the concept of admissibility to dismiss claims on the basis of the alleged wrongdoing by the investor. For example, in Plama v. Bulgaria29 the tribunal found that the effect of the claimant’s fraud and illegal conduct was to ‘preclude the application of the protections of the ECT’.30 The respondent had argued that the claimant had obtained the investment through unlawful means, rendering the claim inadmissible.31 The tribunal bifurcated the proceeding in jurisdiction and merits phase. In the decision on jurisdiction, the tribunal concluded that the respondent’s allegations on misrepresentation did not deprive it of jurisdiction in this case and decided to examine these allegations during the merits phase.32 The analysis section of the

26 ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, paragraph 154 (29 January 2004).
27 id. at paragraph 155.
28 id. at paragraph 154 (citing Brownlie, Principles of Public International Law 681, 6th edn, 2003).
29 Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (27 August 2008).
The tribunal composed of Carl F Salans (president), Albert Jan van den Berg (appointed by claimant) and V V Veeder (appointed by Bulgaria).
30 id. at paragraph 135.
31 id. at paragraph 96.
32 id. at paragraph 97.
Plama award on the merits did not use the term ‘admissibility’. However, in substance, the tribunal adopted the respondent’s arguments finding that ‘the substantive protections of the ECT cannot apply to investments that are made contrary to law’. In its reasons, the tribunal stated that granting the protection of the Energy Charter Treaty (ECT) would be contrary to the principle of *nemo auditur propriam turpitudinem allegans* – no one is heard when alleging one’s own wrong. The tribunal referred to the decisions in *Inceysa v. El Salvador* and *World Duty Free v. Kenya* invoking the principle of good faith, respect for the law and international public policy. The tribunal thus dismissed the claims because of the conduct on the part of the investor, not because of lack of jurisdiction.

Brownlie lists five grounds for inadmissibility of interstate claims: (1) the existence of legal interest on part of the claimant; (2) necessary third parties; (3) mootness of the dispute as a result of events arising after the complaint was filed; (4) extinctive prescription (i.e., unreasonable lapse of time in presentation of international claim); and (5) waiver. Under separate ‘other grounds’, Brownlie observes that ‘[t]here may be a residue of instances in which questions of inadmissibility and “substantive” issues are difficult to distinguish. This is the case of the “clean hands” doctrine, according to which a claimant’s involvement in activity unlawful either under municipal law or international law may bar the claim.’ Interestingly, Brownlie observed that the ICJ has never applied the doctrine even in cases where it could have done so. Crawford’s *Second Report on State Responsibility* includes chapter V, entitled ‘Circumstances precluding wrongfulness’. A section of chapter V entitled ‘Possible justifications or excuses not included in chapter V’ contains a subsection entitled ‘The so-called “clean hands” doctrine’. The report notes that the doctrine of unclean hands has hardly been referred to in the International Law Commission’s previous work on state responsibility. Citing Salmon, the report notes that the doctrine has been applied in a series of decisions of the United States–Great Britain Mixed Commission set up under a Convention of 8 February 1853 for the settlement of shipowners’ compensation claims. These cases were ‘all characterized by the fact that the breach of international law by the victim was the sole cause of the damage claimed, [and] that the cause-and-effect relationship between the damage and the victim’s conduct was pure, involving no wrongful act by the respondent State’, Considering that chapter V was not concerned with procedural issues or admissibility of claims, the report explained the Special Rapporteur’s view that there

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33 id. at paragraph 139.
34 id. at paragraph 141.
36 id. at 701.
37 id. at 701 n. 66.
39 id. at paragraph 332.
40 id. at paragraph 333.
41 id. at paragraph 334 (citing Jean Salmon, ‘Des “mains propres” comme condition de recevabilité des réclamations internationales’, 10 *Annaire français de droit international*, 259 (1964)).
was thus no basis to include the clean hands doctrine as a ‘new circumstance precluding wrongfulness’. The Special Rapporteur concluded that ‘it is not possible to consider the “clean hands” theory as an institution of general customary law’. The doctrine of nemo auditur propriam turpitudinem allegans has been discussed not only by investment tribunals, but also by national courts. By way of comparison, in French tort law, for example, illegality has for a long time played a major role in discarding the protection of interests held to be illegitimate. The discussion turned mainly around the admissibility of claims brought by concubines who suffered material and non-material damage as a result of their partner’s death in fatal accidents. The interest of such secondary victims was long regarded as being illegitimate. Since the 1970s, however, there has been strong support for the opinion that the maxim nemo auditur propriam turpitudinem allegans could not be invoked to dismiss an action in tort, and that the participation of the victim in the wrongful act was to be treated as an instance of contributory negligence that could lead to partial, or even total, exoneration of the defendant. Whether the doctrine of clean hands should be considered as a basis of erasing the wrongfulness of the state’s conduct, or to what extent the wrongfulness of the investor conduct has contributed to the injury suffered by it, are not issues that have so far received attention in the decisions of investment tribunals.

VI ADMISSION OF EVIDENCE

In the US federal legal system, the term ‘admissibility’ is used in the context of evidence. For evidence to be presented in legal proceedings, in addition to being relevant to factual proposition in the case, it also must be admissible. The concept of admissibility allows the court to exclude evidence that may otherwise be relevant or material. Two prominent examples of such rules of admissibility or rules of exclusion are the rule against hearsay evidence and the rule against character evidence. In the United States, Federal Rule of Evidence 404(a)(1) bars the use of evidence of a person’s character ‘to prove that on a particular occasion the person acted in accordance with the character’ and Federal Rule of Evidence 404(b)(1) provides that evidence of a crime or wrong is not admissible ‘to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character’.

In the context of ICSID proceedings, parties also have objected to the use of documents in evidentiary hearings on the basis of their admissibility; although it is not always clear whether the parties refer to inadmissible documents as documents that are otherwise relevant or have used the term ‘admissibility’ as synonymous with ‘relevancy’. In Methanex Corporation v. United States, the tribunal held certain documents illegally obtained by Methanex to be inadmissible. The documents were found to be obtained by Methanex ‘by deliberately trespassing onto private property and rummaging through dumpsters inside the office-building for other persons’ documentation’.

42 id. at paragraph 336.
43 id.
45 Fed R Evid 404(a)–(b).
46 Methanex Corporation v. United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) Pt II, chapter I, paragraph 55.
In *Abaclat v. Argentina*, the tribunal was seized to decide on the admissibility of documents for witness and expert examination at the hearing. The claimants had objected to the respondent’s proposed use of documents during the hearing, because the documents were not ‘within the scope of admissible examination, i.e. to documents relevant to the direct testimony by Claimants’ experts and witnesses’. The claimants had also objected on the asserted basis that the documents violated the tribunal’s confidentiality order and the respondent acted in bad faith in not disclosing those documents earlier.\(^47\) The tribunal issued a detailed procedural order addressing whether certain categories of documents were admissible or not, but the order did not set forth a standard or definition of admissible evidence. The tribunal ruled that ‘the use of these documents may not serve to unduly extend the scope of admissible examination for the jurisdictional hearing’.\(^48\) Claimants had also objected to the use of a DVD and its transcript of an Italian television show broadcast discussing Italian court decisions concerning proceedings initiated by the claimants, and intended to be used for cross-examination by the respondent of the claimants’ expert because of (1) the fact that the statements made in this television show are not witness testimony, (2) the alleged unreliability of the source and (3) the late filing of this material.\(^49\) After expressing concern about the time the respondent intended to use with the particular witness, the tribunal allowed the use of the material requested by the respondent subject to ‘the Tribunal reserv[ing] the right to interrupt the examination of [the claimants’ expert] in case it deems that Respondent’s examination is beyond the scope of what is necessary and appropriate’.\(^50\) Thus, in this case, even though the claimants’ objections were on the basis of admissibility and what the claimant was alluding to were concerns about the quality of the evidence, the tribunal generally found the material to be admissible (even though it did not formulate what it viewed as admissible evidence) but reserved for itself the right to exclude it on the basis of judicial economy.

In the recent decision of the ad hoc committee in *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v. Romania*,\(^51\) the respondent sought to introduce into the record eight factual exhibits concerning various enforcement proceedings. Following the claimants’ objection on admissibility grounds, the committee denied the request on the basis that ‘the new evidence was not directly relevant to the grounds for annulment.’\(^52\) In *Churchill Mining Plc and Planet Mining Pty Ltd v Republic of Indonesia*,\(^53\) another ICSID ad hoc committee recently denied the claimant’s application for annulment, which was premised on the fact that it had been deprived of the opportunity to submit new evidence related to a matter as to which the parties were specifically asked to present their views. When the tribunal found that the evidence the claimant had submitted in the arbitration had been forged, it had sought the parties’ views regarding the Minnotte case (dealing with claims tainted by fraud), following which the claimant attempted to offer

\(^{48}\) id. at paragraph 50.
\(^{49}\) *Abaclat v. Argentine Rep*, ICSID Case No. ARB/07/5, Procedural Order No. 5, paragraph 18 (2 April 2010).
\(^{50}\) id. at paragraph 20(ii).
\(^{51}\) ICSID Case No. ARB/05/20, Decision on Annulment (26 February 2016).
\(^{52}\) id. at paragraph 79.
\(^{53}\) ICSID Case No. ARB/12/40 and 12/14 (18 March 2019).
evidence of its good faith. The committee determined that, given the seriousness of the tribunal's finding of forgery, the claimant was rightfully precluded from invoking the right to be heard and submit evidence of its good faith.

VII CONCLUSION

The concept of admissibility has played and will continue to play an important role in investment treaty arbitration. With the increase in investment treaty disputes, it can be expected that respondent states will continue to rely on admissibility as a basis for dismissal of investor claims. Future investment tribunals will have the opportunity to develop the concept in a way that fits the unique nature of the claims they are called on to adjudicate.
BIFURCATION IN INVESTMENT TREATY ARBITRATION

Marinn Carlson

I INTRODUCTION

Bifurcation refers to splitting an arbitration into two separate phases, and most often involves splitting jurisdictional issues from the merits. A tribunal’s decision on whether to bifurcate is one of the most critical procedural inflection points in an investment treaty arbitration. If a tribunal bifurcates and dismisses the claims on jurisdiction, the parties avoid briefing the merits, which can save many months (if not years) of time and millions of dollars in legal fees. But, if the tribunal bifurcates and finds jurisdiction, the parties must then embark on a new, separate merits procedure, extending the overall arbitral calendar and increasing costs substantially. It follows that a tribunal’s bifurcation decision is a pivotal moment in an investment treaty arbitration.

This chapter focuses on the legal framework that tribunals apply when considering whether to bifurcate jurisdictional objections from the merits (Section II), and the strategic issues parties consider when deciding to seek or to resist jurisdictional bifurcation (Section III). Lastly, we briefly explore the less common practice of bifurcating proceedings to separate the analysis of damages from the merits phase (Section IV).

II LEGAL FRAMEWORK FOR CONSIDERING APPLICATIONS TO BIFURCATE JURISDICTION

1 The rules governing bifurcation

The two primary sets of procedural rules for investment treaty arbitration – the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules and the United Nations Commission on International Trade Law (UNCITRAL) Rules – expressly provide for bifurcation of jurisdictional objections. Article 41(2) of the ICSID Convention states that:

"Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

1 Marinn Carlson is a partner at Sidley Austin LLP. The author wishes to thank her former colleague Patrick Childress for his contribution to this chapter.
In the 2006 ICSID Arbitration Rules, Rule 41 uses similar language, stating in the pertinent part that:

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

(4) The Tribunal . . . may deal with the objection [that a dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal] as a preliminary question or join it to the merits of the dispute.

ICSID’s latest Proposals For Amendment of the ICSID Rules, if adopted, will provide considerable new direction to parties and tribunals considering bifurcation requests regarding preliminary objections. Proposed new Rule 44 would mandate the following process for such requests:

(a) unless the parties agree otherwise, the request for bifurcation shall be filed:
   (i) within 45 days after filing the memorial on the merits;
   (ii) within 45 days after filing the written submission containing the ancillary claim, if the objection relates to the ancillary claim; or
   (iii) as soon as possible after the facts on which the preliminary objection is based become known to a party, if those facts were unknown to that party on the dates referred to in paragraph (1)(a)(i) and (ii);
(b) the request for bifurcation shall state the preliminary objection to which it relates;
(c) unless the parties agree otherwise, the proceeding on the merits shall be suspended until the Tribunal decides whether to bifurcate;
(d) the Tribunal shall fix time limits for written and oral submissions on the request for bifurcation, as required; and
(e) the Tribunal shall issue its decision on a request for bifurcation within 30 days after the later of the last written or oral submission on the request.

The practical impact of these proposed changes would be to formalise and standardise the process for asserting, arguing, and deciding bifurcation requests. Moreover, by setting strict deadlines, it appears that the amendments are meant to accelerate the bifurcation process, thereby minimising the impact on the broader arbitral calendar. To that end, the proposed ICSID amendments also set a deadline of 180 days after the last party submission for tribunals to decide bifurcated preliminary objections.

Like the ICSID Rules, the UNCITRAL Rules also contemplate bifurcation. The approach to bifurcation shifted between the 1976 and 2010 versions of the UNCITRAL Rules. Article 24(4) of the 1976 UNCITRAL Rules states that:

2 The 2006 ICSID Arbitration Rules also provide that ‘[u]pon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits.’ ICSID Arbitration Rules, Rule 41(3).
4 ibid., at Rule 44(3)(c).
In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

Tribunals have held that this language – namely that a tribunal ‘should rule’ on its jurisdiction ‘as a preliminary question’ – suggests that the 1976 UNCITRAL Rules create a presumption in favour of bifurcation.5

The approach to bifurcation changed in the 2010 revision to the UNCITRAL Rules. Article 23(3)6 states that:

The arbitral tribunal may rule on a [jurisdictional objection] either as a preliminary question or in an award on the merits.

Tribunals have held that this new formulation – namely that a tribunal ‘may rule’ on its jurisdiction as a preliminary question – eliminated the presumption in favour of bifurcation that existed in the 1976 UNCITRAL Rules.7 This change brought the UNCITRAL Rules in line with ICSID Arbitration Rules, which likewise include no stated presumption in favour of jurisdictional bifurcation.

ii The legal test for bifurcation

Neither the 2006 ICSID Arbitration Rules nor the 1976 or 2010 UNCITRAL Rules provide guidance on the factors that a tribunal should consider when deciding whether to bifurcate proceedings.8 However, investment treaty tribunals have developed and followed a fairly consistent approach to the analysis, which is mirrored in ICSID’s pending proposed amendments to its Rules.9


6 This provision is unaffected by the 2013 revisions to the UNCITRAL Rules (incorporating rules on transparency in investment treaty arbitration).


8 See, e.g., Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, Procedural Order No. 2 Decision on Respondent Request for Bifurcation, 14 December 2017 (holding that ‘[n]either the ICSID Convention nor the Arbitration Rules sets forth a legal standard applicable to the decision of whether to join preliminary objections to the merits or instead to hear them in a preliminary phase. The ICSID Convention and the Arbitration Rules leave this decision entirely to the discretion of tribunals’).

9 ICSID’s proposed amendments to the ICSID Rules set out factors that tribunals should consider when ruling on requests for bifurcation of preliminary objections. Proposed amended Rule 44(2) states:

(2) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;
(b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and
Bifurcation in Investment Treaty Arbitration

Procedural efficiency – whether bifurcation is more likely to increase or decrease the time and costs associated with the arbitration – is the overarching factor that tribunals consider when deciding bifurcation applications. In his seminal treatise on the ICSID Convention, Professor Schreuer explains that the question of whether to bifurcate proceedings is:

>a matter of procedural economy. It does not make sense to go through lengthy and costly proceedings dealing with the merits of the case unless the tribunal's jurisdiction has been determined authoritatively. On the other hand, some jurisdictional questions are so intimately linked to the merits of the case that it is impossible to dispose of them in preliminary form.10

Tribunals generally agree with Professor Schreuer’s analysis.11 For instance, the *Clayton v. Canada* tribunal held that ‘its purpose in directing bifurcation... was to facilitate the efficient litigation of the claim within the arbitration process’.12 In the *Eco Oro v. Colombia* decision on bifurcation, the tribunal held similarly, noting that, in addressing a bifurcation application, ‘it should seek to determine what will best serve the Parties and the sound administration of justice, in particular with respect to procedural efficiency’.13 The ICSID Secretariat appears to have embraced this emphasis on efficiency. A new provision appears in the ICSID Secretariat’s recently proposed revisions to the ICSID Arbitration Rules, specifying that:

[i]n determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether: bifurcation would materially reduce the time and cost of the proceeding.14

To determine whether bifurcation would be efficient, investment treaty tribunals focus their analyses on three questions:15

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Each prong of the test is taken up in the sections that follow.

Prong 1: Is the jurisdictional objection serious and substantial?

The first question that tribunals ask when addressing an application to bifurcate is whether the jurisdictional objection is ‘serious and substantial’.16 If it is not, the objection is unlikely to succeed, and will not dispense with (or reduce the scope of) the arbitration. It follows that, absent one or more serious and substantial objections, a separate jurisdictional phase is needless and wasteful. When addressing whether a jurisdictional objection is serious and substantial at the bifurcation request stage, tribunals do not undertake a full analysis of the objections. Instead, tribunals typically limit their assessment to whether, on its face, the objection is frivolous or clearly without merit. The Resolute Forest tribunal explained the limited nature of the Prong 1 inquiry, noting that:

\[ \text{[t]he determination of the first part of the test, namely whether an objection is prima facie serious and substantial[,] should not, in the Tribunal's view, entail a preview of the jurisdictional arguments themselves. Rather, at this stage the Tribunal is only required to be satisfied that the objections are not frivolous or vexatious.}^{17} \]

This approach creates practical challenges for counsel when crafting Prong 1-related arguments. On the one hand, a respondent18 must set out its arguments in some detail to satisfy the tribunal that its objection is not frivolous. And of course, a claimant will need to assert its counterarguments with some granularity to persuade the tribunal that the respondent’s objection is not, in fact, serious and substantial. On the other hand, it is not

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16 See, e.g., Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste, ICSID Case No. ARB/15/2, Procedural Order No. 3 on Bifurcation and Related Requests, 8 July 2016, Paragraph 23 (holding that Timor Leste’s objections regarding consent to ICSID arbitration, the existence of a cognizable investment, and the alleged foreign investor’s nationality ‘do not appear frivolous’, and thus, satisfy Prong 1 of the test).


18 Of course, a jurisdictional objection may also be raised by a claimant against a respondent state’s ancillary claim (such as a counterclaim) – and thus, at least in theory, bifurcation could equally be sought by a claimant looking to dispose of a respondent state’s claim. For convenience, however, the discussion here will use terminology associated with the far more common scenario of a respondent state proposing bifurcation and the claimant investor resisting it.
appropriate for the parties to submit lengthy, fully formed jurisdictional briefing (backed by extensive jurisprudence, copious factual evidence, etc.) at this stage. For counsel, finding the right balance with respect to Prong 1 can be a challenge.

**Prong 2: Will a successful objection materially reduce the scope of the proceedings?**

The second question that investment treaty tribunals generally ask when considering a bifurcation application relates to the impact that the jurisdictional objection, if successful, will have on the proceedings. If the objection will not ‘materially reduce’ the scope of the arbitration, bifurcation will be a wasteful exercise. This of course raises the question: what does ‘materially’ mean in this context? On one extreme, if a successful jurisdictional objection would end the arbitration, that objection would certainly satisfy Prong 2. This was the situation in the recent *Glencore v. Bolivia* decision on bifurcation, where the tribunal noted that:

> Respondent alleges that the Tribunal lacks jurisdiction because Glencore Bermuda committed an abuse of process by structuring an investment in order to obtain standing. . . . [A]s to [this objection] it is clear that, if successful, these proceeding [sic] would be brought to an end.  

However, if a successful objection would only narrow, but not eliminate, a future merits phase, this may not be sufficient to warrant bifurcation. The *Gavrilovic v. Croatia* tribunal held that a bifurcation application failed Prong 2 of the analysis because:

> even if the Respondent were successful in its [jurisdictional argument], it would not appear to obviate the need for a merits phase. . . . Indeed, the scope of the dispute, although perhaps narrower, may not be so narrowed as to warrant the cost, expense and inconvenience of dividing the proceeding into two phases. Put simply, as the Claimants contend, it appears not to be a substantial enough objection, in and of itself, to justify bifurcation.

As this analysis illustrates, the requirement that a jurisdictional objection can materially reduce the scope of the arbitration is a sensible one. It would be inefficient to hear a jurisdictional objection in a separate phase if, regardless of the outcome, the parties will nonetheless proceed to a complex and costly merits phase of the proceedings.

**Prong 3: Is the jurisdictional objection intertwined with the merits?**

The third question that investment treaty tribunals typically ask when considering bifurcation is whether reaching a decision on the jurisdictional objection will require an examination of the merits of the case. If the jurisdictional arguments are too intertwined with merits-related

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20 *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, para. 82.
issues, tribunals generally refuse to bifurcate. Professor Schreuer confirms that bifurcation is not appropriate ‘where the answer to the jurisdictional questions depends on testimony and other evidence that can only be obtained through a full hearing of the case’. The Gavrilovic v. Croatia tribunal explored Prong 3 in detail, ultimately concluding that the jurisdictional objections in that case were not sufficiently separated from the merits. The Gavrilovic tribunal held that:

a ruling on at least three of the four preliminary objections would in all likelihood require a detailed examination of the same evidence that will ultimately need to be examined at the stage of determining the merits. There is no procedural or other advantage with bifurcating the proceeding, so as to require not only the Tribunal to consider the same, or similar, evidence on two occasions, but so as to require witnesses to appear on two occasions, submissions to be prepared which canvas the same, or similar, matters, and the consequential cost and expense. . . . Once a considerable factual overlap is accepted, which the Tribunal considers to be the case, little can be said in support of the division of the case.

As the Gavrilovic tribunal explained clearly, there is little sense in bifurcating a jurisdictional objection if, to decide that objection, a tribunal would need to examine anyway the merits of the claimant’s claims. Furthermore, tribunals have held that addressing merits-related issues at the jurisdictional stage – before the tribunal can review all of the evidence and arguments on the merits – could raise due process issues related to ‘prejudging’ the merits. The Orlandini v. Bolivia tribunal addressed this issue directly, observing that the ‘overlap of evidence’ between jurisdictional and merits issues raises due process concerns because:

[a]t the jurisdictional stage, the Tribunal will need to make certain findings of fact. To the extent that the same facts are also relevant to liability, and if the Tribunal reaches that stage, the Tribunal may have prejudged some of the issues of fact without having heard (at the jurisdictional stage) all the relevant evidence, which will only become fully available to the Tribunal at the liability stage.

21 See, e.g., Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, Paragraph 93. See also Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste, ICSID Case No. ARB/15/2, Procedural Order No. 3 on Bifurcation and Related Requests, 8 July 2016, Paragraph 25.


23 Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, Paragraph 93.

24 ibid.


For this reason, tribunals prefer not to bifurcate preliminary objections that require an analysis of the facts pertaining to the merits of the claimant’s claims.

The three-part analysis described above is a conjunctive test. Tribunals typically only favour bifurcation when a preliminary objection meets all three criteria. It would seem ill-advised, for example, to bifurcate an objection that was not serious and substantial (Prong 1), even if the objection would dispose of the case if successful and were distinct from the merits (Prongs 2 and 3). Likewise, it would appear unwise to bifurcate an objection that would not dispose of ‘all or an essential part of’ the claims (Prong 2), even if the objection were serious and substantial and distinct from the merits (Prongs 1 and 3). For these reasons, tribunals typically deny bifurcation if an objection fails even one of the three prongs of the test.

III STRATEGIC CONSIDERATIONS REGARDING BIFURCATION APPLICATIONS

In light of the significant impact that bifurcation can have on the arbitral process, parties should consider carefully whether to request or to resist bifurcation. Unsurprisingly, the strategic considerations for claimant investors and respondent states differ, as are described below.

i Strategic considerations for respondents

The conventional wisdom is that if a respondent state has reasonably sound jurisdictional objections, the respondent should seek to bifurcate the proceedings. There is logic to this approach: if a respondent prevails on one or more of its jurisdictional objections, this could dispense with, or at least lessen the complexity of, the merits phase of the arbitration. In addition to this clear upside, there are at least three other potential benefits to a respondent seeking bifurcation.

First, bifurcated proceedings often focus the tribunal’s attention (at least initially) on facts favourable to the respondent. In many cases, the factual story related to a jurisdictional objection (be it corruption, illegality, abuse of process, etc.) does not present a claimant in a positive light. However, the facts related to the merits (e.g., alleged expropriation or unfair and inequitable government treatment) may well paint a less-than-ideal picture of the respondent state. In that scenario, by isolating jurisdictional issues from the rest of the case, a respondent can focus the tribunal’s attention on factual issues that are unfavourable to the claimant, while keeping its own alleged misdeeds largely out of the spotlight. By shaping and narrowing the story in this way, the respondent gains a strategic advantage.

Second, respondents might seek to use bifurcation to extend arbitral proceedings to delay any possible adverse consequences of their actions. Although this is an approach the authors do not endorse, commentators have observed that ‘[a] party may be advocating bifurcation to delay and obstruct the arbitration, rather than to make it more efficient.’

The appeal of this strategy is not difficult to discern: in a bifurcated proceeding, even if the jurisdictional claim fails, the respondent succeeds in extending the arbitral calendar, and

thus, delaying its receipt of a potential adverse award. (Though a tribunal’s eventual award of interest could in theory nullify any financial advantage of such a delay, financial motives may not be the only ones in play.)

Third, if a respondent state presents a jurisdictional objection, but does not seek bifurcation, a tribunal might (rightly or wrongly) perceive this as an indication that the respondent believes its jurisdictional objection is weak. It could be argued that if a respondent truly believes its jurisdictional objection will succeed, it will seek to have that objection heard before arguing the merits.

There are, however, perfectly valid reasons why a respondent state might not want to seek bifurcation. For example, if a respondent believes that the overall equities favour the state – imagine, for example, that the respondent has evidence that the investor caused serious environmental damage that it wants the tribunal to see – it might behoove that respondent to tell its whole story (jurisdiction and merits) all at once for maximum impact. Or, if a respondent’s jurisdictional objection will not significantly streamline the case if successful, the respondent might be best served by not seeking bifurcation, thereby avoiding additional costs. More often, however, if a respondent has strong jurisdictional objections that will have a material impact on the scope of the case, seeking bifurcation is a prudent course.

ii Strategic considerations for claimants
Claimants typically oppose bifurcation, and do so for reasons that are often the converse of the factors that lead respondents to lodge bifurcation requests. First, claimants generally prefer to avoid stand-alone jurisdictional phases if they will focus on the claimants’ own alleged misconduct (e.g., corruption or abuse of rights), while deferring consideration of the compelling facts that claimants want to highlight (e.g., facts related to expropriation or unfair treatment). In those cases, claimants will perceive a benefit in presenting their merits-related story at the same time that they argue jurisdiction.

Second, unlike a respondent (which might prefer for various reasons to extend the proceedings), a claimant’s incentive is to conclude the arbitration and receive a favourable award as quickly as possible. The most direct path to that outcome is an arbitral process in which the tribunal hears jurisdiction and merits together.

Third, Prong 1 of the bifurcation analysis relates to whether the jurisdictional objection is serious and substantial. Thus, an application for bifurcation necessarily involves an argument from the respondent that it is asserting a serious and substantial objection. If a claimant does not challenge that characterisation, a tribunal might interpret this as a sign that the respondent’s objections have traction. At the very least, by not opposing bifurcation, a claimant forgoes an early opportunity to explain to the tribunal why the respondent’s jurisdictional objection is not, in fact, serious and substantial.

For these reasons, it is typically advisable for claimants to oppose bifurcation. As always, however, there are exceptions to the rule. For instance, if a respondent raises a jurisdictional objection that is indeed distinct from the merits and has the potential to dispose of the case, it might make sense for a claimant to agree to bifurcate that issue to save its own resources as well. The case for doing so may be even stronger if, in exchange for agreeing not to oppose bifurcation, the claimant can secure the respondent’s agreement to an accelerated procedural calendar for the jurisdictional phase. Imagine, for example, a hypothetical case where a respondent state objects to ICSID jurisdiction based on its withdrawal from the ICSID Convention. This is a purely legal issue that is wholly separate from the substance of the hypothetical investor’s claim, and may be amenable to a relatively speedy resolution.
In this scenario, it might be wise for a claimant to agree to obtain the tribunal’s verdict on the threshold issue before expending the resources to fully develop and argue its case on the merits.

IV  BIFURCATION OF DAMAGES

Historically, the vast majority of bifurcated proceedings have involved the separation of the jurisdictional and merits phases of an arbitration. This section, however, briefly discusses a different category of bifurcation: separating the damages phase of the proceedings from the merits. The rules of the major arbitral institutions do not specifically provide for the bifurcation of damages or quantum issues. However, tribunals typically cite procedural rules granting them general authority to control the arbitration procedure as a basis for bifurcating damages. The proposed amendments to the ICSID Rules, if adopted, would explicitly permit requests for bifurcation not related to preliminary objections, including the bifurcation of damages.

Although bifurcating damages is not common, it also not unheard of – tribunals do, on occasion, decide damages-related issues separately from the merits, and considerations of efficiency appear to predominate in their analysis of the decision to do so, just as in the bifurcation of jurisdiction and merits. For instance, in Suez v. Argentina, the tribunal decided that the most efficient approach would be to separate its damages analysis from its decision on the liability of the respondent. The Suez tribunal stated that it:

has decided to render a decision on liability before arriving at an award on damages. It has chosen to adopt this procedure for reasons of judicial economy. Given the complexity of this case and the extraordinarily voluminous nature of the record, the Tribunal by rendering a decision on liability now and thereby defining the scope of its investigation with respect to a determination of damages will be able more efficiently to define the mission of the independent expert that will assist the Tribunal in this determination.

We use ‘the merits’ here to encompass all stages of the case leading to a finding of liability, whether or not those prior stages include jurisdictional objections (or indeed, even bifurcation of jurisdictional issues, which can potentially lead to ‘trifurcation’ of the case into jurisdiction, merits and damages phases).

For instance, in Suez v. Argentina, the tribunal based its authority to bifurcate damages on Article 44 of the ICSID Convention, which states that: ‘[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question’. See 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 272.


Sec, e.g., 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 272.
The tribunal in *Glencore v. Bolivia* took a similar approach. In that case, the tribunal rejected an application to hear jurisdictional challenges in a separate phase, but chose to bifurcate damages, noting that ‘[t]his approach seems to the Tribunal more efficient in terms of time and costs than the alternative’.33

Bifurcating the damages phase is more likely to produce efficiencies in particular situations. For instance, where a claimant plans to assert particularly complex, novel or fact-intensive damages arguments, bifurcation of damages may be warranted for at least two reasons. First, if the claims fail at the jurisdictional or merits stage, both parties would avoid the time and expense associated with developing their complicated damages-related theories. Second, a separate damages phase would ensure that parties have sufficient opportunity to focus on, and fully develop, their damages theories and counterarguments. Another scenario that might warrant bifurcation of damages would be a case involving jurisdictional objections with the potential to eliminate some claims, particularly if the damages are expected to differ from claim to claim or overlap in complex ways across claims. In that situation, where the jurisdictional outcome may significantly reduce the scope or complexity of the damages analysis, it may make sense to bifurcate and address damages only after it is clear which claims are left standing.

**V CONCLUSION**

As this chapter highlights, a decision on bifurcation is a critical procedural moment in an arbitration. Though bifurcation can accelerate the resolution of a dispute, it can also significantly prolong the arbitral process. For this reason, tribunals have developed – and have applied with commendable consistency – the detailed, tripartite test described above. The parties also play an important role. Their strategic decisions regarding whether to request or to oppose bifurcation will shape the arbitration in important ways, impacting the length and cost of the arbitral proceedings.

Chapter 7

OBJECTION OF MANIFEST LACK OF LEGAL MERIT OF CLAIMS: ICSID ARBITRATION RULE 41(5)

Alvin Yeo and Koh Swee Yen

I INTRODUCTION

The promulgation of Rule 41(5) in the ICSID Rules of Procedure for Arbitration Proceedings (the ICSID Arbitration Rules) on 10 April 2006 was a bold and innovative step in international arbitration, and remained a unique feature of the ICSID Arbitration Rules for the first 10 years of its promulgation. Rule 41(5) reads:

Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objections, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to [Rule 41(1)] or to object, in the course of the proceeding, that a claim lacks legal merit.

The governing rules of most arbitral institutions did not stipulate in express terms the arbitral tribunal’s authority to dismiss claims in an expedited fashion, other than to make a general

1 Alvin Yeo is a senior counsel and Koh Swee Yen is a partner at WongPartnership LLP. The authors are grateful to their colleagues Monica WY Chong and Donny Trinh Ba Duong for the considerable assistance given in respect of the research and preparation of this chapter.


3 Similar provisions have since been introduced in the 2016 SIAC Rules (effective from 1 August 2016) and the 2017 SIAC Investment Arbitration Rules (effective from 1 January 2017), modelled upon Rule 41(5). Other arbitral institutional rules that have since expressly empowered arbitrators to decide on an early summary dismissal of claims include the 2017 SCC Rules and the HKIAC Administered Arbitration Rules 2018.

4 An identical provision is found in Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules, which was promulgated in the same year as Rule 41(5) of the ICSID Arbitration Rules. In Lion Mexico Consolidated LP v. United Mexican States, ICSID Case No. ARB(AF)/15/2 (Decision on the Respondent's Preliminary Objection under Article 45(6) of the ICSID Arbitration (AF) Rules, 12 December 2016) (Lion Mexico), the first publicised decision concerning an application pursuant to Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules, the tribunal noted (at [56]) that the two Rules contain ‘effectively the same language’, and '[t]hus . . . [r]eferred guidance, as to the applicable standard [under Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules, from the jurisprudence developed in the interpretation of [Rule 41(5)]']. In this Article, references to the ‘Rule 41(5)’ procedure refers also to the procedure under Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules.
provision for the tribunal to ‘conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ disputes’. Over the past few years, major arbitral institutions have departed from this trend, and there is an increasing number of institutional rules that now expressly provide for powers of summary dismissal of claims. Although some commentators have suggested that it is possible for such authority to be read into the general provision, tribunals no doubt take different views on this. It is reasonable to imagine that an arbitral tribunal would be slow to terminate the proceedings at the outset, without an explicit power to do so, for fear of (unwittingly) affecting the claimant’s right to be heard.

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5 Article 17(1) of the 2013 UNCITRAL Arbitration Rules (‘The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute’); Article 22(1) of the 2017 ICC Arbitration Rules (‘The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute’); Article 14.4 of the 2014 LCIA Arbitration Rules (‘Under the Arbitration Agreement, the Arbitral Tribunal’s general duties at all times during the arbitration shall include . . . (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties’ dispute’).

6 Rule 29.1 of the 2016 SIAC Rules (‘A party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that: (a) a claim or defence is manifestly without legal merit; or (b) a claim or defence is manifestly outside the jurisdiction of the Tribunal’) and Rule 26.1 of the 2017 SIAC Investment Arbitration Rules (‘A Party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that: (a) a claim or defence is manifestly without legal merit; (b) a claim or defence is manifestly outside the jurisdiction of the Tribunal; or (c) a claim or defence is manifestly inadmissible’); Article 39(1) of the 2017 SCC Rules (‘A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration’); Article 43(1) of the HKIAC Administered Arbitration Rules 2018 (‘The arbitral tribunal shall have the power, at the request of any party and after consulting with all other parties, to decide one or more points of law or fact by way of early determination procedure, on the basis that: (a) such points of law or fact are manifestly without merit; or (b) such points of law or fact are manifestly outside the arbitral tribunal’s jurisdiction; or (c) even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party’). In the ICC’s recent ‘Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration’, it was clarified that the power to expeditiously determine manifestly unmeritorious claims or defences comes within the broad scope of the ICC Rules of Arbitration (as amended 2017): see https://iccwbo.org/media-wall/news-speeches/icc-court-revises-note-to-include-expedited-determination-of-unmeritorious-claims-or-defences (last visited on 11 February 2019).


II GENESIS OF RULE 41(5)

The inclusion of such a summary dismissal mechanism in the ICSID Arbitration Rules was first raised in an ICSID Secretariat Discussion Paper circulated to the members of the ICSID Administrative Council on 22 October 2004,\(^{10}\) some 36 years after the ICSID Arbitration Rules came into force on 1 January 1968. It proposed the creation of ‘a special procedure’, pursuant to which ‘the tribunal may at an early stage of the case be asked on an expedited basis to dismiss all or part of the claim . . . without prejudice to the further objections a party might make, if the request were denied’.\(^{11}\) This was intended to address calls for greater efficiency in ICSID proceedings, as well as recurring complaints by state parties that the ICSID Secretariat’s limited screening power under Article 36(3) of the ICSID Convention was inadequate to weed out claims that were manifestly unmeritorious.\(^{12}\) These complaints grew louder with the increase in number of investment claims lodged, and were fuelled by concerns that state parties were being exposed to abusive tactics of investors seeking to game the system:

*The significant increase in investment disputes over the last decade has given rise to the concern that investors may abuse the system. Investors may be eager to claim as many violations of the applicable IIA as possible in order to increase their chances of success. This may take a heavy toll in terms of time, effort, fees and other costs, not only for the parties to the dispute, but also for the arbitral tribunal. It is within this context that several countries have advocated a procedure to avoid “frivolous claims” in investment-related disputes, namely claims that evidently lack a sound legal basis.*\(^{13}\)

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11 ICSID Discussion Paper-2004 at [10].

12 The exercise of the Article 36(3) screening power is confined to cases where the request discloses a manifest lack of jurisdiction of the Centre, and does not extend to the merits of the dispute or to cases where jurisdiction is merely doubtful but not manifestly lacking. In the words of Antonio Parra, former Deputy-Secretary General of ICSID and main drafter of the 2006 amendments, ‘[t]he Secretariat is powerless to prevent the initiation of proceedings that clear this jurisdictional threshold, but are frivolous as to the merits’. A decision by the ICSID Secretariat pursuant to Article 36(3) is, furthermore, given only on the basis of information supplied by the requesting party and therefore does not typically follow an adversarial process. See ICSID Discussion Paper-2004 at [6], [9], [10]; Antonio Parra, ‘The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes’ (2007) 22(1) ICSID Review 55, page 65; Puig and Brown, ‘The Secretary-General’s Power To Refuse To Register a Request for Arbitration under the ICSID Convention’ (2012) 27(1) ICSID Review 172, page 190; Carlevaris, ‘Preliminary Matters: Objections, Bi-furcation, Request for Provisional Measures’ in *Litigating International Investment Disputes: A Practitioner’s Guide* (Giorgetti ed., Brill, 2014) page 173 (Carlevaris-2014), pages 175–180; Michele Potestà, ‘Preliminary Objections to Dismiss Claims that are Manifestly Without Legal Merit under Rule 41(5) of the ICSID Arbitration Rules’ in Crina Baltag (ed.), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International, 2017) (Potestà-2017), page 252.

Following consultations with various stakeholders and interest groups, the first draft of what would become the current Rule 41(5) was published in a 12 May 2005 ICSID Secretariat Working Paper. The main differences between the draft and final versions of the text of Rule 41(5) were the addition in the final version of ‘legal’ in the phrase ‘manifestly without legal merit’; the inclusion in the final version that parties can agree ‘to another expedited procedure for making preliminary objections’; and the addition of the rule that the objection needs to be filed ‘in any event before the first session of the Tribunal’ (these aspects of the Rule are discussed further in Section IV).

### III THE EARLY CASES

Rule 41(5) got off to a relatively muted beginning. In the first three years of its existence, it was invoked only twice in the 72 cases registered under the ICSID Convention (in Trans-Global Petroleum Inc v. Jordan (Trans-Global) in February 2008 and Brandes Investment v. Venezuela (Brandes) in December 2008), and with only partial success in Trans-Global.

Trans-Global concerned allegations that Jordan had engaged in a systematic campaign to destroy the claimant’s investments in a petroleum exploration venture after the claimant confirmed its discovery of oil pay zones in the designated area of exploration. Specifically, Jordan was alleged to have breached: (1) the fair and equitable treatment standard in Article II(3)(a) of the US–Jordan bilateral investment treaty (BIT); (2) the non-discrimination provision in Article II(3)(b) of the US–Jordan BIT; and (3) an obligation to consult the claimant in Article VIII of the US–Jordan BIT. Jordan filed Rule 41(5) objections, asserting that the claims were manifestly without legal merit as they alleged ‘infringements of non-existent legal rights of the Claimant or non-existent legal obligations of [Jordan]’. The application failed in relation to the first two claims under Articles II(3)(a) and II(3)(b), but succeeded in relation to the third claim as Article VIII was found to contain only an obligation of consultation between the two contracting states and not between the investor and the host state; ‘the essential legal basis’ in respect of the third claim was therefore ‘entirely missing under the BIT’.

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17 Brandes Investment v. Venezuela, ICSID Case No. ARB/08/3 (Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009).
18 Trans-Global at [95].
19 Trans-Global at [118]–[119].
It was not until December 2010 that Rule 41(5) came to life. Within a span of 10 days, two separate tribunals in Global Trading Resource Corp and anor v. Ukraine (Global Trading) and RSM Production Corp v. Grenada (RSM Production) issued orders dismissing claims pursuant to Rule 41(5). The tribunal in Global Trading did so on jurisdictional grounds (holding that the sale and purchase contracts on which the claims were based were ‘pure commercial transactions that cannot on any interpretation be considered to constitute “investments” within the meaning of Article 25 of the ICSID Convention’), while the tribunal in RSM Production dismissed all of the claimant’s claims on preclusion grounds (as the claims were ‘no more than an attempt to relitigate and overturn the findings of another ICSID tribunal’).

Since then, decisions on Rule 41(5) have been rendered (albeit mostly finding against the applicant) a further 30 times (thrice in annulment proceedings and recently, for the first time, in proceedings for the revision of an award), bringing the total number of
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Rule 41(5) applications filed to date to 34. A review of the available decisions rendered to date reveals a fairly consistent application and interpretation of Rule 41(5) by ICSID tribunals (see Section IV).

IV RULE 41(5) IN PRACTICE

i A residual rule

Rule 41(5) begins with ‘Unless the parties have agreed to another expedited procedure for making preliminary objections’. This accords ‘proper prominence’ to agreements on other forms of expedited procedures that may already be contained in some investment treaties and agreements. Where that is the case, the procedure proposed in Rule 41(5) would only apply to the extent not otherwise agreed by the parties under the relevant treaties. See, for example, Pac Rim Cayman LLC v. El Salvador (Pac Rim), where El Salvador submitted that, given the opening line in Rule 41(5), it was the expedited procedure under Articles 10.20.4 and 28(5) of the 2008 Rwanda–US BIT; Articles 28(4) and 28(5) of the 2008 Rwanda–US BIT; Articles 10.20.4 and 10.20.5 of the Central America Free Trade Agreement (CAFTA).

Antonietti, ‘The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules’ (2007) 41 International Lawyer 427 (Antonietti-2007), page 441. In the absence of such a treaty provision, disputing parties may also mutually agree on the use of an alternative procedure (e.g., in an investment contract), though one would expect such a scenario to be uncommon: Potestà and Sobat-2012, page 12; Potestà-2017, page 253.

Pac Rim Cayman LLC v. El Salvador, ICSID Case No. ARB/09/12 (Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010).
10.20.5 of CAFTA, and not that under Rule 41(5), that was applicable.\textsuperscript{34} That submission was not materially disputed by the claimant and was accepted by the ICSID tribunal as correct.\textsuperscript{35}

ii Scope – merits, jurisdiction and procedure

In terms of the scope of objections that can be raised by respondent states,\textsuperscript{36} it is by now accepted that Rule 41(5) permits not just objections as to merits, but also jurisdictional objections.\textsuperscript{37} As was first noted in Brandes:\textsuperscript{38}

\begin{quote}
Rule 41(5) does not mention “jurisdiction”. The terms employed are “legal merit”. This wording, by itself, does not provide a reason why the question whether or not a tribunal has jurisdiction and is competent to hear and decide a claim could not be included in the very general notion that the claim filed is “without legal merit” . . . .\textsuperscript{[But] [t]here exist no objective reasons why the intent not to burden the parties with a possibly long and costly proceeding when dealing with such unmeritorious claims should be limited to an evaluation of the merits of the case and should not also englobe an examination of the jurisdictional basis on which the tribunal’s powers to decide the case rest . . . .}
The Arbitral Tribunal therefore interprets Rule 41(5) in the sense that the term “legal merit” covers all objections to the effect that the proceedings should be discontinued at an early stage because, for whatever reason, the claim can manifestly not be granted by the Tribunal.\textsuperscript{39}
\end{quote}

This position accords with the drafting history of Rule 41(5) and discussions at the ICSID Secretariat during the 2006 amendment process,\textsuperscript{40} and has been consistently endorsed by subsequent ICSID tribunals confronted with Rule 41(5) applications raising objections based on jurisdiction.\textsuperscript{41}

In \textit{RSM Production}, Rule 41(5) was further extended to cover objections premised on ‘equitable considerations and procedural impediments’.\textsuperscript{42} The dispute concerned an agreement between the claimant and Grenada, under which the claimant was to be granted a licence for petroleum exploration if this was requested within a certain period. After Grenada denied the claimant’s untimely licence request, the claimant initiated ICSID arbitration proceedings,
which were disposed of in Grenada’s favour. The claimant was dissatisfied, and commenced a second ICSID arbitration on the basis of the US–Grenada BIT, although all of the legal and factual predicates of the claims were the same as those that arose in the first arbitration and had been determined conclusively against the claimants. In the circumstances, the tribunal in the second arbitration dismissed all of the claims pursuant to Rule 41(5), reasoning that:

[A]s pleaded and argued, the present case is no more than an attempt to relitigate and overturn the findings of another ICSID tribunal, based on allegations of corruption that were either known at the time or which ought to have been raised by way of a revision application and over which the Prior Tribunal had jurisdiction. Claimant’s present case is thus no more than a contractual claim (previously decided by an ICSID tribunal which had the jurisdiction to deal with Treaty and contractual issues), dressed up as a Treaty case. . . . [T]he Tribunal finds that the initiation of the present arbitration is thus an improper attempt to circumvent the basic principles set out in Convention Article 53 [finality of awards] and the procedures available for revision and rectification of awards provided for in Article 51.

The ‘abuse of process’ overtones in *RSM Production* highlight an additional functionality of Rule 41(5) in preventing abuse of international arbitral procedures. As Brabandere suggests, ‘[a]lthough the objective of Rule 41(5) is not explicitly aimed at targeting claims that constitute an “abuse of process”, it is likely that the rule will prevent, or at least offer an adequate procedure to assess the submission of such claims, since it provides arbitral tribunals operating under the ICSID Convention with a procedure to assess the claims, *inter alia* on these grounds in an early stage in the proceedings’. It remains to be seen whether Rule 41(5) will be more often utilised in this capacity.

### iii Procedure

The procedure under Rule 41(5) is significantly expedited. The respondent has just 30 days after the constitution of the tribunal, and ‘in any event before the first session of the Tribunal’, to raise any objection under Rule 41(5). This 30-day period was designed to fit within the default 60-day period post the constitution of the tribunal (stipulated in ICSID Arbitration Rule 13(1)) within which the tribunal must hold its first session, and after which the tribunal must decide ‘promptly’. In *Trans-Global*, the tribunal confirmed that the two temporal conditions in Rule 41(5) are cumulative, meaning that a preliminary objection must be filed within 30 days from the constitution of the tribunal and before the first session.

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43 *RSM Production* at [4.1.1]–[4.1.2].
44 *RSM Production* at [7.3.6]–[7.3.7].
45 Brabandere-2012, pages 30 and 44.
46 Brabandere-2012, page 44.
47 The 2016 SIAC Rules and 2017 SIAC Investment Arbitration Rules do not specify any time limit to raise an objection that the claim is manifestly without legal merit.
49 *Trans-Global* at [24]–[29]. In *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2 (Award on the Respondent’s Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (*Almasryia* at [25]–[26])), the tribunal confirmed that the 30-day time limit starts to run from the date on which the tribunal’s constitution was announced, excluding the day of dispatch for computation. The deadline also falls on the next business day after
Though it was suggested that ‘promptly’ should be understood in terms of ‘days or weeks, [and] not months’,  
the concept has generally been applied in terms of weeks and, at times, months; for example, the tribunals in Trans-Global, Brandes and PNG Sustainable Development Program Ltd v. Papua New Guinea (PNGSDP)  
took roughly three weeks following oral arguments to issue their decisions, whereas the process took more than three months in Lion Mexico and almost five months in Global Trading.  

In any case, the Rule specifically requires parties to be given ‘the opportunity to present their observations on the objections’ before the tribunal ‘promptly’ decides, and failure to accord parties with a full opportunity to be heard could potentially lead to a charge of serious departure from a fundamental rule of procedure, with the consequence of a possible annulment under Article 52(1)(d) of the ICSID Convention. How the balance between the desire for an expedited decision and the requirements of a properly reasoned determination is to be struck would depend on the requirements of each individual case. As noted in Global Trading:

Rule 41(5) is sparse in its indications to a tribunal as to the procedure to be followed when an objection is lodged. It says no more than that “the parties” (in the plural) must have “the opportunity to present their observations on the objection”, and that the Tribunal is required to notify the parties of its decision “at its first session or shortly thereafter”. To the extent that the Rule leaves the question of procedure there, it is no doubt for each individual Tribunal to fill in the gaps by exercising the general procedural powers given to it by Rule 19. On the other hand, it should be noted that – if a Tribunal does in the event decide that all claims are manifestly without legal merit – it is then required by Rule 41(6) to render “an award” to that effect, thus attracting those elements of the Rules and the ICSID Convention that relate to the rendering of an award. . . . There may be cases in which a tribunal can come to a clear conclusion on a Rule 41(5) objection, simply on the written submissions, but they will be rare, and the assumption must be that, even then, the decision will be one not to uphold the objection, rather than the converse. That is because, if an objection is not upheld at the Rule 41(5) stage, the rights of the objecting party remain intact, as the last sentence of the Rule makes plain.  

the 30-day period. Kuwait’s Rule 41(5) application in Almasryia, which was submitted on Monday 3 September 2018, was thus found to be within time as the tribunal’s constitution was only notified to parties on 2 August 2018.

50 Markert-2011, page 145.
51 ICSID Case No. ARB/13/33 (Decision on the Respondent’s Objections under Rule 41(5) of the ICSID Arbitration Rules, 28 October 2014).
52 There must be some limit to this – if it is too difficult to decide, the case is probably not one that is suitable for summary dismissal under Rule 41(5). The drafters of Rule 41(5) ‘can only have had in mind an objection that was so clear-cut that it could be decided virtually on the papers or with a minimum of supplementary argument’ (MOL Hungarian Oil and Gas Company plc v. Croatia, ICSID Case No. ARB/13/32 (Decision on Respondent’s Application under ICSID Arbitration Rule 41(5), 2 December 2014) (MOL) at [44]).
54 Global Trading at [32]–[33].
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It appears to be the norm for parties to be permitted one to two rounds of written submissions, followed by a round of oral arguments, before the tribunal issues a decision or award under Rule 41(5). With the exception of a handful of cases, this has been the typical manner in which Rule 41(5) proceedings have been conducted to date.

Finally, the last sentence of Rule 41(5) makes clear that the dismissal of a Rule 41(5) objection will not affect a party’s right to thereafter file jurisdictional objections according to the normal procedure under Rule 41(1). In this manner, Rule 41(5) forms part of a ‘harmonious continuum’ of jurisdictional review of claims with a progressively higher standard of review at each stage, beginning from the Secretary General’s screening power under Article 36(3) of the ICSID Convention, and ending with the tribunal’s determination of objections raised under the Rule 41(1) procedure.

iv Test for ‘manifest lack of legal merits’

There is a high level of uniformity in the manner in which ICSID tribunals have applied the test of ‘manifest’ lack of merit. ‘Manifest’ in this regard has consistently been equated with ‘evident’, ‘obvious’ or ‘clearly revealed to the eye, mind or judgement’. The threshold is very high, and a respondent must establish its Rule 41(5) objection ‘clearly and obviously, clearly and obviously,

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55 Emnis International; Accession Mezzanine Capital LP and anor v. Hungary, ICSID Case No. ARB/12/3 (Decision on Respondent’s Objection under Arbitration Rule 41(5), 16 January 2013); Edenred SA v. Hungary, ICSID Case No. ARB/13/21 (Decision on Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 6 June 2014); Transglobal Green Energy LLC and Transglobal Green Panama SA v. Republic of Panama, ICSID Case No. ARB/13/28 (Decision on the Admissibility of Respondent’s Preliminary Objection to Jurisdiction of the Tribunal under Rule 41(5) of the Arbitration Rules, 17 March 2015); Álvarez y Marín Corporation SA and others v. Republic of Panama (Álvarez), ICSID Case No. ARB/15/14 (Decision on Respondent’s Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 27 January 2016); Mathias Kruck and others v. Spain, ICSID Case No. ARB/15/23 (Decision on the Respondent’s Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 14 March 2016); Lion Mexico (where the tribunals appeared to have dispensed with oral arguments on the Rule 41(5) applications).

56 Trans-Global; Brandes; Global Trading; RSM Production; Rafat Ali Rizvi v. Indonesia, ICSID Case No. ARB/11/13 (Award on Jurisdiction, 16 July 2013); PNGSDP; MOL; Pan American Energy LLC v. Plurinational State of Bolivia, ICSID Case No. ARB/10/8 (Decision on the Respondent’s Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 26 April 2013); CEAC Holdings Limited v. Montenegro, ICSID Case No. ARB/14/8 (Decision on the Respondent’s Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 27 January 2015); Elektrogospodarstvo Slovenije – razvoj in inzenir

d.o.o. v. Bosnia and Herzegovina, ICSID Case No. ARB/14/13 (Decision on the Respondent’s Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 3 November 2015); Elsamex SA v. Honduras, ICSID Case No. ARB/09/4 (Decision on Elsamex SA’s Preliminary Objections, 7 January 2014); Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12 (Decision on the Respondent’s Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 2 July 2013); Lundin Tunisia BV v. Tunisia, ICSID Case No. ARB/12/30 (Decision on the Respondent’s Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 6 January 2014); Ansung Housing, Similarly for Mobile TeleSystems, in respect of proceedings under Arbitration (Additional Facility) Rule 45(6).

57 Diop-2010, page 318. See also Brandes at [53], where the tribunal noted that ‘there are actually three levels at which jurisdictional objections could be examined. First by the Secretariat, and if the case passes that level, it would then be under Rule 41(5), and if it passes that level, it might still be under Rule 41(1)’.


59 Trans-Global at [83]; PNGSDP at [88]; Lion Mexico at [62]–[67] (in the content of an application brought pursuant to Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules); Almamyria for Operating
with relative ease and dispatch'. 60 Put another way, it must be shown that the claim is ‘clearly and unequivocally unmeritorious’ 61 and thus ‘untenable in a way that is evident and easily proved’. 62 Most recently, in Lotus Holding Anonim Sirketi v Republic of Turkmenistan, ICSID Case No. ARB/17/30 (Award, 6 April 2020), the tribunal described this high threshold as one which demanded that ‘no matter what evidence is adduced, there is a fundamental flaw in the way that the claim is formulated that must inevitably lead to its dismissal’. 63 This will not be the case where the claimant has ‘a tenable arguable case’, 64 or where the objections throw up novel, difficult or disputed legal issues (as Rule 41(5) was intended ‘only to apply undisputed or genuinely indisputable rules of law to uncontested facts’). 65

Unsurprisingly, the high threshold under Rule 41(5) has rarely been crossed. For example, in Trans-Global, where it was ‘obvious’ 66 that the claims under Article VIII of the US–Jordan BIT were based on ‘non-existent legal rights of the Claimant’ and ‘non-existent legal obligations of [Jordan]’ 67 (a conclusion that the tribunal was able to reach with ‘little difficulty of interpretation’); 68 in Global Trading, where neither of the relevant contracts could ‘by any reasonable process of interpretation be construed to be “investments” for the purposes of the ICSID Convention’; 69 in Emmis International, where it was ‘manifest’ from the ‘plain text of the Treaties’ that the claimants were not covered by the consent of the host state; 70 in Ansung Housing, where there were ‘multiple and clear pleadings’ 71 by the claimants confirming that they ‘first knew’ that they incurred loss and damage more than three years before the commencement of proceedings (thus offending the three-year limitation period under Article 9(7) of the 2007 China–Korea BIT) 72 and where it was ‘clear’ from a ‘plain reading’ of the most favoured nation (MFN) clause in Article 3(3) of the 2007 China–Korea BIT that MFN treatment did not extend to the temporal limitation period for investor–state arbitration in Article 9(7); 73 and in Almasryia, where the tribunal found that it was ‘manifest, clear and obvious just from simply looking at the text of the letters’ that the

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claimant’s sending of the said letters did not comply with a six-month waiting period and notification requirement prescribed by Article 10(2) of the Egypt–Kuwait BIT, and where it was ‘obvious’ that the claimant did not even have an existent property right under the laws of Kuwait to ground an expropriation claim.

More often than not, the threshold is fallen short of. In PNGSDP, the state raised Rule 41(5) objections in relation to both the tribunal’s jurisdiction and the substantive merits of the claimant’s claims. On jurisdiction, the state argued that the mandatory jurisdictional requirements under Article 25(1) of the ICSID Convention were not satisfied as the state did not provide a standing offer to arbitrate investment disputes by its domestic legislation, Section 39 of the Investment Protection Act 1992 (IPA), and the claimant was not a ‘foreign investor’ with a ‘private foreign investment’, because it existed to fulfil the sole public purpose of promoting sustainable development and advancing the general welfare of the people of Papua New Guinea (PNG). The state also argued that the claims that were based upon the alleged MFN clause in Section 37(1) of the IPA were manifestly without legal merit, as Section 37(1) was not an MFN clause but simply a clause that entitled a foreign investor to the protections under the IPA, unless the investor is entitled to more favourable treatment under any other treaty to which PNG is also a party.

Although the MFN clause argument essentially required the tribunal to construe Section 37(1) of the IPA – which could arguably be carried out under a summary Rule 41(5) procedure – after three rounds of written submissions (two by the state and one by the claimant) and an oral hearing, the tribunal found that all of the state’s objections gave rise to novel and complex issues of laws that also required analysis of ‘relatively unusual’ facts:

The interpretation of the [IPA and IDCA] [Investment Disputes Convention Act] is central to the Respondent’s objections with respect to written consent and the alleged MFN clause in the IPA. The Tribunal considers that these interpretations cannot be satisfactorily made in the context of a Rule 41(5) application, which necessarily involves an expedited and summary procedure. The Tribunal notes that there are disputed questions regarding which system (or systems) of law should apply to the interpretation of the IPA and IDCA (in particular, international or domestic rules of interpretation), and in addition, which specific interpretive principles should apply (e.g., the effet utile principle and the rule of contra proferentem). Further, the Tribunal notes that the IPA and the

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74 Almasryia at [34]–[48]. This Rule 41(5) ruling is currently the subject of annulment proceedings commenced on 12 March 2020.
75 Almasryia at [49]–[58]. As mentioned above, this Rule 41(5) ruling is currently the subject of annulment proceedings commenced on 12 March 2020.
76 Section 39 of the IPA provided: ‘The Investment Disputes Convention Act 1978, implementing the [ICSID Convention], applies, according to its terms, to disputes arising out of foreign investment.’ The Investment Disputes Convention Act 1978 in turn provided, in Section 2: ‘A dispute shall not be referred to [ICSID] unless the dispute is fundamental to the investment itself.’ Papua New Guinea (PNG) eventually succeeded on this ground in the subsequent Rule 41(1) proceedings (PNG Sustainable Development Program Ltd v. Papua New Guinea, ICSID Case No. ARB/13/33 (Award, 5 May 2015)).
77 PNGSDP at [35].
78 Section 37(1) of the IPA provided: ‘The provisions of this section shall apply to a foreign investor except where treatment more favourable to the foreign investor is accorded under any bilateral or multilateral agreement to which the State is a party’.
79 PNGSDP at [52].
IDCA have not yet been the subject of interpretation by an ICSID tribunal, and it will therefore be required to decide issues of first impressions. Doing so in a summary Rule 41(5) procedure would be inappropriate.

The Respondent’s objection with respect to “private foreign investment” cannot be satisfactorily dealt with at this stage of the proceeding. The Respondent’s objection does not appear to be based upon an explicit jurisdictional criterion set out in either the ICSID Convention or the relevant PNG legislation. Rather, the Respondent’s objection appears to be based on the Respondent’s interpretation of the ICSID Convention’s jurisdictional requirements in light of materials extraneous to the terms of Article 25(1) (in particular, the Convention Preamble and the Report of the Executive Directors on the [ICSID Convention]) and a distinction drawn by the Respondent between the Claimant and what the Respondent refers to as “typical foreign investors” considered in other ICSID Convention cases.

As such, the Respondent’s objection is unsuited for a Rule 41(5) application. It does not involve application of undisputed or indisputable legal rules, but rather involves novel issues of interpretation and analysis.

The tribunal in Lion Mexico (the first publicised decision concerning an application brought pursuant to Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules) also dismissed the respondent state’s preliminary objections in very similar terms:

The amount of evidence and the length and detail of the arguments show the complexity of the underlying legal question. The Tribunal further notes that the issue of whether pagarés [i.e., promissory notes] and hipotecas [i.e., mortgages] that formalize and secure loans with a maturity of less than three years can be considered as investments under Art. 1139(g) and (h) NAFTA – separately from contemporaneous loan transactions – seems to be a novel issue, which has never been addressed in previous decisions.

The question whether the pagarés and hipotecas constitute an investment pursuant to Art. 1139(g) and (h) NAFTA, or whether their status must be considered exclusively pursuant to Art. 1139(d) NAFTA, raises complex interpretative issues and requires a greater degree of consideration and a more thorough analysis of Mexican law and international legal principles. The Tribunal requires further legal argument on these issues within the context of the full development of the Parties’ cases.

In a relatively recent decision of Eskosol SpA in liquidazione v. Italian Republic (Eskosol), the tribunal rejected the respondent’s (Italy’s) application under Rule 41(5). Italy presented four separate grounds for its application and the claimant, Eskosol SpA, argued that none of Italy’s objections satisfied the requirements of Rule 41(5), as they demanded ‘a significant

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80 PNGSDP at [94]–[98].
81 Lion Mexico at [79]–[81].
83 ‘(i) Eskosol cannot be considered a “national of another Contracting State” under Article 25(2)(b) of the ICSID Convention . . . (ii) Eskosol does not qualify as an “investor” either under the Energy Charter Treaty or the ICSID Convention . . . (iii) Under Article 26(3)(b)(i) of Annex 1D of the Energy Charter Treaty, Italy declined to consent to arbitration of a dispute previously submitted to another forum; (iv) The claim is barred by the principles of lis pendens and res judicata or collateral estoppel.’ Eskosol at [43].
factual enquiry’ and raised ‘novel and complex legal issues’. While the parties agreed that ‘in order to be manifestly without legal merit, the claims must be plainly without merit as a matter of law’, Italy used the additional formulation of ‘clearly and obviously’ to construe the word ‘manifest’, and Eskosol SpA referred to tribunal decisions to contend that the defect must be ‘obvious and plain’. The tribunal opined that ‘for the purposes of this case, there was no need to distinguish among the formulations of plain, clear and obvious, which all recognize that the manifest standard requires a very high degree of clarity, [such that], in the view of the tribunal, the claims presented cannot succeed as a matter of law’. The tribunal concluded that as the issues involved were not ‘manifest’, but ‘novel and complex’, they were unsuitable for resolution in a Rule 41(5) application.

These explications of the test of manifest lack of legal merit should not be confused with the prima facie test that is used for preliminary objections to jurisdiction under Arbitration Rule 41(1), which is less strict:

The prima facie test . . . requires the arbitral tribunal to undertake a full evidentiary inquiry into genuine jurisdictional matters but allows a prima facie assessment not only of the alleged facts but also of the legal standards applicable to determine a violation of the BIT on the merits. Contrary to this, a preliminary objection under Arbitration Rule 41(5) must be directed either at jurisdiction or at the merits and allows neither for an evidentiary inquiry nor for the arbitral tribunal to undertake a prima facie assessment of legal standards. Instead, the arbitral tribunal has to be absolutely certain about the applicable legal standard in order to find that a claim is manifestly without legal merit. If the tribunal is in doubt, the preliminary objection will be rejected and the proceeding will continue.

v Addressing disputed facts

The applicable standard of review for making a finding that a claim is ‘manifestly’ without legal merit must also be distinguished from the question of what standard an ICSID tribunal should apply in addressing facts asserted by a claimant. As seen above, the threshold for the former inquiry is necessarily very high (manifest). Conversely, a very low bar is set for the latter inquiry:

At the first level of inquiry, the Tribunal should accept pro tem the facts as alleged by the claimant, to assess whether, on the basis of the claimed set of facts . . . there might be a violation of the relevant obligation. At the second level of inquiry, the Tribunal must make a definitive finding that the claims are “manifestly without legal merit”. It is on this second question that the four Tribunals are in complete agreement that the bar is “high”.

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84 Eskosol at [42].
85 The claimant inter alia relied on Trans-Global, Global Trading, Brandes, Elsamex, RSM Production, Álvarez and PNGSDP. Eskosol at [37].
86 Eskosol at [37].
87 Eskosol at [98].
88 Eskosol at [120]; [169]; [171].
The word ‘legal’ (in ‘without legal merit’) was specifically introduced into the final text of Rule 41(5) to avoid improper discussions on the facts of the case at the Rule 41(5) stage, and ICSID tribunals have therefore been careful to emphasise that objections should be based on legal impediments to claims (and not factual ones, which a tribunal may not be in a position to decide in a preliminary manner). Tribunals would therefore refuse to entertain factual evidence or weigh the credibility or plausibility of a disputed factual allegation at the Rule 41(5) stage; basically the factual premise has to be taken as alleged by the Claimant. Only if on the best approach for the Claimant, its case is manifestly without legal merit, it should be summarily dismissed.

Notwithstanding this, tribunals (e.g., those in Trans-Global and RSM Production) seem prepared to make a ‘plausibility exception’ to the rule that the facts alleged by the claimant should be taken at face value if disputed facts that are relevant to the legal merits of the claim are regarded as manifestly incredible, frivolous, vexatious or inaccurate, or made in bad faith.

V CONCLUSION

After more than 10 years of Rule 41(5), one looks back and notes with some relief that initial concerns that the Rule would be prone to abuse by respondent states – who can delay proceedings and increase costs by invoking without basis an ‘additional procedural layer’ – have not eventuated. To date, only 34 Rule 41(5) applications have been filed, representing a fraction of ICSID’s caseload. The high threshold set and consistent approach to such applications, as well as potential costs consequences for unmeritorious invocations of Rule 41(5) have likely served as important deterrents against trigger-happy behaviour.

92 Antonietti-2007, page 440; Diop-2010, pages 325–326; Lion Mexico at [68]–[70].
93 Trans-Global at [97]; Brandes at [59]; PNGSDP at [90]; Almasryia at [30]–[33], [47], [58].
94 Schreuer, page 543; Trans-Global at [91].
95 Trans-Global at [105].
96 Brandes at [61].
97 Markert-2011, page 147.
98 Trans-Global at [105]; RSM Production at [6.1.2]; Emmis International at [26].
99 Schreuer, page 544.
100 See Le Cannu, ‘Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System’ (2018) 33(2) ICSID Review 456, page 486, where it is estimated that around 1 per cent of all arbitration proceedings under the ICSID Convention and Additional Facility Rules have resulted in an award deciding claims are manifestly without legal merit.
101 Although tribunals in the earlier cases had exercised caution in the allocation of costs (given the newness of Rule 41(5)), a more robust approach to costs may be expected by tribunals moving forward as parties gain familiarity with the scope and aims of the Rule 41(5) procedure. This was so in Ansung Housing, where the tribunal noted at [162] that ‘the Rule 41(5) procedure is no longer new and . . . the Claimant’s limitations arguments were not reasonable’, and awarded the successful Rule 41(5) applicant (China), inter alia, 75 per cent of its legal fees and expenses. Going forward, one can also expect the same robust approach to be adopted against parties mounting unmeritorious Rule 41(5) applications. In the recent Eskosol case, the tribunal, vide Procedural Order No. 3, Decision on Respondent’s Request for Provisional Measures, dated 12 April 2017, denied Italy’s request for provisional measures, which included an order for security for costs for the Rule 41(5) application. Noting that requests for measures regarding security for costs are
in this respect. The built-in short timelines in Rule 41(5) have also ensured that applications have generally been swiftly disposed of, and guard against any abuse of the process as a delay tactic.

Given the positive experience with Rule 41(5) thus far, this is certainly a feature of the ICSID Arbitration Rules that is worth retaining. The recent series of Working Papers published by ICSID on the proposed amendments to the ICSID Arbitration Rules suggests Rule 41(5) is indeed here to stay, as the proposed amendments to Rule 41(5) thus far aim to enhance rather than replace it.

The success of Rule 41(5) has meanwhile led to moves by the Singapore International Arbitration Centre and a number of other major arbitral institutions to include similar explicit provisions in their rules, and it will be interesting to see whether more arbitral institutions follow suit.

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103 For example, a proposed change is to make it explicitly clear that the scope of Rule 41(5) encompasses jurisdictional objections in addition to objections as to the merits of the claim, following the line of cases discussed in Section IV.ii above (see ICSID Working Paper 1 at p. 175 and [372]–[373]). Other proposals aimed at further expediting the process include (1) allowing the filing of Rule 41(5) applications even before the tribunal's constitution (pending which the ICSID Secretary General will fix time limits for parties' observations so that the tribunal may deal with the objections as soon as possible after its constitution) (see ICSID Working Paper 1 at p. 175 and [376]), and (2) requiring the tribunal to rule on the objection within 60 days after the latest of the constitution of the tribunal or the last written or oral submission on the objection (see ICSID Working Paper 1 at p. 175 and [378]).

Chapter 8

PROVISIONAL MEASURES

Raëd Fathallah and Marina Weiss

I INTRODUCTION

Provisional measures can be a decisive tool in protecting the rights of parties during pending investment treaty disputes. The number of requests for provisional measures has continued to increase proportionally to the development of treaty-based claims by investors against states. Provisional measures requests have not been brought solely by claimant-investors. Respondent-states, too, are requesting provisional measures with increasing frequency. The circumstances for requesting provisional relief are highly diverse, as are the types of provisional remedies ordered. This is because of the factual complexity that characterises investment disputes and the manifold types of state conduct that may be at issue in treaty-based arbitration.

This chapter provides a brief overview of provisional measures in investment treaty arbitration. Following a proposed definition (Section II) and an examination of tribunals’ powers to order provisional measures (Section III), this chapter will review the main types of measures ordered (Section IV), and discuss the requirements for ordering provisional measures (Section V) before setting out a proposed conclusion (Section VI).

II DEFINITION

Provisional measures seek to preserve the rights of litigants on a temporary basis while awaiting the final adjudication of a pending dispute. They are provisional in that they may be subject to modification or withdrawal, and they generally lapse upon the final adjudication of

1 Raëd Fathallah is a partner and Marina Weiss is a counsel at Bredin Prat.
3 See, Goldberg/Kryvoi/Philippov, 6.
4 For the avoidance of doubt, the terms ‘treaty-based arbitration’ and ‘treaty-based tribunals’ refer to disputes initiated and arbitral tribunals constituted based on bi- or multilateral treaties for the protection of investment and/or, as the case may be, the ICSID Convention or ICSID Additional Facility (as defined at footnote 11). They also include cases initiated under the ICSID Convention or ICSID Additional Facility that are based on contracts or state investment legislation. For the purpose of this study, references to ‘treaty-based tribunals’ or ‘investment tribunals’ are used interchangeably.
5 While the terms “interim measures of protection”, “provisional orders”, “interim awards”, “conservatory measures” or “preliminary injunctive measures” (UNCITRAL, Working Group on Arbitration, Thirty-second session, 20–31 March 2000, Report of the Secretary General, UN Doc A/CN.9/WG.II/
the dispute. Their intent is to protect, not to prejudge the merits of a case. Provisional relief can be declaratory or injunctive in nature; it is thus a powerful tool for tribunals to direct party conduct in the course of a dispute. By definition, requests for provisional measures relate to circumstances that cannot await the final adjudication of the main dispute, and thus require priority examination by the adjudicator.

 Provisional measures are available in different forms under virtually all domestic legal orders and most international adjudicatory systems, and the principle underlying interim protection of rights has been considered to constitute a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute.

 Provisional measures are also available in arbitration. Today, the UNCITRAL Model Law on International Commercial Arbitration and most domestic arbitration laws contain provisions regulating interim relief, as do all modern arbitration rules.

 Whether designed for institutional or ad hoc arbitration, all modern arbitration rules may be chosen to govern investor–state arbitration if the parties so agree. The ICSID
Provisional Measures

Convention and the ICSID Arbitration Rules\(^\text{11}\) are specific to investor–state arbitration. All of these rules display significant similarities, including the manner in which they regulate provisional measures.

The arbitration rules most commonly referred to in investment treaties are those set forth under the ICSID framework,\(^\text{12}\) followed by the UNCITRAL Arbitration Rules.\(^\text{13}\) Other institutional rules, such as the ICC Arbitration Rules,\(^\text{14}\) the SCC Arbitration Rules,\(^\text{15}\) and the LCIA Arbitration Rules\(^\text{16}\) are also referenced, albeit less frequently.\(^\text{17}\)

One distinctive feature of provisional measures in the investor–state arbitration context is that they are subject to increased public scrutiny as they often relate to core sovereign conduct and are frequently published.

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\(^{11}\) i.e., the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (the ICSID Convention) and the Rules of Procedure for Arbitration Proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID Arbitration Rules), administered by the International Centre for Settlement of Investment Disputes (ICSID). The ICSID Convention, which counts 163 Member States on the date of publication of this chapter, provides for an autonomous dispute settlement system that is ‘seatless’ and is thus subject neither to any domestic arbitration law, nor to the supervision of domestic courts. As at the date of the preparation of this chapter, the ICSID Arbitration Rules are in the process of undergoing revision. On 27 September 1978, the ICSID Additional Facility was created for arbitration or conciliation of investment disputes between a state and a foreign national, one of which is not an ICSID Member State or a national of an ICSID Member State (Additional Facility and ICSID Additional Facility Rules). In contradistinction to arbitration under the ICSID Convention, arbitration under the ICSID Additional Facility Rules will take place pursuant to a domestic arbitration law, subject to the supervisory powers of the courts of the seat of the arbitration.


\(^{15}\) The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) of 2010, as revised in 2017 (the SCC Rules).

\(^{16}\) The London Court of International Arbitration (LCIA) Arbitration Rules (LCIA Rules).

III THE POWER TO GRANT PROVISIONAL MEASURES IN INVESTMENT TREATY ARBITRATION

The power to order provisional measures has been widely considered as inherent to the adjudicatory function of international tribunals. In investment treaty arbitration, the powers to grant provisional relief are regulated by the applicable arbitration rules, subject to the terms of the arbitration agreement (i.e., the dispute resolution clause in the relevant investment treaty). For arbitrations outside the ICSID context, any mandatory requirements of the lex arbitri must also be taken into account.

The vast majority of investment treaties do not specifically regulate the organisation of the arbitral process or the granting of provisional measures. One notable exception is Article 1134 of the NAFTA, which provides that investment tribunals 'may not order attachment or enjoin the application of the measure' impugned in the main proceedings, thereby significantly limiting the scope of tribunals' powers. Certain subsequent treaties concluded by the contracting states to the NAFTA stipulate nearly identical restrictions.

However, the relevant arbitration rules govern the arbitral process in detail, including the power to grant provisional measures. This section will examine the powers to grant provisional measures under the ICSID framework and the UNCITRAL Rules before briefly considering selected institutional rules.

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18 See, e.g., E-Systems, Inc. v. The Government of the Islamic Republic of Iran, Bank Melli Iran, IUSCT Case No. 388, Interim Award (Award No. ITM 13-388-FT), 4 February 1983 (E-Systems v. Iran), para. 33 (holding that 'this Tribunal has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective.'); Behring International, Inc. v. Islamic Republic of Iran Air Force, Iran Aircraft Industries and others, IUSCT Case No. 382, Interim and Interlocutory Award (Award No. ITM/ITL 52-382-3), 21 June 1985, para. 126. See also, Collins (footnote 7), 215.

19 See, e.g., Pohl/Mashigo/Nohen (footnote 12), 31; Goldberg/Kryvoi/Philippov (footnote 2), 4.


21 NAFTA, Article 1134 reads in full: 'A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal’s jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.’

22 See, e.g., the Canada–Ukraine BIT (1994), Article XIII(8); the Mexico–Bolivia FTA (1994), Article 15-34; the United States–Georgia BIT (1994), Article IX(3)(b); the Dominican Republic–Central America Free Trade Agreement, Article 10.20(8). See also, US Model BIT (2012), Article 28(8); the EU–Canada Comprehensive Economic and Trade Agreement (CETA), Article 8.34.
i  The ICSID framework

The ICSID Convention explicitly allows arbitral tribunals to ‘recommend’ provisional measures ‘which should be taken to preserve the rights of either party,’ unless the parties to the dispute have agreed otherwise (Article 47).23 ICSID Arbitration Rule 39 regulates provisional measures more specifically.24

Rule 39(1) provides that a request for provisional measures may be made at any time after the initiation of an ICSID arbitration. Such a request must specify the rights to be preserved, the measures requested and the circumstances that require such measures.

According to Rule 39(5), whenever a request for provisional measures is made before the constitution of the tribunal, the Secretary-General of ICSID will, on the application of either party, fix the time limits for the parties to submit observations on the request. This rule is intended to allow the request (and related observations) to be considered ‘promptly’ upon the constitution of the tribunal.

23 Article 47 of the ICSID Convention provides: ‘Except as the parties otherwise agree, the 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.’ According to Prof. Schreuer, this provision was directly inspired by Article 41 of the ICJ Statute. See, Christoph H Schreuer with Loretta Malintoppi, August Reinisch, Anthony Sinclair, The ICSID Convention: A Commentary (Cambridge University Press; 2nd edn, 2009) (Schreuer), Article 47, 758–759, para. 1.

24 ICSID Arbitration Rule 39 provides:

(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

See also, Article 46 of the ICSID Additional Facility Arbitration Rules. Contrary to arbitration under the ICSID Convention and the ICSID Arbitration Rules, proceedings under the ICSID Additional Facility Rules will be subject to the mandatory rules of the law of the seat of the arbitration. See, ICSID Additional Facility Arbitration Rule 1.

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Rule 39(2) adds that requests for provisional measures shall be given priority consideration. This principle applies even in instances where the jurisdiction of the ICSID tribunal is contested, thereby recognising that provisional relief is intrinsically urgent.

Rule 39(3) stipulates that ICSID tribunals may recommend provisional measures at their own initiative or recommend measures other than those specified in a party request, thus granting them flexibility. Rule 39(3) further provides that ICSID tribunals may modify or revoke their recommendations at any time. According to Rule 39(4), the tribunal must give each party an opportunity to present its observations prior to recommending, modifying or revoking provisional measures. According to the Notes to Rule 39 in its 1968 version, this requirement seeks to avoid ‘surprises or unintentionally unfair dispositions’. Certain commentaries have interpreted this provision as excluding preliminary (or ex parte) measures. However, the practice of ICSID tribunals shows that tribunals have found it appropriate, in certain instances, to direct parties to refrain from a specific conduct in order to preserve the status quo while a request for provisional measures was pending.

Last, Rule 39(6) excludes the resort to any judicial or other authority to order provisional measures ‘prior to or after the institution of the proceeding,’ save in cases where the parties have agreed to the contrary. This provision reverses the presumption of concurrent jurisdiction between arbitral tribunals and domestic courts over provisional measures.

25 Schreuer (footnote 23), Article 47, 771, para. 46.
26 Schreuer (footnote 23), Article 47, 769 para. 37. See also, e.g., Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001 (Pey Casado v. Chile), para. 5.
28 Schreuer (footnote 23), Article 47, 774–775 paras 58–59 (noting also that ‘[i]f the circumstances requiring provisional measures no longer exist, the tribunal is under an obligation to revoke them.’). id. 775, para. 58.
requests. According to commentaries, this language reflects ‘the consensus of national courts and publicists [that] parties to an ICSID arbitration agreement must bring to ICSID all their disputes (which are the subjects of such agreement) and thus forego submitting any claims to national courts’.

According to the practice of ICSID tribunals, the difference between the terms ‘recommend’ and ‘order’ has been understood to be a primarily semantic one, which does not cast into doubt the authority of ICSID tribunals to order binding provisional measures.

Neither the ICSID Convention nor the ICSID Arbitration Rules specify the types of rights that may benefit from provisional protection, or the requirements which must be fulfilled to justify a recommendation for provisional measures. According to the drafting history of the Convention, the absence of examples or criteria was deliberate—in recognition of the fact that provisional relief may be required in a variety of circumstances that are difficult to foresee. In practice, ICSID tribunals have interpreted these provisions as granting them broad discretion in ordering provisional measures. At the same time, ICSID tribunals have exercised a degree of self-restraint, emphasising ‘the exceptional nature of relief granted before the parties have had the opportunity fully to present their respective cases’, and concluding


33 Charles N. Brower, Ronald E.M. Goodman, ‘Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings’, 6(2) ICSID Review—Foreign Investment Law Journal (1991), 431–461 (Brower/Goodman), 436. See also, Schreuer (footnote 23), Article 47, paras 8–10. Brower and Goodman further note, with reference to Article 26 of the ICSID Convention, that ‘[s]everal jurisdictions and a number of publicists have insisted further that the ICSID system dictates jurisdictional exclusivity so complete (even without the addition of Rule 39(5)) that it prohibits even applications to national courts for conservatory measures’. Brower/Goodman, 436.


35 The language of Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules merely refer to the respective rights of the parties.

36 See, Schreuer (footnote 23), Article 47, 778, para. 72.


38 PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, 21 January 2015
that ‘the imposition of provisional measures is an extraordinary measure which should not be granted lightly’. As regards the form of recommendations on provisional measures, these are generally adopted in the form of procedural orders or decisions.

ii UNCITRAL Rules

Conceived for use in ad hoc arbitration, the UNCITRAL Arbitration Rules may (and are frequently chosen to) govern treaty-based arbitrations. To this date, the 1976 version of the Rules has been applied far more frequently in investment treaty arbitrations than the 2010 version—this is because the 1976 UNCITRAL Rules govern disputes under investment treaties concluded before 15 August 2010 (i.e., the majority of investment treaties currently in force).

Article 26(1) of the 1976 UNCITRAL Rules clearly recognises arbitral authority to grant provisional measures, subject to the mandatory rules of the arbitral seat. In contradistinction to the ICSID Arbitration Rules, Article 26(1) of the 1976 UNCITRAL Rules requires that provisional measures be requested by a party to the dispute, and excludes measures ordered at tribunals’ initiative.

Article 26(1) also provides that an arbitral tribunal ‘may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods’. In practice, Article 26(1) has been
understood as granting arbitral tribunals ‘broad powers’ to order interim relief.\textsuperscript{48} Indeed, the reference to the ‘subject-matter of the dispute’ and the ensuing enumeration of measures have been considered as constituting non-exhaustive examples of arbitral discretion.\textsuperscript{49}

The broad scope of arbitral authority with respect to provisional measures is further confirmed by Article 26(2). Article 26(2)(second sentence) entitles arbitral tribunals to require security for the costs of a provisional measure ordered. Such security is intended to compensate the defendant in the event an interim measure that has been ordered proves at a subsequent stage to have been unwarranted (whether in light of additional information or resulting from the final adjudication of the parties’ rights and obligations). This concept has also been referred to as ‘security for damages’;\textsuperscript{50} orders of security are at the arbitral tribunal’s discretion.\textsuperscript{51}

Article 26(2)(first sentence) provides that arbitral tribunals may choose the form in which interim measures are granted, including that of an interim award.\textsuperscript{52} In some cases, the view has been held that the form of an interim award would aid enforceability in domestic courts.\textsuperscript{53}

Finally, under Article 26(3) of the 1976 UNCITRAL Rules, the parties remain at liberty to address requests for provisional measures to domestic courts, without such resort being construed as a waiver of the agreement to arbitrate. The permission of such ‘concurrent jurisdiction’\textsuperscript{54} allows the powers of domestic courts and arbitral tribunals to complement each other—especially where the safeguarding of a party’s rights is dependent upon the use of coercive jurisdiction, which arbitral tribunals lack.\textsuperscript{55}

While the issue of preliminary (or \textit{ex parte}) orders is not explicitly addressed in Article 26, arbitral practice under the 1976 UNCITRAL Rules suggests that temporary restraining measures may be obtained in exceptional circumstances where the urgency of a threat to the requesting party’s rights ‘outstrip[s] even the speed with which interim measures


\textsuperscript{50} See, Yesilirmak (footnote 5), 188–189, paras 5–47.


\textsuperscript{53} See also, Born 2014 (footnote 9), 2506–2507 (commenting on the identical language under the previous version of the UNCITRAL Model Law).


\textsuperscript{55} For further discussion, see, e.g., Caron/Caplan (footnote 47), 529–530.
may be granted’.\textsuperscript{56} In such instances, tribunals constituted under the 1976 UNCITRAL Rules have considered it permissible to order temporary restraining measures pending the receipt of the observations from the party against whom provisional measures were sought.\textsuperscript{57}

The 2010 UNCITRAL Rules were largely inspired by the revised wording of Article 17 of the 2006 UNCITRAL Model Law (which sought to clarify the scope of arbitral powers with respect to provisional measures). These Rules provide for significantly more detail than the 1976 version in their regulation of provisional measures while also introducing some deletions to the wording of the previous version.\textsuperscript{58} For instance – to highlight the most noteworthy modifications for the purpose of this chapter – in addition to including a definition of interim measures similar to the 2006 UNCITRAL Model Law, the 2010 UNCITRAL Rules no longer contain the reference to the ‘subject-matter of the dispute’.\textsuperscript{59} This deletion reflects the previous understanding that the powers of arbitral tribunals are

\textsuperscript{56} Igor Boyko v. Ukraine, PCA Case No. 2017-32, Procedural Order No. 3 on Claimant’s Application for Emergency Relief, 3 December 2017 (Boyko v. Ukraine), para. 2.3.


\textsuperscript{59} Article 26 of the 2010 UNCITRAL Rules provides:

\begin{enumerate}
\item The arbitral tribunal may, at the request of a party, grant interim measures.
\item An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
\begin{enumerate}
\item maintain or restore the status quo pending determination of the dispute;
\item take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
\item provide a means of preserving assets out of which a subsequent award may be satisfied; or
\item preserve evidence that may be relevant and material to the resolution of the dispute.
\end{enumerate}
\end{enumerate}
not limited to a specific type of measure.\textsuperscript{60} Instead, Article 26(2) (in sub-paragraphs (a)--(d)) now provides a non-exhaustive list of generically-phrased categories of measures that may be ordered. In practice, these categories frequently overlap. In addition, Article 26(3) of the 2010 UNCITRAL Rules specifies the conditions to be fulfilled for ordering provisional relief. As elaborated below,\textsuperscript{61} the manner in which these (and similar) requirements are interpreted and applied may vary quite considerably in practice.

Article 26(4) makes clear that the requirements for ordering provisional measures may be relaxed at the tribunal's discretion if the request for provisional relief concerns the preservation of evidence. Article 26(5) states that provisional measures may be modified, suspended or terminated either at a party's request or at its own initiative. Article 26(7) further provides that tribunals may require parties to notify any change in circumstances relating to an order for interim relief.

Article 26(6) deals with the possibility to require security for interim relief. In addition, Article 26(8) provides for the possibility of holding the requesting party liable for any costs and damages caused by a provisional measure that is later found should not have been granted.

Similar to Article 26(3) under the 1976 version of the UNCITRAL Rules, Article 26(9) of the 2010 version provides that requests for interim measures may be addressed to domestic courts.

\begin{itemize}
  \item 3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:
    \begin{itemize}
      \item (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
      \item (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
    \end{itemize}
  \item 4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.
  \item 5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.
  \item 6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
  \item 7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.
  \item 8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.
  \item 9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.
\end{itemize}

\textsuperscript{60} See, e.g., Caron/Caplan (footnote 47), 517.
\textsuperscript{61} See, Section V.
Contrary to the 1976 version, Article 26 of the 2010 version no longer refers to the power to grant interim relief in the form of an award. However, certain commentaries consider that ‘[i]t continues to be generally accepted that the granting of interim measures can be made in the form of an award’.62

Whether and to what extent arbitral practice will differ under the 1976 and 2010 UNCITRAL Rules will depend on the manner in which arbitrators under the 1976 Rules apply their wide interpretive discretion. According to Professor David Caron, ‘[i]n all likelihood, the detail of the 2010 Rules will come to influence the way discretion is used under the 1976 Rules’.63

iii Other institutional arbitration rules

Treaty-based arbitrations also may be (and have been) governed by institutional rules that are used to administer wide varieties of cases. These include the ICC Rules, the SCC Rules, or the LCIA Rules, all of which provide for the possibility of interim relief. In addition, the Singapore International Arbitration Centre (SIAC) has issued a dedicated set of rules specifically applicable to investor–state disputes.64

For instance, similarly to the UNCITRAL Rules, Article 28 of the ICC Rules provides for broad arbitral powers with respect to provisional measures.65 Indeed, an ICC tribunal may, at the request of a party, order any ‘interim or conservatory measure’ it deems appropriate. The ICC Rules also explicitly reference tribunals’ power to require ‘appropriate security’ from the requesting party, as well as their power to adopt provisional measures in the form of an order or an award (Article 28(1)). In the latter case, the award would be subject to the

62 See, e.g., Caron/Caplan (footnote 47), 525. As regards the possibility of obtaining preliminary orders under the 2010 UNCITRAL Rules, commentaries are of the view that such ex parte relief may remain available in limited circumstances. See, Petrochilos (footnote 58), 887–888; Paulsson/Petrochilos (footnote 51), 206–207, paras 42–46.

63 Caron/Caplan (footnote 47), 532.

64 Specifically, the ‘Investment Arbitration Rules of the Singapore International Arbitration Centre’ apply to disputes ‘involving a State, State-controlled entity or intergovernmental organization, whether arising out of a contract, treaty, statute or other instrument’. Investment Arbitration Rules of the Singapore International Arbitration, Introduction, (i). These Rules also provide for the possibility to seek interim and emergency interim relief. See, id., Rule 27.

65 Article 28 of the ICC Rules provides:

1) Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

2) Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.
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scrutiny review of the ICC Court. Similarly to the UNCITRAL Rules, the ICC Rules provide for the right of parties to resort to domestic courts for provisional relief under certain circumstances (Article 28(2)). While the ICC Rules do not explicitly address the possibility of urgent arbitral ex parte relief, requests to that effect are reported to have been granted on rare occasions with the aim of preserving the status quo for very brief periods.

Furthermore, Article 29 of the ICC Rules provides for the possibility of emergency arbitration before the initiation of an arbitration (and the constitution of the tribunal) under a dedicated Annex V to the ICC Rules. However, based on the language in Article 29(5) of the ICC Rules, the ICC’s emergency arbitrator rules have been understood to exclude treaty-based arbitration from their scope.

The SCC Rules also provide for broad powers to order interim measures potentially subject to security, in the form of an order or award. The SCC Rules resemble the UNCITRAL and ICC Rules in many respects. The SCC Rules, do not explicitly contemplate preliminary ex parte orders, either. However, commentaries note that such orders have been issued in the practice of SCC tribunals in view of preserving a status quo during the determination of a request for interim measures.

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67 See, Fry/Greenberg/Mazza (footnote 66), para. 3-1040.

68 ICC Rules, Article 29 and Appendix V. the ICC Emergency Arbitrator Rules.

69 Article 29(5) provides that the ICC Emergency Arbitrator Rules ‘shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories’.


71 Article 37 of the SCC Rules provides:

(1) The Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate.

(2) The Arbitral Tribunal may order the party requesting an interim measure to provide appropriate security in connection with the measure.

(3) An interim measure shall take the form of an order or an award.

(4) Provisions with respect to interim measures requested before arbitration has commenced, or before a case has been referred to an Arbitral Tribunal, are set out in Appendix II.

(5) A request for interim measures made by a party to a judicial authority is not incompatible with the arbitration agreement or with these Rules.


Similarly to the ICC Rules, the SCC Rules provide for emergency arbitration prior to the commencement of an arbitration or the constitution of an arbitral tribunal. SCC Emergency Arbitrators have the same powers as tribunals under the SCC Rules. Emergency decisions are binding upon the parties, but may be modified or revoked. They do not bind the tribunal constituted in the main proceedings. The SCC Emergency Arbitrator Rules may (and have been) invoked in treaty-based disputes.

The LCIA Rules explicitly confer broad powers on arbitral tribunals which may order ‘any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties’. They also

25.1. The Arbitral Tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances:

(i) to order any respondent party to a claim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner;

(ii) to order the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration; and

(iii) to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.

Such terms may include the provision by the applicant party of a cross-indemnity, secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by the respondent party in complying with the Arbitral Tribunal’s order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration.

25.2. The Arbitral Tribunal shall have the power upon the application of a party, after giving all other parties a reasonable opportunity to respond to such application, to order any claiming or cross-claiming party to provide or procure security for Legal Costs and Arbitration Costs by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate in
otherwise regulate provisional measures in a considerable degree of detail. In addition, the LCIA Rules provide for an emergency arbitrator mechanism.\textsuperscript{80} The LCIA Rules have been used in investor–state cases, although only few cases are publicly available.\textsuperscript{81}

IV RIGHTS ENTITLED TO PROTECTION AND TYPES OF PROVISIONAL MEASURES GRANTED

As seen in Section III, the rules most used in investment treaty arbitration do not specify the types of rights that are entitled to protection and the types of relief available.\textsuperscript{82} Their drafters have made it clear that the primary aims of provisional measures were to preserve the status

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\item The power of the Arbitral Tribunal under Article 25.1 shall not prejudice any party’s right to apply to a state court or other legal authority for interim or conservatory measures to similar effect: (i) before the formation of the Arbitral Tribunal; and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal’s authorisation, until the final award. After the Commencement Date, any application and any order for such measures before the formation of the Arbitral Tribunal shall be communicated promptly in writing by the applicant party to the Registrar; after its formation, also to the Arbitral Tribunal; and in both cases also to all other parties.

25.4. By agreeing to arbitration under the Arbitration Agreement, the parties shall be taken to have agreed not to apply to any state court or other legal authority for any order for security for Legal Costs or Arbitration Costs.
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\textsuperscript{80} LCIA Rules, Article 9B.

\textsuperscript{81} In addition, the LCIA has administered treaty-based arbitrations conducted under the 1976 UNCITRAL Rules. See, e.g., \textit{EnCana Corporation v. Republic of Ecuador}, LCIA Case No. UN3481, UNCITRAL, Interim Award – Request for Interim Measures of Protection, 31 January 2004.

\textsuperscript{82} ICSID Arbitration Rule 39(1) refers to the possibility for a party to request a recommendation of provisional measures for ‘the preservation of [a party’s] rights’. See, footnote 23. Article 26(1) of the 1976 UNCITRAL Rules provides for the power of an arbitral tribunal to ‘take any interim measures it deems necessary in respect of the subject-matter of the dispute[,]’ See, footnote 45. The ICC Rules and SCC Rules do not contain any qualifying or illustrative language and merely refer to interim (or conservatory measures) that the arbitral tribunal deems appropriate. See, footnotes 65 and 71. By contrast, Article 26(2) of the 2010 UNCITRAL Rules, which as of today has only been rarely used in treaty-based arbitration, lists four broad, non-exhaustive categories of rights that may be protected provisionally. See, footnote 59.
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quo between the parties pending a tribunal’s final adjudication of the merits and to protect the effectiveness of future awards. As a corollary, it was widely agreed that provisional measures may also serve to prevent the aggravation of investment disputes.

In investment treaty arbitration today, requests for provisional measures continue to be driven by parties’ desire to protect the status quo, to prevent the aggravation of disputes, and to preserve the effectiveness of future awards. Requests for provisional measures may relate to substantive rights (such as contractual or property rights) that are the subject of the investment dispute or otherwise related thereto. They may also concern procedural rights that seek to protect the integrity of the dispute. Moreover, protection of status quo and non-aggravation of disputes have been regarded as ‘self-standing’ rights that may in and of themselves form the basis of an order for provisional measures.

Today’s practice confirms that requests for provisional measures need not be strictly limited to the subject matter in dispute. They may extend to general rights, including procedural rights, as stated above. However, at least in the context of ICSID arbitration,

83 See, Schreuer (footnote 23), Article 47, 778 para. 73 citing International Bank for Reconstruction and Development, Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of other States, Working Paper for Consultative Meetings of Legal Experts designated by Governments, 15 October 1963, COM/AF/WH/EU/AS/1, 29–30, para. 5 in II(1) History of the ICSID Convention, 216 ("[U]nless the parties specifically precluded from doing so, the Tribunal would have the power to prescribe provisional measures designed to preserve the status quo between the parties pending its final decision on the merits."). See also, UNCITRAL, Working Group II (Arbitration and Conciliation), Thirty-sixth session, 4–8 March 2002, Settlement of commercial disputes, Preparation of uniform provisions on interim measures of protection, Note by the Secretariat, A/CN.9/WG.II/WP.119, 5–6, para. 14.
84 Id. See also, Schreuer (footnote 23), Article 47, 778 para. 74 citing I History of the ICSID Convention, 206. As further noted by commentaries, ‘[t]his is a constant theme in international practice. As early as 1907, the Convention for the establishment of a Central American Court of Justice gave the court power (Article 18) to “fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved in status quo pending a final decision”. In municipal tribunals, the maintenance or restoration of the status quo is also the primary purpose of interim measures, and it has been seen in Chapter I that the preservation of the peace was also a purpose of the injunction in civil law. Today the overriding reason for such measures is to ensure that the final judgment of the court will not be prejudiced by the actions of the parties.’ Collins (footnote 7), 215. See also, Paul D Friedland, ‘Provisional Measures and ICSID Arbitration’, 2 Arbitration International 335 (1986) (Friedland), 336.
85 Notes to the ICSID Arbitration Rules, Rule 39, Note A, 1 ICSID Reports (1993) 63–118, 99–100; Schreuer (footnote 23), Article 47, 793–796 paras 135–151. See also, for a discussion of these three aims in a general context, Bond (footnote 4), 10.
tribunals have held that the rights for which protection is sought must be delineated. As explained by the tribunal in *Plama v. Bulgaria*, Article 47 of the ICSID Convention and Arbitration Rule 39 cannot be read as encompassing ‘all rights a party may have unconnected with the [applicable investment treaty] or vis-à-vis third parties’. While a limitation to ‘rights in dispute’ may be too narrow, the rights to be preserved must at least ‘relat[e] to the dispute’, that is, they ‘must relate to the requesting party’s ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants . . . the [final relief sought] to be effective and able to be carried out.’

In practice, it may not be apparent how to distinguish the rights that should be considered as ‘related to the dispute’ and those that should not. Where a request for interim relief concerns a right that is the subject of the main dispute, the existence of a relationship is more readily established. Similarly, procedural conduct that threatens the integrity of the procedure would arguably qualify as relating to the requesting party’s ability to have its claims fairly considered, hence necessarily relating to the dispute. By contrast, difficulties may emerge where requests for interim relief seek to protect against factual evolutions on the ground in the host state, and such difficulties may be amplified where the impugned acts have not been identified in the parties’ substantive claims or requests for final relief.

By the same token, it may be a delicate matter to identify the threshold of aggravation, which – if reached – will justify the issuance of a protective measure for a right that has been recognised in principle, but that could theoretically be considered as not strictly related to the merits of a dispute. As the tribunal in *Nova Group v. Romania* put it, ‘the desire to avoid ‘moving target’ events . . . alone is not sufficient to justify the recommendation of measures to prevent any and all alteration of the status quo or any and all increase in injury to the investor’. According to that tribunal, ‘[t]he contrary proposition would mean that by the simple step of initiating an ICSID claim, an investor obtains a sweeping right to freeze all circumstances as they then exist (perhaps for a period of years), even where such an overall standstill is otherwise not required to preserve its rights to present its case and obtain meaningful relief.’

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89 ibid. See also, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Procedural Order No. 14 (Provisional Measures), 22 December 2014 (*Churchill Mining v. Indonesia*), para. 72, noting that a ‘particularly high threshold must be overcome’ when such unfolding events concern criminal investigations and prosecutions. See also Section IV.iii.


91 *Nova Group v. Romania* (footnote 88), para. 236.

92 ibid.
These difficulties cannot be addressed in a principled manner, but will require a case-by-case determination when assessing whether provisional measures are necessary. The fact that such measures may require interfering with the exercise of respondent-states’ sovereign core prerogatives underlines the need for a careful balancing of the interests involved.

i Preservation of contractual and property rights that are at issue in the main dispute

In the context of commercial arbitration, parties frequently seek to preserve rights that are contested on their merits while awaiting final adjudication; for instance, by requesting provisional measures that coincide with the final relief sought, such as the right to the performance of a (contested) contractual obligation or the cessation of allegedly illegal conduct.

In the context of treaty-based arbitration, requests for provisional measures that coincide with the final relief sought appear to be more controversial.

This said, investment tribunals have affirmed the principle that a provisional measures order could require that ‘a piece of property, the ownership of which is in dispute . . . not be sold or alienated before the final award of the arbitral tribunal’. As stated in Maffezini v. Spain, ‘[s]uch an order would preserve the status quo of the property, thus preserving the rights of the party in the property’. On this basis, tribunals have agreed to order the temporary performance of contractual obligations that are in dispute, provided of course that the criteria for ordering provisional measures were fulfilled – and notably, that the requesting party demonstrated the existence of a plausible legal right to the performance of the contract. In certain cases, tribunals also ordered respondent-states to refrain from enforcing contested obligations under such

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93 What is apparent, however, is that the analysis of the rights to be protected in such instances cannot be divorced from the analysis of substantive harm, which constitutes one of the requirements for awarding interim relief (see Section V). See also, CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on the Claimants’ Request for Provisional Measures, 3 March 2010 (CEMEX v. Venezuela), paras 60–61.

94 Stern (footnote 31), 631.

95 See, e.g., Born 2014 (footnote 9), 2477–2478.

96 As noted at Section III, certain investment treaties explicitly limit arbitral powers with respect to provisional measures, for instance by prohibiting tribunals from ordering attachment or enjoining the application of state measures that are contested on the merits in the main proceedings. See, e.g., Article 1134 of the NAFTA. As noted by one commentator, this limitation in Article 1134 NAFTA is consistent with the limitation in Article 1135 NAFTA, which limits the type of relief available on the merits and excludes specific performance other than restitution if chosen by the respondent party. See, Cameron A. Miles, Provisional Measures before International Courts and Tribunals, Cambridge University Press, 2017, 112–113. See also, Pope & Talbot v. Government of Canada, UNCITRAL, Ruling on Claimant’s Motion for Interim Measures, 1 January 2000, 1.

97 Maffezini v. Spain (footnote 34), para. 14. See also, Phoenix Action Ltd v. Czech Republic, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2007 (Phoenix v. Czech Republic), para. 34.

98 Maffezini v. Spain (footnote 34), para. 14.

99 See, City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) [I], ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters, 13 May 2008 (City Oriente v. Ecuador, 2008), para. 45; Burlington v. Ecuador (footnote 86), para. 71; Perenco v. Ecuador (footnote 31), para. 48. See also, Holiday Inns S.A. and others v. Morocco, ICSID Case No. ARB/72/1, Decision on Provisional Measures, 2 July 1972, excerpts published in Pierre
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contracts in domestic courts. By contrast, the situation was analysed differently when the state had already terminated a disputed agreement. For instance, in *Occidental Petroleum v. Ecuador*, the natural resources concession agreement at issue had already been terminated by the state. The tribunal declined to order the provisional reinstatement of the agreement because this would have constituted specific performance, which ‘must be deemed legally impossible . . . where a State has, in the exercise of its sovereign powers, put an end to a contract or license, or any other foreign investor’s entitlement’. The tribunal’s reasoning was based on the premise that provisional measures are ‘not deemed to give to the party requesting them more rights than it ever possessed and has title to claim’.

Investment tribunals have also accepted to enjoin respondent-states from adopting certain conduct affecting property rights. For instance, tribunals have granted requests for a stay for the payment of taxes (the international legality of which was disputed by the claimant-investor) where such payments would have endangered the economic operation of the investment.

Similarly, tribunals have granted requests for injunctions to refrain from enforcing a decision cancelling corporate shares owned by an investor-claimant, to refrain from taking

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100 Perenco v. Ecuador (footnote 31), paras 61–63.
101 *Occidental Petroleum v. Ecuador* (footnote 34), para. 79. See also, id., paras 75–86; *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, Award (Merits), 10 October 1973 (*BP Exploration Company v. Libya*), para. 200; Perenco v. Ecuador (footnote 31), para. 48; Stern (footnote 31), 136; *Hela Schwarz GmbH v. People’s Republic of China*, ICSID Case No. ARB/17/19, para. 113 (A recommendation of provisional measures cannot be used as a basis to restore the Claimant to the status quo ante, before the building that were the subject of the PM Request were demolished.).
102 *Phoenix* (footnote 97), para. 37, holding also that ‘[i]n other words, provisional measures are deemed to maintain the status quo, not to improve the situation of the Claimant before the rendering of the Tribunal’s award.’ ibid.
103 See, *Paushok v. Mongolia* (footnote 48), Operative part, para. 1 (ordering the respondent-state to suspend the payment, by the claimant-investor, of a tax on gold mining operations until the final determination of the dispute, subject to the posting of security by the claimant-investor); *JKX Oil & Gas plc v. Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine*, SCC Case EA/2015/002, Emergency Award, 24 February 2016; *Lao Holdings N.V. v. Lao People’s Democratic Republic (I)*, ICSID Case No. ARB(AF)/12/6, Decision on Claimant’s Amended Application for Provisional Measures, 17 September 2013 (*Lao Holdings v. Laos*, 2013), para. 30; *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 102 (referencing previous decisions regarding injunctions regarding the lifting of garnishment); Stern (footnote 31), 631. See also, *Perenco v. Ecuador* (footnote 31), paras 56–63.
measures to restructure the management of a partially state-owned company,\textsuperscript{105} to lift the seizure of a vessel,\textsuperscript{106} or to suspend the execution of a domestic judgment that relates to rights that are the subject of an investment claim.\textsuperscript{107}

These types of orders for specific performance have sought to preserve the status quo between the parties by protecting ongoing legal relationships between the parties or operating businesses, the economic existence of which may otherwise have been compromised during the resolution of the dispute. By their nature, such orders likely helped to prevent unnecessary exacerbation of the relevant disputes during their adjudication.

This said, investment tribunals have been more reserved when requests for provisional measures sought more than the preservation of an existing right. For instance, an ICSID tribunal has held that there was ‘a distinction to be drawn between the protection of rights and the enforcement of rights’; it declined to order a measure that would have been equivalent to an order for specific performance under a series of contracts.\textsuperscript{108} Similarly, another ICSID tribunal held that requests for interim measures were ‘not the appropriate vehicle for requesting relief on the merits’, with respect to a request in which the claimant-investor had sought a ‘permanent injunction’ to restrain the respondent-state from criminally prosecuting a number of individuals including the claimant’s funder, while at the same time demanding an order that the respondent-state pay damages for alleged moral and reputational injury.\textsuperscript{109} In any event, in these cases the requesting parties were found not to have established the substantive requirements for provisional relief.

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\textsuperscript{105} See, PNGSDP v. Papua New Guinea (footnote 38), para. 171.
\textsuperscript{106} Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Decision on Provisional Measures, 8 February 2013, para. 187, reproduced in Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award, 22 August 2017, para. 26.
\textsuperscript{108} Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited, ICSID Case No. ARB/98/8, Decision on the Respondent’s Request for Provisional Measures, 20 December 1999, paras 13, 16. At the same time, the tribunal in that case noted that the requesting party had neither established that its contractual risks were being eroded in the absence of the requested relief, nor shown that there was urgency. See, id., paras 14–17.
\textsuperscript{109} Teinver S.A., Transportes de Cercanias S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016, paras 167, 169. See also, Behring International, Inc. v. Islamic Republic of Iran Air Force, Iran Aircraft Industries and others, IUSCT Case No. 382, Interim Award (Award No. ITM 46-382-3), 22 February 1985 (Behring International v. Iran), a case in which the Iran–US Claims Tribunal refused to order interim relief that would be tantamount to the final relief requested by way of a counter-claim, and which would have consisted in the transfer to the respondent party of possession of warehoused goods before finally ruling on its jurisdiction over such a claim. See, id., para. 3.
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Protection of other substantive rights relating to the investment dispute

Investment tribunals have also granted interim measures protecting substantive rights that are not directly the subject of an investment dispute, but are related thereto. For instance, one tribunal has ordered a respondent-state to ensure that a state-owned company refrain from cashing a warranty bond that the claimant-investor had issued in a related, previous arbitration. Other tribunals have granted requests asking that claimant-investors refrain from dissipating assets that could serve for the satisfaction of a future award outside a given jurisdiction.

A significant number of requests for provisional measures have also been granted in relation to domestic proceedings conducted in parallel with an investment treaty arbitration; notably when such proceedings were found to endanger the status quo between the parties, aggravate the dispute or compromise the effectiveness of a future award.

For instance, in *MINE v. Guinea*, the claimant-investor was ordered to discontinue proceedings for interim relief in domestic courts.

Likewise, investment tribunals have ordered the provisional suspension of parallel civil proceedings in local courts, arbitration fora, or bankruptcy proceedings when such proceedings related to the determination of issues that were under consideration by the tribunal, such as the validity of a claim against one of the parties.

In addition to the protection of the status quo and the non-aggravation of the dispute, investment tribunals have identified the protection of their jurisdiction as an additional right that deserved protection – either under Article 26 of the ICSID Convention or under

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111 See, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited (Bapex), and Bangladesh Oil Gas and Mineral Corporation (Petrobangla)*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Procedural Order No. 5 (Preservation of Status Quo Until the Hearing on Provisional Measures), 6 March 2014 (*Niko Resources v. Bapex and Petrobangla*), para. 12(c); *Paushok v. Mongolia* (footnote 48), Operative part.
112 In that case, the claimant-investor had sought to provisionally enforce an arbitral award rendered between the parties in a previous arbitration relating to the same facts as those disputed before the ICSID tribunal. See, *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Provisional Measures, 4 December 1985, discussed in *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Award, 6 January 1988, para. 40. See also, *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea*, ICSID Case No. ARB/84/1, Decision on Provisional Measures, 19 December 1984, reproduced in *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea*, ICSID Case No. ARB/84/1, Award, 21 April 1986 (*Atlantic Triton v. Guinea*), para. 13 (denying request); *Holiday Inns v. Morocco* (footnote 99), 136 (granting request only with respect to non-escalation of dispute); *Friedland* (footnote 84), 346.
115 *SGS v. Pakistan* (footnote 113), para. 44; *Zhinvali v. Georgia* (footnote 113), para. 44; *Millicom v. Senegal* (footnote 113), paras 44–45; *Perenco v. Ecuador* (footnote 31), paras 56–63.
Article 26(1) of the 1976 UNCITRAL Rules. In this regard, commentaries have asked to what extent ‘ICSID tribunals limit the application of the rule of exclusivity under Article 26 to identical parallel proceedings and require triple identity under the rule of lis pendens (identity of parties, subject matter and relief sought)’. A survey of publicly available decisions suggests that the triple identity test has not been applied by ICSID tribunals that have accepted to suspend parallel proceedings that involved different legal persons than those party to the ICSID arbitration. At the same time, cases in which such requests for provisional measures enjoining parallel court actions were rejected involved proceedings in which the parties and the subject matter were not the same and were considered insufficiently related to the ICSID arbitration.

Provisional protection has also been granted to protect the right of investors, their corporate officers or employees not to be harassed and not be subject to human rights violations; for instance, in the context of administrative or criminal investigations. In addition to qualifying as a potential factor of aggravation of the investment dispute, such acts may also directly affect the integrity of an investment arbitration.

iii Protection of the integrity of the arbitral proceedings

Provisional measures may serve to protect a broad spectrum of procedural rights. On one end of the spectrum, provisional measures have been sought with respect to criminal or administrative investigations, prosecutions and proceedings under the domestic law of respondent-states. In this regard, investment tribunals have noted that criminal proceedings cannot be considered of the same nature or subject matter as investment disputes and thus do not fall under the rule of Article 26 of the ICSID Convention. Tribunals have also been cautious to emphasise that they ‘do . . . not question the sovereign right of a State to conduct criminal proceedings,’ and that they would not interfere with the conduct of criminal investigations or criminal proceedings absent ‘exceptional circumstances’, which the

116  E-Systems v. Iran (footnote 18) and Rockwell v. Iran (footnote 57), para. 5.
117  Kauffmann-Kohler/Antonietti/Potestà (footnote 87), 654, para. 24.78. In this regard, see, Lao Holdings N.V. v. Lao People’s Democratic Republic (I), ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order, 30 May 2014 (Lao Holdings v. Laos, 2014), para. 21 (holding that the rule under Article 26 of the ICSID Convention only ‘applies only to civil proceedings having the same parties and same subject matter as the arbitral proceeding’).
118  See, e.g., Zhinvali v. Georgia (footnote 113); Millicom v. Senegal (footnote 113).
119  See, e.g., Pey Casado (footnote 26), paras 40–41; Plama v. Bulgaria (footnote 88), para. 44.
120  See, e.g., Boyko v. Ukraine (footnote 56).
121  Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Procedural Order No. 1 (Provisional Measures), 1 July 2003, para. 7.
123  Quiborax v. Bolivia (footnote 86), para. 164. See also, Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic, ICSID Case No. ARB/07/5, Procedural Order No. 13, 27 September 2012, para. 39; EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic, ICSID Case No. ARB/14/14, Procedural Order No. 3 (Decision on the Parties’ Request for Provisional Measures), 23 June 2015 (Eurogas v. Slovakia), para. 77; Churchill Mining v. Indonesia (footnote 89), para. 72; Italba Corporation v. Oriental Republic of Uruguay, ICSID Case No. ARB/16/9, Decision on Claimant’s Application for Provisional Measures and Temporary Relief, 15 February 2017 (Italba v. Uruguay), para. 116.
requesting party must establish.\(^\text{124}\) In analysing such circumstances and the harm alleged by the requesting party, investment tribunals have applied a ‘high threshold’.\(^\text{125}\) As noted by the tribunal in *Churchill Mining*, in the context of criminal investigations and prosecutions, an allegation that the status quo has been altered or that the dispute has been aggravated ‘needs to be buttressed by concrete instances of intimidation or harassment’.\(^\text{126}\)

In practice, provisional measures have been granted when it was established that there was a threat to the security of a claimant-investor,\(^\text{127}\) its corporate officers,\(^\text{128}\) employees\(^\text{129}\) or witnesses, or when criminal investigations were found to have been initiated to secure payments under a newly-enacted law.\(^\text{130}\) Provisional measures were also ordered where a criminal investigation was found to have a ‘direct relationship’ with an ICSID arbitration that could prevent the investor-claimant from accessing witness evidence.\(^\text{131}\)

As regards the type of relief ordered, tribunals have in some instances recommended the full\(^\text{132}\) or partial\(^\text{133}\) stay of a criminal investigation. Other tribunals, while declining to order a stay, have recommended that respondent-states refrain from limiting the liberty of movement of an investor-claimant’s officers.\(^\text{134}\) In addition, investment tribunals have ordered respondent-states to provisionally suspend the transmission of arrest warrants relating to the extradition of the investor-claimant’s corporate officers.\(^\text{135}\) Likewise, tribunals have ordered the respondent-state to preserve the investor-claimants’ access to counsel,\(^\text{136}\) and to provide copies of documents seized during criminal investigations.\(^\text{137}\) Tribunals have also ordered a respondent-state to provide information regarding the existence of investigations against the legal counsel of a claimant-investor by domestic judicial authorities.\(^\text{138}\) In some cases, 124 See, e.g., *Eurogas v. Slovakia* (footnote 123), para. 77; *Italba v. Uruguay* (footnote 123), para. 116.
126 *Churchill Mining v. Indonesia* (footnote 89), para. 72. See also, e.g., *Italba v. Uruguay* (footnote 123), para. 116.
127 *Hydro v. Albania* (footnote 122), para. 3.20; *Boyko v. Ukraine* (footnote 57), para. 2.4.
134 *Convial Callao v. Peru* (footnote 128), para. 129.
135 *Nova v. Romania* (footnote 88), para. 42; *Pugachev v. Russia* (footnote 125), Decision.
138 *Alicia Grace and others v. United Mexican States*, ICSID Case No. UNCT/18/4, Procedural Order No. 6 Decision on the Claimants’ Application for Interim Measures, 19 December 2019, para. 73.
tribunals that had declined to order a specific injunctive measure nevertheless accepted to issue general non-aggravation orders. Moreover, in *Manolium v. Belarus*, the tribunal ordered that ‘if in doubt whether a specific action or conduct might result in the violation of the above order, both Parties are recommended to approach the Tribunal *ex ante* and request additional guidance’.139

Other tribunals have accepted to protect the confidentiality of certain documents relating to an arbitration by ordering, for instance, the provisional prohibition to communicate about a dispute in the media (whether addressed to the claimant-investor or the respondent-state)140 or to keep specific documents confidential.141

At the other end of the spectrum of measures protecting procedural rights are orders to preserve documents, to prepare inventories of certain information,142 or to grant access to corporate records.143 As noted above, Article 26(2)(d) of the 2010 UNCITRAL Rules explicitly lists the preservation of ‘evidence that may be relevant and material to the resolution of the dispute’ as a right for which interim protection can be sought.

Another type of right for which protection has been sought by way of provisional measures applications includes is security for costs.145 ICSID tribunals have initially refused to consider that security for costs could be included among the rights to be protected under Article 47 of the ICSID Convention.146 This position subsequently evolved. While having noted that security for costs was not an ordinary measure contemplated under the ICSID Convention or the ICSID Arbitration Rules, subsequent ICSID tribunals have accepted that a recommendation of the same could be contemplated in the presence of extraordinary

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139 *Manolium v. Belarus* (footnote 42), para. 176.
140 See, e.g., *Pugachev v. Russia* (footnote 125), para. 430; *EDF (Services) Limited v. Republic of Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 2, 30 May 2008, para. 54(2); *United Utilities (Tallinn) B.V. and Aktiaisedl Tallinna Vesil v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent’s Application for Provisional Measures, 12 May 2016, para. 114; *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Procedural Order No. 5, 29 August 2018, para. 79.
142 *Biwater Gauff v. Tanzania* (footnote 86), para. 98;
143 *AGIP S.p.A. v. People’s Republic of the Congo*, ICSID Case No. ARB/77/1, Award, 30 November 1979, para. 42. See also, *Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994, para. 16 (reporting that the respondent undertook to provide access to certain corporate documents following a request for provisional measures relating to the same.
A similar reasoning was adopted by tribunals constituted under the 1976 UNCITRAL Arbitration Rules. In the context of commercial arbitration, ICC tribunals, too, have recognised (and granted) requests for security for costs. The SCC Arbitration Rules explicitly permit applications for security for costs.

Extraordinary circumstances have only been found in a few treaty-based cases so far. In one case, an impecunious ICSID claimant, who had a third-party funding arrangement in place, had failed to pay costs in a previous ICSID arbitration. In another case, an impecunious claimant-investor had entered into a third-party funding agreement that did not provide for the coverage of an adverse costs order.

V REQUIREMENTS FOR GRANTING PROVISIONAL MEASURES

The question of the law governing orders of provisional measures has not been a topic of frequent discussion in investment treaty arbitration; it does not appear to have been a topic of controversy in practice either. In recent years, some treaty-based tribunals have relied on Article 17 of the 2006 UNCITRAL Model Law in their reasoning regarding provisional measures. The general tendency of treaty-based tribunals has been to apply principles of public international law and to seek guidance in international judicial and arbitral practice in exercising their powers and analysing the requirements for provisional measures. The same
Provisional Measures

may be observed from ICSID tribunals constituted based on contracts; they relied on arbitral practice and rules of international law and considered the governing law of the contract among one of several 'factual and legal elements'.155

As noted above, the most relevant arbitration rules do not specify the substantive criteria for granting interim measures. In this regard, too, investment tribunals will be guided by international judicial and arbitral practice. The consensus is that a party requesting provisional measures needs to establish the prima facie jurisdiction of the tribunal and show that its claim is not manifestly without merit. Further, tribunals will require a demonstration of urgency and of necessity to prevent an imminent danger of serious prejudice. In addition, tribunals generally verify the proportionality of a requested measure.

i Prima facie jurisdiction

As explained above, tribunals will give priority consideration to a request for provisional measures because of the urgency inherent to such requests.156 For this reason, it is widely agreed that the granting of provisional measures does not need to await a tribunal’s final determination on its jurisdiction (irrespective of whether or not such a determination has been requested as a preliminary matter).157 Thus, investment tribunals will conduct a preliminary inquiry as to whether the facts as alleged by the requesting party are, if true, capable of establishing jurisdiction.158 This inquiry has been characterised as ‘usually not a complex task’.159 In ICSID arbitration, tribunals have held that the fact of ICSID having registered a request for arbitration pursuant to Article 36(3) of the ICSID Convention is not per se sufficient to establish prima facie jurisdiction.160 Rather, the relevant inquiry will be for the tribunal to verify the prima facie existence of personal, subject matter and temporal jurisdiction as well as consent (or jurisdiction ratione voluntatis).161

In the context of SCC Emergency Arbitrator proceedings, the question has arisen of whether the non-expiry of the ‘cooling off’ period (or negotiation period) under the applicable investment treaty deprived SCC Emergency Arbitrators from jurisdiction ratione voluntatis. According to publicly available rulings, SCC Emergency Arbitrators have answered this question in the negative, accepting – among others – the requesting parties’ arguments regarding the alleged futility of such negotiation requirements.162

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156 Schreuer (footnote 23), 771, para. 46.
159 Stern (footnote 31), 629.
161 Id., citing, Quiborax v. Bolivia (footnote 86), paras 109–112.
Determinations of *prima facie* jurisdiction are of provisional nature, only. In practice, the granting of provisional measures has not precluded tribunals from ultimately dismissing investor-claimants’ claims for lack of jurisdiction.163

### ii Underlying claim not manifestly unmeritorious

Under domestic legal systems, the showing of a ‘probable, or *prima facie*, prospect of success on the merits’ or at least ‘a serious question to be tried’ is a prerequisite for provisional measures.164 In the context of international arbitration, the existence of such a criterion has been subject to discussion, notably because such a requirement could potentially be seen as standing in tension with the cardinal principle that provisional measures must not prejudge the merits of the dispute.165 At the same time, it stands to reason that provisional measures, the impact of which can be disruptive and potentially intrusive, should not be granted where a claim is obviously devoid of merit.166 Indeed, rather than being protective, such measures would risk to procure unjustified advantages to the requesting party.167 Consequently, international tribunals appear to have accepted to conduct some degree of *prima facie* merits analysis.168 Article 26(3)(b) of the 2010 UNCITRAL Rules reflects this understanding.169

The International Court of Justice (ICJ), for instance, has adopted a ‘plausibility of rights’ test.170 ICSID tribunals have endorsed this standard, holding that the requesting party ‘must prove that the rights invoked are plausible’.171 In applying this test, certain ICSID

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164 Collins (footnote 7), 224, identifying the test of ‘a serious question to be tried’ as ‘the current English text’ and distinguishing it from the ‘more stringent test in civil law countries that there must be a probable, or *prima facie*, prospect of success on the merits’. ibid. See also, e.g., Kaufmann-Kohler/Antonietti/Potestà (footnote 87), 661, paras 24.105.


166 See, Collins (footnote 7), 226; Born 2014 (footnote 9), 2478–2480.

167 Born 2014 (footnote 9), 2480.

168 See, e.g., Caron 1986 (footnote 57), 490–491; Born 2014 (footnote 9), 2479.

169 See, footnote 58.


171 *City Oriente v. Ecuador*, 2008 (footnote 99), para. 20 (‘the party requesting the measure need only prove that its claim has the appearance of good right, *fumus boni iuris*, or, in other words, the petitioner must prove that the rights invoked are plausible. Accordingly, the Tribunal’s decision is merely provisional and is subject to revocation at any time; moreover, the passing of such measures does not at all impact the decision on the merits to be eventually rendered once the proceedings have been fully substantiated’). See also, *Lao Holdings v. Laos*, 2013 (footnote 103), para. 15; *Lao Holdings N.V. v. Lao People’s Democratic Republic* (I), ICSID Case No. ARB(AF)/12/6, Decision on Claimant’s Second Application for Provisional Measures, 18 March 2015 (*Lao Holdings v. Laos*, 2015), para. 16; *Millicom v. Senegal* (footnote 113), para. 42; *PNGSDP v. Papua New Guinea* (footnote 38), para. 120; Stern (footnote 31), 628–629, 634.
tribunals focused their analysis on the nature of the rights to be preserved, and whether they constitute ‘theoretically existing’ rights, meaning whether they are legally (as opposed to factually) possible. By the same token, tribunals in treaty-based arbitrations conducted under the 1976 UNCITRAL Rules have adopted a similar approach, holding that a tribunal requested to grant provisional measures must verify ‘that the claims made are not, on their face, frivolous’.

Thus, in practice, the degree of *prima facie* analysis of the underlying claim will depend on the nature of the right for which protection is sought and the type of relief requested. Investment tribunals’ analysis may arguably be somewhat more stringent if what is sought is relief similar to the final relief requested. In any event, such determinations at the provisional measures stage will not bind tribunals with respect to their final findings in a subsequent award.

### iii Urgency of the relief requested

The requirement of ‘urgency’ is largely considered to be subsumed in requests for provisional measures in investment treaty arbitration. This is because urgency is considered inherent to a request for provisional measures. By definition, urgency is the primary condition for obtaining emergency relief prior to the constitution of a tribunal.

In practice, the test for finding urgency has been whether or not a requested measure could await the final adjudication of the underlying claim (as opposed to proving the need for immediate relief). Commentaries have qualified this standard as a ‘low threshold to allow this requirement to be easily satisfied in practice,’ especially where a provisional measure is found to be necessary. Thus, the test of urgency is frequently conflated with investment tribunals’ analysis of the necessity of a provisional measure.

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175 See also, *Born 2014* (footnote 9), 2479.
176 See, e.g., *Occidental Petroleum v. Ecuador* (footnote 34), para. 61. Interestingly, the preparatory works of the ICSID Convention indicate that the suggestion to include a reference to ‘urgency’ in the text of the ICSID Convention was unavailing. See Schreuer (footnote 23), Article 47, 775 para. 63 citing SID/LC/SR/16 (30 December 1964), Summary Proceedings of the Legal Committee Meeting, 4 in II(2) *History of the ICSID Convention*, 815. Indeed, the term ‘urgency’ is not explicitly mentioned in the above-cited arbitration rules. See Section II.
177 See, e.g., *Petrochilos* (footnote 58), 882; *Yesilirmak* (footnote 5), 178.
181 See, e.g., *Sarooshi* (footnote 37), 366; *Petrochilos* (footnote 58), 882.
Moreover, investment tribunals have acknowledged that the provisional protection of certain rights, such as the integrity of evidence in an arbitration or the protection of the exclusivity of ICSID jurisdiction are urgent ‘by definition’.

At the same time, the degree of urgency required may vary depending on the type of relief requested. For instance, in cases where a party seeks a temporary restraining order, the urgency of the threat must be such so as to require immediate action.

### iv Necessity to avoid the risk of serious harm to the requesting party

Provisional measures must also be proven to be necessary to avoid a risk of harm that could not be adequately repaired in the final award. This criterion has also been referred to as ‘periculum in mora’ (danger in delay). Indeed, it is the danger of injury that renders provisional protection necessary and urgent.

Similar to the requirement of urgency to which it is linked, the requirement of necessity to avoid the risk of harm is not explicitly mentioned in the prevalent rules. The ICSID Convention and the ICSID Arbitration Rules state that provisional measures may be recommended ‘if the circumstances so require’. The 1976 UNCITRAL Rules as well as the ICC Rules and SCC Rules state that an interim measure must be ‘necessary’ or ‘appropriate’. At the same time, the practice of tribunals constituted under these rules confirms that an order of provisional measures is predicated on showing a risk of serious harm to the requesting party.

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183 City Oriente v. Ecuador, 2007 (footnote 31), para. 63; Brower/Goodman (footnote 33), para. 461.
184 See, e.g., Paushok v. Mongolia, TRO (footnote 57), para. 16; Boyko v. Ukraine (footnote 56), para. 2.4; Pezold v. Zimbabwe (footnote 31), paras 7–8.
186 See, Article 47 of the ICSID Convention and Arbitration Rule 39(1) (footnotes 23 and 24). See also, Article 41(1) of the ICJ Statute, which provides: ‘1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party’. At the same time, the preparatory works to the ICSID Convention suggest that provisional measures were understood to require ‘compelling reasons’ or have to be ‘absolutely necessary’. See, Settlement of Investment Disputes, Consultative Meeting of Legal Experts, Summary Record of Proceedings, Z10 (30 April 1964) Fifth Session, 18 December 1963, 32 in II(1) History of the ICSID Convention, 270 (referring to the need for provisional measures to be justified by ‘compelling reasons’). See also, Settlement of Investment Disputes, Consultative Meeting of Legal Experts, Summary Record of Proceedings, Z10 (20 July 1964), Fourth Session, 30 April 1964, 64 in II(1) History of the ICSID Convention, 523 (quoting a delegate who noted that ‘thought that provisional measures ought not to be prescribed unless absolutely necessary in the circumstances, and that if pecuniary compensation would be adequate in lieu of some preliminary measure, then no preliminary measure ought to be prescribed.’), referenced in Schreuer (footnote 23), Article 47, 775 para. 63.
187 Article 26(1) of the 1976 UNCITRAL Rules. See, footnote 45.
188 See, Article 28(1) of the ICC Rules (footnote 65) and Article 37(1) of the SCC Rules (footnote 71).
189 See, e.g., Caron 1986 (footnote 57), 494; Petrochilos (footnote 58), 882; Born 2014 (footnote 9), 2442 et seq. See also, 2006 UNCITRAL Model Law, Article 17.
In investment treaty arbitration, tribunals also generally require a showing of necessity to prevent the risk of harm during the dispute. However, investment tribunals have adopted different approaches regarding the requisite threshold of harm required to order provisional measures.

In a number of earlier cases, investment tribunals have relied on the standard of ‘irreparable prejudice’ developed by the ICJ, interpreting this standard as requiring a threat of injury that could not ‘readily be compensated by a monetary award’. In *Plama v. Bulgaria*, the tribunal noted that the final relief sought in the arbitration consisted of monetary damages (rather than restitution or specific performance) for alleged impediments of the operation of the going concern that was the subject of the investor-claimant’s investment. Having found that the injury alleged in the request for provisional measures (i.e., the potential bankruptcy of said going concern) was capable of being repaired through monetary compensation, the tribunal held that the requirement of irreparable harm was not fulfilled (among other requirements).

A similar standard has been applied by other tribunals in cases where claimant-investors sought provisional measures to protect the integrity of an arbitration, with tribunals reasoning that while the destruction of an investment could in theory be repaired by an award of monetary damages, an investor-claimant’s ability to effectively participate in an arbitration – if proven on the facts – could not be so remedied.

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190 See, Goldberg/Kryvoi/Philippov (footnote 2), 18–19.

192 *Occidental Petroleum v. Ecuador* (footnote 34), para. 92. Interestingly, the tribunal also introduced a balancing test, holding that ‘provisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party, in this case, the rights of a sovereign State’. ibid., para. 93.

A previous tribunal tasked to adjudicate a request for provisional measures under Article 1134 NAFTA, rejected a request for provisional measures on the grounds that the requesting party had failed to prove that ‘its rights have suffered prejudice, let alone serious or irreversible damage’ after having announced that the requested measures must be ‘urgently required in order to protect [the applicant’s] rights from an injury that cannot be made good by the subsequent payment of damages’. See, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information, 27 October 1997, para. 8.

193 *Plama v. Bulgaria* (footnote 88), paras 46–47.

By contrast, in cases that concerned ongoing legal relationships between an investor-claimant and the respondent-state, or which related to businesses with operational activity, tribunals have approached the requirement of necessity differently.\textsuperscript{196}

For instance, in \textit{City Oriente v. Ecuador}, the tribunal noted that the right to be preserved was contractual performance.\textsuperscript{197} Having assured itself that ‘neither Article 47 of the Convention nor Rule 39 of the Arbitration Rules require that provisional measures be ordered only as a means to prevent irreparable harm’,\textsuperscript{198} the tribunal stated: ‘It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceed greatly the damage caused to the party affected thereby’.\textsuperscript{199} The tribunal then confirmed that the balance of interests justified granting the relief requested by the claimant.\textsuperscript{200}

Other investment tribunals in similar types of cases considered that the ‘irreparable harm’ test had to be understood flexibly, especially where the provisional (and final relief) requested concerned the preservation of an ongoing contractual relationship or a business. In \textit{Paushok v. Mongolia}, an \textit{ad hoc} arbitration brought under the 1976 UNCITRAL Rules, the tribunal considered that ‘the concept of “irreparable prejudice” does not necessarily require that the injury complained of not be remediable by an award of damages.’\textsuperscript{201} It also found that ‘the possibility of monetary compensation does not necessarily eliminate the possible need for interim measures’.\textsuperscript{202} Based on the facts before it, the tribunal considered that enforcement of the impugned windfall profit tax would likely lead to the insolvency of the claimant’s business,
which in its view warranted provisional measures (i.e., the suspension of tax collection). At the same time, the tribunal also ordered the claimant to both refrain from removing assets out of Mongolia and to make security payments into an escrow account. Other ICSID tribunals have followed a similar approach. In PNGSDP v. Papua New Guinea, the tribunal summarised the test as follows:

*The degree of “gravity” or ‘seriousness’ of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party; suffice it to say that substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures.*

As regards the standard of proof, the tribunal noted that serious harm did not need to be proven with certainty. Rather, the requesting party had to establish a ‘sufficient risk or threat that grave or serious harm will occur if provisional measures are not granted.’

In cases relating to requests for the preservation or the production of evidence, some tribunals have applied a less stringent reading regarding necessity – holding that the standard was one of reasonableness, and finding requests for the preservation of documentary evidence necessary ‘because of the potential need for the evidence in question’.

In sum, a survey of relevant cases indicates that the standard of harm required to order provisional measures may depend on the circumstances of each case – notably the main issues of contention between the parties as well as the rights for which provisional protection is sought. This is a fact-specific inquiry in which tribunals must exercise their discretion. At the same time, in assessing necessity, tribunals frequently conduct a balancing analysis

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203 *Paushok v. Mongolia* (footnote 48), para. 77.

204 id., Operative part.

205 See, e.g., *Burlington v. Ecuador* (footnote 99), paras 78–82, 87. See also, *CEMEX v. Venezuela* (footnote 93), paras 47 and 55, which, after finding that the ICJ had in the past accepted to recommend provisional measures although the alleged injury could have been repaired by monetary compensation, noted that ‘ICSID Tribunals, when considering government actions which may well prove to have infringed a right and caused harm, make a distinction between: (a) situations where the alleged prejudice can be readily compensated by awarding damages; (b) and those where there is a serious risk of destruction of a going concern that constitutes the investment. In the first category of cases, provisional measures were denied because of the absence of an “irreparable harm”. In the second category of cases they were granted, the tribunals using other standards — although they could have based their decision on the fact that, the destruction of the ongoing concern that constituted the investment, would have created an “irreparable harm”.’

206 *PNGSDP v. Papua New Guinea* (footnote 38), para. 109. See also, *Kompozit v. Moldova*, SCC Emergency Award (footnote 104), paras 88–89; *TSIKInvest v. Moldova*, SCC Emergency Award (footnote 154), para. 64.


208 See, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Provisional Measures, 15 October 2008, para. 34 (‘Since no qualifications to the power of an ICSID tribunal to recommend provisional measures found their way in the text of the ICSID Convention, the standard to be applied is one of reasonableness, after consideration of all the circumstances of the request and after taking into account the rights to be protected and their susceptibility to irreversible damage should the tribunal fail to issue a recommendation.’).

209 *Biwater Gauff v. Tanzania* (footnote 86), para. 86.
and are mindful to preserve a certain proportionality between the measures ordered and the potential effect on both parties’ rights. Article 26 of the 2010 UNCITRAL Rules reflects this understanding.

**v Balance of harm/proportionality**

In assessing the urgency and necessity of a provisional measure, arbitral tribunals frequently analyse the proportionality between the rights the requested measure seeks to protect on the one hand, and the impact of such measure on the requested party, often the respondent-state, on the other hand. Save for the 2010 UNCITRAL Arbitration Rules, the relevant arbitral rules do not mention this criterion explicitly. However, reference to the ‘circumstances’, such as under the ICSID framework, or the requirement that provisional measures be deemed ‘appropriate’, such as under the ICC Rules, LCIA Rules and the SCC Rules, imply that the interests of the adverse party need to be taken into account in assessing whether to grant a provisional measure.

When assessing the risk of harm from which the requesting party seeks protection, investment tribunals balance the injury from which the requested party would be preserved against the burden which the requested measure inflicts on the requested party.

Moreover, certain tribunals which provisionally ordered states to continue performing a contract or refrain from enforcing tax legislation have ordered the investor to provide security payments into escrow accounts, to preserve the requested party’s rights until final adjudication. Similarly, in a case where the state was ordered to provisionally suspend the operation of an arrest warrant, the investor was ordered to comply with a certain number of instructions set forth in the tribunal’s decision.

In addition, certain tribunals and commentaries have insisted on the specificities arising from the hybrid nature of investment treaty arbitration and the fact that these types of disputes involve sovereign state interests, holding that investment tribunals should be mindful not to ‘unduly encroach on the State’s sovereignty and activities serving public interests’:

_The fact that the Respondent is a State is relevant in this regard. Indeed, any party to an arbitration should adhere to some procedural duties, including to conduct itself in good faith; moreover, one can expect from a State to adhere in that very capacity, to at least the same principles and standards, in particular to desist from any conduct in this Arbitration that would be incompatible with the Parties’_

210 See also, Orrego Vicuña (footnote 34), 949; Caron 1986 (footnote 57), 493–497.
211 Article 26(3)(a) of the 2010 UNCITRAL Rules reads in full: ‘The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that: (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted[.]’ Also note that the sub-category of rights listed as Article 26(2)(d) (i.e., the preservation of documents, is not included among the rights to which the requirements for provisional measures listed in Article 26(3) apply).
213 Burlington v. Ecuador (footnote 99), para. 87; Paushok v. Mongolia (footnote 48), Operative part.
214 Paushok v. Mongolia (footnote 48), Operative part.
duty of good faith, to respect equality and not to aggravate the dispute. But this Tribunal must be mindful when issuing provisional measures not to unduly encroach on the State’s sovereignty and activities serving public interests.216

Thus, depending on the nature of provisional relief requested and the degree of intrusiveness such relief might be found to have on the exercise of a state’s functions, the burden of proving injury or a serious risk thereof may be a higher one.217

VI CONCLUSION

Investment tribunals constituted under the prevalent arbitration rules enjoy broad powers and a high degree of flexibility in ordering a panoply of different provisional measures which they may deem appropriate. Provisional measures may be necessary to protect and preserve the disputing parties’ rights during the course of a (potentially lengthy) investment dispute, so that the ultimate effectiveness of an award is not compromised. However, provisional measures are not granted lightly. They are intrusive instruments, the use of which requires a strong demonstration of need under the circumstances of each case. Such circumstances are often highly diverse, as are the types of rights at issue. The presence of sovereign states adds an additional element of complexity, which requires careful balancing of party interests. The careful analysis displayed by investment tribunals in determining provisional measures is pivotal to ensuring the effectiveness of investment treaty arbitration as a means of peaceful dispute settlement.

216 Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Claimants’ Request for Provisional Measures, 4 December 2014, para. 121. See also, Stern (footnote 31), 631.

I INTRODUCTION

Remarkably little has been written on evidence and proof in the specific context of investment arbitration. This is not because evidence plays a different or even smaller role in investment arbitration than in commercial arbitration, but rather because there are no major differences in the collection of evidence in investment arbitration. In fact, when the IBA Rules on the Taking of Evidence in International Commercial Arbitration of 1999 were revised in 2008, their title was changed to the IBA Rules on the Taking of Evidence in International Arbitration.2

The same applies with regard to the burden of proof. However, the specificities of investment arbitration, with claimants asking for compensation for expropriation and – given the involvement of state parties – a higher incidence of allegations of corruption, have led several tribunals to specifically address the degree of burden of proof in such circumstances.

II EVIDENCE

i Statutory provisions and institutional rules

It is generally accepted that, in international arbitrations, tribunals enjoy broad discretion as to evidentiary matters. Strict evidentiary rules typical for domestic evidential systems apply just as little to international arbitrations as domestic procedural rules.

The discretion of arbitrators is expressly provided for in the various national arbitration laws (lex arbitri) and many institutional arbitration rules. Article 19 of the UNCITRAL Model Law on International Commercial Arbitration provides for the ‘Determination of rules of procedure’ as follows:

(1) Subject to the provisions of this Law, the Parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provision of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.

1 Martin Wiebecke is an attorney-at-law at Anwaltsbüro Wiebecke.
2 IBA Rules on the Taking of Evidence in International Arbitration of 29 May 2010.
However, many national legislators that do not follow the UNCITRAL Model Law have also made similar provisions, such as Sections 34(1) and (2)(f) of the English Arbitration Act of 1996:

**Procedural and evidential matters.**

1. It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

2. Procedural and evidential matters include—

   (f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented.

This view is also confirmed by court decisions, in particular in the United States, where courts have repeatedly emphasised the broad discretion of arbitrators in matters of evidence, even in contradiction to domestic evidential rules such as the exclusion of hearsay evidence.3

Subject to the provisions on evidence in the *lex arbitri*, the parties may, of course, agree on the evidentiary rules to be applied in their arbitration. This is mostly done with reference to the arbitration rules of an arbitration institution, but it is also possible to agree evidentiary rules in the arbitration clause or, once the dispute has arisen, in the context of establishing procedural orders or terms of reference.

Article 27 of the UNCITRAL Arbitration Rules 2013 on ‘Evidence’ provides, inter alia, as follows:

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party.

4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

The provisions in Article 25 of the International Chamber of Commerce Rules are more extensive in describing the collection of evidence, but do not mention issues related to its valuation:

*Article 25: Establishing the Facts of the Case*

1. The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

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After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.

The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.

The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.

At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.

The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

The ICSID Rules of Procedure for Arbitration Proceedings contain more detailed provisions on evidence. After Rule 33 on Marshalling of Evidence, Rule 34 provides for General Principles. Its first paragraph states: ‘The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.’

The provisions in Rule 34(2) give tribunals the power to call upon the parties to produce documents, witnesses and experts, and to visit any place connected with the dispute or conduct inquiries there, at any stage of the proceedings. Rule 34(3) obliges the parties to cooperate with the tribunal. Rule 35 addresses the examination of witnesses and experts, with some special rules related thereto in Rule 36. Finally, Rule 37 provides, inter alia, details for visits and inquiries.

Although specific evidentiary rules in arbitration clauses are rare, agreeing to evidentiary or procedural rules with a substantial impact on evidentiary matters and questions is very common when tribunals submit to the parties drafts of specific procedural rules, constitution orders and terms of reference. These documents often contain a reference – of higher or lower obligation on the part of the tribunal – to adhere to the IBA Rules on the Taking of Evidence in International Arbitration (the IBA Rules of Evidence).

Admissibility of evidence

Whether with an explicit reference, for example, in an arbitration clause (rare), or within specific procedural rules or terms of reference (more common), the parties are often (indirectly) agreeing on the application of the evidentiary rules contained in the IBA Rules of Evidence. Article 9(1) thereof on ‘Admissibility and Assessment of Evidence’ is worded almost identically to Article 27(4) of the UNCITRAL Arbitration Rules: ‘The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.’

However, it is generally accepted that, even without any statutory provision or private agreement by the parties, be it on the application of arbitration rules, the IBA Rules of Evidence, or in an arbitration clause or subsequent procedural agreement, tribunals have the implied authority to resolve issues of admissibility, relevance, materiality and weight of evidence.5

Again, national rules on the admissibility of evidence, such as the exclusion of hearsay or the rule that corporate officers may not testify for their company, are not applicable in

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4 Rule 34(2) has largely the same content as Article 43 of the ICSID Convention.
Evidence and Proof

international arbitration. Nevertheless, arbitral tribunals may limit the evidence, though they are rather reluctant to do so in practice. They sometimes do so with regard to the testimony of witnesses and experts at evidentiary hearings. In this respect, Article 8(2) of the IBA Rules of Evidence provides as follows:

*The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2.*

Article 9(2) of the IBA Rules of Evidence gives tribunals, not only at the request of a party, but also on their own motion, the power to exclude from evidence or production documents, statements, oral testimony or inspection for reasons such as the lack of sufficient relevance to the case or materiality to its outcome; legal impediment or privilege; unreasonable burden to produce; compelling commercial or technical confidentiality; or even for compelling grounds of special political or institutional sensitivity.

However, even if arbitral tribunals have the right to exclude evidence under these circumstances, they are hesitant to do so in practice—and even more so in investment treaty arbitration. Reasons for this include avoiding the need to exclude evidence that could possibly prejudice a party’s right to present its case, with no possibility of appeal on substantive grounds, but also to avoid the impression that the tribunal is escaping difficult decisions, in particular in highly political matters. For these reasons, arbitral tribunals generally admit evidence rather freely, disregard technical rules of admissibility of evidence—in particular, those known in common law—and focus on assessing the weight of the evidence (i.e., its probative value).

### iii Probative value

Given that admissibility criteria are not often used to exclude evidence, the weighing of evidence by tribunals becomes more important. Most arbitrators consider contemporaneous documents to be the best form of evidence. Witness testimony, unless it has been tested in cross-examination or by an examination of the arbitrators themselves, is usually given less weight. Direct (primary) evidence is usually considered to be more reliable and thus to have more weight than indirect (secondary) or circumstantial evidence. However, a tribunal will look at the reasons why it is impossible for a party to produce direct evidence. Documents may have been lost or destroyed because of armed conflicts or civil unrest. In such cases, tribunals will rely on presumptions or inferences, and consider facts proven on the basis of other proven facts or factual knowledge, a series of facts linked together or accepted factual knowledge, such as in the *Corfu Channel* case of the International Court of Justice. However, a presumption or inference may shift the burden of proof to the other party.

Tribunals may also draw negative inferences from a party’s procedural conduct, such as not producing documents that should be in its possession or witnesses under its control.

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6 Born, op. cit., page 2,311.
7 See also Article 9(2)(d) of the IBA Rules of Evidence.
However, it is difficult to draw negative inferences in practice, mostly because it is not clear what the inference must actually be. Arbitrators, therefore, usually avoid such situations, particularly in view of the fact that non liquet decisions are not customary in arbitration.  

### III PROOF

#### i Burden of proof

Unlike for the taking of evidence, few provisions on the burden of proof in arbitration exist. Usually, the *lex arbitri* does not contain any, and only a few arbitral rules mention it, such as Section 27(1) of the UNCITRAL Arbitration Rules, which states that each party shall have the burden of proving the facts relied on to support its claim or defence. This is the general rule in international arbitration: the burden of proving factual assertions and assertions that have been contested by the other side.

In civil law systems, the burden of proof is considered to be a question of the applicable substantive law. Not only are many burden of proof rules contained in substantive law provisions, but they may be inextricably connected to substantive legal rules: for example, a provision for the reversal of the burden of proof.  

In common law jurisdictions, however, it is an issue of procedural law. The common law distinction that the applicable foreign law must be proven like facts has become less important in arbitration as it is now customary for lawyers from civil law systems to provide extensive arguments on the legal points of their case.

This difference raises conflict of law questions – although these are alleviated in international arbitrations by a more pragmatic approach. Even though the inherent connection between the burden of proof rules and the substantive law may favour the civil law system view, in international arbitral practice, additional considerations come into play, such as the availability or unavailability of discovery, which does not exist in civil law systems but gives burden of proof rules a strong procedural aspect as well. Therefore, tribunals tend to be flexible when applying the burden of proof rules to a specific case. Generally, international arbitral decisions hinge much less on burden of proof issues than in domestic cases, not least because tribunals try to collect more evidence to have a more complete picture of the case.

In investment treaty arbitrations, questions of burden of proof typically further arise in respect of certain issues specific to investor–state arbitration: nationality, *ratione personae* scope, expropriation and compensation.

As regards nationality, including dual nationality and foreign control issues, and the *ratione personae* scope, tribunals traditionally followed the general rule that a party asserting a fact has the burden to prove it. More recently, however, as regards nationality issues at the jurisdictional phase of the proceedings, tribunals have begun to differentiate. However, so far a general trend to shift the burden of proof for certain nationality issues from the claimant to the respondent cannot be ascertained.

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9. cf. Article 42(2) of the ICSID Convention.
10. Such as in Article 97 of the Swiss Code of Obligations.
Evidence and Proof

Standard of proof

The standard of proof indicates the required degree of proof necessary to show that an assertion of fact has been proven. National laws provide many different definitions of what degree of proof must be met. However, most arbitration laws and institutional arbitration rules do not contain any provisions regarding the standard of proof that must be met. The most common standard in current international arbitration practice is the test of a ‘preponderance of evidence’ – namely, a fact will be considered as proven if it is more probable than not that it is true (same as ‘balance of probabilities’). As with the burden of proof, tribunals should address the standard they apply in their awards.

A question intensely debated is whether criminal acts such as fraud, bribery and corruption require a higher standard of proof than the generally accepted standard of balance of probabilities (e.g., ‘clear and convincing evidence’). There is no uniform approach. Recently, the propositions of parties to adopt a heightened standard of proof for corruption were rejected. Some argue that, in cases of corruption, a party only needs to establish a prima facie case of corruption and that the burden of proof then shifts to the other party to prove the absence of corruption. However, this would result in the other party having to prove the negative, which it will not be able to do, particularly in corruption cases.

It is sometimes argued that, for the quantum of damages, a different, mostly lower, standard of proof applies, not least because this may be the case under certain civil law provisions. This does not apply generally in arbitration. However, there are other, contractual, situations where the burden of proof or the standard of proof to be applied for the calculation of damages may change. Contractual provisions (e.g., liquidated damages clauses or penalty clauses) may lead impliedly to a different allocation of the burden of proof. With liquidated damages clauses, the claimant only needs to prove the breach by the other party and the existence of the damage, and not the quantum of the damage. This is different from penalty clauses, where the claimant only needs to prove the breach, but the respondent then has the burden of proof to show that the penalty is excessive.

Quantifications of damages are always discretionary. Tribunals may not apply rules of burden of proof and standard of proof in such a way to either award damages or not. Rather, with the assistance of the parties and experts, tribunals have to assess the damages on their own, and thus the compensation to be paid.

Finally, in cases of a limitation of liability for wilful misconduct or gross negligence, the claimant needs to prove not only the existence and quantum of damages resulting from the breach, but also that these were the result of a wilful misconduct or gross negligence of the respondent.


15 cf. Metal-Tech v. Uzbekistan, ICSID Case No. Arb/10/3, Award of 4 October 2013, paras 236 et seq.
Chapter 10

BURDEN AND STANDARD OF PROOF IN INVESTMENT ARBITRATION

Mladen Stojiljković and Daniele Favalli

I INTRODUCTION

Matters relating to the burden and the standard of proof have increasingly been receiving scholarly attention in the past years in both investment and commercial arbitration. Likewise, in the practice of arbitration, parties tend to spend more time arguing the applicable evidentiary rules, particularly regarding complex issues such as corruption allegations and the substantiation of future damages. Arbitral tribunals, too, increasingly try to address the applicable rules of evidence in their awards. This chapter provides an overview of the pertinent issues and recent developments regarding the burden and the standard of proof in investment arbitration.

1 Mladen Stojiljković is a counsel and Daniele Favalli a partner at VISCHER in Zurich, Switzerland.
II  BURDEN OF PROOF

i  Principle

The basic rule on the legal burden of proof in international law is\textit{ actori incumbit probatio}: he or she who asserts must prove.\textsuperscript{4} The word ‘actor’ in this context is ‘not to be taken to mean the plaintiff from the procedural standpoint but the real claimant in view of the issues involved’.\textsuperscript{5} Accordingly, the claimant bears the burden of proof with regard to all elements of its claim. If the respondent raises a defence, the respondent is to prove the facts on which that defence is based.\textsuperscript{6} In other words, each party bears the burden of proof for the facts on which it relies for its claim or defence.\textsuperscript{7}

If a party fails to meet its burden of proof on a particular claim, the tribunal will decide against that party, because the party bearing the burden of proof is to bear the consequences of failing to prove its claim.\textsuperscript{8} The claimant fails to meet its burden of proof not only when the tribunal is more convinced of the other party’s case but also when the tribunal is unable to form a view on the facts. The tribunal’s decision in \textit{Plasma Consortium v. Bulgaria} illustrates this principle: given the conflicting evidence, the tribunal was unable to form any firm view as to what really transpired, and, therefore, ruled against the party bearing the burden of proof, in that case the claimant.\textsuperscript{9}

The above has been applied not only with respect to the merits of the dispute, but also to the jurisdictional and damages phases of a dispute, in security-for-costs motions, challenges of arbitrators, interim measures, and other claims or motions that may come up in proceedings.\textsuperscript{10}

\textsuperscript{4} See, e.g., \textit{SolEs Badajos GmbH v. Kingdom of Spain}, ICSID Case No. ARB/15/38, Award, 31 July 2019, para. 335 (‘Each Party bears the burden of proving that the facts that it alleges’); \textit{Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia}, ICSID Case No. ARB/16/6, 16 March 2016, para. 668 (‘In international law, the general principle is actori incumbit probatio: the party who alleges a certain fact has the burden of proving it.’); Bin Cheng, \textit{General Principles of Law As Applied By International Courts And Tribunals} 327 (2006); Frédéric G. Sourgens, Kabir AN Duggal & Ian A Laird, \textit{Evidence in International Investment Arbitration} 2.02 (2018).

\textsuperscript{5} See \textit{Asian Agricultural Products Ltd. v. Republic of Sri Lanka}, ICSID Case No. ARB/87/2, Final Award, 27 June 1990, para. 56.

\textsuperscript{6} Cf. the maxim \textit{reus excipiendo fit actor} – the defendant, by raising an exception, becomes a claimant.

\textsuperscript{7} Cf. Article 27(1) UNCITRAL Rules (2013) (‘Each party shall have the burden of proving the facts relied on to support its claim or defence.’); Nathan O’Malley, \textit{Rules of Evidence in International Arbitration: An Annotated Guide} 7.20 (2nd edn, 2019); \textit{Sapiem SpA v. The People’s Republic of Bangladesh}, ICSID Case No. ARB/05/7, Award 113 (30 June 2009) (‘It is well a well established rule in international adjudication that the burden of proof lies with the party alleging a fact, whether it is the claimant or the respondent.’).


\textsuperscript{9} \textit{Plama Consortium Limited v. Republic of Bulgaria}, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 249.

\textsuperscript{10} Frédéric G. Sourgens, Kabir A. N. Duggal & Ian A. Laird, \textit{Evidence in International Investment Arbitration} 2.22 (2018).
The burden of proof rule does not apply with regard to ‘obvious or notorious facts’ and to facts that are already ‘within the knowledge of the tribunal’. Tribunals, however, have rarely qualified facts as obvious or notorious, particularly when they are disputed between the parties.

The rule on the burden of proof applies also with regard to the arbitral tribunal’s jurisdiction. In ICSID arbitration, for example, it is on the claimant to prove all facts necessary to establish the arbitral tribunal’s jurisdiction under Article 25 of the ICSID Convention and the relevant treaty, and to show a prima facie cause of action under the treaty. If the claimant has discharged these burdens, the respondent bears the burden of proving that an exception is to apply.

The respondent bears the burden of proof where it not merely challenges the veracity of claimant’s allegations or sufficiency of the evidence submitted by the claimant but raises an exception (or affirmative defense) to jurisdiction. Such exceptions or defences include, among other things, the issue of whether the investment was procured in an illegal manner or whether the investor has acted with unclean hands. In the same vein, where respondent disputes the validity of the claimant’s nationality (e.g., by alleging that it was acquired fraudulently), tribunals have held that respondents bear the burden of proof for that contention.

**ii Shifting**

While the burden of proof discussed above (also called the ‘legal burden of proof’) rests on the asserting party and does not shift, tribunals have found that the burden to produce evidence, sometimes called the ‘evidential burden of proof’, may shift to the other party under certain circumstances.

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14 Frédéric G. Sourgens, Kabir AN Duggal & Ian A Laird, Evidence in International Investment Arbitration 2.48 (2018).

15 Frédéric G. Sourgens, Kabir AN Duggal & Ian A Laird, Evidence in International Investment Arbitration 2.49 (2018).

16 See, e.g., Ioan Micula, Viorel Micula and others v. Romania (I), ICSID Case AERB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 87 (’The burden of proving that nationality was acquired in a manner inconsistent with international law lies with the party challenging the nationality.’).


18 See, e.g., Churchill Mining and Planet Mining PTY Ltd. v. Republic of Indonesia, ICSID Case No. ARB/12/40 and 12/14, Decision on Annulment, 18 March 2019, para. 215 (’placing the initial onus on a party presenting an application does not obviate the requirement, once it adduces proof of the facts on which its claims are based, that the opposing party present proof to the contrary, supporting its denial of the claim.’); Mercer International Inc. v. Canada, ICSID Case ARB(AF)/12/3, Award, 6 March 2018, paras. 7.14 and 7.16; Apotex Holdings Inc. and Apotex Inc. v United States of America, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 8.8 – 8.10; Asian Agricultural Products Limited v. © 2020 Law Business Research Ltd
Such a shifting can occur when the party bearing the initial evidential burden (namely the party bearing the legal burden of proof, typically the claimant) has adduced sufficient evidence to support its allegation; the burden to produce evidence shifts to the other party to rebut the evidence put forward or to concede the point.\(^{20}\)

Tribunals increasingly describe this ‘shifting principle’\(^{21}\) as ‘well accepted’.\(^{22}\) It is also not uncommon that parties in investment arbitrations are in agreement that the evidential burden can shift, at least, in principle.\(^{23}\) They more often disagree, however, on whether a shifting is justified in the specific case.

The ‘shifting principle’ is sometimes misunderstood to imply a reversal of the legal burden of proof. But such is not the case. Inaccurate use of terminology may occasionally facilitate such misunderstandings – it is not the ‘burden of proof’ that shifts, but the burden to produce evidence. The notion that the evidential burden of proof can shift back and forth during the proceedings should not be foreign to either civil law or common law jurists, as similar concepts exist in jurisdictions of both legal traditions.\(^{24}\)

The shifting of the burden to produce evidence ‘envisions an engagement of the evidence by the parties to the dispute’ similar to a ‘ping-pong’.\(^{25}\) There is no formal event within the procedure when the burden shifts.\(^{26}\) The goal of this process of engagement is to provide the arbitral tribunal with all necessary materials on a particular issue. It enables the arbitral tribunal to decide the case on a broad evidentiary basis.\(^{27}\) The better an arbitral tribunal knows the relevant facts, the more likely it will be in a position to decide the issues before it. In this regard, the tribunal takes into account that often it is not the party bearing the burden of proof who is in possession of the relevant evidence. It is also a way of avoiding complicated evidence production procedures. This encourages the parties to provide relevant evidence in their possession.

As in all evidentiary matters, tribunals have considerable discretion in deciding how much evidence is needed to give rise to a presumption, and how much evidence is necessary to rebut the presumption and shift the evidential burden back to the party who originally bore it. Some tribunals have required the party bearing the initial evidential burden to adduce

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\(^{20}\) Frédéric G Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration 3.01* (2018) (‘shifting principle’).


\(^{22}\) See, e.g., Churchill Mining and Planet Mining PTY Ltd. v. Republic of Indonesia, ICSID Case No. ARB/12/40 and 12/14, Decision on Annulment, 18 March 2019, para. 215 (‘well accepted’).

\(^{23}\) See, e.g., Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation, ICSID Case No. ARB/10/11 and No. ARB/10/18, Decision on the Corruption Claim, 25 February 2019, para. 790-791.


‘evidence that prima facie supports [the asserting party’s] allegation’. In *Apotex Holdings v. United States*, however, the tribunal required evidence that, ‘in the absence of [a] rebuttal’, would be sufficient for claimants to succeed with their claim. It is not clear whether the difference in wording also implies a different standard.

If *prima facie* evidence is evidence that, if unrebutted, would establish the contention, this means that the evidential burden does not shift before the evidence on record meets the applicable standard of proof. Only then would failure to produce rebuttal evidence be ‘fatal to the case’ of the party to whom the evidential burden has shifted. As a result, parties should not expect the shifting principle to help them in discharging their respective burden of proof.

Recent cases illustrate how the shifting principle is argued by parties and how it is applied by tribunals. In *Niko Resources v. Bangladesh*, one of the issues was whether showing a sufficient number of ‘red flags’ of corruption would be sufficient to shift the evidential burden on the party denying corruption. The tribunal carefully examined the alleged acts of corruption and ultimately did not have to decide the question whether the evidential burden had shifted because ‘the facts as they emerged from the record were at odds with the respondent’s allegations’.

In *Gavrilovic v. Croatia*, the claimants argued that they had been treated less favourably than a Croatian national in like circumstances, and that this violated clause 3(1) of the BIT. To establish ‘likeness’, they argued, it was sufficient for them to point out at least one Croatian national who was *prima facie* in like circumstances (or a *prima facie* comparator), at which point the evidential burden to rebut the claimants’ allegation would shift to the respondent. The tribunal found, however, that the claimants were not successful in showing that a certain Croatian national was, *prima facie*, in like circumstances; even if claimants had proven like circumstances, the tribunal argued, they would have been unsuccessful in proving that the investor was accorded less favourable treatment.

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28 See, e.g., *International Thunderbird Gaming Corporation v. The United Mexican States*, NAFTA Arbitration under the UNCITRAL Rules, Award, 26 January 2006, para. 95. See also *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 56 (‘In a case a party adduces some evidence which prima facie supports his allegations, the burden of proof shifts to his opponent.’).

29 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 8.65. See also Nathan O’Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* 7.31 (2nd edn, 2019) (‘prima facie evidence is proof that is sufficient, if not contradicted, to establish the contention’).


33 *ibid.*, paras 1204–05.
Burden and Standard of Proof in Investment Arbitration

III  STANDARD OF PROOF

i  Ordinary standard

The standard of proof determines the level of evidence needed to establish either an individual issue or the party’s case as a whole.\(^{34}\) If the party bearing the burden of proof cannot establish a fact under the applicable standard of proof, the allegation will be qualified as unproven.\(^{35}\)

Unlike the burden of proof, the standard of proof is relative and will depend on the particular issue before the arbitral tribunal.\(^ {36}\) There are different standards of proof. Though, even where the standard of proof may be the same, tribunals may require more evidence for certain allegations than for others before they are persuaded that the standard of proof is met.\(^ {37}\) This is not to be confused, however, with the standard of proof as such.

In investment arbitration, the general standard of proof is the ‘balance or probabilities’ or ‘preponderance of the evidence’.\(^ {38}\) The standard requires a showing that the factual allegation is ‘more likely than not true’.\(^ {39}\) This appears to be a lower standard than the ‘inner conviction’ test typically applied in state courts in civil law jurisdictions, though some believe that the results under the two standards are the same.\(^ {40}\)

ii  Heightened standard

It is controversial whether it is justified, in certain specific cases, to apply a heightened standard of proof. In the common law, the elevated standards of proof are justified on the ground that they ‘help to avoid the high social costs of false positives, as in convicting the innocent’.\(^ {41}\) By contrast, the preponderance-of-the-evidence standard leaves the fact-finder ‘indifferent as between false negatives and false positives’.\(^ {42}\) Investment tribunals and commentators have justified elevated standards of proof on similar grounds. In *Lao Holdings v. Laos (I)*, for example, the tribunal cited the ‘seriousness of the charge’ and the ‘severity of the consequences to the individuals involved’.\(^ {43}\)

\(^{34}\) *The Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 178; Frédéric G Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration* 3.21 (2018).

\(^{35}\) *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 11 November 2009 para. 34 (‘Whatever party bears the burden of proof on a particular issue and presents supporting evidence “must also convince the Tribunal of [its] truth, lest it be disregarded for want, or insufficiency, of proof.”’).

\(^{36}\) Kabir Duggal & Wendy W Cai, *Principles of Evidence in Public International Law as Applied by Investor-State Tribunals: Burden and Standards of Proof* 37 (2019);

\(^{37}\) See, e.g., *Churchill Mining and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and 12/40, Award, 6 December 2016, para. 244 (‘more persuasive evidence is required for implausible facts’).


\(^{42}\) ibid.

\(^{43}\) *Lao Holdings N.V. Lao People’s Democratic Republic (I)*, ICSID Case No. ARB(AF)/12/6, Award, 6 August 2019, para. 109 (‘seriousness of the charge’, ‘severity of the consequences to the individuals involved’).
Continental European civil laws do not generally distinguish between standards of proof for civil and criminal law matters. In both civil and criminal cases, the applicable standard of proof is, in principle, the full conviction of the judge that the alleged facts are true. This implies a higher standard than a mere preponderance of the evidence such that, to civil lawyers, there is little need to discuss circumstances under which elevated standards would be justified. Indeed, in civil law jurisdictions, the ordinary standard of proof can be sometimes lowered (e.g., for allegations that are notoriously difficult to prove), but it is never elevated above the high level set by the ordinary standard of proof.

With regard to allegations of wrongdoing, there is no uniform approach. Allegations of corruption, some tribunals have held, need to be ‘clear and convincing’. Interpretations differ, however, with some tribunals noting that the standard is ‘elevated’ or ‘high’ while others simply describe it as ‘demanding’ without further analysis. Recently, in Lao Holdings v. Laos (I), the tribunal decided that there need not be clear and convincing evidence of every allegation of corruption, but such clear and convincing evidence must point clearly to corruption; but, on the whole, the alleged act of corruption has to be established to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt.

A number of tribunals, however, have declined to elevate the standard of proof on certain issues; instead, they required more persuasive evidence. To be sure, this does not necessarily lead to different results. But it is an attractive way of reasoning because it allows tribunals to avoid abstract doctrinal discussions and moves the analysis to the persuasiveness of the evidence, an area in which tribunals enjoy wide discretion. For example, more recently, the tribunals in Niko Resources v. Bangladesh seemed to have followed such an approach. They ‘[did] not find much assistance in terms such as “preponderance of evidence” and “heightened standard of proof”’, as ‘[i]n the end the question is whether the tribunals are involved’; see also Frédéric G Sourgens, Kabir AN Duggal & Ian A Laird, Evidence in International Investment Arbitration 5.34 (2018) (‘serious consequences’).

45 This is because the ordinary standard of proof – ‘full conviction’ – is described as requiring near certainty. See Mark Schweizer, ‘The civil standard of proof—what is it actually?’, The International Journal of Evidence & Proof 220 (2016) (‘the exceptions – and the considerable doctrinal effort required for their justification – prove the rule’).
46 See, e.g., EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 221; Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 317.
47 Ioan Micula, Viorel Micula and others v. Romania (II), ICSID Case No. ARB/14/29, Award 5 March 2020, para. 378 (‘allegations of bad faith require a high standard of proof’).
49 Lao Holdings N.V. Lao People’s Democratic Republic (I), ICSID Case No. ARB(AF)/12/6, Award, 6 August 2019, paras. 109-110.
50 See, e.g., Libananco Holdings Co., Limited v. Republic of Turkey, ICSID Case No. ARB/06/08, Award, 2 September 11, para. 125; The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/10/3, Award, 6 May 2013, para. 183; Kabir Duggal & Wendy W Cai, Principles of Evidence in Public International Law as Applied by Investor-State Tribunals: Burden and Standards of Proof 46-47 (2019).
persuaded that the [agreements] were procured by corruption or not’.\(^\text{51}\) Consequently, rather than raising the standard of proof, the tribunals considered that ‘[b]ecause corruption is a serious charge with serious consequences attached, the degree of confidence a tribunal should have in the evidence of that corruption must be high’.\(^\text{52}\) Other tribunals have applied the ordinary balance-of-probabilities standard, without openly requiring more persuasive evidence for allegations of corruption.\(^\text{53}\) In *Union Fenosa v. Egypt*, for example, the tribunal explained, citing *Libananco v. Turkey*, that there was no reason to heighten the standard as ‘this is not a criminal proceeding’.\(^\text{54}\) Such decisions, however, remain in the minority.\(^\text{55}\)

How to deal with allegations of corruption remains a hot topic.\(^\text{56}\) The burden and standard of proof play an important role in addressing such issues appropriately. It is worth mentioning in this context the ‘Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators’ (the Guide) issued in June 2019 by the Basel Institute on Governance.\(^\text{57}\) The Guide is meant to help arbitrators in both investment and commercial arbitration to address and deal with issues of corruption and money laundering. Regarding the applicable standard of proof, the Guide states that the arbitrators have three options: (1) the balance of probabilities or preponderance of the evidence standard, which means that the arbitrator will decide in favour of the party whose claims are more likely to be true; (2) the clear-and-convincing evidence standard, which is more severe than the balance of probabilities; and (3) ‘another feasible option’, the arbitrator’s inner conviction. The latter standard, the Guide explains, is met if the arbitrator is convinced that there is ‘enough evidence to substantiate the corruption allegations or suspicions’. To treat the different standards of proof as equal ‘options’ is an approach that is unlikely to find wide acceptance at least in investment arbitration. While it is important which standard is adopted, the reason why it is adopted may even be more important. In this regard, however, the Guide offers little guidance.

\(^{51}\) Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation, ICSID Case No. ARB/10/11 and No. ARB/10/18, Decision on the Corruption Claim, 25 February 2019, para. 805.

\(^{52}\) ibid.

\(^{53}\) *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 7.52 (‘although these allegations amount to serious criminal misconduct, the Tribunal considers that the standard of proof remains “the balance of probabilities”’).

\(^{54}\) *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 7.52.


iii  Standard of proof and damages

The standard of proof raises particular questions in the context of damages calculations, because most of the damages analysis requires the tribunal to compare the existing scenario with a hypothetical scenario in which one refers to a situation without the breach.58 In Crystallex v. Venezuela, the tribunal applied different standards for establishing the existence of a loss and the quantification of a future damage. For the former, it applied the general preponderance of the evidence standard. For the latter, it considered, citing the Lemire v. Ukraine tribunal, that, because future damage is inherently difficult to prove, the claimant only needed to prove ‘a basis upon which the tribunal can, with reasonable confidence, estimate the extent of the loss’.59

More recently, this approach was also followed by the tribunal in Watkins Holdings v. Spain, noting, among other things, that proving the amount of damages is a notoriously difficult task.60 Thus, it held, the claimant has to establish the loss with ‘sufficient certainty’ and, then, provide a ‘reasonable basis’ for the tribunal to determine the amount of that loss.61

IV  CONCLUSION

This chapter has provided an overview of recent developments and case law relating to the burden and standard of proof in investment arbitration. While the rule actori incumbit probatio is generally accepted, the more intriguing question is when the evidential burden of proof can shift. This continues to raise questions in practice, as recent cases illustrate. Even though parties often argue that the evidential burden should shift to the opposing party, this has not helped them discharge their burden of proof.

The ordinary standard of proof in investment arbitration is the balance of probabilities. Here, too, the more controversial question relates to the exceptions. While many tribunals have heightened the standards for allegations of wrongdoing (corruption, fraud, etc.), others have applied the ordinary standard but required more persuasive evidence. Damages calculations raise special evidentiary issues. Here, tribunals have applied the preponderance of the evidence standard to the existence of a loss, and a ‘reasonable basis’ for the quantum of the loss.

As tribunals continue to focus on and explain their rationales for burden and standard-of-proof issues, arbitral practice evolves and will, over time, contribute to the development of evidence law in investment arbitration.

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58 Frédéric G Sourgens, Kabir AN Duggal & Ian A Laird, Evidence in International Investment Arbitration 5.22 (2018).
59 Crystallex International Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 868.
60 Watkins Holdings S.à.r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award, 21 January 2020, para. 648.
61 ibid.
This chapter first appeared in the previous edition of *The Investment Treaty Arbitration Review*. It set out to explore in investor–state dispute settlement (ISDS) the origins of that now ubiquitous feature of investment treaty arbitration – the third-party funder. Questions such as: where does it come from? how did it get here? and how did it spread so quickly? were posed and answers proposed. One year later, it is still a headache to some and a cure for others. This updated chapter seeks to bring new cases to light, address previous predictions and continue to examine the past and present to speculate on the future of third-party funding as it pertains to ISDS.

As with all good investigations that seek to identify what was to explain what has come to be, it is proposed that there are categories with specific characteristics of their age that reveal different stages of development. Each of these categories are designated ages specific to the evolution of the third-party funder, summarised in the following table:

<table>
<thead>
<tr>
<th>Age</th>
<th>Time</th>
<th>Number of third-party funders</th>
<th>Available investment (US$)</th>
<th>Type</th>
<th>Expansion</th>
<th>Nature</th>
<th>Third-party funding terms *</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-industry</td>
<td>Pre-2005</td>
<td>&lt;10**</td>
<td>&lt;30 million†</td>
<td>Opportunity</td>
<td>Litigation</td>
<td><em>Ad hoc</em></td>
<td>50%</td>
</tr>
<tr>
<td>Industry</td>
<td>2005–2010</td>
<td>&lt;30***</td>
<td>&gt;100 million</td>
<td>Industry</td>
<td>Commercial arbitration</td>
<td>Standardisation</td>
<td>30%</td>
</tr>
<tr>
<td>Post-industry</td>
<td>2010–2017</td>
<td>&lt;40‡</td>
<td>&gt;1 billion</td>
<td>Profession</td>
<td>Investment treaty arbitration</td>
<td>Risk pricing</td>
<td>30%–70%</td>
</tr>
<tr>
<td>Modern</td>
<td>2017 onwards</td>
<td>&gt;60§</td>
<td>&gt;10 billion*</td>
<td>Specialist</td>
<td>Sector-specific</td>
<td>Merits-driven</td>
<td>1–2x +%</td>
</tr>
</tbody>
</table>

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1 Iain C McKenny is a director at and co-founder of Profile Investment.
THE PRE-INDUSTRY AGE

Third-party funding as a concept has existed for hundreds of years, and likely more. Despite what critics of third-party funding may say, it has its origins in access to justice. Jeremy Bentham wrote exhaustively on the topic of access to justice in the 1700s in the furtherance of ideas such as utilitarianism and distributive justice, and worked tirelessly for the repeal of champerty and maintenance laws in place since medieval times. The cost of access to justice has long been high in most legal jurisdictions, and without third-party funding good claims were often defeated by deep pockets. The fear that vulnerable people could be used as puppets in staged legal battles between wealthy land owners was not sufficient to deny access to justice for the majority of the population. It was inconsistent with what Bentham defined as the ‘fundamental axiom’ of his philosophy: the principle that ‘it is the greatest happiness of the greatest number that is the measure of right and wrong’.

Since then, very slowly, champerty and maintenance laws or their equivalents in most legal jurisdictions have been diluted or repealed in whole or in part. However, this is, in short, the philosophical origins of access to justice and third-party funding, not third-party funders. Third-party funders with a specific mandate to invest in disputes are a relatively recent phenomenon. Research suggests that prior to 2005, there were few types of third-party funders with the dedicated purpose of investing in claims, let alone a third-party funding industry. Although third-party funding as an investment opportunity existed, it was relatively low-profile and characterised by an infrequent ad hoc nature. There is debate as to whether it evolved in Australia (long considered the birth place of third-party funding in the common law world) or Germany as an offshoot from a highly developed form of legal insurance. There is little doubt that, during this pre-industry age, types of third-party funders existed in both these jurisdictions. However, the type of third-party funder unconnected with a claimant prior to the beginning of a dispute (i.e., not premium-based legal cost insurance) with the ability to allow for complete, or near complete, cost-risk transfer in exchange for sharing damages to advance a claim, the essence of the modern day third-party funder is likely to

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2 See first table footnote.
have arisen in common law jurisdictions. Why? Cost. The cost of third-party funding in most common law jurisdictions, owing to the nature of their litigation proceedings, is generally higher than civil law jurisdictions. In common law jurisdictions, it was and is for many as the former Irish Judge Sir James Mathew has said, that 'justice is open to all, like the Ritz Hotel.'

A third-party funder during this pre-industry age, from the early 1990s to the early 2000s, was unlikely to have many disputes specialist lawyers working for it let alone ISDS specialists. They would have likely been characterised by insurance and investment experience; it would have undoubtedly required a high appetite for risk. Financial markets at this time were running hot and cold. Surplus funds designated for high-risk investment turned to third-party funding as an uncorrelated asset class. As a consequence, and from mostly anecdotal evidence, commercial terms ran high. Terms as high as 80 per cent of the damages have been seen and were likely common, embedded in questionably enforceable contracts.

In parallel to this development, the notion of beneficial ownership of proceeds and control was being revisited at the ISDS level as exemplified by *CSOB Bank v. Slovak Republic*, where the tribunal found 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 the beneficial owner is a State Party or a private party.*

The issue at stake in this dispute was nationality and control from financing parties. Such cases involving beneficial ownership of the proceeds of a claim and control set the scene for revisiting this issue with third-party funders at a subsequent stage.

### II  THE INDUSTRY AGE

In this period, the viability of third-party funding as not just an *ad hoc* investment opportunity but as an industry started to take shape. The evolution was not, of course, uniform; some jurisdictions advanced faster than others. In Europe, the United Kingdom was where many third-party funders began to most resemble modern day third-party funders. Third-party funding contracts were mostly imported and worked on from non-recourse financing practices, and a small body of law began to develop. However, from the decision in *Arkin v. Borchard Lines Ltd* (2005), a shift occurred in the United Kingdom. It is a decision that gave rise to what has since been interpreted as the principle that a funder could be held liable in adverse costs for a failed claim up to the amount that it invested into that claim: the ‘Arkin cap’, which has more recently come under review from the 2017 decision in *Bailey v. GlaxoSmithkline UK Ltd*. For some, *Arkin* exposed a potential liability that would deter investors in third-party funding. For others, *Arkin* provided reassuring clarity. A known

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5 Ceskoslovenska obchodni banka, a.s. (CSOB) v. Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999). More recently, in David R. Aven and others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018: In *CSOB v. Slovakia*, the Claimant assigned its interest in the investment following initiation of arbitral proceedings. The tribunal stated that jurisdiction is determined based on the state of the investment interest upon the date of the arbitration's commencement.

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unknown became clearer, and from it contractual risk sharing mechanisms could be forged and business models engineered. *Arkin* provided the bedrock on which a new industry could be founded. It heralded the first paradigm shift of third-party funding from isolated investment opportunity to the creation of third-party funding as a viable business model that would give rise to the burgeoning industry that it is today.

During this time, third-party funding was still mostly concentrated on litigation but, as with all developing industries, satellite opportunities spiralled from it to create third-party funding brokers.\(^6\) A satellite industry was formed by those who had worked on raising financing on an *ad hoc* basis for claims during the pre-industry age – those individuals with ability and foresight but who had neither the means nor arguably the appetite for third-party funding of disputes. Brokers accounted for the majority of third-party funding opportunities for the nascent third-party funder during the industry age. They paved the way through competition and legitimisation for not only a standardisation of terms but the expansion of third-party funding into commercial arbitration. As more funders came on to the market, the need for more investment opportunities expanded. In exchange for a tempering of industry terms to what is still often seen today – the greater of three times the investment or 30 per cent of the damages – brokers sought to increase the number of investment opportunities for these hungry third-party funders. International commercial arbitration was a natural choice. Rooted in practices not too dissimilar to what the third-party funding industry were used to, the leap was not one of faith but of logic.

The nature of international commercial arbitration is more private than either litigation or ISDS. The confidentiality of the proceedings and the privacy of the parties allowed third-party funders to revert to a more creative financial space. How a private party to private proceedings financed its dispute was not the purview of the tribunal in commercial arbitration. This allowed funders to focus more on creative financial solutions than legal issues in respect of access to justice and any form of associated liability for costs. As third-party funders were not considered party to the arbitration agreement, they were not exposed to the same liability as they might be during domestic litigation as with *Arkin* in the United Kingdom. Third-party funders during this time adopted vocabulary from the banking world and started to identify themselves more with providers of non-recourse financing and, accordingly, started adapting third-party funding models on that basis. This allowed them to focus on wealthier claimants rather than access to justice or impecunious claimants. They sought to infiltrate corporate culture by promoting the advantages of financial risk transfer to commercial entities that did not need investment but that may choose it if the advantages in doing so could be justified not in terms of access to justice but in terms of bottom-line profitability. This period gave rise to financing solutions such as portfolio financing: the notion that a financial facility can be put in place across a claimant’s portfolio of disputes or indeed a facility for a law firm to be used across multiple disputes. Third-party funders explained the benefits of their financing to corporate clients as one in which a legal department could be converted from a cost centre into a profit centre, and notions of shifting the costs of a dispute off the balance sheet sought to win over chief financial officers. For many, this was a rebalancing of what third-party funders should be – a financial device, not a legal one. Disputes for funders could be seen as purely about compensation of loss without having to concern themselves with issues such

\(^6\) This is not to suggest that third-party funding brokers did not exist prior to this time but merely that by this time there were established third-party funders, and therefore brokers who catered for them.
as the dispensation of justice and the role funders play in either supporting, or in some jurisdictions running, claims. It was, like the commercial arbitration agreement, a private matter between commercial entities only.

This view of third-party funding as one chiefly about finance was born in the industry age as it pertains to international commercial arbitration and remains so today. It is perhaps best exemplified in the *Essar Oilfield Services limited v. Norscot Rig Management Pvt Limited* case (*Essar v. Norscot*). This was an International Chamber of Commerce (ICC) arbitration seated in London where Sir Philip Otto, sitting as sole arbitrator, allowed the victorious party to claim its third-party funding costs (including the funders’ uplift) from the losing party. The award was challenged on this basis but upheld by the High Court of Justice by J Waksman QC on the basis that recoverable costs were broadly enough defined under the ICC 2012 Rules and the 1996 Arbitration Act that the arbitrator was permitted to do so. There are multiple procedural issues that relate to *Essar v. Norscot*, but from the perspective of third-party funder responsibility, the case is significant for two main reasons: (1) it reinforces the view that third-party funding is purely a financial device and, under the right conditions, recoverable on success; and (2) it raises issues of transparency and the effect of the presence of a third-party funder on all the parties to a dispute. The latter is of particular importance as it pertains to the third-party funder of investment treaty disputes, which dramatically increased in the post-industry age.

### III THE POST-INDUSTRY AGE

#### i Third-party funding and ISDS

The second paradigm shift in third-party funding occurred nearly 10 years after *Arkin* with the now infamous *Excalibur Ventures LLC v. Texas Keystone Inc and Ors*, which was revisited more recently by the court of appeal in 2016. In this seminal case, Lord Justice Clarke drew a clear line between professional and *ad hoc* third-party funders. Weighing the benefits of access to justice against the potential for profiteering, his judgment was reassuring to some and a stern warning to others. In addition to confirming the *Arkin* cap, Clarke LJ inferred that if a third-party funder undertook proper due diligence to meet the claimant and to undertake the requisite assessment of the merits of a claim, it may be treated differently to those third-party funders that had abdicated responsibility and sought to treat a claim purely as an investment opportunity. The latter could be subject to costs orders on an indemnity basis. It imparted a sense of responsibility on third-party funders to be accountable for their investments. For some, *Excalibur* would discourage further investment in third-party funding and for others, as with *Arkin*, it provided additional clarity.

As a result, third-party funders began to distinguish themselves by those that had invested in the requisite skills and abilities to assess the merits of a claim, and those that were derided as being akin to gamblers, or *ad hoc* in the parlance of the growing third-party funding industry. *Excalibur* was the catalyst for the second paradigm shift that gave rise to the self-proclaimed professional third-party funder. Distinguishing between *ad hoc* and professional third-party funders, however, was unclear. At best, it seemed to be a distinction based on how many lawyers the third-party funder recruited. But, the focus on bringing on

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more disputes lawyers and the professionalisation of the industry brought disputes lawyers with ISDS experience – another disputes market for third-party funders to expand into. During this age, third-party funders began more aggressively focusing on ISDS disputes.

Third-party funding of disputes did not start with ISDS but it has become the fastest growing dispute forum for third-party funders. The reasons for this are both qualitative and quantitative: ISDS is expensive (US$6.1 million per side in claimants’ costs)\(^8\) and long (an average of 3.86 years to obtain an award, and an additional one to two years for post-award processes and enforcement).\(^9\) The ability to transfer the cost risk to a third party by sharing the upside in a potential award is obviously very attractive, but it was not obvious what the commercial terms of the funding agreement should be. ISDS was relatively untested at early stages of this post-industry age. As a result, what was typically seen in the industry was a reversion to pre-industry pricing revamped and referred to as risk pricing: this was merely a means by which a third-party funder could account for uncertainty by increasing profitability.

But the nature of ISDS disputes are qualitatively different to commercial arbitration. Where investors seek recourse for either the partial or wholesale destruction or expropriation without fair, prompt or adequate compensation of their investment, the loss suffered is often near complete. Third-party funding has its origins in access to justice for the impecunious, as explained above. When the wealthy ruling classes had such disproportionate influence that by their dealings they could destroy not just the transaction but the livelihood, the wealthy were practically above the rule of law, not least of which because of the high cost of access to justice. Investors and states have a similar inequality of arms inherent in the system (notwithstanding certain wealthy multinational companies), and as third-party funding was originally sought to balance the playing field in domestic litigation, it has readily been taken up by investor claimants in ISDS for the same reason.

Suddenly, at the ISDS level during this time, there were a plethora of task forces,\(^10\) white papers,\(^11\) practice directions\(^12\) and salient cases\(^13\) about or concerning third-party

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8 In 2012, the OECD concluded that legal and arbitration costs for claimants and respondents in recent ISDS cases averaged in excess of US$8 million, having surveyed 143 ISDS awards (available as of August 2011). In 2013, UNCTAD reported that legal fees and tribunal expenses, on average, ‘exceeded $8 million per party per case’. In 2014, an Allen & Overy study concluded that average party costs were US$4,437,000 for claimants and US$4,559,000 for respondents based on a review of 176 ISDS awards (available as of December 2012). In 2015, the European Commission suggested in a paper entitled ‘ISDS: some facts and figures’ that ‘the average legal and arbitration costs for a claimant are around $8 million’.


10 The ICCA-Queen Mary Task Force on Third-Party Funding is a joint task force established by ICCA and Queen Mary, University of London in 2013. https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf.

11 In Hong Kong, the Commission issued two reports after consultations, in October 2015 and October 2016, which culminated in proposed legislative amendments to Hong Kong’s Arbitration Ordinance, as well as proposed amendments to associated regulations. In Singapore, the consultations carried out by the Ministry culminated in two proposed draft instruments: the Civil Law (Amendment) Bill 2016 and the Civil Law (Third Party Funding) Regulations 2016.


13 There are several examples of investor–state arbitration cases where third-party funders have been involved. Among the more high-profile is the Canadian mining company, Crystallex, which was awarded over
For some, the issues relevant to domestic litigation where the nation state was involved in administering disputes pertaining to transparency and accountability became even more relevant when dealing with the nation state as a party to the dispute. From cases and developments, the dominant issues were those of provisional measures such as security for costs and confidentiality and transparency of the agreement with the third-party funder, as summarised below.

### ii Security for costs

The ICSID Convention does not contain an express provision on security for costs and tribunals have tended to be reluctant on granting such orders.\(^\text{14}\) This restrictive approach has been maintained in various ICSID proceedings where third-party funders were involved. For instance, the arbitral tribunal in *Commerce Group Corp and San Sebastian Gold Mines, Inc v. El Salvador*\(^\text{15}\) maintained a restrictive approach to security for costs even when the proceedings were stayed while the applicants sought third-party funding. In the Order of the Committee Discontinuing the Proceeding and Decision on Costs, dated 28 August 2013, the tribunal ordered the claimants to pay the full administrative costs of the proceedings, but maintained its denial of security for costs.

The first known instance where an ISDS tribunal ordered security for costs where third-party funding was involved was the *RSM Production Corporation v. Saint Lucia* case, 13 August 2014,\(^\text{16}\) in which the tribunal ordered the claimant to pay security for costs in the amount of US$750,000 in the form of an irrevocable bank guarantee. However, that the claimant had obtained third-party funding was only used as a supportive argument notwithstanding the separate ‘assent’ by Gavin Griffith who saw the ruling as confirmation that there should be automatic or near automatic security for costs where third-party funders are involved in ISDS cases. In contrast, the tribunal’s reasoning did not show any such contempt for third-party funders, as the main and decisive reason for ordering security for costs was the claimant’s proven history of defaulting on costs orders.

There have been subsequent decisions since *RSM* that have retained the same position in terms of a third-party funder’s involvement and an applicant’s request for security for costs.\(^\text{17}\)

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US$1.38 billion in a claim against Venezuela in which Crystallex was supported by third-party funders.

More recently, Eco Oro, having filed an ICSID arbitration under the Canada–Colombia Free Trade Agreement relating to the Angosutra gold and silver deposit in the country’s Andean region, has the backing of third-party funders.

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\(^\text{16}\) *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, 13 August 2013.

These early cases in the post industry age at the ISDS level as they relate to third-party funders suggest that tribunals are thus far inclined to maintain the status quo and to treat the advent of third-party funders in ISDS as nothing that would give rise to deviating from the long held view that security for costs applications should be allowed only in exceptional circumstances.\(^\text{18}\) However, there is a growing number of cases that suggest that future tribunals are prepared to investigate third-party funding arrangements more closely.

### ii Confidentiality

ICSID tribunals have held that the parties themselves are not under a general duty of confidentiality, absent agreement to the contrary.\(^\text{19}\) In contrast, certain tribunals have highlighted the importance of limiting public discussion of the case to not disturb the proceedings.\(^\text{20}\) However, as non-parties to the arbitration agreement, third-party funders are not bound by any confidentiality duties flowing from that agreement. This was notably the case during the *EuroGas Inc and Belmont Resources Inc v. The Slovak Republic* case in which the respondent's request for a confidentiality order against the claimants' funder was reportedly rejected by an ICSID tribunal. More recently, in the the *Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Plurinational State of Bolivia*, PCA Case No. 2018-39, Amended Procedural Order No. 1, 27 March 2019:

Third Party Funding. The Parties shall submit a written notice disclosing the use of third party funding to cover the costs of this arbitration and the identity of the third party funder. Such notice

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\(^{18}\) There have been two ISDS cases in 2020 that indicate that tribunals are prepared to consider awarding security for costs where there are multiple claimants: *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020: 'Earlier the Tribunal indicated that if this case were to go forward consideration would have to be given to granting security for costs. The right of tribunals to grant security for costs has been widely recognized, and it has been included specifically in ICSID’s proposed amendments to its Arbitration Rules. Its application, however, has been exceedingly limited. Generally, it is considered that security for costs should be awarded only in exceptional cases where a Respondent faces having to defend a claim against a claimant whose past actions or current financial position show that there is a real likelihood that it will not pay costs awarded against it. There is no evidence of this kind in respect of the Claimants. What the Respondent has demonstrated, however, is the difficulty of pursuing claims against claimants to recover costs, when the cost of doing so could well exceed the amount of the costs awarded. The Tribunal recognizes that this is a unique consequence of a mass claim and creates a burden that respondents in cases involving much smaller numbers of claimants do not face. Accordingly, the Tribunal considers that it would be a reasonable protection of the Respondent’s interests to make an order for security of costs and condition the continuance of this case on the provision of that security’ (pars 264–266).

\(^{19}\) See, for instance, in *Amco Asia Corp. & Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures of 9 December 1983: ‘as to the “spirit of confidentiality” of the arbitral procedure, it is right to say that the Convention and the Rules do not prevent the parties from revealing their case’; and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 of 29 September 2006 (pars. 114–121).

\(^{20}\) *The 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 of 5 January 2001.
Evolution of the Third-Party Funder

shall be sent to the Tribunal once the third party funding agreement has been signed. Each Party bears the ongoing duty to disclose any change in the information . . . including termination or withdrawal of the funding agreement.

iv Conflicts of interest

Arbitral tribunals tend to set aside requests for disclosure of third-party funding agreements raised by respondents at the ISDS level. In **Guaracachi America, Inc and Rurelec PLC v. The Plurinational State of Bolivia** (2013), the tribunal decided not to order the production of the agreement or ‘further documentation’ because ‘the applicable provisions governing conflicts of interest in the present proceedings do not foresee the production of document by the Parties but rather disclosure by the arbitrators upon becoming aware of circumstances that could create a conflict of interest’.

Concerns for conflicts of interest where third-party funding is involved are usually raised by the non-funded party and often relate to potential funder–arbitrator relationships. This issue is closely related to confidentiality, disclosure and transparency. For instance, in **South American Silver Ltd (Bermudas) v. Plurinational State of Bolivia**22 with respect to Bolivia’s request to order South American Silver to disclose the identity of its third-party funder and to disclose the terms of the funding agreement, the claimant readily conceded on the former and the tribunal rejected the latter.

During the **Muhammet Çap and Sehil İnşaat Endüstri ve Ticaret Ltd Sti v. Turkmenistan** case, on 23 June 2014, the tribunal issued its Procedural Order No. 2 recording its decision on the respondent’s request of 11 April 2014 for disclosure of the third-party funding agreement. The tribunal ruled as follows:


23 ‘The Tribunal considers that while the existence of a third-party funder may be an element to be taken into consideration in deciding on a measure as the one requested by Bolivia, this element alone may not lead to the adoption of the measure . . . the disclosure of the name of the funder, the Tribunal considers that, for purposes of transparency, and given the position of the Parties, it must accept Bolivia’s request of disclosure of the name of SAS’ funder. Finally, concerning the disclosure of the terms of the financing agreement entered into with the third-party funder, the Tribunal will reject such request. In the Tribunal’s opinion, there is basis to order the disclosure of the name of the third-party funder, but not to order the disclosure of the agreement entered into with the third-party funder.’ (paras. 75–84). More recently, in **Tennant Energy, LLC v. Government of Canada**, PCA Case No. 2018-54, Procedural Order No. 4, 27 February 2020 it was decided that ‘The Tribunal considers that it has the authority to order the disclosure [of third party funding] if doing so would preserve the integrity of the arbitral process’. Furthermore, the tribunal stipulated that ‘Any such disclosures by the Claimant to the Tribunal and the Respondent . . . shall be designated “Confidential Information”.’ Furthermore, the tribunal stipulated that ‘these disclosures need not be made available to the general public [and] the Tribunal’s decision is based on the following factors. First, the existence of third-party funding agreements can be relevant to the Tribunal’s assessment of applications for security for costs. The Tribunal notes that the Claimant has not denied that there is a third-party funder for its claims in this arbitration. It would have been easy for the Claimant to do so if there was no such funder. Secondly, and in any event, the Tribunal considers that transparency as to the existence of a third-party funder is important to determine whether any conflict of interest exists.’

24 **Muhammet Çap and Sehil İnşaat Endüstri ve Ticaret Ltd Sti. v. Turkmenistan** (Decision on Respondent’s Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan BIT).
It seems to the Tribunal that the following factors may be relevant to justify an order for disclosure, and also depending upon the circumstances of the case:

- To avoid a conflict of interest for the arbitrator as a result of the third-party funder;
- For transparency and to identify the true party to the case;
- For the Tribunal to fairly decide how costs should be allocated at the end of any arbitration;
- If there is an application for security for costs if requested; and
- To ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motives.

Applying these factors, the tribunal was not persuaded that there was any reason to make an order requiring the claimants to disclose how they were funding the arbitration, but the factors listed do open the door to future rulings where such a disclosure can be made, and specifically the tribunal held that ‘this decision does not preclude the respondent from making a further request for disclosure at a later stage in this arbitration if it has additional information to justify the application.’ Furthermore, at the time of writing, the draft ICSID rules in respect of third-party funding indicate that the fact of third-party funding and the identity of the third-party funder will have to be disclosed to allow arbitrators to clear conflicts.25

Taken as a whole, these cases and developments as they pertain to security for costs, confidentiality and conflicts of interest at the ISDS level are strong evidence that the role of third-party funders is unlikely to be relegated to that of mere financial services providers. Questions of transparency and legitimacy will continue to be probed, and, as a consequence, the type of third-party funder, how they conduct themselves, and from where and how they have raised their money are likely to be of greater relevance in the modern age.

IV THE MODERN AGE

When this chapter was first published it was hypothesised that we are currently in what appears to be the third paradigm shift of third-party funding – the modern age. In that chapter, it was postulated that there are two prevailing and competing models of ‘professional’ third-party funders: risk pricing versus merits-based models. The former dictates that most claims can be funded if the terms are right and adheres to the view that third-party funders are mere providers of bespoke financial products. By this logic, even Excalibur could have been funded providing the commercial terms of the investment were sufficiently high to justify the risk.

The reason for this is that the risk pricing model considers awards and judgments only in terms of compensation of loss and thus there is nothing wrong in funding an unmeritorious claim if the potential for a windfall is possible. This is the same mentality that characterises many financial markets where higher risks equate to higher rewards.

In contrast, the merits-based model requires the funder to treat a judgment or award as more than just an investment opportunity and a commodity to be invested in. It dictates that an award is first and foremost a judicial instrument for the dispensation of justice. The compensation of loss is as a result of the dispensation of justice, and thus knowingly funding an unmeritorious case or not accepting responsibility to assess the merits can and arguably should expose the funder to a costs liability.


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When this chapter was first published, we speculated that if the battle between these two competing models continues unchecked, it is likely that the risk pricing model will prevail. Since then, there have been some interesting developments including the recent Muddy Waters affair\(^\text{26}\) that revealed a charge that Burford has made 60 per cent of its reported profits from just four cases\(^\text{27}\) – what some might call a classic example of risk pricing. Furthermore, Vannin Capital abandoned its IPO aspirations and was taken over by one of its creditors, Fortress.\(^\text{28}\) Both of these events have the potential to harm the attractiveness of third-party funding as an asset class. However, even more recently, covid-19 has become a global pandemic that has had a devastating effect on financial markets and thus correlated asset classes. It is not clear what the impact of these developments have been on the third-party funding market but for many potential investors third-party funding remains an attractive uncorrelated asset class and thereby an attractive investment especially during times of financial market instability. In addition to a new crop of would-be funders that have come to the market recently, there appears to be even greater interest in portfolio financing for third-party funding.\(^\text{29}\) This is particularly important as it relates to merits-based models of funding and risk pricing because portfolio financing has the greatest potential to tip the scales in favour of risk pricing models. The reasons for this are clear – portfolio financing does not have to assess the merits of any one case but of a bundle of cases of a likely mixed composition in terms of merits. From a purely compensation of loss perspective, portfolio financing is attractive owing to the inherent risk diversification of investing in multiple cases in a portfolio. However, from a dispensation of justice perspective, the temptation for third-party funders could be to accept funding some cases of questionable merit but high reward because of an artificial financial connection within the same portfolio of cases of stronger merit. The implications for dispute forums that impact on public finances such as national litigation or ISDS is profound because portfolio financing opens the door to speculate more and assess less.

In the previous edition of this chapter it was suggested that this current paradigm shift, characterised by the battle between the risk pricing and merits-based models of third-party funding, is not devoid of indicators as to how it may develop. Consistent with the previous two paradigm shifts, in 2016 the UK Court of Appeal upheld Clarke LJ’s judgment on *Excalibur* and, therefore, the merits-based model that encourages thorough due diligence prior to funding a claim, and ongoing and effective monitoring during the life of the dispute. Furthermore, in *Bailey v. GlaxoSmithKline UK Ltd* [2017] Justice Foskett effectively considered the nature of the funder involved and decided that the *Arkin* cap could be lifted if not doing so would lead to an injustice. These advancements in case law at the domestic litigation level in countries such as the United Kingdom are likely to help shape the development of the role of the third-party funder at the ISDS level because of the one common denominator – the nation state. Where public money is involved, whether by administering a dispute or participating in it, questions will be asked about whether third-party funders are adopting a risk pricing model that may well give rise to more and greater disputes of questionable merit.

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27 ibid.


29 Portfolio financing as it applies to third-party funding can be defined in many ways. For these purposes, portfolio financing is meant to describe a funding facility that provides financing for multiple disputes for a single claimant or for a law firm to run multiple disputes from a single facility.
in search of windfall returns regardless of the cost to the public, or whether funders will be compelled to adopt a merits-based model where funders scrutinise more and temper returns on investment. At the time of writing, the author is unaware of any significant developments in this respect but it may suffice to say that it may have significant implications for those third-party funders currently and strongly advocating for the benefits of portfolio funding.

In the first edition of this chapter, it was said that the differences between funders is greater today than their similarities. Third-party funders, irrespective of their origins, continue to evolve as their environment changes. There are now more funders that have opted to be publicly listed, or have front offices regulated by financial authorities and there appears to still be only one that has set up regulated asset management funding vehicles for the specific purpose of funding disputes. However, as of writing, the vast majority of third-party funders appear to opt for a form of self-regulation with no oversight or transparency on conduct, how money is raised or from where. Tribunals in ISDS and courts in national litigation cases are likely to be put under more pressure to probe further not only into who the third-party funder to a dispute is, but also how much control it is exerting over the dispute. So far, tribunals have mostly been reluctant to inspect the workings of the funding agreement. Instead, they tend to prefer to focus on who the funder is for the purpose of conflicts of interests with the tribunal. However, it is not inconceivable that at some point during the modern age, if third-party funding remains an unregulated activity, tribunals will more frequently seek to inspect funding agreements to determine whether the funder has subrogated any of the rights typically reserved for the claimant. In the absence of an ability to develop an equivalent to the Arkin cap principle, ISDS tribunals may more frequently render orders for provisional measures such as security for costs. In the previous edition of this chapter it was speculated that as a counterbalance, such a development may lend greater weight to arguments that the costs of such security should be recoverable from the respondent if the claim ultimately prevails. In January 2020 of this year such an order was issued.

The evolution of the third-party funder from litigation through commercial arbitration to ISDS has brought with it a desire for greater oversight and control of third-party funding. The question is what type of regulation – negative (responding to a problem) or positive (ensuring access to third-party funding) – will prevail? In the previous edition of this chapter

30 e.g., IMF Bentham, Burford Capital, Foris, LCM.
31 e.g., Augusta Ventures, Harbour Litigation Funding and, until the recent decision to cease trading, Calunius.
33 The Association of Litigation Funders is the most well-known example of a self-regulating body owned and controlled by the members it regulates.
34 In 2017, Burford Capital’s role as funder of a pair of treaty claims against Pakistan worth US$640 million ended with the claimants being ordered to pay around £11 million in costs; Vannin Capital’s role in financing a US$100 million DR-CAFTA claim against Costa Rica ended in a victory for the state and a US$1 million costs award against the claimant. At the time of writing, in Italba Corporation v Oriental Republic of Uruguay (ICSID Case No. ARB/16/9), the state prevailed leaving a cost awards against the claimant who was funded by IMF Bentham for US$5.9 million.
35 Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan, ICSID Case No. ARB/18/35, Decision on the Respondent Request for Security for Costs and the Claimant Request for Security for Claim, 27 January 2020. In this matter, the tribunal ordered that the claimant provide security for costs but also ordered that the costs associated with the security for costs are recoverable from the respondent if the claimant prevails.
it was submitted that the answer lies in the type of third-party funder and the third-party funding model that prevails between risk pricing or merits-driven models as it pertains to ISDS. We speculated earlier in this updated chapter that portfolio funding may be to the advantage of risk pricing models in this contest. However, there are early signs that an alternative merits driven model may yet prove to be a significant counterweight to portfolio financing and that is the rise of the law firm/funder hybrid. A law firm with a dedicated fund. A single new legal life form that can combine the cross disciplinary expertise of legal assessment with investor acumen around an asset class understood by both disciplines. For some jurisdictions, such an entity would not be allowed to exist owing to restrictions on a lawyers ability to have a vested interest in any one case. However, for jurisdictions where such restrictions are more relaxed, the law firm/funder hybrid could be an evolution of the merits-driven model.
I INTRODUCTION

The year 2018 saw a record 10 decisions on disqualification proposals to arbitrators and ad hoc committee members alike within the International Centre for Settlement of Investment Disputes (ICSID) context. A further four disqualification decisions were issued in 2019. Having regard to the public availability of decisions and this flurry of activity, this chapter will focus on challenges to arbitrators (and committee members) brought under the ICSID Convention. The chapter begins by setting out the grounds for disqualification under the ICSID Convention and Rules, before briefly detailing the prevailing legal standard as developed through ICSID jurisprudence. The majority of this chapter will be devoted to a discussion of three categories of alleged conflict, concentrating on the reasoning of publicly available decisions published during 2018 and 2019.

II THE RULES

The main grounds for disqualification of arbitrators under the ICSID Convention are prescribed by Article 57, which provides that:

[a] party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

Reference to Section 2 of Chapter IV is to the nationality requirements for appointment under Articles 38 and 39 of the ICSID Convention. A third ground for disqualification is found in Rule 8 of the ICSID Arbitration Rules, which provides for a situation where an arbitrator becomes incapacitated or unable to perform the duties of his or her office.
The most commonly invoked ground for disqualification is a manifest lack of the qualities required by Article 14(1):

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

It is well settled that although the English text of Article 14(1) refers only to ‘independent judgment’, this provision also contains a requirement of ‘impartiality’ (deriving from the equally authentic Spanish text).

In practice, applications for disqualification under Article 14(1) are almost always premised on an alleged lack of independence or impartiality, and it is on these types of challenges that this chapter will focus.

III THE LEGAL STANDARD UNDER THE ICSID CONVENTION

The legal standard for disqualification in the ICSID context has been closely considered in decisions on disqualification proposals and scholarly commentary. The authors do not propose to rehearse that commentary here in full, but rather note that recent decisions suggest a welcome shift in the direction of a consistent and predictable standard.

The applicable legal standard is objective

In determining whether an arbitrator lacks impartiality or independence, it is well established that the test is objective. As put by the chair of the ICSID Administrative Council in Blue Bank and Burlington:

[The applicable legal standard is an “objective standard based on a reasonable evaluation of the evidence by a third party”. As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.]

This has been consistently reaffirmed, including by a number of decisions in 2018 and 2019.

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4 See Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, 12 November 2013 (Blue Bank) paragraph 60; and Burlington Resources Inc v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Ortega Vicuña, 13 December 2013 (Burlington), paragraph 67.

5 See, for example, Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia, ICSID Case No. ARB/17/32, Decision on the Proposal to Disqualify Professor Brigitte Stern, 23 April 2018 (Elitech), paragraph 46; Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov, 17 May 2018 (Raiffeisen), paragraph 84; Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23, Decision on the Proposal to Disqualify Mr Gary B Born, 16 March 2018 (Mathias Kruck), paragraphs 51–52.

6 See, for example, Italba Corporation v. Oriental Republic of Uruguay, ICSID Case No. ARB/16/9, Decision on the Proposal to Disqualify Gabriel Bottini (Annulment Proceeding), 29 October 2019, paragraph 37.
Challenges to Arbitrators under the ICSID Convention and Rules

It is sufficient to establish the appearance of dependence or bias

In the case of *Amco*, the very first challenge to an arbitrator brought under the ICSID Convention in 1982, Indonesia sought the disqualification of the claimants’ appointed arbitrator on a number of grounds, including that he had provided tax advice to a principal shareholder in the claimants’ company after the commencement of the arbitration. Prior to this, his law firm also had a profit sharing arrangement with the claimants’ counsel. The unchallenged arbitrators are reported to have dismissed the proposal, noting that proof of the existence of facts that indicated a lack of independence was insufficient without strict proof of actual bias. The standard of proof imposed in *Amco* was, accordingly, significantly higher than the ‘justifiable doubts’ standard typically adopted by other arbitral institutions and rules.

This decision was heavily criticised, and a majority of subsequent decisions have confirmed that Articles 57 and 14(1) do not require proof of actual dependence or bias; rather, it will be sufficient for a party to establish the appearance of dependence and bias. The next challenge, some 20 years later, was to the president of the ad hoc committee in the annulment proceedings in *Vivendi I*. In that case, the unchallenged committee members rejected the findings in the *Amco* decision, noting a proper interpretation of the standard of proof was analogous to that in Rule 3.2 of the International Bar Association (IBA) Code of Ethics, which refers to an ‘appearance of bias’.

The rationale for this lower standard was neatly summarised in the 2010 *Urbaser* decision:

> [s]he requirements of independence and impartiality serve the purpose of protecting the parties against arbitrators being influenced by factors other than those related to the merits of the case. In order to be effective this protection does not require that actual bias demonstrate a lack of independence or impartiality. An appearance of such bias from a reasonable and informed third person’s point of view is sufficient to justify doubts about an arbitrator’s independence or impartiality.

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7 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Proposal to Disqualify an Arbitrator, 24 June 1982 (unpublished) (*Amco*).
8 *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001 (*Vivendi I*), paragraph 21.
10 See, for example, PCA Arbitration Rules, Article 12(1); UNCITRAL Arbitration Rules 1976, Article 10(1); UNCITRAL Arbitration Rules 2010 and 2013, Article 12(1).
11 See, for example, IBA Guidelines on Conflicts of Interest in International Arbitration Adopted by resolution of the IBA Council on Thursday 23 October 2014 (the IBA Guidelines).
12 See the opinion of the unchallenged members of the ad hoc committee in *Vivendi I*, paragraphs 21–22.
13 The qualities required of tribunal members pursuant to Article 14(1) apply *mutatis mutandis* to ICSID ad hoc committee members.
14 *Vivendi I*, paragraph 20.
This was also espoused by the chair of the ICSID Administrative Council in the Blue Bank and Burlington decisions, as well as more recently in the Raiffeisen decision, in which the chair relatedly noted that ‘[a]ll relevant facts shall be taken into account in establishing the appearance of dependence or bias’.

iii The requirements of impartiality or independence, or both, must be manifestly lacking

The nature of these requirements has twice been summarised by the chair of the ICSID Administrative Council in the following terms: ‘[i]mpartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control’.

The requirement that these must be manifestly lacking is found in Article 57. As Professor Schreuer observed in his commentary, ‘[t]he requirement that the lack of qualities must be “manifest” imposes a relatively heavy burden of proof on the party making the proposal’. The meaning of ‘manifest’ has been the subject of interpretation through ICSID jurisprudence.

Karel Daele’s monograph, *Challenge and Disqualification of Arbitrators in International Arbitration*, suggests the existence of three generations of decisions on this matter:

a The first comes from *Amco*. In that case, the unchallenged arbitrators interpreted ‘manifest’ to mean that a lack of the qualities required pursuant to Article 14(1) must be ‘quasi-certain or highly probable’.

b Daele’s second generation of decisions, starting with *Vivendi I*, refocused the discussion in this context on a requirement that the circumstances giving rise to the challenge must be established. In this regard, the unchallenged arbitrators noted that the term ‘manifest’ in Article 57 ‘must exclude reliance on speculative assumptions or arguments’. Instead, ‘the circumstances actually established (and not merely supposed or inferred) must negate or place in clear doubt the appearance of impartiality’. Without further discussion of the specific meaning of ‘manifest’, the unchallenged arbitrators concluded that any deficiency of the qualities in Article 14(1) so proven would be manifest.

c The third and most recent generation of decisions, starting with *Blue Bank* in 2013, preferred a more focused and specific interpretation of ‘manifest’ as meaning ‘evident’ or ‘obvious’.

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16 Blue Bank, paragraph 59; Burlington, paragraph 66.; Interocean Oil Development Company v. Federal Republic of Nigeria, ICSID Case No. ARB/13/20, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, 3 October 2017 (Interocean), paragraph 68.

17 Raiffeisen, paragraph 83.

18 See Blue Bank, paragraph 59; Burlington, paragraph 66; and Green Energy Opportunities I, S.à r.l. and Canepa Green Energy Opportunities II, S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/19/4, Decision on the Proposal to Disqualify Mr Peter Rees QC, 19 November 2019 (Canepa), paragraph 51.


20 K Daele, *Challenge and Disqualification of Arbitrators in International Arbitration*, 2012, (Daele).

21 id., page 237, paragraph 5-034.

22 id., page 239, paragraph 5-035.

23 *Vivendi I*, paragraph 25.

24 See, for example: *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, 28 December 2016, paragraph 54; Burlington paragraph 68 n.83; *Abaclat and Others*. 
This interpretation was recently affirmed by the unchallenged arbitrators in the 2019 Canepa decision, where the unchallenged arbitrators rejected the respondent’s submissions that Articles 57 and 14 of the ICSID Convention must be interpreted as an obligation to disqualify an arbitrator if there is ‘any indication’ of its lack of independence or impartiality or ‘any doubt’ of bias.

In its 2019 recommendation to ICSID on Germany’s proposal to disqualify the entire tribunal in Vattenfall, the Permanent Court of Arbitration summarised the applicable legal principles as follows:

Pursuant to Article 57 of the ICSID Convention, the challenging party carries the burden to establish, first, the existence of facts on the basis of which a “manifest” lack of the qualities of an arbitrator can be inferred. Second, the challenging party must establish that such inference is reasonable, considering the circumstances of the case. Article 57 of the ICSID Convention contains an objective standard. Subjective perceptions or beliefs of the challenging party are insufficient to disqualify an arbitrator.

25 Canepa, paragraph 50.
26 Following a complaint by Germany that the ICSID Secretary-General had prejudged the merits of its pending proposal to disqualify the entire Tribunal (based on comments reported to have been made by the Secretary-General in an interview), ICSID agreed to solicit a non-binding recommendation on the proposal from the Permanent Court of Arbitration. The Secretary-General of the Permanent Court of Arbitration went on to recommend that Germany’s proposal be dismissed. (Global Arbitration Review, PCA to weigh in on challenge to Vattenfall panel, 25 January 2019, https://globalarbitrationreview.com/article/1179654/PCA-to-weigh-in-on-challenge-to-vattenfall-panel).
27 Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Recommendation of the Permanent Court of Arbitration pursuant to the Request by ICSID dated 24 January 2019 on the Respondent’s Proposal to Disqualify all Members of the Arbitral Tribunal dated 12 November 2018, 4 March 2019, paragraph 50.
IV CIRCUMSTANCES GIVING RISE TO CHALLENGE UNDER THE ICSID CONVENTION – A SELECTION OF DECISIONS

In establishing the circumstances giving rise to an alleged lack of independence or impartiality, parties have often relied upon the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines). They are a non-binding source of guidance, which represent an international consensus on minimum standards in relation to conflicts of interest in international arbitration. As such, it is often argued that they can be equated with the view that a reasonable and informed third party would take of a set of circumstances, and that they would form a part of the analysis of a reasonable third party when assessing a conflict situation. Notwithstanding their non-binding nature, previous ICSID decisions have referred to them as ‘useful references’, ‘instructive’ and ‘a most valuable source of inspiration’.

i Multiple appointments by (or against) the same party

Challenges based on multiple appointments by the same party, or its affiliates, have a long history in ICSID arbitration.

The 2010 Tidewater decision remains highly relevant to challenges of this nature. In finding that ‘the question whether multiple appointments to arbitral tribunals may impugn the independence or impartiality of an arbitrator is a matter of substance, not of mere mathematical calculation’, the unchallenged arbitrators noted that ‘[t]he starting-point is that multiple appointments as arbitrator by the same party in unrelated cases are neutral, since in each case the arbitrator exercises the same independent arbitral function’. The following factors may give rise to an appearance of a manifest lack of independence or impartiality: (1) the prospect of continued and regular appointment, with attendant financial benefits that might create a relationship of dependence or otherwise influence the arbitrator’s judgement; or (2) a material risk that the arbitrator may be influenced by factors outside the record as a result of his or her knowledge derived from the other cases, or both.

This has found support in a majority of later decisions, including the successful challenge in Caratube II and two recent decisions: Elitech and Raiffeisen.

In Caratube II, the only successful challenge in this category, the claimants challenged Kazakhstan’s appointed arbitrator, Mr Brunch Boesch, on two main grounds: (1) his three
prior appointments by Kazakhstan’s counsel, Curtis Mallet-Prevost Colt & Mosle; and (2) his appointment by Kazakhstan (also represented by Curtis Mallet-Prevost Colt & Mosle) in the Ruby Roz UNCITRAL arbitration, said to have been premised on the same legal grounds and factual allegations as the claims in Caratube II.

In relation to (1), the unchallenged arbitrators noted that the claimants had not made any allegations of Mr Boesch’s financial dependency on either Curtis Mallet-Prevost Colt & Mosle or Kazakhstan and, following the proposition in Tidewater, the mere fact of his appointments (without more) could not suffice to indicate a manifest lack of independence or impartiality. As to (2), the unchallenged arbitrators concluded that there was a significant overlap in the underlying facts between the two arbitrations, which satisfied the objective test for disqualification. In particular, Mr Boesch would be privy to information and facts from the Ruby Roz proceedings (outside of the record of the instant proceedings) leading a reasonable third party to find it highly likely that Mr Boesch would prejudge legal issues in the present arbitration based on the facts underlying the Ruby Roz case. The claimants in each case were relying on the same fact witnesses. Relatedly, the same was held to give rise to an appearance of imbalance within the tribunal. The unchallenged arbitrators left it open as to whether this constituted an aggravating factor or a stand-alone ground for disqualification.

In February 2018, the claimants in Elitech submitted an application to disqualify Croatia’s appointed arbitrator, Professor Brigitte Stern, on the basis that her repeat appointments by Croatia and Croatia’s counsel, Latham & Watkins, raised doubts as to her ability to exercise the qualities enshrined in Article 14(1) of the ICSID Convention.

In particular, the claimants noted that between 2014 to 2016, Professor Stern had been appointed by Croatia in three other investor–state arbitrations, all of which were ongoing; and, including the instant case, Professor Stern had served as Croatia’s appointed arbitrator in four of the seven known investor–state proceedings brought against it.

The claimants relied upon the IBA Guidelines, which include at Clause 3.1.3 of the Orange List, whether the arbitrator has been appointed as arbitrator on two or more occasions by one of the parties within the past three years. To extend the temporal scope of this guideline, the claimants referred to the decision in Highbury v. Venezuela, relating to

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36 id., paragraph 107.
37 id., paragraphs 78–90.
38 id., paragraphs 90–91.
39 id., paragraph 86.
40 id., paragraphs 92–94.
41 id., paragraph 96.
42 Professor Stern had been appointed as arbitrator twice in the preceding six years by Croatia’s counsel, Latham & Watkins (Elitech, paragraph 20). This ground of complaint was not addressed in the decisions.
43 Elitech, paragraphs 12 and 41.
44 id., paragraph 15.
45 The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence (IBA Guidelines, Recital II, 3).
46 IBA Guidelines, Part II, Section 3, Clause 3.1.3.
47 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 (Highbury).
an (unsuccessful) challenge to Professor Stern three years earlier,\textsuperscript{48} which stated that it was sometimes appropriate in investment arbitrations to consider the period beyond the three years specified in the IBA Guidelines.\textsuperscript{49}

The claimants also argued that the other ongoing cases in which Professor Stern was appointed by Croatia concerned factual and legal issues that were substantially similar to those to be decided in the instant proceedings.\textsuperscript{50} Relying on Clause 3.1.5 of the IBA Guidelines,\textsuperscript{51} the claimants asserted that this fact created ‘reasonable or clear doubt or real risk in regard to the exercise of independent judgment’ and therefore served as a ground for disqualification.\textsuperscript{52}

Notably, the unchallenged arbitrators (Professors Kaufmann-Kohler and Goatanda) were divided on the issue, and the challenge was accordingly decided by the chair of the ICSID Administrative Council in accordance with ICSID Article 58.\textsuperscript{53} In a decision dated 23 April 2018, the chair rejected the claimants’ disqualification proposal, reaffirming the \textit{Tidewater} decision and noting that the claimants had failed to set out any circumstance that would call into question Professor Stern’s impartiality and independence. The multiplicity of her appointments by Croatia by itself was insufficient,\textsuperscript{54} and the claimants had failed to discharge the burden of showing that the presence of common issues was ‘sufficient to give rise, objectively, to the appearance of dependence or bias’.\textsuperscript{55} Of relevance to this finding, the chair noted that Professor Stern’s other appointments were in cases that did not arise in the same industry as in \textit{Elitech}. That those disputes arose under the same treaty was insufficient to give rise to any presumption of bias.\textsuperscript{56}

Also, in February 2018, and in another ICSID arbitration involving Croatia, Croatia proposed the disqualification of the claimants’ appointed arbitrator, Dr Stanimir Alexandrov, in \textit{Raiffeisen}. The application was premised on four points that Croatia asserted gave rise to objective and justifiable doubts as to Dr Alexandrov’s independence and impartiality, including Dr Alexandrov’s multiple appointments in treaty cases against Croatia.

In this regard, pointing to Dr Alexandrov’s appointment in three other ongoing treaty arbitrations against Croatia\textsuperscript{57} (and a further nomination that was voluntarily declined),\textsuperscript{58} Croatia stated that the effect of Dr Alexandrov’s serving on 45 per cent of ongoing ICSID claims against the state was that he ‘possesse[d] significant and unique influence over the Respondent’s financial situation and international reputation which no single arbitrator should possess’\textsuperscript{59} and that he was highly likely to be negatively predisposed against Croatia.

\textsuperscript{48} \textit{Elitech}, paragraph 14.
\textsuperscript{49} \textit{Highbury}, paragraph 84.
\textsuperscript{50} \textit{Elitech}, paragraph 18.
\textsuperscript{51} IBA Guidelines, Part II, Section 3, Clause 3.1.5: ‘[t]he arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties’.
\textsuperscript{52} \textit{Elitech}, paragraph 19 (citing \textit{Electrabel SA v. Republic of Hungary}, ICSID Case No. ARB/07/19, Decision on the Claimant’s Proposal to Disqualify a Member of the Tribunal, 25 February 2008, paragraph 40).
\textsuperscript{53} id., paragraph 10.
\textsuperscript{54} id., paragraph 50.
\textsuperscript{55} id., paragraph 52.
\textsuperscript{56} id., paragraph 54.
\textsuperscript{57} \textit{Raiffeisen}, paragraphs 17–19.
\textsuperscript{58} Dr Alexandrov declined an appointment as the claimants’ arbitrator in \textit{Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia}, ICSID Case No ARB/17/37.
\textsuperscript{59} \textit{Raiffeisen}, paragraph 19.
Challenges to Arbitrators under the ICSID Convention and Rules

(although if subconsciously) to secure further appointments by future claimants against the state. Furthermore, and as a result of Dr Alexandrov having become an independent arbitrator in September 2017, Croatia argued that his own income was heavily dependent upon arbitral appointments by claimants in investment treaty arbitrations. Dr Alexandrov’s multiple appointments in cases against Croatia was stated to be equivalent to multiple appointments of an arbitrator by the same claimant or counsel falling under Clause 3.1.3 of the IBA Guidelines Orange List.

Croatia stated that the overall circumstances surrounding Dr Alexandrov’s repeat appointments and, in particular, ‘the prospect of continued and regular appointment, with the attendant financial benefits’ gave rise to justifiable doubts as to his ability to exercise independent judgment.

Croatia also argued that Dr Alexandrov would be required to consider the same legal issues as in the case of Gavrilović, where he was also sitting as the claimants’ arbitrator. In this regard, and owing to the more advanced stage of the Gavrilović proceedings, it was contended that Dr Alexandrov would already have formed a view on the compatibility of the Austria–Croatia BIT and EU law, before any opportunity to hear the parties’ submissions in the instant case arose.

More broadly, Croatia also noted that Dr Alexandrov had served as the claimant-investor’s appointee in 35 out of the 38 known investment treatment arbitrations in which he has sat as arbitrator.

For reasons that were not disclosed, Croatia’s appointed arbitrator, Mr Lazar Tomov, recused himself from deciding the application, which was accordingly considered instead by the chair of the ICSID Administrative Council.

In determining Croatia’s complaint regarding Dr Alexandrov’s multiple appointments in treaty cases against Croatia, and by claimant-investors more generally, the chair relied on the earlier stated proposition from Tidewater and further noted the principle in Vivendi I, stating that circumstances giving rise to a finding that a lack of impartiality of independence is manifest ‘must negate or place in clear doubt the appearance of impartiality’. In this regard, the chair determined that Croatia had failed to evince an appearance of bias or financial dependence that satisfied this requirement.

Specific to any overlap of factual or legal issues, the chair noted that ‘the mere exposure of an arbitrator to the same legal issue in multiple arbitrations is insufficient to disqualify that arbitrator’, and, relying on the unchallenged arbitrators’ reasoning in Caratube II, that ‘[i]t here must be an additional – significant – overlap of facts that are specific to the merits and the parties involved’.

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60 ibid.
61 id., paragraph 20.
62 id., paragraph 23.
63 id., paragraph 22.
64 See Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39.
65 Raiffeisen, paragraph 26.
66 id., paragraph 16.
67 id., paragraph 10.
68 id., paragraph 88 (citing to Vivendi I, paragraph 25).
69 id., paragraph 89.
70 id., paragraph 91 (citing to Caratube II, paragraphs 78, 84, 86 and 90).
Both challenges made reference to the frequency with which the challenged arbitrators had been appointed by either investors or states: in the case of Dr Alexandrov, appointments by claimant-investors and, in the case of Professor Stern, appointments by respondent-states. So far as the authors are aware, no challenge based on this (relatively commonplace) occurrence in the ICSID context has ever been successful.

The subject of multiple appointments also arose in three separate challenges brought by Venezuela against Mr Alvaro Castellanos Howell. These challenges, all of which were decided in 2018, related to Mr Castellanos Howell’s appointment as the president of three ad hoc committees in ICSID annulment proceedings involving Venezuela. All three challenges were reported to have been brought on the same grounds, and all were rejected. The decision in the Blue Bank annulment proceedings (the only one of the decisions that is publicly available) is considered below.

Venezuela relied on Article 3.1.3 of the Orange List of the IBA Guidelines to argue that the appointment of Mr Castellanos Howell to five ad hoc committees overseeing annulment proceedings involving Venezuela was indicative of Mr Castellanos Howell’s reliance and financial dependence on such repeat appointments and his resultant lack of independence. In determining the application, the unchallenged committee members noted that the potential risk of conflict identified by Article 3.1.3, which applies to multiple appointments by a party or its affiliate, was not applicable to a recurring professional relationship with ICSID, the appointing authority to ad hoc committees.

At the same time, relying on Article 3.1.5 of the Orange List of the IBA Guidelines, Venezuela also pointed to an alleged commonality of issues across the proceedings to be determined by the committees of which Mr Castellanos Howell sat as president. This was dismissed on the basis that Venezuela had failed to identify any overlap beyond all proceedings being related to the annulment of awards in proceedings involving Venezuela.

This issue also arose in Spain’s challenge to the Claimant’s appointed arbitrator Mr Peter Rees QC in Canepa. The unchallenged arbitrators dismissed this ground of challenge, finding that the fact of Mr Rees QC’s two previous appointments by Allen and Overy ‘is not, standing alone, a basis for finding either an actual or an appearance of a manifest lack of independence or impartiality when appointed in a third case’.

The 2018 and 2019 decisions suggest that the test set out in Tidewater is likely to remain persuasive in determining these types of challenges, and that the threshold for establishing an appearance of dependence or partiality remains high.

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73 Blue Bank Annulment, paragraph 75.

74 id., paragraphs 98–99.

75 id., paragraphs 104–105.

76 Canepa, paragraph 63.
A pre-existing relationship with one of the parties or their affiliates

Pre-existing professional relationships have formed the basis for a number of challenges under the ICSID Convention. It does not define the kinds of relationships that should be disclosed by arbitrators or considered as a bar to appointment. As noted by Professor Schreuer:

*a relationship with a party affecting the eligibility as arbitrator may be of a personal, family or business nature. It would include a permanent attorney/client relationship, any other permanent or recurrent business relationship, employment by a party, including civil service in a State that is a party, substantial participation or shareholding in a company that is a party and any form of relationship in which the arbitrator stands to profit directly or indirectly from the financial gain of a party.*

A pre-existing professional relationship, in this case in the context of a lawyer and client, formed the grounds for challenge in *Amco*. Although the challenge was dismissed, in noting the subsequent criticism of this decision, the unchallenged arbitrators in *Vivendi I* stated that any such relationship can only be justified under the *de minimis* exception. In their estimation, anything more would surely be sufficient to establish the appearance of dependence.

In *Blue Bank*, the respondent challenged the claimant’s appointee, Mr José María Alonso, on the basis that the firm at which he was a partner (Baker McKenzie) also represented the claimant in parallel arbitration proceedings. The chair of the ICSID Administrative Council upheld the respondent’s request, inter alia, because, in the words of Professor Schreuer, Mr Alonso ‘stood to profit directly or indirectly from the financial gain of a party’. As the chair observed:

>[i]he sharing of a corporate name, the existence of an international arbitration steering committee at a global level, and Mr. Alonso’s statement that his remuneration depends “primarily” but not exclusively on the results achieved by the Madrid firm imply a degree of connection or overall coordination between the different firms comprising Baker & McKenzie International.

In *Generation Ukraine*, the claimant challenged the respondent state’s nominee, Dr Jürgen Voss, on the basis that he had been involved in studies and investment policy reviews of Ukraine during his time as Deputy General Counsel of the Multilateral Investment Guarantee Agency. The claimant cited concerns that Dr Voss had developed personal connections with Ukrainian political officials and that these personal connections would deprive him of the capacity for independent judgement. On referral by the unchallenged arbitrators, the request was recommended to be dismissed by the Secretary General of the Permanent Court of Arbitration without reasoning. Nevertheless, it must presumably have been considered that

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77 Schreuer, p. 513, paragraph 22.
78 *Vivendi I*, paragraph 22.
79 Schreuer, p. 513, paragraph 22.
80 *Blue Bank*, paragraph 67.
82 ibid.
previous professional relationships arising out of an arbitrator’s participation in a multi-state programme of cooperation, without any resultant financial dependency, was not a basis for disqualification.

The circumstances of the challenge in *Generation Ukraine* are similar in a number of respects to those raised by the claimant in its challenge to Kazakhstan’s appointed arbitrator, Professor Knieper, in *Big Sky*. The challenge, which was successful, centred on Professor Knieper’s previous work as a German employed consultant on various legal reforms across central Asia. In particular, it was alleged that Professor Knieper’s work had brought him into close contact with members of the Kazakh judiciary, whose actions the claimant criticises.

Two complaints in this regard were also raised in *Ratiffeisen*. First, it was alleged that Dr Alexandrov and counsel to the claimants, Wilmer Cutler Pickering Hale and Dorr (WilmerHale), had developed a ‘special relationship’ based on cross-appointments of Dr Alexandrov as arbitrator by WilmerHale as counsel, and of Mr Gary Born, a partner at WilmerHale, as arbitrator by Dr Alexandrov as counsel. This was said to give rise to an appearance of dependence or bias.

Second, Croatia raised allegations of impropriety arising out of Dr Alexandrov’s purported long-standing and publicly recognised relationship with the Brattle Group, experts retained by UniCredit in *UniCredit Bank v. Croatia*. In this regard, Croatia asserted that Dr Alexandrov would be predisposed towards arguments put forward by the claimants where they mirrored the expert evidence put forward by the Brattle Group in UniCredit’s claim under the same treaty, which was said to be on ‘an identical factual basis’.

Both of these complaints were dismissed. In respect of the alleged ‘cross-appointments’, without ‘something more’, these were held to be insufficient to satisfy the objective test that Dr Alexandrov appeared lacking in the ability to exercise independence or impartiality, or both. And, on the basis that the Brattle Group had not been instructed in the instant proceedings and that Dr Alexandrov should not be privy to the Brattle Group’s testimony in *UniCredit* (not being appointed to the tribunal in that case), this ground of complaint was likewise rejected.

Also in 2018, and on the same point, the president of the tribunal in *Gran Colombia Gold v. Colombia*, Ms Malintoppi, stepped down following a challenge by the claimant purportedly on the basis of her marriage to Mr Rodman Bundy, an international lawyer who has represented Colombia in a dispute before the International Court of Justice.

In *Canepa*, Spain alleged that Mr Rees QC’s prior service as the Legal Director of Shell from 2010 to 2014, during which time Shell instructed the claimant’s counsel Allen and

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84 L Peterson, ‘In a rare development, a part of ICSID arbitrators decide that a colleague must be disqualified’, *IA Reporter*, 4 May 2018, https://www.iareporter.com/articles/30250/ (last accessed 6 March 2019).
85 *Ratiffeisen*, paragraph 29.
86 id., paragraph 33.
87 id., paragraph 32.
88 id., paragraph 34.
89 id., paragraph 95.
90 *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23.
Overy on six occasions for advice regarding mergers and acquisitions or antitrust litigation demonstrated an ‘old and strong mutual trust relationship’ between Mr Rees QC and the firm.\(^92\) In this regard, the unchallenged arbitrators held that Spain had failed to prove that Mr Rees’ position as Legal Director at Shell ‘created an intertwined relationship’ between him and Allen and Overy so as to manifestly call into question Mr Rees QC’s ability to act independently or impartially.\(^93\)

The 2018 and 2019 decisions confirm that proposals of this nature will be considered on a case-by-case basis. The existence of a personal or professional relationship, without more, will be insufficient but a risk of financial gain or profit arising out of that relationship is not a prerequisite to disqualification.

### iii Prejudgment of issues based on previously expressed views

Previously expressed opinions have formed the basis for a number of recent disqualification applications, all of which have been dismissed.

In *Urbaser*, the claimants sought to disqualify Professor Campbell McLachlan, the respondent-appointed arbitrator, on the basis that Professor McLachlan had expressed views in previous academic writings on a key point of law that was at issue in the case. The claimants’ argument was that Professor McLachlan would not be able to find against the respondent without contradicting his previous statements.\(^94\) The issue in question was whether a most favoured nation clause could apply in relation to dispute settlement provisions and, according to the claimant, the application of the most favoured nation clause in the Spain–Argentina BIT was an ‘essential element of the conflict that is the object of this arbitration’.\(^95\) Professor McLachlan had previously stated that the protections afforded by the most favoured nation clause ‘will not apply to the dispute settlement provisions, unless the parties expressly so provide’.\(^96\)

In dismissing the claimants’ disqualification proposal, the unchallenged arbitrators in *Urbaser* observed as follows:

> [w]hat matters is whether the opinions expressed by Prof. McLachlan on the two issues qualified as crucial by Claimants are specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the Parties in this proceeding.\(^97\)

In *Saipem*, Pakistan’s proposal to disqualify the claimant-appointed arbitrator was based, in part, on the assertion that the arbitrator had expressed opinions in his writing that, in the respondent’s view, showed preconceived positions with regard to some of the central issues of

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\(^92\) *Canepa*, paragraph 25.

\(^93\) *id.*, paragraph 70.

\(^94\) *Urbaser*, paragraph 41.

\(^95\) *id.*, paragraph 23.

\(^96\) *Urbaser*, paragraph 21.

\(^97\) *id.*, paragraph 44.
the arbitration. In their decision the unchallenged arbitrators dismissed the proposal, noting that an arbitrator’s doctrinal opinions ‘expressed in the abstract without reference to any particular case do not affect the arbitrator’s impartiality and independence’.98

This issue also formed the basis for a pair of 2018 challenges to Mr Gary Born in KS Invest and Mathias Kruck. In each case, Spain’s challenge was premised on the ground that Mr Born had prejudged issues relevant to the case, said to be demonstrated by Mr Born’s: (1) dissenting opinion in JWS Solar,99 (2) questioning of counsel in Masdar,100 and (3) questioning of a fact witness presented by Spain during the hearing in KS Invest.101

The unchallenged arbitrators in Mathias Kruck issued their decision in March 2018, rejecting Spain’s challenge. Dealing first with Mr Born’s dissenting opinion in the JWS Solar case, the unchallenged arbitrators noted that the analysis and opinions contained therein were fact-specific to that particular case and accordingly did not consider that it gave rise to any doubts as to Mr Born’s impartiality in the present case.102 The unchallenged arbitrators also found that there was nothing improper in Mr Born’s questioning of counsel and witnesses in the Masdar and KS Invest cases.103 The reasoning set out in the Mathias Kruck decision was thereafter adopted by the unchallenged arbitrators in rejecting Spain’s parallel challenge in KS Invest.104 Notwithstanding the twin decisions of the two sets of unchallenged arbitrators, Mr Born went on to resign from both the Mathias Kruck and KS Invest tribunals.

This issue also arose in Venezuela’s three separate challenges to Mr Castellanos Howell.105 In those cases, Venezuela took issues with an article written by Mr Castellanos Howell and published in a Guatemalan daily newspaper in 2017, ‘The Ideologization of Justice’.106 This article discussed proposed amendments to the Guatemalan Constitution, detractors of which argued would lead ‘to a scenario like Venezuela’. Commenting on the debate, Mr Castellanos Howell rejected the suggestion that the proposed amendments to the constitution would result in ‘imminent “Venezuelisation”’, described as a ‘scenario where there is no judicial independency from other branches of government’.107

In rejecting the Blue Bank annulment proposal, the unchallenged committee members held that it was not possible to extrapolate from the article any explicit criticism, or prior judgment, of Venezuela by Mr Castellanos Howell. Rather, the article was intended to reproduce and comment on the views expressed by opponents to constitutional reform, and upon which Mr Castellanos Howell did not imply any value judgement.108

100 Masdar Solar & Wind Cooperative U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1 (Masdar).
101 Mathias Kruck, paragraphs 28–29; KS Invest, paragraph 22.
102 Mathias Kruck, paragraph 54.
103 id., paragraph 55.
104 KS Invest, paragraph 48.
107 ibid.
108 Blue Bank, paragraphs 88–89.

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The 2018 and 2019 cases confirm that the threshold for this category of challenge remains extremely high. Only in circumstances where an independent third party would find circumstances demonstrating the appearance of a firmly held predisposition or prejudgement (and accordingly a real risk that the challenged arbitrator would rely on such opinions without giving proper consideration to the facts and evidence put forward by the parties) is such a challenge likely to be successful.

V CONCLUSION

The 2018 and 2019 disqualification decisions, which upheld only one of the 14 proposals, demonstrate that disqualification remains the exception, rather than the norm. The threshold for disqualification continues to be extremely high, regardless of the circumstances giving rise to the proposal (as to which, multiple appointments remains the most popular). It is likely that 2020 will see more disqualification proposals in the ICSID context, which (it is hoped) will build upon the emerging body of consistent case law as to the legal standard for disqualification.
I  GENERAL INTRODUCTION

This chapter deals with the challenges faced by arbitrators and parties alike in investment treaty arbitrations under the arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID) regime and under non-ICSID Arbitration Rules, particularly the United Nations Commission on International Trade Law (UNCITRAL) Rules of Arbitration. It does not deal with the issue of challenges to a tribunal’s jurisdiction generally, but rather challenges based on alleged bias or issue-based conflicts that an arbitrator is alleged to possess.

One cannot emphasise enough the importance of neutrality of an arbitrator or judge and the ability of the arbitrator to adjudicate the dispute fairly and provide equal treatment to the parties. The overwhelming majority of international investment arbitrations are heard before a three-member arbitral tribunal.

One of the key pillars of international arbitration is the principle of party autonomy, and this entails allowing the parties themselves an opportunity each to nominate one of the arbitrators. The chairperson or presiding arbitrator is then selected either with the agreement of the parties, or by the two party-appointed arbitrators, or, as is often the case, by a neutral appointing authority under the selected rules of arbitration.

Article 37(2)(b) of the ICSID Convention typically provides as follows:

Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

In the event of default by a party to appoint its arbitrator, Article 38 of the ICSID Convention provides that:

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet

1 Colin Ong QC is Queen’s Counsel at 36 Stone, Counsel at Eldan Law LLP (Singapore) and senior partner at Dr Colin Ong Legal Services (Brunei).
appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

Similarly, for non-ICSID investment treaty arbitrations, the UNCITRAL Arbitration Rules 2010 provide a comparable mechanism for the appointment of arbitrators. Article 9 of the UNCITRAL Rules provides as follows:

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.2

There are nationality restrictions under both the ICSID3 and UNCITRAL Rules4 because of the presumption that an arbitrator who has the same nationality as one of the parties may feel more sympathetic towards that party or its position.

Generally, each of the parties will nominate and appoint their own arbitrator and not leave the appointment to a neutral appointing authority. Parties often spend a lot of time and resources conducting in-depth research in selecting their appointed arbitrator as the experience and calibre of the arbitrator is crucial for a successful arbitration. It is often said that arbitration is only as good as the arbitrator and some commentators have gone as far to say: 'choosing the right arbitral tribunal is critical to the success of the arbitral process. It is, above all, the quality of the arbitral tribunal that makes or breaks the arbitration, and it is one of the unique distinguishing factors of arbitration.'5

These days, it is taken as a starting point and a norm that most, if not all, leading arbitrators already have the basic academic qualifications6 and 20 years of experience as distinguished counsel in their chosen field. For the most important and largest cases, parties and counsel often tend to spend a lot of time and money to identify and select well-known arbitrators who possess similar commonalities – they are highly knowledgeable; are highly experienced, with many years sitting as arbitrators; have a commanding presence; have a great knowledge of comparative law; and are academically advanced. Many arbitrators who

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2 See also the equivalent Article 7 of the 1976 UNCITRAL Rules of Arbitration.
3 Article 39 of the ICSID Rules provides that 'The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute'.
4 Article 6(7) of the 2010 UNCITRAL Rules provides that: 'The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties'.
6 In addition to decades of experience as a lawyer, there is also the expectation of fellowship courses and higher legal qualifications.
had proven themselves to be worthy advocates in their younger years would also be sought by counsel, who may prefer to have an arbitrator who appreciates and sympathises with the rigours and practical difficulties faced by counsel. All of these factors help to mould and balance the different skill sets needed of the appointed arbitrator.

The skills of the arbitrators will generally have quite an important impact on the conduct and evolution of the arbitration process. They will also have an ultimate impact on the award itself and the successful enforcement of the award. This is because arbitrators are the sole adjudicators of all the issues in disputes between the parties. In the course of the proceedings, the arbitrators will have to exercise their power to make important decisions on all procedural steps as well as the substantive matters that pertain to the parties’ dispute.

Yet, what is perfume to one person may be regarded as poison to another and one sometimes sees this at play where one party has appointed as its arbitrator an extremely highly rated academic who is known for his or her black-letter law knowledge, while the other party has appointed a renowned lawyer who is known for his or her previous counsel practice experiences and who knows the machinations, complexities and practical difficulties faced by governments in running a country.

In such cases, the two party-appointed arbitrators may be unable to agree on a presiding arbitrator and the neutral appointing authority will have to step in to appoint the presiding arbitrator. However, this means that the scene is already set for potential confrontation between the tribunal and the parties, which may have different expectations of how the tribunal should run the arbitration.

In addition to the restriction on nationality, the other two requirements for arbitrators are for them to be impartial and independent. Impartiality means that an arbitrator should not be partial towards or biased against one of the parties in the arbitration case. Independence means that an arbitrator should not be professionally linked to one of the parties or its counsel and should not be financially dependent on either of the parties.

II TRUE REASONS BEHIND THE CHALLENGES OF ARBITRATORS

The usual reasons that are given by parties in the challenge process against one or more members of a tribunal is that the parties are concerned about protection of the parties’ fundamental right to an impartial and independent tribunal. In any challenge, the parties will almost always start off with a speech on the need to guarantee a fair and unbiased arbitral proceeding.

However, as is quite often is the case, the real reason behind the challenge has nothing to do with a party’s alleged concerns over fairness or bias. Challenges are often made for tactical reasons, and there is a reason behind this. As it is very difficult to set aside arbitral awards under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), a party that has been reluctantly dragged into an arbitration may need to find another excuse to try to delay or derail the arbitral proceedings. It is easier for a party to do so by finding some minor doubt as to an arbitrator’s independence or impartiality and then to find some form of opportunistic means to challenge that arbitrator to both create delay and to hope for a derailment of the proceedings.

In any event, whether the reason is genuine or a purely tactical attempt to delay the arbitration proceedings, a party that seeks to challenge the independence or impartiality of an arbitrator needs to appreciate at the outset that there is a very high barrier to being able to
reach a successful challenge. While both the ICSID and UNCITRAL rules of arbitration and national laws do provide for a statutory mechanism to challenge an arbitrator on the basis of a lack of independence or impartiality, generally such challenges tend to fail.

The generally accepted view of those regularly involved in such arbitrations is that there is only a slim chance of success under the UNCITRAL Rules and an even slimmer chance of success available under the ICSID Rules, unless the facts are very strong. As such, before a party can even start preparing for the challenge against an arbitrator, it will need to have mastery over: (1) the applicable arbitration rules; (2) national statutory legislation; (3) relevant case law under the applicable rules of arbitration; and, to a limited extent, (4) generally recognised guidelines including the International Bar Association’s Guidelines on Conflicts of Interest in International Arbitration 2014 (the IBA Guidelines). It is important to make it very clear at the outset that although the IBA Guidelines may have gained full acceptance in international arbitration practices across the world, they cannot override national law; nor can they override any arbitral rules that have been selected by the parties.

III THE ICSID REGIME FOR THE APPOINTMENT OF AND CHALLENGES TO ARBITRATORS

Arbitrators in ICSID matters are generally directly appointed by the parties. There is often less controversy when the arbitrators are appointed by the Chairman of the Administrative Council of ICSID from the ICSID panel of arbitrators. The criteria for arbitrators is set out in Articles 14(1) and 40(2) of the ICSID Convention and it obliges all ICSID arbitrators to be ‘persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment’. Article 14 clearly states that competence in ‘the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators’ and in a large number of cases, many of the arbitrators on the ICSID panel of arbitrators are lawyers experienced in international law.

By the time of the tribunal’s first session, each of the ICSID arbitrators must have already signed a declaration confirming his or her independence. ICSID specifically amended Rule 6(2) in 2006 obliging arbitrators to disclose their professional, business dealings and other relationships with the parties to the arbitration. It includes a very important paragraph that obliges ICSID arbitrators to provide in the declaration a statement of all ‘past and present professional, business and other relationships (if any) with the parties and also any other circumstance that might cause’ their ‘reliability for independent judgment to be questioned by a party’. The signed declaration is also couched as a continuing obligation to promptly notify the Secretary-General of ICSID of ‘any such relationship or circumstance that subsequently arises during this proceeding’. The last sentence of Article 6(2) of the ICSID Rules makes it clear that ‘[a]ny arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.’

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7 Article 5 of ICSID Convention designates the President of the World Bank to be Chairman of the Administrative Council of ICSID.
8 Article 14 (1) of the ICSID Convention provides that ‘Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.’
9 The 2006 amendment obliges arbitrators to make continuous disclosure throughout the arbitration.
It has to be observed that when compared to the UNCITRAL Arbitration Rules, Article 57 of the ICSID Convention sets a much higher barrier to any party that wishes to challenge an arbitrator. The challenge application must clear the initial barrier and prove that the arbitrator has exhibited a ‘manifest lack of the qualities’ as provided for under Article 14(1) of the Convention.

A challenging party will need to set out a clear basis to challenge the arbitrator on unshakeable facts as opposed to inference. The challenger needs to prove why the arbitrator has in the past acted in such a way as to amount to a manifest lack of high moral character, a manifest lack of competence in his or her field of law, or a manifest lack of ability to exercise his or her own independent judgement.

IV REPEAT APPOINTMENTS OF ARBITRATORS IN ICSID AND UNCITRAL CASES

One of the concerns about arbitrators that have repeat appointments by parties or law firms is that there is a possibility of the arbitrator having an economic interest in being reappointed or at least a cognitive disposition to favour the appointing party.10 Such concerns are particularly highlighted when an arbitrator’s primary occupation was solely that of a professional full-time arbitrator.

While there may be more indifference cast on busy counsel who are not full-time arbitrators and earn a lot more fees on counsel work, this concern will only increase with the rise of challenges against arbitrators for ‘double-hatting’ (combining counsel and arbitrator work). Increasingly, lawyers involved in investment treaty cases have to choose between sitting as arbitrator or acting as counsel but not both.

While it is not binding and by no means free from difficulties,11 the IBA Guidelines on Conflicts in International Arbitration (2014) are generally referred to by arbitral tribunals in non-ICSID arbitrations and used as a guide by tribunals and parties alike in deciding whether or not a conflict of interest exists between a particular arbitrator and a party. The Orange List in the IBA Guidelines on Conflicts addresses multiple appointments under Section 3.3.8 where ‘[t]he arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm’.

Unlike in arbitrations governed under the UNCITRAL rules, which tend to apply the IBA Guidelines on Conflicts, there are still many ICSID disputes that do not take heed of the IBA Guidelines, especially over the issue of repeat appointments of arbitrators by the same party or same law firm.

There have been a few powerful articles that have criticised the current rules allowing for repeat party appointments of arbitrators within the ICSID system. The repeated appointment of arbitrators to ICSID arbitrations by the same law firm or similar state entities continue to be a rather controversial topic. This has occurred in a number of ICSID tribunals, including

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those in *Tidewater Inc v. Venezuela*\(^\text{12}\) and *Universal Compression v. Venezuela*\(^\text{13}\) which have decided to adopt a position that repeat appointments do not, in themselves, necessarily affect an arbitrator’s independence or impartiality. Those ICSID decisions held that each case would turn on its own facts and that one requires an objective evaluation of the economic significance of the party appointments to the arbitrator. In *Tidewater Inc v. Venezuela*, the two remaining members of the tribunal (Professor McLachlan and Dr Rigo) decided that while Section 3.1.3 of the 2004 IBA Guidelines (predecessor of the 2014 revision) did lay down such guidelines, they questioned whether ‘multiple appointments to arbitral tribunals may impugn the independence or impartiality of an arbitrator is a matter of substance, not of mere mathematical calculation’. The two remaining tribunal members also decided that the ‘starting point is that multiple appointments as arbitrator by the same party in unrelated cases are neutral, since in each case the arbitrator exercises the same independent arbitral function’.

Similarly, in *Universal Compression v. Venezuela*, the Chairman of the Administrative Council rejected a challenge against Professor Stern that was based on her multiple appointments by Venezuela. The decision was that there was ‘no objective fact’ to suggest her independence or impartiality would be manifestly impacted by her multiple appointments by the same party.

Some prominent arbitration practitioners have made strong suggestions that this should not be allowed, as it destroys the legitimacy of ICSID.\(^\text{14}\) Others have reached the opposite conclusion and have said that there is nothing significantly wrong with the ICSID system of party appointments and that one can make simple adjustments to the appointment process.\(^\text{15}\) One should laud the decision of the two remaining tribunal members (Professor Doug Jones, AO and Professor Guido Tawill) in *OPIC v. Venezuela*.\(^\text{16}\) The two members who had to decide a challenge made against Professor Philippe Sands, which was based on multiple appointments by Venezuela, expressly disagreed with the earlier position stated in *Tidewater* that multiple appointments are to be regarded as a neutral factor. The two members came to the conclusion that:

> [47] . . . It is suggested by the arbitrators in that decision that multiple appointments as arbitrator by the same party in unrelated cases are a neutral factor in considerations relevant to a challenge. We do not agree. In our opinion, multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge. In an environment where parties have the capacity to choose arbitrators, damage to the confidence that investors and States have in the institution of investor-State dispute resolution may be adversely affected by a perception that multiple appointments of the same arbitrator by a party or its counsel arise from a relationship of familiarity and confidence inimical to the requirement of independence established

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\(^\text{12}\) *Tidewater Inc v. The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5 (2010) [Decision on proposal to disqualify Prof. Brigitte Stern].

\(^\text{13}\) *Universal Compression International Holdings SLU v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9 [Decision on proposal to disqualify Prof. Brigitte Stern and Prof Guido Santiago Tawill].


\(^\text{15}\) See Brower, Pulos and Rosenberg, ‘So Is There Anything Really Wrong with International Investment Arbitration as We Know it?’, in *The Fordham Papers 2012*, Rovine ed., 2013.

\(^\text{16}\) *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14 (2014) [Decision on proposal to disqualify Prof. Philippe Sands].
The two members decided that in their view, ‘multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case’.

They then proceeded on the basis that multiple appointments of an arbitrator by a party or its counsel is one of the factors that ‘may lead to the conclusion that it is manifest that the arbitrator cannot be relied upon to exercise independent judgment as required by the Convention’.

In relation to the IBA Guidelines on Conflicts, the two members decided that:

[48] . . . We accept that the IBA Guidelines are not conclusive for the purposes of the decision that we are required to make on this challenge, and that the examples contained in the IBA Guidelines are both non-exhaustive and not in themselves decisive of whether or not the standards set out in the guidelines for impartiality and independence of arbitrators have been met. The IBA Guidelines do, however, indicate that multiple appointments represent an issue relevant to impartiality and independence and, in our opinion, are correct in so doing.

Many of the challenges against arbitrators in ICSID cases have tended to be on the basis of relationships of the arbitrator with parties, and also relationships between arbitrators and counsel or law firms. ICSID decisions such as Caratube v. Kazakhstan and Universal Compression v. Venezuela also applied the test contained within Articles 14 and 57 of the ICSID Convention and have concluded that the mere fact of having sat in previous arbitral appointments does not, in itself, indicate a manifest lack of independence or impartiality on the part of an arbitrator.

The unchallenged arbitrators in Opic v. Venezuela did, however, make the following statement [at 47]:

In an environment where parties have the capacity to choose arbitrators, damage to the confidence that investors and States have in the institution of investor-State dispute resolution may be adversely
In the decision of *Canepa v. Spain*, Spain unsuccessfully brought two separate applications to challenge the Claimant’s appointed arbitrator. The first challenge to disqualify Peter Rees QC from hearing an Energy Charter Treaty claim over the state's renewable energy reforms was based on two main grounds. Spain challenged Rees on the alleged close relationship between Rees and the claimant’s counsel, Allen & Overy. Spain alleged that when Rees was legal director at Royal Dutch Shell, Allen & Overy had been one of the favoured law firms that was instructed as external counsel. Spain complained that Rees has been appointed on three occasions (including the current case) by Allen & Overy in the past three years for proceedings where the total quantum exceeded €2 billion but Rees had failed to make this disclosure. Spain submitted that this situation falls within Section 3.3.8 of the IBA Guidelines on Conflicts of Interest in International Arbitration.

Spain also challenged Rees on the ground that he had initially failed to disclose former membership on the investment committee of third-party funder, Harbour Litigation Funding (HLF). Spain complained that before he stepped down from the committee, Rees had been involved in HLF’s decision to fund a claim brought by Rockhopper Exploration against Italy as this was also an intra-EU dispute that had been filed under the ECT. The two unchallenged co-arbitrators, Sean Murphy and Silvina Gonzalez Napolitano declined to uphold the first challenge against Rees as they highlighted that had already disclosed on 8 May 2019 the fact of his two prior appointments relating to Allen & Overy, thereby alerting the respondent to those two cases. In addition, the unchallenged arbitrators stated that the mere fact that an arbitrator has been appointed twice previously by a law firm in arbitral cases is not, standing alone, a basis for finding either an actual or an appearance of a manifest lack of independence or impartiality when appointed in a third case. The unchallenged arbitrators concluded that no objective fact had been presented to demonstrate that the arbitrator’s independence or impartiality had been impacted by the three appointments involving Allen & Overy. They stated that it has not been shown that Rees is in a relationship of financial dependence to the Firm based on these three appointments. In addition, the unchallenged arbitrators found that the earlier two cases were unrelated and any relationship of familiarity and confidence between Rees and the Firm is not obvious from the fact of the three appointments. It was also concluded that Rees has not received more than three appointments by Allen & Overy within the past three years and only had two such appointments.

The unchallenged arbitrators took the view that Rees should have disclosed his connection with HLF as a part of his declaration and statement as the third-party litigation fund was actively involved in funding investor–state disputes. The unchallenged arbitrators believed that it is a circumstance that might cause Rees’ reliability for independent judgment or impartiality to be questioned by a party. However, the unchallenged arbitrators then concluded that a failure to disclose a relevant fact does not by itself demonstrate a manifest lack of impartiality or independence. The purpose of disclosure is to inform the parties of a situation that they may wish to explore further to determine whether there are justifiable

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23 id. at [63].
doubts as to the arbitrator’s independence or impartiality. The final conclusion was that the initial failure to disclose such information is not of sufficient gravity to merit disqualification of the arbitrator.

With regard to the HLF membership issue, there was no discussion at the Investment Committee in relation to the issue of an investor from an EU country making a claim against an EU state. Because the *Achmea* decision was not released by the Court of Justice of the European Union until March 2018, this issue could not have been a subject of debate. Because the respondent had not identified any specific opinion rendered by Rees on the validity a jurisdictional objection to intra-EU investment arbitration, this ground for disqualification is based on a conjecture as to what Mr. Rees might have believed at the material time. The unchallenged arbitrators concluded that it was too speculative to assume that Rees had already pre-considered and pre-rejected the validity of a jurisdictional objection to intra-EU investment arbitration.

Spain then brought a second challenge to disqualify Peter Rees QC based on his successful removal by the European Union in another ECT case. The two unchallenged co-arbitrators, Sean Murphy and Silvina Gonzalez Napolitano declined to uphold the challenge on the ground that the successful challenge in the other ECT case, was based on the ground that his previous employer Royal Dutch Shell was financing that claim. However, this ground had nothing to do with the *Canepa v. Spain* case and it did not prove a lack of independence and impartiality on the part of the arbitrator.

In *Serafin Garcia Armas and others v. Venezuela* (PCA Case No. 2013-3), Venezuela again challenged Professor Tawil for a second time towards the end of 2017 and this time based its challenge on the basis that a former employee of D’Empaire Reyna (the Venezuelan law firm that was acting as co-counsel for the claimants) had been employed by M&M Bomchil, a law firm in Argentina where Professor Tawil was a partner.

Venezuela took the position that the failure by Professor Tawil to disclose this fact was intentional, or should be treated as intentional. Venezuela submitted that this non-disclosure gave rise to a risk of a lack of independence or impartiality by Professor Tawil. On 12 February 2018, the Permanent Court of Arbitration rendered its decision to dismiss the challenge brought by Venezuela. The PCA held that while the employee's transfer from D’Empaire Reyna to M&M Bomchil may in principle have given rise to an on-going obligation on the part of Professor Tawil to disclose that circumstance, there was no conclusive evidence to show that Professor Tawil had been aware of the move of the junior lawyer. The PCA went on to deal with the hypothesis that Professor Tawil had been made aware of the employment of the junior lawyer and had failed to disclose this fact. It decided that there was no solid evidence that such a lack of disclosure alone would give rise to justifiable doubts to trigger off the exceptional requirements to remove a challenged arbitrator. The PCA decided that any lack of disclosure by professor Tawil appears to have been inadvertent, the result of an honest exercise of discretion taken by the arbitrator, or both.
V CHALLENGES MADE AGAINST ARBITRATORS BASED ON AN ALLEGATION OF ISSUE CONFLICTS

Some challenges have been made based on the same arbitrators sitting in other arbitrations involving similar issues in dispute.24 This is a separate category of challenges against arbitrators sitting in investment arbitration and would fall under alleged ‘issue conflicts’. The concern is over issue-based conflicts where the arbitrators may have a subconscious bias based on their particular mindset. Arbitrators in investment dispute cases tend to have to make decisions on recurring topics and they are likely to have decided those on those topics in several cases. The allegations that are made against such arbitrators is that particular arbitrators are appointed because the appointing party knows through experience or through research that the arbitrator’s view tend to be aligned with the case that the appointing party expects to make in the arbitration. As an arbitrator may have decided the same legal issue or issues in other previous investment treaty cases, the appointing party would be very confident that such an arbitrator would rule in their favour on those legal issues.

The idea behind this category of challenges is based on the arbitrator’s impartiality and independence in dealing with certain subject factual matters and legal thinking. For example, the arbitrator may have to decide a certain issue or legal point but had in the past written an article or a book setting out his or her thinking on the identical subject matter. The arbitrator may also be asked to decide a point of law or interpretation of contractual terminology that he or she had previously decided in a previous life as a court judge. Similarly, the arbitrator may have been counsel in a previous case whereby he or she had advocated his or her strong views on the subject matter or on how to interpret certain legal positions.

In investment treaty arbitrations, some of the typical challenges are made against arbitrators who have heard similar evidence and legal submissions and have made decisions on such subject matters. Such arbitrators are often accused of possessing certain defined ‘doctrinal predispositions’ and predetermined views on various key legal issues.25 Such challenges, if successful or if accepted by the arbitrator,26 tend to have the effect of slowing down the dispute resolution process significantly.27

In *Ickale Insaat v. Turkmenistan*,28 Ickale, a Turkish company, sought to disqualify Professor Philippe Sands from hearing an ICSID claim against Turkmenistan on the basis of his participation in another case involving the same legal issues. The basis of Ickale’s challenge against Professor Sands was his appointment by Turkmenistan in a different ICSID case.

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24 See, e.g., *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/03/19; *Electrabel SA v. Republic of Hungary*, ICSID Case No. ARB/07/19; and *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20.

25 Examples could include the definition of ‘investment’ or ‘investor’. It could include whether a most favoured nation clause in a bilateral investment treaty should be interpreted to also extend to procedural rules.

26 For example, in the UNCITRAL case of *Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. AA434, after Professor Brigitte Stern was challenged by the on the basis of her ‘remarkable’ record of appointment by states and alleged prejudgment of the subject matter of the dispute, she resigned from the case.

27 See also *Highbury International AVV v. Bolivarian Republic of Venezuela* (ICSID No. ARB/14/10), where the claimants brought a challenge against Professor Stern alleging that she was in ‘issue conflict’ because she had also sat as arbitrator on other ICSID tribunals that subsequently refused to allow claims brought under Venezuela’s 1999 law on foreign investment.

that had been brought by another Turkish company, Kilic, under the Turkey–Turkmenistan bilateral investment treaty (BIT). Kilic was unsuccessful as the tribunal in that arbitration held that Kilic as the claimant had failed to comply with the BIT through its failure to submit its dispute to the local courts first. Accordingly, the Kilic tribunal decided that Kilic could not rely upon the Turkey–Turkmenistan treaty’s most favoured nation (MFN) clause to circumvent that requirement.

In its challenge against Professor Sands, Ickale submitted that the earlier Kilic ICSID case raised the same jurisdictional issues as Ickale’s own claim. This included the important question of whether the disputes clause of the BIT requires an investor to first bring its claims before Turkmenistan courts prior to filing an arbitration. There was also the question as to whether other disputes provisions from other treaties that did not have a local courts requirement could be imported into the BIT by way of an MFN clause.

Ickale submitted that Professor Sands had in the previous Kilic arbitration already been shown similar factual evidence and had already been shown similar witness evidence in deciding these identical issues. Ickale submitted that much of the factual evidence it will be relying on, such as the drafting history of the treaty, would be exactly the same as the evidence considered in the earlier Kilic case. Ickale complained that Turkmenistan had submitted witness statements by government officials and the same expert witnesses who had also prepared expert reports in Kilic. Ickale also pointed out the fact that Turkmenistan had hired the same translator and the same expert linguist to give evidence on the conflicting English and Russian translations of the BITs.

Ickale complained that Professor Sands had already been presented with the identical facts and legal arguments in the Kilic arbitration. Ickale submitted that these factors would result in a ‘manifest imbalance’ in the tribunal, as the same information had not been made available to the other two arbitrators in its panel. Finally, Ickale submitted that Professor Sands would be conflicted as he would be faced with ‘a position to defend’ and that he would have ‘a desire to conform’ to his earlier views as expressed in Kilic. The two remaining tribunal members, Veijo Heiskanen and Carolyn Lamm, subsequently dismissed the challenge and held that Professor Sands’ appearance on an earlier ICSID panel that had ruled on the interpretation of the same investment treaty did not demonstrate a manifest lack of impartiality.

The Secretary-General of the Permanent Court of Justice had to deal with a challenge brought by Venezuela made against Professor Guido Tawil who was the party-appointed arbitrator of the claimants in the case of Serafin Garcia Armas and others v. Venezuela (PCA Case No. 2013-3). Venezuela alleged that Professor Tawil had an affinity and sympathy towards the claims of foreign investors and he had a pre-disposition bias against states. It was also alleged that he was very likely to have pre-decided the case as he had been involved in similar cases involving foreign investors and national expropriation by states.

The Secretary General published his decision on 8 May 2013 and rejected the challenge on several grounds. First, the PCA found that that Professor Tawil had demonstrated a clear intention to disclose all relevant issues in his declaration of impartiality and independence. The PCA also held that Venezuela had failed to prove a connection between the earlier investment cases apart from the fact that those cases concerned sovereign expropriations. The PCA also decided that there was no evidence that the information present in the previous investment cases were capable of influencing Professor Tawil to pre-decide any issues that
Challenging Arbitrators in Investment Treaty Arbitration

would arise in the Venezuelan case. Finally, the PCA decided that while there may be a real risk in certain cases that an arbitrator would identify with the interests of a party that he had once represented as an advocate, one cannot presume that this is the case.

There are clearly two different views on the subject of issue conflicts. The purist view is that arbitrators should always be beyond reproach in any way and that anyone who has expressed a certain line of legal thinking on a particular subject matter should not sit as an arbitrator. This is considered to be the more narrow-minded view when compared to the other line of thinking that there is nothing wrong with party-appointed arbitrators that have such predictable predetermined doctrinal ideas.

In fact, one would say that this was probably the real reason why such an arbitrator had been carefully selected out of a pool of available arbitrators. Where parties to international arbitration have an equal opportunity to select and appoint their party-appointed arbitrator, they do so because they believe that their chosen arbitrator would be able to influence the thinking of the tribunal and eventually lead them to a favourable outcome of the case.

One would, however, submit that both sole arbitrators and presiding arbitrators should be held to a higher standard of doctrinal neutrality on any potentially relevant issues that will require the decision of the tribunal.

VI GENERAL BACKGROUND OF ARBITRATORS MATTERS

In a study made on investor-state arbitrators, based on 247 cases collected from public databases, some researchers had reached the conclusion that the international investment arbitration group is very much controlled by a small and close-knit community of northern hemisphere-based leading arbitrators. It was claimed that this group tends to defend rights brought by private investors. It concluded that this small community valued private investor rights above public interest and also alleged that they had an inherent pro-corporate bias.29

In an interesting study involving a compilation of responses received between December 2017 and February 2018 from selected arbitration institutions, stakeholders and experts in response to a request for comments on an OECD Secretariat research paper, it was discovered that while ICSID the Convention requires the ICSID chair to appoint 100 per cent of the ad hoc committees, parties appoint in roughly 75 per cent of ICSID cases without assistance from the institution.30 In addition, the research paper indicated that while private sector lawyers and commercial arbitrators form the bulk of appointees at ICSID, a very significant number of ICSID arbitrators come from other backgrounds like legal academics, international judges or former diplomats.

For non-ICSID investment cases, the Permanent Court of Arbitration (PCA) makes the most appointments of arbitrators. This is because the UNCITRAL Arbitration Rules


stipulate for the Secretary-General of the PCA to designate an appointing authority if parties fail to agree on the choice of appointing authority, or if the designated appointing authority refuses or fails to act.31

The PCA, which contributed to the OECD Secretariat research paper, explained that the PCA deals with a more varied group of dispute resolution proceedings, both procedurally and substantively, than most arbitral institutions. The PCA Secretary-General’s approach when designating an appointing authority or acting as appointing is highly flexible and is adapted to the needs of each case. The PCA Secretary-General will take account of many considerations, including the following factors to determine the appropriate procedure in an appointing-authority matter:32

- Applicable rules of procedure (e.g., PCA Rules, UNCITRAL Rules (1976/2010/2013), other ad hoc rules, etc.) as potentially modified by underlying agreement (BIT or FTA, compromis, contract, etc.);
- Nature of the parties (States, intergovernmental organizations, private parties);
- Nature of the dispute (treaty claim, commercial contract claim, environmental dispute, human rights dispute, etc.);
- Size of the claim (ranging from disputes worth several thousand euros to disputes worth several billion euros);
- Agreement by the disputing parties on procedural steps at the appointment stage.

The PCA only discloses what is agreed by the parties to the dispute, or what the tribunal decides should be disclosed to the public. When disclosure is agreed, the PCA’s Case Repository enables the PCA to make a wide range of case-related information available to the public.33 An interesting point that was noted is the fact while ICSID arbitrators make US$3,000 per day, equivalent to US$375 per hour, arbitrators at some other centres make significantly more and up to US$1,000 per hour.34 The PCA Secretary-General frequently designates eminent jurists, including members of the international judiciary or former officials of intergovernmental organisations, as appointing authorities to answer concerns commonly voiced in investor–state cases under the UNCITRAL Rules about the ‘most appropriate profile for appointing authorities in proceedings involving States or intergovernmental organizations under international law (as compared with commercial claims between private parties under domestic law)’.35

While it deals with a connected subject on case strategy, the background of arbitrators is very important to how the case is likely to be run.36 Parties tend to look for arbitrators that are perceived to adopt procedures that are more advantageous for the appointing party. For

34 id. 32 at page 6, paragraph 50.
35 id. 32 at page 15.
example, given that US style discovery (including requests to produce) are quite onerous, a party that is trying to avoid or limit extensive document production is most likely to propose a civil law professor as a chair as opposed to an American court litigator.

VII  DOUBLE-HATTING

There is increasing concern that while serving as arbitrators, some lawyers also act as counsel in representing clients in other cases that also deal with the same contested issues. Such arbitrators are said to wear ‘double hats’ and this can sometimes raise challenges both to their legitimacy and impartiality. It has been suggested by academics that double hatting is practised consistently by a small but ‘highly visible and powerful core of actors in the investment arbitration community’.37

One notable example involved professor Emmanuel Gaillard who was challenged in the case of Telkom Malaysia v. Ghana.38 While Professor Gaillard was serving as the claimant’s appointed arbitrator in the PCA matter, he was also acting as the legal counsel for the claimant in an ICSID annulment proceeding in a different case of RFCC v. Morocco.39 Professor Gaillard had made disclosure that he was acting as counsel in RFCC v. Morocco. However, the respondent (Ghana) in the PCA arbitration, where he was serving as arbitrator made several challenges against him in the Hague District Court,40 which was the seat of the PCA arbitration. Ghana alleged that Professor Gaillard’s role as arbitrator in the PCA case was contradictory with his concurrent role as legal counsel in the ICSID annulment case, as both cases involved similar legal issues and as Ghana was relying on the case of RFCC v. Morocco in its own legal submissions. Ghana alleged that Professor Gaillard who was opposing a specific position, in his capacity of counsel, cannot be unbiased in his adjudication of that same approach in the ICSID case in which he was acting as arbitrator. The Hague District Court made an order for Professor Gaillard to make a decision as to whether he wanted to continue as arbitrator or legal counsel, but he could not be in both roles. This was because an appearance of bias or conflict could be reasonably made out, even if there was no showing of actual bias itself.

VIII  ARBITRATORS WHO ARE MEMBERS OF THE SAME BARRISTERS’ CHAMBERS

General Standard 6(a) of the IBA Guidelines on Conflicts of Interest makes it clear that arbitrators need to consider the identity of their law firm when considering potential conflicts or whether there is any need for disclosure. This means that the activities of the arbitrator’s law firm and the relationship between the arbitrator and the law firm must be considered in

38 Telkom Malaysia Berhad v. The Republic of Ghana, PCA Case No. 2003-03 UNCITRAL.
each individual matter. If an arbitrator or his or her law firm regularly advises a party or an affiliate of that party, and the arbitrator or his or her firm derives significant financial income from that party, this must be disclosed as it is deemed as a waivable Red List.

In short, this means the arbitrator who will need to make such disclosure will be faced with a much higher likelihood of a challenge by an opposing party. This is one of the reasons why many eminent arbitrators have been leaving their larger law firms to join smaller firms or to form new small boutique law firms.

This problem of increased potential of conflict of interests has also increased for barristers who practise in large chambers. General Standard 7(b) of the IBA Guidelines on Conflict of Interest provides that each party is obliged to state the identity of its counsel as well as any relationship, if such exists, between its counsel and the arbitrator by virtue of being members of the same barristers’ chambers. This disclosure must be made at the earliest possible opportunity and upon any change in its counsel team. The reason for such disclosure to be made at the earliest opportunity is to avoid the possibility of last-minute conflicts that may cause prejudice to the opposing party or may jeopardise the proceedings if the other party has to remove its counsel from the team of lawyers.

The English Bar Council has produced a guidance note dealing with the issue of barristers from the same set of chambers appearing as counsel and arbitrator in the same arbitration. The Bar Council has sought to explain the ‘structure and culture of the English bar’, and has also tried to explain that the ‘valuable protection given to clients by the availability of the independent bar is not compromised’. The Bar Council has explained the position of the self-employed members of the Bar, who do not practise through employment, partnership or other structures. To address this concern of conflict of interests, the Bar Council guidance recommended that separate clerks be designated to deal with the matter on behalf of the arbitrator and the advocate, and that there should be ‘state of the art arrangements’ to ensure that communications destined for one member do not come into the hands of the other member. The Bar Council also recommended that there should be arrangements for the secure storage of papers. While one would prefer the test set out by the UK House of Lords, of identifying whether a ‘fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased’, the difficulty lies in deciding the term ‘fair-minded’ in cases of an international nature where parties, arbitrators and counsel all come from different legal backgrounds.

In the case of Hrvatska v. Slovakia (ICSID Case No. ARB/05/24A), a member of the tribunal was a door tenant in the same chambers as lead counsel for the respondent. As this was only disclosed two weeks before the final hearing, the claimant sought an order to prevent the respondent from using their selected counsel. The tribunal agreed and decided that the participation of the respondent’s chosen counsel would create ‘an appearance of impropriety and thus an unacceptable situation’. The Hrvatska v. Slovakia tribunal held that:

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41 While the explanatory note to General Standard 6(a) provides that barristers’ chambers should not be equated with law firms for the purposes of conflicts, disclosure may be required where there is a closer relationship among barristers, solicitors or parties.
42 www.barcouncil.org.uk/media/376302/bc_information_note_-_perceived_conflicts_in_international_arbitration_-_060715.pdf.

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This evolution has been observed in the Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration. Paragraph 4.5 of that Background Information discusses the question of barristers who practise as arbitrators, and states:

“While the peculiar nature of the constitution of barristers’ chambers is well recognised and generally accepted in England by the legal profession and by the courts, it is acknowledged by the Working Group that, to many who are not familiar with the workings of the English Bar, particularly in light of the content of the promotional material which many chambers now disseminate, there is an understandable perception that barristers’ chambers should be treated in the same way as law firms”.

The Hrvatska v. Slovakia tribunal went on to hold that:

The ICSID Convention in Article 14 demands that arbitrators “be relied upon to exercise independent judgment”. ICSID Arbitration Rule 6 requires them to ‘judge fairly’. The objection in this case is not predicated on any actual lack of independence or impartiality, but on apprehensions of the appearance of impropriety. In the interest of the legitimacy of these proceedings, the arbitrators consider that the Claimant is entitled to make this objection and that it is well founded.

The Hrvatska v. Slovakia tribunal explained that the ICSID Convention and Rules do not explicitly give the power to tribunals to exclude counsel, and held that as a general rule parties may seek such representation as they see fit as this is a fundamental principle. However, the tribunal came to the decision that:

Even fundamental principles must, however, give way to overriding exceptions. In this case, the overriding principle is that of the immutability of properly constituted tribunals (Article 56(1) of the ICSID Convention).

It then went on to state that while a party was free to select its legal team as it saw fit prior to the constitution of a tribunal, it was not entitled to subsequently amend the composition of its legal team in such a fashion as to imperil a tribunal’s status or legitimacy. The Hrvatska v. Slovakia tribunal concluded that it had:

to preserve the integrity of the proceedings and, ultimately, its Award. Undoubtedly, one of the ‘fundamental rules of procedure’ referred to in Article 52(1)(d) of the ICSID Convention is that the proceedings should not be tainted by any justifiable doubt as to the impartiality or independence of any Tribunal member. The Parties agree that the relevant perspective in that inquiry is that of a reasonable independent observer.

One would have to agree with the Hrvatska v. Slovakia tribunal that as a judicial formation governed by public international law, a tribunal has an inherent power to take measures to preserve the integrity of its proceedings. The Hrvatska v. Slovakia tribunal rightly held that in light of the fundamental rule enshrined in Article 56(1) of the Convention and given its inherent procedural powers confirmed by Article 44, the Hrvatska v. Slovakia tribunal logically decided that it ‘would be inappropriate and improper’ to allow counsel from the same barristers’ chambers to appear.

Outside the UK and Hong Kong, it is now widely accepted that it would be very difficult for barristers from the same set of chambers to appear as arbitrator and counsel in the
same case. The increasing tendency for barristers’ chambers to market their services together as members from the same chamber and the trend for barristers to set up incorporated companies to run chambers have made it even more problematic for barristers from the same chamber to appear in the same arbitration as counsel and arbitrator. Despite the continued resistance by barristers in ICSID cases against the applicability of the IBA Guidelines on the conflict of interests applying to barristers’ chambers, the risk of challenges will make it quite likely we will see more departures of leading counsel and arbitrators from larger sets of chambers to smaller chambers.

IX RISE IN CHALLENGES TO ARBITRATORS IN NON-ICSID CASES

According to a report by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), between January 2016 and December 2018, there were 551 arbitral proceedings initiated at the SCC. Of these 551 cases, there was a total of 46 challenges filed against arbitrators. However, only three of these challenges resulted in the arbitrator stepping down, either voluntarily or because of an agreement of the parties. Of the remaining 43 challenge cases, 36 challenges were dismissed while seven challenges succeeded.

The LCIA also published summaries of 32 decisions of the LCIA Court relating to challenges made against its arbitrators between 2010 and 2017. These decisions show that the challenge to an arbitrator or tribunal was rejected in 25 cases but upheld in six cases and partially upheld in a further case.

One of the leading international arbitration centres in the world is the Hong Kong International Arbitration Centre (HKIAC). While it is known that challenges to arbitrators at the HKIAC is also known to be on the rise, because of the broad confidentiality provisions in the legislation and in the HKIAC’s rules, it is not possible to obtain any published information that may identify ongoing or concluded proceedings. However, the decisions of challenges to arbitrators made by the HKIAC are completely transparent to the parties. The HKIAC issued a Practice Note in 2019 in relation to the challenge of an arbitrator under the HKIAC Administered Arbitration Rules or in an arbitration administered by HKIAC. The Practice Note sets forth very clear procedures as to how the parties and HKIAC are to deal with any challenge made to an arbitrator in such challenges.

X CONCLUSION: MAJOR DIFFERENCE BETWEEN ICSID STANDARD AND UNCITRAL STANDARD

As far as challenges to arbitrators are concerned, one significant difference between challenges made under the ICSID system and the UNCITRAL system lies in the standards that are to be applied in the challenge. Article 58 of the ICSID Convention provides that the decision to the challenge made against an arbitrator shall fall on the shoulders of the other two remaining

members of the tribunal and, where there is any disagreement between the two arbitrators, the chair of the ICSID Administrative Council shall make the ultimate decision. Similarly, in the event that the majority of the arbitrators are challenged, the chairman of the ICSID Administrative Council shall also decide the challenge. The accepted legal standards for challenges to arbitrators in ICSID cases are to be found at Articles 14 and 57 of the ICSID Convention. The term ‘manifest’ as contained in Article 57 is significant as it requires the challenging party to show ‘evident’ or ‘obvious’ bias. This means that it must be capable of being discerned with little effort and without requiring deeper analysis. In addition, the burden of proof for disqualifying an arbitrator is a heavy one as Article 57 imposes an objective standard based on a reasonable evaluation of the evidence by a third party, as opposed to the subjective perceptions or beliefs of the challenging party. Quite often, parties would refer to the *Vivendi v. Argentina* case, in which it was held that the challenging party must rely on established facts and not on mere speculation or inference.47

If the challenge is upheld and results in the disqualification of the challenged arbitrator, a replacement arbitrator is appointed using the same method by which the disqualified arbitrator had been appointed. The new appointment must be made and accepted within 45 days of the notification of the vacancy, and the replacement appointment shall be made by the chairman of the ICSID Administrative Council.

The International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014 (IBA Guidelines) are often referred to by parties, counsel, arbitrators, institutions and courts across the world as a helpful guide on best practices and what may amount to ‘justifiable doubts’. While the IBA Guidelines do not have the force of law, they are widely respected and used by non-ICSID arbitral institutions and are often cited in challenges. It is important to highlight that the test for bias is an objective one and not a subjective test. The threshold is that of ‘apparent bias’ as opposed to actual bias that needs to be shown to trigger a reasonable challenge for the removal of an arbitrator. The SCC report is particularly useful as a guide as to how the SCC Board decided many challenges in which a party alleged that the arbitrator may be biased.48 Allegations of bias by an arbitrator because of a relationship with opposing counsel such as serving on the same tribunal in separate and unrelated proceedings, or attending the same conferences or teaching at the same university were all dismissed. Such scenarios did not give rise to justifiable doubts as to the arbitrator’s impartiality. The test under the IBA Guidelines is generally accepted by many courts as the accepted standard to decide impartiality. This can be contrasted with the less strict standard under English law. The English Court of Appeal in *Halliburton v. Chubb*49 decided that the fact that an arbitrator accepted appointments in multiple cases concerning the same or overlapping subject matter with only one common party does not of itself give rise to an appearance of bias. The fact that multiple appointments may be accepted is not determinative as to whether disclosure ought to made before an arbitrator accepting the appointments. It held that the test as a matter of English law is objective and the question as to what might lead to a conclusion of apparent bias is to be considered prospectively based upon the facts


that were actually known to an arbitrator at the time. It would be interesting to see how the UK Supreme Court rules on the pending appeal and whether it would move English law closer to the standards of the IBA Guidelines.

In the case of the 2010 UNCITRAL Rules, the challenge is first decided by the Appointing Authority under Article 13(4) of the UNCITRAL Rules. Article 15 of the UNCITRAL Rules acts in a similar fashion to Article 58 of the ICSID Convention in the sense that, where an arbitrator is replaced, the proceedings shall be resumed at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise. However, where the challenge is unsuccessful and the arbitrator is not disqualified, in the event that the seat of the arbitration is located in a UNCITRAL Model Law jurisdiction and the local arbitration statute allows for it, there is still a final right for the challenging party to go to the local high court or its equivalent to review the challenge under Article 13(3) of the Model Law. This additional level of judicial challenge to an arbitrator who has not been removed by the contractually agreed appointing authority in the UNCITRAL Rules does not exist in the ICSID system.

While the UNCITRAL Standard tends to follow the guidelines set out in the IBA Guidelines on Conflicts of Interest, the ICSID Standard requires a higher standard of evidence. In the ICSID decision of Suez v. Argentina, ICSID ARB/03/17 & 19 (2007), the two remaining arbitrators decided at 34 that:

"At the outset, it must be recalled that Article 57 of the ICSID Convention requires a "manifest lack of the qualities required" of an arbitrator. The term "manifest" means "obvious" or "evident". Christoph Schreuer, in his Commentary, observes that the wording manifest imposes a "relatively heavy burden of proof on the party making the proposal" to disqualify an arbitrator."

They went on to decide at 40 that:

"Implicit 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 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. Previous ICSID decisions on challenges to arbitrators support our position."

In summary, this means that the operation of Article 14(1) and 57 of the ICSID Convention effectively creates a rule that an ICSID arbitrator may only be challenged for bias if it is possible to prove that the arbitrator manifestly lacks the capacity to exercise independent judgement. This in itself is a very difficult burden to discharge.

While the ICSID Standard required to challenge an arbitrator is already high enough, a challenger in an ICSID matter will also face the lack of a right to an additional judicial challenge in the ICSID system. This is one of the reasons why it is generally considered to be comparatively much more difficult for a challenger to make a successful challenge to an arbitrator under the ICSID system than under the UNCITRAL system. On 1 May 2020, ICSID and UNCITRAL jointly released a draft code of conduct for adjudicators in

50 The hearing in Halliburton v. Chubb [UKSC 2018/0100] took place before the UK Supreme Court in November 2019, with interventions from institutions including the LCIA and the ICC.
investment arbitration disputes. The draft code includes proposals on dealing with double hatting and imposes limitations on the number of cases that can be heard simultaneously and the penalties to be imposed for unethical behaviour. The draft code uses the term ‘adjudicator’ to encompass any person who adjudicates investor–state dispute settlement cases, including arbitrators, members of annulment committees and members of an appeal mechanism. It remains to be seen when this draft Code will be adopted as a definitive code, but when it is released, it would level the different standards between ICSID and UNCITRAL.

Part III

PRACTICAL AND SYSTEMIC ISSUES
I INTRODUCTION

In the majority of investment treaty arbitrations, investors are entitled to submit an investment dispute to arbitration under the rules designated in the bilateral investment treaties (BITs). BITs usually specifically provide the foundation of the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) as well as arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, for example:

> [t]he investment dispute shall at the request of the disputing investor be submitted to either: 
> (b) arbitration in accordance with the ICSID Convention, if the ICSID Convention is available; 
> (c) arbitration under the ICSID Additional Facility Rules, if the ICSID Additional Facility Rules are available; (d) arbitration under the UNCITRAL Arbitration Rules, or (e) if agreed with the disputing Contracting Party, any arbitration in accordance with other arbitration rules.

A smaller number of investment treaty arbitrations are based on investment agreements instead of BITs. If the country of the investor and the host state have not entered into a BIT, the investor needs to specifically agree with the host state to submit the investment dispute to arbitration under specific rules, such as the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings (the ICSID Rules), which require that disputing parties must have consented in writing to the submission of their dispute to ICSID arbitration.

II THE ICSID CONVENTION AND THE ICSID RULES

i The ICSID Convention

History and Member States

As at 1 January 2018, 153 countries had ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The ICSID Convention was signed by the first contracting states in 1965. The ICSID Convention established the International Centre for Settlement of Investment Dispute (ICSID) in Washington, DC in the United States. ICSID is funded by the World Bank.

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1 Hiroki Aoki and Naoki Iguchi are partners at Nagashima Ohno & Tsunematsu. The information in this chapter was accurate as at April 2019.

2 Article 15(2) of the 2012 Japan/Korea/China Triparty Agreement for the Promotion, Facilitation and Protection of Investment (the 2012 Japan/Korea/China Investment Treaty).
Belize, the Dominican Republic, Ethiopia, Guinea-Bissau, Kyrgyzstan, Russia and Thailand have signed the ICSID Convention but have not yet ratified it (List of Contracting States and Other Signatories of the Convention (ICSID/3)). Brazil, India, Vietnam and South Africa are large economies that have not signed.

**Overview**

The ICSID Convention contains various provisions in addition to the procedural rules for arbitration. Since the ICSID Convention creates a fundamental basis for ICSID’s dispute resolution function and mechanism, it has also provided a basis for other subordinate rules and regulations, which include the Administrative and Financial Regulations; the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings; the Rules of Procedure for Conciliation Proceedings; and the Rules. For the purpose of practical use, this chapter focuses on the ICSID Convention and the Rules.

The ICSID Convention also sets out procedural provisions that directly impact arbitration procedures. Among them, there are some provisions that are unique compared with popular rules of arbitration for conventional commercial arbitration, including those detailed in the following subsections.

**Jurisdiction (Article 25)**

Jurisdictional conditions for access to arbitration under the ICSID Convention are: (1) the dispute must be between an ICSID member state and an individual or company that qualifies as a national of another ICSID member state; (2) the dispute must be a legal dispute arising directly out of an investment; and (3) the disputing parties must have consented in writing to the submission of their dispute to ICSID arbitration (Article 25). Those are considered to be mandatory requirements to resolve the dispute by ICSID arbitration.

Requirement (3) may be satisfied by a specific submission clause in investment agreements entered into between investors and host states. In the great majority of investment treaty arbitrations, this requirement has been satisfied by the state’s prior agreement in BITs, for example, ‘[e]ach Contracting Party hereby gives its consent to the submission of an investment dispute by a disputing investor to the arbitration set out in paragraph 3 in accordance with the provisions of this Article’.3

Most BITs, as well as Article 25(1) of the ICSID Convention, adopt a concept of ‘investment’, which has been argued in many cases in connection with the jurisdiction. One of the leading cases in this regard is Salini Construttori SpA and Italstrade SpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), which stated:

> [t]he Tribunal notes that there have been almost no cases where the notion of investment within the meaning of Article 25 of the ICSID Convention was raised. However, it would be inaccurate to consider that the requirement that a dispute be “in direct relation to an investment” is diluted by the consent of the Contracting Parties. To the contrary, ICSID case law and legal authors agree that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre.

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3 Article 15(4) of the 2012 Japan/Korea/China Investment Treaty.
The *Salini* tribunal further held that ‘[t]he doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction [citation omitted]. In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.’

Since each of the ICSID tribunal’s awards are not treated as binding precedents for subsequent tribunals, tribunals have taken different approaches in determining and applying the criteria for investment.

**An award and its recognition and enforcement (Articles 53 to 55)**

An award is final and binding. Each party must comply with it pursuant to its terms. An award may not be set aside by the courts of any member state (Article 53). If a party fails to comply with the award, the other party 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 that state’s courts (Article 54(1)). In summary, awards rendered in the ICSID arbitration are preferred.

A party seeking recognition or enforcement in a member state must provide a copy of the award certified by the ICSID Secretary-General to a competent court (Article 54(2)). Certified copies are sent to the parties on the date of dispatch of the award, and the parties may request additional copies at any time.

However, although member states must recognise and enforce the award, each state’s laws relating to ‘sovereign immunity’ from execution continue to apply (Article 55). Accordingly, investors are sometimes confronted with the problem of execution, even after obtaining a winning award. ICSID does not formally assist a winning party’s enforcement procedure in state courts.

Accordingly, an unsatisfied party must consider various measures to press the state to accept the award. For example, if a party finds difficulty in enforcing the award and informs ICSID of such a situation, ICSID may contact the non-complying party to request further information on how to comply with the award, which may be helpful for the performance by the state. Another *de facto* enforcement measure would be publication (see below).

**Annulment (Articles 50 and 52)**

ICSID provides annulment as a post-award remedy. It is intended to be a safeguard against the violation of fundamental legal principles relating to the process (Article 52 and Rules 50 and 52–55). A party may apply for full or partial annulment of an award on the basis of one or more of the following five grounds:

- the tribunal was not properly constituted;
- the tribunal has manifestly exceeded its powers;
- there was corruption on the part of a member of the tribunal;
- there has been a serious departure from a fundamental rule of procedure; or
- the award has failed to state the reasons on which it is based.

The application for annulment has to be submitted within 120 days after the award is rendered (Article 52(2)).

An *ad hoc* committee will decide the application. The *ad hoc* committee comprises three members appointed from the panel of arbitrators by the Administrative Council. The Rules
apply, *mutatis mutandis*, to an annulment proceeding (Rule 53). A party may request stay of enforcement of the award pending the committee’s annulment decision (Article 52(5) and Rule 54).

The committee’s decision on annulment is not an award and may not be annulled through an ICSID annulment procedure. However, the decision is equated to an award for purposes of its binding force, recognition and enforcement (Article 53(2)).

If an award is annulled in whole or in part, a party is entitled to submit a request resubmission, identifying the original award and explaining in detail (Rule 55(1)). The resubmission request will be examined by a new tribunal.

**Publication (Article 48)**

The ICSID Convention provides that ICSID shall not publish the award without the consent of the parties; in other words, ICSID can publish the award if the parties agree to it. The parties may agree to publish the award or annulment decision on ICSID’s website. If the parties do not agree, ICSID will publish excerpts of the decision’s legal reasoning (Rules 48(4) and 53). Arbitrators owe confidentiality obligations (Rule 6).

However, the ICSID Convention and Rules do not have any provision to prohibit the parties from publishing the award. In practice, most commercial agreements have a confidentiality clause that requests parties to arbitration to keep the procedure and award confidential, unless otherwise required under the applicable law (e.g., mandatory disclosure to investors). Unlike commercial arbitration, parties to investment treaty arbitration are not necessarily parties to commercial agreements and, in such a case, are not bound by contractual confidentiality obligations. Accordingly, unless otherwise agreed during the arbitration procedure, the parties may unilaterally publish the awards and decisions. In many situations, the purpose of publishing is to make the outcome transparent and urge the losing party to perform the award.

ii The ICSID Rules

**Overview**

The ICSID Arbitration Rules apply as a basic set of rules for ICSID arbitration, together with the ICSID Convention.

**Appointment of arbitrators (Rule 3)**

Absent a prior agreement between the parties or specified rules in the investment treaty, ICSID invites the parties to agree on the number of arbitrators and the method of their appointment (Rule 2).

The number of arbitrators is one or any uneven number. The parties are otherwise free to adopt any workable method of appointment that suits their needs, including provisions on time limits and special procedures. The parties are free to appoint arbitrators from the ICSID Panel of Arbitrators.

The Rules provide a method and timeline for appointing arbitrators. In a three-arbitrator tribunal, the Rules assume that the president of the tribunal is appointed by agreement of the parties (Article 37 and Rule 3). If the tribunal is not constituted within 90 days of the registration of the case, either party may request the chair of the Administrative Counsel of ICSID to appoint the arbitrator not yet appointed and designate the president of the tribunal (Rule 5). Certainly, the ICSID Convention and Rules allow parties to agree on the method of
appointment and will follow such agreed method, including exchange of a list of candidates between the parties. If the parties cannot appoint all the arbitrators, including the chair of the tribunal, the ICSID default mechanism will operate.

**Sessions of the tribunal (Rule 13)**

The first session should be held within 60 days of the constitution of the tribunal, unless the parties agree otherwise (Rule 13(1)). The dates of that session shall be fixed by the president of the tribunal after consultation with its members and the Secretary-General of ICSID. The secretary of the tribunal will assist the tribunal to fix the date by contacting the parties to enquire about their availability for the session.

The parties may agree on any location for the first session, provided that the tribunal approves the venue and there are suitable facilities. The tribunal often proposes a venue for the parties’ consideration. If there is no agreement, an in-person meeting will take place by default at the seat of ICSID in Washington, DC (Article 63 of the ICSID Convention and Rule 13(3)). The World Bank's facilities in Washington, DC or Paris, France, are the most popular places for the first session. ICSID can also provide other premises of the World Bank. ICSID has also entered into collaboration agreements with some popular arbitration institutions. The first session can be held in person, by telephone or by videoconference. In fact, increasing numbers of first sessions have been held by telephone or videoconference, to save time and costs.

The purpose of the first session of the tribunal is to ascertain the parties’ agreements or separate views on procedural questions such as the applicable arbitration rules, languages to be used, place of proceedings and the procedural calendar. The session enables the tribunal to set a schedule and establish specific rules for each case in a procedural order.

Unlike traditional commercial arbitration, the secretary of the tribunal, who is appointed by the Secretary-General (Administrative and Financial Regulation 25) will have an active function in the procedures. The secretary of the tribunal circulates a draft agenda approved by the tribunal to the parties for their comments well in advance of a first session. The draft agenda has been developed by ICSID taking into account standard procedural items, such as the procedural calendar (Rule 20). The agenda is often accompanied by a draft procedural order to guide the parties in reaching agreements on specific issues.

At the first session, the tribunal sometimes allows oral submissions of either party, if such a party submits a request for bifurcation of the proceeding, a request for provisional measures or a request to dispose of the matter because the claim is manifestly without legal merit.

The president of the tribunal will issue a procedural order based on the agreements reached and the procedural decisions taken by the tribunal. The procedural order will be circulated to the parties by the secretary of the tribunal promptly after the first session.

**Evidence (Rules 33, 34, 35 and 36)**

The parties should file evidence in support of their claim or defence with their written pleadings or instruments (Rules 24 and 33).

The ICSID Convention and Rules allow various types of evidence to be filed in the written procedure; namely, documentary evidence (e.g., exhibits, witness statements and expert reports) or non-documentary evidence (e.g., audio and video files) (Rule 34(2)(b)). Demonstrative exhibits (e.g., PowerPoint presentations, charts and graphs) may be used at a hearing provided they contain no new evidence and identify the evidence on record relied
on. Site visits may be allowed by the tribunal upon a party’s request (Rule 37(1)). If the evidence is in a language other than the procedural language, it must be submitted in the original language together with a translation (Administrative and Financial Regulation 30(3) and (4)).

The tribunal decides any disagreement about the admissibility of the evidence (Rule 34(1)). The parties and the tribunal often agree that the tribunal may be guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration (the IBA Rules of Evidence) when considering the admissibility of evidence and other evidentiary issues. The tribunal has the discretion to consider the relevance, weight and credibility of the evidence submitted by the parties (Rule 34(1)).

Like commercial arbitration, each party produces its own witnesses and appoints its own experts. The tribunal may call upon the parties to produce further witnesses and experts if it deems it necessary (Article 43 of the ICSID Convention and Rule 34).

**Oral procedure – hearings and procedural sessions (Rule 29)**

The oral procedure follows parties’ written submissions (Rule 29). The oral procedure consists of ‘hearings’ and ‘procedural sessions’. Most hearings are held in person, while procedural sessions (such as the first session of the tribunal) are often held by telephone or videoconference.

Usually, hearings will take place in the following order: (1) opening statements, (2) witness examination, (3) expert examination and (4) closing arguments. A tribunal may put questions to counsel, witnesses and experts (Rule 32). The parties may agree that there should be no opening or closing statement, or that the closing statement should be replaced by post-hearing briefs.

While the Rules refer to general principles on ‘Marshalling of Evidence’ (Rule 33), ‘Evidence: General Principle’ (Rule 34), ‘Examination of Witnesses and Experts’ (Rule 35) and ‘Witnesses and Experts: Special Rules’ (Rule 36), the ICSID Convention and Rules do not have detailed rules on how witnesses and experts are examined. In practice, a party that intends to cross-examine a witness or expert calls that witness. Fact witnesses and experts are required to make a declaration before testifying (Rules 35(2) and (3)). Fact witnesses are often not allowed to attend the hearing until after their testimony.

After seeking the views of the parties, the tribunal will decide the manner in which the record of the hearings shall be kept (Rule 20(g)). In practice, ICSID usually keeps audio recordings and written transcripts of hearings. In many cases, the parties ask the court reporter to prepare a verbatim transcript of the entire hearing in electronic format.

**Public access to the hearings**

Unlike Conciliation Rule 27(1), which requires that the conciliation hearing should be held in private, the ICSID Convention and Rules applicable to investment treaty arbitration do not set out default rules on the privacy of the hearings. If the hearing is open to the public, ICSID provides a video link from the hearing room that is broadcast to a separate room in the premises of the hearing that is open to the public.

**Decision-making of the tribunal (Rules 15 and 16)**

The deliberations of the tribunal shall take place in private and remain secret (Rule 15), usually immediately after a hearing or procedural session. Deliberations can also be held by telephone, videoconference or correspondence (Rule 16(2)).
Decisions of the tribunal shall be taken by a majority of the votes of all its members. The tribunal is generally allowed to have a deliberation by correspondence, but in this case all members must be consulted. The parties may agree that the president of the tribunal decides without consulting the other members in urgent situations, subject to possible reconsideration of the decision by the full tribunal. Such decisions typically relate to the extension of time limits and other urgent procedural questions (Rule 26(1)).

iii  The Additional Facility Rules
ICSID stipulated the 1978 Additional Facility Rules for investment disputes that fall outside the scope of the ICSID Convention. The ICSID Additional Facility Rules are widely referred to in investment treaties of which either party is not a member state of the ICSID Convention.

iv  Recent developments
ICSID initiated the amendment process in October 2016 and invited member states to suggest topics that merited consideration. In January 2017, ICSID also invited suggestions from the public in early 2018. The Secretariat has recently published those suggested comments on its website. It is expected that ICSID will consider and incorporate the lessons learned from the development of investment treaty arbitration practice.

III  THE UNCITRAL RULES

i  Overview
The UNCITRAL Arbitration Rules introduced in 1976, or as revised in 2010 (the UNCITRAL Rules), have also been extensively used in investment arbitrations under various BIT and free trade agreement investment chapters. The UNCITRAL Rules were tailored mainly for ad hoc arbitration, but a number of arbitration institutions accept the administration of the arbitration under the UNCITRAL Rules.

ii  Key features of the UNCITRAL Rules

Commencement of arbitration
Arbitration may be commenced by communicating to the respondents a notice of arbitration (Article 3.1). Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant the response (Article 4.1).

Selection of arbitrators
If parties have not agreed on the number of arbitrators previously or within 30 days of the respondents’ receipt of the notice of arbitration, three arbitrators shall be appointed (Article 7.1).

If the parties have not reached agreement within 30 days (1) of receipt by other parties of a proposal for the appointment of a sole arbitrator, or (2) of the appointment of the second arbitrator (if three arbitrators are to be appointed), the appointing authority shall use the ‘list procedure’ for selecting the arbitrator, as set forth in Article 8.2.

Challenge to arbitrators
Any arbitrator may be challenged if ‘circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence’ (Article 12.1). A party that intends to
challenge an arbitrator shall send notice of its challenge within 15 days after either it has been notified of the appointment of the challenged arbitrator or after the circumstances mentioned above became known to that party (Article 13.1).

**Seat of arbitration**

If the parties have not previously agreed on the place of arbitration, it shall be determined by the arbitral tribunal with regard to the circumstances of the case (Article 18.1).

The arbitral proceedings and the award will be subject to the national legislation applicable in the jurisdiction where the seat is situated. This is the notable difference from the ICSID Rules.

**Arbitral procedure**

Subject to the Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated equally and that each party is given a reasonable opportunity of presenting its case (Article 17.1). As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration (Article 17.2).

**Preliminary measures**

Article 26.2 lists examples of the interim measures available to the party as follows:

- **a** maintain or restore the status quo pending determination of the dispute;
- **b** take action that would prevent, or refrain from taking action that is likely to cause:
  - current or imminent harm; or
  - prejudice to the arbitral process itself;
- **c** provide a means of preserving assets out of which a subsequent award may be satisfied; or
- **d** preserve evidence that may be relevant and material to the resolution of the dispute.

The party requesting an interim measure is required to satisfy the arbitral tribunal for the following requirements (Article 26.3):

- **a** harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- **b** there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

These are the characteristic provisions of the UNCITRAL Rules since some other institutional rules do not provide such a detailed list of examples and the requirements, but just leave it to the tribunal’s discretion.

**Costs**

The arbitral tribunal shall fix the costs of arbitration in the final award or in another decision (Article 17.2). Within 15 days of receiving the arbitral tribunal’s determination of fees and expenses, any party may refer for review such determination to the appointing authority. The appointing authority may make adjustments to the tribunal’s determination and such adjustment shall be binding upon the arbitral tribunal (Article 41.4(b) and (c)).
Confidentiality and transparency – the UNCITRAL Transparency Rules

In 2013, the UNCITRAL Rules were amended and the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration (the UNCITRAL Transparency Rules) were introduced.

The UNCITRAL Transparency Rules are applicable to arbitration initiated pursuant to a treaty concluded on or after 1 April 2014, unless the parties to the treaty have agreed otherwise (Article 1 of the UNCITRAL Transparency Rules). It can be applied to arbitration based on a treaty concluded prior to 1 April 2014 when the parties to the relevant treaty, or disputing parties, agree to their application.

The UNCITRAL Transparency Rules went further than the other arbitration rules such as the ICSID Rules with regard to the transparency. The key elements are as follows.

Possible ISDS reform

At UNCITRAL, states have begun debates about the possible reform of investor–state dispute settlement (ISDS). UNCITRAL mandates a working group to proceed to: (1) first identify and consider concerns regarding ISDS; (2) consider whether reform was desirable in light of any identified concerns; and (3) if the working group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the UNCITRAL Commission.

Publication of information and documents

Upon the filing of notice of arbitration, (1) the name of the disputing parties, (2) the economic sector involved and (3) the treaty under which the claim is being made shall be published (Article 2). Further, the following documents shall be published:

- a notice of arbitration and response thereto;
- subsequent written statements or submissions, including a statement of claim and a statement of defence;
- a table listing all exhibits to the written submission, and to expert reports and witness statements (but not the exhibits themselves), if the table has been prepared in the proceedings;
- expert reports and witness statements, upon request by any person to the tribunal;
- any written submissions by a non-party to the arbitration;
- transcript of hearings (where available); and
- tribunals orders, decisions and awards.

Third-party submissions

Non-disputing parties to the treaty and any other third party may make a submission with the tribunal’s permission (Articles 4 and 5). In determining whether to allow such submission by the third party (other than the non-disputing party), the tribunal shall consider:

- whether the third party has a significant interest in the proceedings; and
- the extent to which the submission would assist the tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

Hearings

Hearings shall be public and the tribunal shall make the logistical arrangements to facilitate public access to hearings (Article 6).
Information to be made available to the public under the UNCITRAL Transparency Rules shall be through the central repository, the function undertaken by the Secretary-General of the United Nations.

IV THE PCA RULES

The PCA Arbitration Rules 2012 (the PCA Rules) were introduced by the Administrative Council of the Permanent Court of Arbitration (PCA) on 17 December 2017. The PCA Rules are a consolidation of four prior sets of procedural rules that the PCA established in the 1990s. The PCA Rules can be applied to a disputes involving at least one state, state-controlled entity or intergovernmental organisation (collectively, ‘the states’).

The PCA Rules basically follow the UNCITRAL Rules, but have some characteristic features, such as:

a. the PCA Rules confirm that agreement by the states to arbitrate under the PCA Rules constitutes a waiver of any right of immunity from jurisdiction, although immunity relating to enforcement must be expressed explicitly (Article 1.2);

b. the International Bureau of the PCA at The Hague shall serve as registry for the proceedings (Article 1.3). The parties to the arbitration must communicate their submissions and all communications to the arbitral tribunal to the International Bureau of the PCA (Articles 3.1, 4.1, 17.4, 20.1 and 21.1);

c. the Secretary-General of the PCA is the mandatory appointing authority (Article 6.1);

d. the PCA Rules clearly provide an option to appoint five arbitrators (Articles 9.1 and 10.1). Arbitrators do not need to be members of the PCA (Article 10.4);

e. notice of challenge to an arbitrator needs to be sent within 30 days (as opposed to 15 days under the UNCITRAL Rules) after the basis for the challenge became known to the party (Article 13.1). In rendering the decision on a challenge, the PCA may indicate reasons for the decision, unless the parties agree that no reasons shall be given (Article 13.5);

f. the PCA Rules set out a clear provision that the arbitrator may perform a site visit after consultation with the parties (Article 27.3);

g. the PCA Rules clarify the applicable laws in cases involving only states, only states and intergovernmental organisations, or intergovernmental organisations and private parties (Article 35.1);

h. before fixing the costs of arbitration, the arbitral tribunal is required to submit its determination to the PCA for review (Article 41.3); and

i. the deposit shall be directed to the PCA instead of the arbitral tribunal (Article 43.1).

V THE SCC RULES 2017

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is a major arbitration institution for investment arbitration, particularly for energy disputes. The SCC announced that the SCC Arbitration Rules are the third most commonly used arbitration rules in investment disputes, and the SCC is the second-largest investment arbitration institute after ICSID. Between 1993 and 2016, 92 investor–state disputes were registered at the SCC.
The latest SCC Rules are the SCC Rules 2017, entering into force on 1 January 2017. Key features of SCC Rules 2017 include:

a. the introduction of Appendix III, which is specifically applied to investment treaty disputes. Under Appendix III, third persons and non-disputing treaty parties may request or be invited to make written submissions;

b. there is no special rule for investment arbitrations of the confidentiality and transparency. Therefore, unless otherwise agreed by the parties, the confidentiality of the arbitration and the award shall be maintained (Article 3);

c. the default number of arbitrators is three for the investment arbitration (Article 2 of Appendix III);

d. a request for arbitration needs to be filed to the SCC, and the Secretariat of the SCC shall send a copy to the respondent. The Secretariat sets a time limit on the answer (Article 9);

e. the board of the SCC may request further details from either party on any of their written submission. If the party fails to comply with the board’s request, the board may dismiss the case, or the counterclaim or set-off (Article 10);

f. the board of the SCC shall dismiss a case, in whole or in part, if the SCC manifestly lacks jurisdiction over the dispute (Article 12);

g. the proposal of appointment of an administrative secretary needs to be submitted to the SCC, and is subject to the parties’ approval. The administrative secretary’s fees shall be paid from the fees of the arbitral tribunal (Article 24);

h. a party may request a summary procedure determining any issues where:
   • an allegation of fact or law material to the outcome of the case is manifestly unsustainable;
   • even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or
   • any issue of fact or law material to the outcome is suitable for the summary procedure for any other reason (Article 39);

i. the final award shall be made no later than six months from the date the case was referred to the arbitral tribunal, unless the board of the SCC extends the time limit (Article 43); and

j. a party may apply for the appointment of an emergency arbitrator until the case has been referred to an arbitral tribunal. The SCC board shall seek to appoint an emergency arbitrator within 24 hours of receipt of application. Any emergency decision on interim measures shall be made no later than five days from the date the application was referred to the emergency arbitrator (Appendix II).

VI THE SIAC IA RULES 2017

In 2016, Singapore International Arbitration Centre (SIAC) introduced a new set of rules for the investment arbitrations, which came into effect on 1 January 2017 (the SIAC IA Rules 2017). The SIAC IA Rules 2017 can be applied in any dispute involving states (no qualification of ‘investor’ or ‘investment’ is required under the Rules, without prejudice to any requirements under the underlying instruments). The SIAC IA Rules 2017 are largely based on the SIAC Arbitration Rules 2016, which are mostly used for commercial arbitration, but include some unique provisions:
Rules of Institutions

a they provide for a state immunity clause similar to the PCA Rules (Article 1.3);
b the parties may agree that the arbitral tribunal shall be composed of one, three or any
other odd number of arbitrators (Articles 5.1 and 5.2);
c a default list procedure shall be adopted if party fails to agree on:
• a sole arbitrator within 42 days; or
• a presiding arbitrator if there are multiple arbitrators. The list procedure is similar
to the one in the UNCITRAL Rules, but the SIAC Court shall communicate at
least five names (as opposed to three names in the UNCITRAL Rules) (Article 8);
d the Rules clearly provide that where the parties are of different nationalities, the SIAC
Court shall appoint a different nationality than the parties in principle (Article 5.7);
e ‘Statement of Claim’ and ‘Statement of Defence’ in the SIAC Rules 2016 are replaced
by ‘Memorial’ and ‘Counter-Memorial’, and the witness statement or expert report
supporting the claim needs to be accompanied with the factual and legal submissions
(Articles 17.2 and 17.3). Reply and rejoinder shall be filed by agreement of the parties,
or if deemed necessary by the tribunal (Article 17.4);
f a third party or non-disputing contracting state may make written submissions subject
to the terms and conditions under the Rules (Article 29);
g by agreeing to use the IA Rules, the parties shall be deemed to have allowed SIAC to
publish limited information as follows (Article 38):
• the nationality of the parties;
• the identity and nationality of the tribunal;
• the treaty, statute or other instrument under which the arbitration has been
commenced;
• the date of commencement;
• whether the proceedings are ongoing or have been terminated; and
• redacted excerpts of the reasoning of the tribunal and redacted decisions by the
SIAC Court on challenges to arbitrators;
h third-party funding: the tribunal may order the disclosure of (Article 24(l)):
• the existence of a party’s third-party funding arrangement;
• the identity of the third-party funder and, where appropriate, details of the third
party;
• the funder’s interest in the outcome of the proceedings; and
• whether the third-party funder has committed to undertake adverse costs liability.
The tribunal may take into account any third-party funding arrangements in
apportioning the costs of the arbitration (Article 33.1);
i early dismissal may be applied by a party if a claim or defence is manifestly without legal
merit; manifestly outside the jurisdiction of the tribunal; or manifestly inadmissible
(Article 26). This rule was the same in the SIAC Rules 2016;
j application for an emergency arbitrator may be available only when the parties expressly
agree on the application of the emergency arbitrator provisions (Article 27.4); and
k within 90 days from the date on which the tribunal declares the proceedings closed, the
tribunal shall submit the draft award to the SIAC Registrar (Article 30.3).
VII THE CIETAC IA RULES 2017

On 19 September 2017, CIETAC released its Investment Arbitration Rules (CIETAC IA Rules 2017), which became effective on 1 October 2017. It was announced on their implementation that the purpose of the CIETAC IA Rules 2017 is to support Chinese enterprises throughout the implementation of the ‘Belt and Road Initiative’.

The CIETAC IA Rules 2017 provide transparency rules, including public access to hearings and documents submitted in the arbitration. They also provide the rules pertaining to third-party submissions following the recent trend implemented in other rules, as we have seen above.

As for third-party funding, Article 27 requires that parties receiving third-party funding disclose, without any delay, the existence and nature of the arrangement and the identity of the funder.

One of the unique features of the CIETAC IA Rules is Article 43, which allows the arbitral tribunal to mediate the case during the pendency of the arbitration by itself.
Chapter 15

THE ROLE OF PRECEDENT IN INVESTMENT TREATY ARBITRATION

Beata Gessel-Kalinowska vel Kalisz and Konrad Czech

I INTRODUCTION

On the face of it, the issue of precedent in investment treaty arbitration is straightforward enough, and also amenable to empirical examination. It is certain that there is no formal doctrine of precedent in the field of investment treaty arbitration. Empirical research shows that arbitrators regularly refer to earlier cases at the same time. The high practical importance of arbitral decisions in the area of investment treaty arbitration is hence unquestionable, even though one can hardly speak of a binding precedent as understood under the common law doctrine of stare decisis. Yet, upon closer examination, the overall picture becomes more complex. The value of prior arbitral jurisprudence is often debatable. Because of the fragmentation of public international law, namely the existence of many differently worded international investment agreements (IIAs), earlier investment treaty decisions can be differentiated on legal grounds, and accordingly found unpersuasive unless referring to legal provisions of the same or largely similar IIAs. Investment treaty cases can also be differentiated on facts, seeing as their factual patterns, especially if referring to different state measures or to different jurisdictions, are rarely identical. Finally, on at least several occasions, it happened that arbitral tribunals blatantly ignored discussion of earlier decisions.

II OBSTACLES TO THE SYSTEM OF PRECEDENT

While investment treaty arbitration largely draws on commercial arbitration, and hence has a mixed status, it concerns international public law matters, including, first and foremost, treaty interpretation. The doctrine of precedent has never been formally adopted in the field of public international law (e.g., by the International Court of Justice or by other international

1 Beata Gessel-Kalinowska vel Kalisz is a senior partner at Gessel, Koziorowski spk and Konrad Czech is a former lawyer at the company.


The Role of Precedent in Investment Treaty Arbitration

Judicial decisions are not sources of international law but, properly speaking, merely help in interpretation of international law provisions contained in IIAs, or are relied upon as ‘evidence for existence of customary international law’. Thus, each arbitral or other adjudicatory decision is of assistance in extrapolating general principles of international law, albeit it does not create any stand-alone international law standard per se (awards are binding only upon the parties). This important doctrinal obstacle on the road to development of the system of precedent is not the only one, however.

Even if one were willing to treat investment treaty arbitration and law as relatively distinct from classic fields of public international law, the lack of full transparency of investment treaty arbitration is another obstacle to development of the precedent system. The latter requires publicity of decisions. Not all arbitral awards are public, many are partially redacted before publication, and the United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (the Mauritius Convention on Transparency) has, so far, been ratified only by three states. Moreover, even a wider adoption of the Mauritius Convention on Transparency and, accordingly, broader application of the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration will not, on its own, pave the way for the future development of a precedential system in investment treaty arbitration.

The major obstacle to the true development of a precedential system is posed in the fact that substantive investment law consists of 2,363 bilateral investment treaties (BITs) and 309 other treaties with investment protection provisions (there are 2,672 IIAs in force). In a word, the investment law framework is, by its very nature, fragmented. As the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) is never applied on its own, and does not contain any substantive standards of foreign investment protection, the aforementioned relates equally to investment law adjudicatory bodies.

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7 See, e.g., Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Republic of Paraguay, ICSID Case No. ARB/07/9, Decision on Jurisdiction, 29 May 2009, para. 58.

8 Reinisch, ‘Investment Arbitration…’, 496.


arbitrations administered outside ICSID and to those within the ICSID system.\textsuperscript{12} The great number of substantive instruments, which are often differently worded, makes it difficult to indiscriminately draw on earlier cases, especially if they referred to interpretation of a differently worded investment protection standard of some other IIA. On the other hand, of course, many IIAs, in particular if agreed by the same capital-exporting state in a similar time period, or if based on the same model BIT, are quite similarly worded. For instance, many UK and French BITs define ‘investment’ in a similar manner.\textsuperscript{13} This facilitates referencing some earlier decisions in later cases.

On top of this, however, multiple IIAs are on par with each other. In consequence, findings of various arbitral tribunals dealing with investment protection matters, deriving their jurisdiction from different IIAs, have equal status. Unlike in the common law systems that adopted the \textit{stare decisis} principle, there is no hierarchy of arbitral awards.\textsuperscript{14} There is also no arbitral appellate body, and ICSID annulment committees have procedural autonomy.\textsuperscript{15} This makes sorting out the relevance of arbitral decisions a discretionary task for counsel and arbitrators who can assign quite different values to them depending on a number of case-specific factors, including linguistic differences between the underlying instruments and fact-driven considerations. Indeed, arbitral tribunals can draw guidance from earlier cases, and usually do so if they concerned similar matters or were issued by respective arbitrators, but are not bound to strictly follow them.\textsuperscript{16} The persuasiveness of previous arbitral decisions is, in most cases, subject to debate between parties, that is to say, in the absence of formal guidelines in this respect, reasonable minds will often differ on the value of earlier awards.

III HIGH RELEVANCE OF PRIOR ARBITRAL DECISIONS

Notwithstanding the above, it has to be emphasised that prior arbitral decisions are nowadays regularly referenced, or even cited \textit{in extenso}, by arbitral tribunals in their awards.\textsuperscript{17} It is fully

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\textsuperscript{14} Quatar de Valors SICAV SA and others (formerly Renta 4 SVSA and others) v. Russian Federation, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009, para. 16.

\textsuperscript{15} Urbaser SA and Consorcio de Aguas Bilbao Biskiaia, Bilbao Biskiaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010, para. 49.

\textsuperscript{16} WNC Factoring Ltd v. Czech Republic, PCA Case No. 2014-34, Award, 22 February 2017, para. 310, where the arbitral tribunal states that ‘to the extent that they [arbitral awards – ed. note] are based on sound legal reasoning, the decisions of tribunals in prior international law cases can provide useful insights to subsequent tribunals considering those issues’.

true that ‘consideration of prior decisions allows tribunals to benefit from reasoning that has been developed in similar scenarios, possibly making their own more effective and efficient.’ As one commentator put it:

\[\text{[e]ven those arbitrators who denounce attempts to impose a system of precedent on investment treaty arbitration do not eschew relying on or citing to other decisions for support and do not shy away from explaining why a particular decision should not be followed. Where there are inconsistent decisions, these issues are debated in scholarly articles, at conferences, on blogs, and, of course, by the parties in any dispute. Over the course of time, tribunals come to distinguish, interpret narrowly, or simply disagree with the less persuasive decisions, until such decisions eventually represent the minority view.}\]

Some commentators argue that an ICSID award can be annulled if prior arbitral awards are not properly discussed by an arbitral tribunal. Several commentators, who also happen to be notable arbitration practitioners, note a de facto system of precedent in the world of investment arbitration (as opposed to the de jure precedent system, which has not developed in investment treaty arbitration). One academic work notes ‘an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law’. A recent treatise on the matter of arbitral lawmaking adapts a similar tack, yet using different language. It argues that ‘the distinction between a de jure and de facto doctrine of precedent is artificial.’ Following this line of thinking, the doctrine of precedent does not require the doctrine of stare decisis and, accordingly, it can be submitted that not only common law jurisdictions, but also civil law jurisdictions, recognise precedents.

In other words, while the notion of precedent is ‘a common law term of art that is clearly distinguishable from civil law judicial lawmaking’, in civil law jurisdictions there stand concepts such as jurisprudence constante or ständige Rechtsprechung, which are quite similar, albeit they do not officially impose strict adherence to legal principles established in the previous decisions. Consequently, it can be argued that investment arbitration promotes a ‘hybrid’ approach to precedent as ‘[o]n the one hand, tribunals pay a higher deference to a

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21 See, e.g., Lucy Reed, ‘The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management’ (2010) 25 *ICSID Review – Foreign Investment Law Journal* 95–103 at 95, where the author asks ‘[w]hy else would the parties and the arbitrators in investment arbitration devote so much ink and time to citing’ arbitral decisions. See also Reinsch, ‘Investment Arbitration – The Role of Precedent’, 508, where arbitral decisions are characterised as being ‘quasi-authoritative manifestations of the law’.


The Role of Precedent in Investment Treaty Arbitration

Civil law type of “jurisprudence constante”; on the other hand, lawyers and arbitrators and counsel readily engage in a common law style of reasoning. It is suggested that “[n]either the common law conception nor the civil law conception is capable of capturing the role of past arbitral decisions.” This ‘hybrid’ understanding of precedent can be a challenge for both common law- and civil law-trained lawyers.

If one thing is sure, it is that it is impossible to successfully argue an investment case without giving account to arbitral jurisprudence. No matter how scholars and practitioners phrase their views on the issue of precedent, they recognise the importance of prior arbitral awards. Most of them, however, either directly or indirectly reject the common law understanding of precedent, which, upon certain systemic conditions, requires a court to abide decisions issued by courts above it, or appellate courts. Whereas investment protection standards contained in IIAs are broadly drafted and require interpretation, making international investment law prima facie prone to the doctrine of precedent, it does not fall on fertile ground in the world of investment treaty arbitration. This is so for many doctrinal and structural reasons, most importantly because of the legal parity of different arbitral tribunals and their awards.

IV ARBITRAL DECISIONS ON THE ROLE OF PRECEDENT

There are many arbitral decisions declaring the lack of precedent in the area on international investment law but, concurrently, emphasising the relevance of prior awards. In one of the most notable cases regarding the role of precedent, namely in ADC v. Hungary, the arbitral tribunal stated that:

28 The Parties to the present case have . . . debated the relevance of international case law. . . . It is true that arbitral awards do not constitute binding precedent. It is also true that a number of cases are fact-driven and that the findings in those cases cannot be transposed in and of themselves to other cases. It is further true that a number of cases are based on treaties that differ from the present BIT in certain respects. However, cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.

A similar conclusion can be drawn, for example, from Jan de Nul v. Egypt. The same reasoning was also applied in two earlier well-known ICSID awards that were issued in a series of cases brought against Argentina after it experienced the economic crisis in 2001–2002.

In Enron v. Argentina, the arbitral tribunal rightly stated that ‘decisions of ICSID tribunals are not binding precedents and . . . every case must be examined in the light of

26 Ibid.
28 ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 293.
29 Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, para. 64.

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The role of precedent was also discussed in AES v. Argentina. In this case, the arbitral tribunal stated that ‘each BIT has its own identity; its very terms should consequently be carefully analysed for determining the exact scope of consent expressed by its two Parties’ and hence ‘the findings of law made by one ICSID tribunal in one case in consideration, among others, of the terms of a determined BIT, are not necessarily relevant for other ICSID tribunals.’

After reaching this conclusion, the AES tribunal continued:

Under the benefit of the foregoing observations, the Tribunal would nevertheless reject the excessive assertion which would consist in pretending that, due to the specificity of each case and the identity of each decision on jurisdiction or award, absolutely no consideration might be given to other decisions on jurisdiction or awards delivered by other tribunals in similar cases.

Following this line of reasoning, in Bayindir v. Pakistan the arbitral tribunal adopted the position that previous decisions are not binding but that, absent compelling reasons to decide otherwise, legal solutions established in a series of consistent awards should be followed, although subject to the specifics of a given IAA and circumstances of the case.

The Bayindir tribunal explained that arbitrators have a ‘duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law’. This position of the Bayindir tribunal was cited a year later in Fakes v. Turkey. Also, in the 2012 award in Daimler v. Argentina, the arbitral tribunal acknowledged the principle of the rule of law that similar cases should be decided alike unless a strong reason exists to distinguish between them. It further stated that much depends on three factors, namely on: (1) how similar the prior and new cases are; (2) the degree to which a clear jurisprudence emerged; and (3) the

30 Enron Corporation and Ponderosa Assets LP v. Argentine Republic, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets LP v. The Argentine Republic), Decision on Jurisdiction, 2 August 2004, para. 25.
31 ibid.
33 AES Corporation v. The Argentine Republic, para. 27.
34 Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 145.
35 ibid.
36 Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 96.
37 Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 22.
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arbitral tribunal’s independent assessment of the persuasiveness of prior decisions. A similar reasoning has been adopted by the arbitral tribunals in Austrian Airlines v. Slovak Republic, in Electrabel v. Hungary and recently in Jürgen Wirten v. Czech Republic. Thus, arbitral tribunals strive to maximise the consistency of investment treaty jurisprudence.

In any case, there exists the ‘general consensus’ among arbitral tribunals that the doctrine of stare decisis is not applicable. Previous arbitral awards discussed by parties in their written submissions are generally taken into account by arbiters who, in response to the parties’ submissions, address arbitral jurisprudence in virtually all awards. This tendency, however, does not fully prevent inconsistencies between decisions. While arbitral tribunals attempt to explain ‘the points on which the different case holdings can be distinguished, and the points on which there is analytical disagreement between tribunals’, they may still, of course, reach in their decisions quite different conclusions. Most, but not all, potential inconsistencies are therefore carefully resolved through the technique of distinguishing. To put it another way, arbitral tribunals that disagree with earlier decisions usually decide to discuss, at least in general terms, differences between the cases in a common law manner.

For instance, in SGS v. Philippines, the arbitral tribunal differentiated between two cases brought by SGS against Pakistan and the Philippines respectively. It pointed to ‘somewhat different legal and factual context’ of these cases and, hence, reached a different conclusion on interpretation of the umbrella clause than the arbitral tribunal in SGS v. Pakistan. Similarly, in Bureau Veritas v. Paraguay, the arbitral tribunal felt obliged to explain why it decided not to follow the approach adopted by other arbitral tribunals. In the past, however, not all arbitral tribunals that decided to deviate from previous arbitral awards saw fit to justify their decisions. There is little doubt that not only are contradictory arbitral awards on some issues possible, but also that the predictability of arbitral awards can be something of a challenge. To illustrate this, many writings on the topic refer to the award issued in LG&E v. Argentina.

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38 ibid.
The LG&E tribunal did not cite the earlier award in CMS v. Argentina, although both cases concerned the 'state of necessity defence' relating to the very same factual circumstances, namely to the legislation on privatisation of gas utilities in Argentina.\textsuperscript{47} Also, in Azurix v. Argentina, the ad hoc ICSID Committee was ‘against a strict analysis of previous Committee decisions in stay applications as if they were common law precedents’.\textsuperscript{48} These two examples, even though the LG&E award and the Azurix annulment decision were issued over a decade ago, show best that arbitral tribunals dealing with investment treaty matters function independently from each other – namely, they all stay in a perfectly horizontal relationship.

V OUTLOOK AND CONCLUSIONS

The inherent characteristics of investment law make it impossible to formally develop and apply the doctrine of precedent in investment treaty arbitration. Accordingly, looking from a traditional perspective, it may be misleading to speak about ‘precedent’ or ‘case law’ in the area of investment treaty arbitration. Arbitral tribunals are under no circumstances bound by earlier arbitral decisions and hence, strictly speaking, prior cases are not a source of investment law. One can safely speak about ‘precedent’ in investment treaty matters only if this term refers to prior arbitration decisions generally, but without implying their legally binding force in later cases. Notwithstanding this classic approach, as a matter of practice, most arbitral tribunals engage in discussion of earlier cases in their awards. The trend to cite prior investment treaty decisions is so well established that some commentators suggest the existence of a \textit{de facto} precedent regime in investment treaty arbitration, or an informal system of precedent. It is often correctly argued that this system contributes to development, and also to greater consistency, of investment law. With that explained, it may sometimes prove somewhat difficult for counsel to foresee to what extent arbitrators will take into account earlier cases in their decision-making process. If arbitrators find some earlier decisions unconvincing, they normally try to carefully distinguish them from the case at hand, but sometimes, although definitely less frequently, also simply sweep them aside and proceed to draw from other cases.

\textsuperscript{47} 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, para. 201 et seq. cf. CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005.

\textsuperscript{48} Azurix Corp v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 28 December 2007, para. 24.
Chapter 16

FAIR AND EQUITABLE TREATMENT

Andre Yeap SC, Paul Tan, Matthew Koh, David Isidore Tan and Ryce Lee

I INTRODUCTION

The fair and equitable treatment (FET) standard in investment protection treaties remains at the core of states’ obligations and thus many disputes. With notable exceptions, particularly in the newer generation of treaties, the FET standard is also often left undefined. Notwithstanding that, tribunals have elaborated on this standard to develop both substantive and procedural principles. This chapter will provide a brief review of these standards and highlight how this has been applied in some of the more recent cases. Notably, a number of awards related to the renewable energy sectors in Spain and the Czech Republic, and concerning Article 10(1) of the Energy Charter Treaty (ECT). Interestingly, while Spain was largely found liable for breaches of the FET standard, the Czech Republic was not. These two groups of cases thus help to draw the line between conduct that is lawful under the FET standard and that which is not. These cases are addressed separately below.

II RECENT CASES ON THE PRINCIPLES OF FET

i Anglo American PLC v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1, 18 Jan 2019

The claimant claimed against Venezuela under the Venezuela–United Kingdom Treaty for the seizure of certain reversionary assets and also the non-issuance of VAT credit certificates (VAT CERTS).

The claimant argued that Venezuela had breached the FET standard on the following grounds: legitimate expectations, consistency and stability, transparency and due process, and non-arbitrariness.4

Venezuela argued for limiting the standard to the customary international law minimum standard of treatment of foreigners and their assets, such that it was necessary to demonstrate that the state had acted with a gross or flagrant disregard for the basic principles of fairness,

1 Andre Yeap SC is a senior partner, Paul Tan is a partner, Matthew Koh is a senior associate, and David Isidore Tan and Ryce Lee are associates at Rajah & Tann Singapore LLP.
3 See Article 9.4 of the Singapore–European Union Free Trade Agreement. See especially footnote 11 of Chapter 9.
4 Anglo American PLC v. Bolivarian Republic of Venezuela at [407].
consistency, even-handedness, due process, or natural justice expected by and of all states
under customary international law; the lack or denial must be gross, manifest, complete, or
such as to offend judicial propriety.5

The tribunal concluded that the seizure of assets was not a breach of the FET standard
as Venezuela had taken assets it owned pursuant to a contractual obligation with which the
claimant had to comply.

In relation to the claim for non-issuance of VAT CERTS:

a Despite repeated requests, Venezuela refused to issue VAT CERTS. The claimant
argued, among others, that this was a breach of legitimate expectations, as requirements
for the VAT CERTS had been fulfilled.6 The claimant argued that Venezuela breached
its obligation to accord a consistent, stable and predictable legal framework by suddenly
requiring compliance with a deduction rule that went against the existing VAT law;7
and Venezuela’s conduct was not transparent, lacked due process and was arbitrary.8

b In response, Venezuela argued, among others, that the requirements for issuance of
VAT CERTS were not complied with (in particular, deduction of a requested refund
amount).9 Venezuela also argued that the question of the consistency of the requirement
with the VAT Law was a matter of Venezuelan law, and the claimant was not denied
access to the local courts.10

The tribunal held that the formula ‘in accordance with international law’ was not synonymous
with the ‘minimum standard of treatment under international law’11 and held that respect for
legitimate expectations, transparency, reasonableness, and due process, as well as the absence
of discrimination and arbitrariness are part of the FET standard under treaty.12

As to the substantive claim, the tribunal held that imposing the deduction requirement
was not in itself contrary to law.13 Further, it was not the lack of transparency of Venezuela’s
administration or the lack of predictability of its legal framework that prevented the claimant
from obtaining the VAT CERTS; rather, it was the claimant’s obstinacy in considering
the deduction requirement to be improper and its refusal to comply with it.14 The tribunal also
noted that there was no violation of due process because the claimant did not seek recourse
in relation to the non-issuance of VAT CERTS until very late in the day, and national
court proceedings were still ongoing.15 The tribunal also held that Venezuela’s conduct was
not arbitrary: the claimant was not prevented from making an appeal against the conduct
of Venezuela’s tax administration, and had not shown that Venezuela’s not responding to
requests was attributable to bad administration or on a whim.16

5 id., at [415].
6 id., at [411].
7 id., at [412].
8 id., at [413]–[414].
9 id., at [418]–[423].
10 id., at [424]–[425].
11 id., at [439].
12 id., at [443].
13 id., at [447]–[457].
14 id., at [461]–[465].
15 id., at [466].
16 id., at [470].
Thus, the tribunal dismissed the claimant’s claim for alleged violation of the FET standard.

ii United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia, Award of the Tribunal, ICSID Case No. ARB/14/24, 21 Jun 2019

The claimant alleged that Estonia had breached the FET standard in the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and the Republic of Estonia, among others, on the following grounds:

a The alleged violation of claimants’ legitimate expectations related to the privatisation of ASTV (the 2nd claimant), pursuant to which the claimants entered into certain privatisation agreements and the investment was made; and

b Estonia had breached the FET standard by rejecting a 2011 tariff application by the Estonian Competition Authority (ECA), and ordering ASTV to apply for tariffs 29 per cent lower than its previous ones.

The tribunal recalled that assessing alleged legitimate expectations ‘requires balancing these expectations against the State’s legitimate regulatory interest’. The tribunal noted also that there was a distinction between purely contractual rights, which may not in themselves guarantee stability of the regulatory regime, and the formation of legitimate expectations, and agreed with Estonia that not every contractual right can amount to a legitimate expectation protected under international law, as this would render all umbrella clauses redundant. The tribunal emphasised that ‘absent other circumstances, the mere expectation that a contractual commitment will be respected and performed cannot suffice to establish a breach of the FET standard’.

The tribunal then considered the representations made by City of Tallinn in relation to the privatisation agreements, noting their terms were ‘determinative in delineating what the claimants could, and could not reasonably expect since they crystallise the common intention of the parties at the time of the privatisation’. In relation to the claimants’ legitimate expectations concerning the mechanism for determining water tariffs, the tribunal concluded that the City of Tallinn did not make any commitment regarding the tariff-setting mechanism or ASTV’s profitability more generally; a reference to the 2001 Business Plan at Schedule E of the Services Agreement did not amount to an incorporation of the entire Business Plan and a legitimate expectation that the investor could legitimately expect to earn any return implied in the Business Plan.

As to the claimants’ expectations in the various clauses of the privatisation agreements regarding changes in the law and the identity of the regulator, the tribunal agreed with Estonia that the terms of the Services Agreement plainly provided that the regulatory framework was not static and, further, that change was indeed likely; there was also no stabilisation clause in the Services Agreement. The tribunal concluded that a sophisticated investor, in the circumstances, could not have expected the regulatory regime prevailing at the time of

17 United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia at [570]–[590].
18 id., at [581]–[587].
19 id., at [588].
20 id., at [618].
21 id., at [684]–[689].
the investment to apply without change, particularly where the City of Tallinn did not have authority to guarantee the maintenance of the relevant law or the stability of the Estonian legal order.\textsuperscript{22}

Hence, in totality, the tribunal held that the claimants had not formed legitimate expectations at the time of entering into the privatisation agreements that the privatisation would be shielded from any legal of regulatory change, nor were there legitimate expectations of any specific legal of return or profitability.\textsuperscript{23} For completeness, the tribunal also considered and held that the claimants had not shown they could hold any legitimate expectations based on post-privatisation events.\textsuperscript{24}

Separately, the tribunal considered whether the claimants had established a breach of the FET standard going beyond a claim of legitimate expectations.

The tribunal first stated that the ‘police powers doctrine’ did not constitute a separate affirmative defence to FET claims as that analysis is already subsumed into any inquiry into the breach of the FET standard: ‘A finding of a violation of the FET standard necessarily entails a determination that the State exceeded its reasonable right to regulate, and to interfere with investors’ rights.’\textsuperscript{25}

As to the basis for Estonia ordering a decrease of ASTV’s tariffs, the tribunal concluded that the legislative change through the amendment of the legislative framework did not indicate breach of the FET standard: this could have been foreseen in view of the terms of the Services Agreement, and further the tribunal was mindful that curtailing of perceived luxury profits constituted a proper policy motivation.\textsuperscript{26}

The ECA did not legally succeed to the City of Tallinn as a party to the Services Agreement,\textsuperscript{27} and therefore the Services Agreement did not bind the ECA.\textsuperscript{28} The tribunal agreed with the national courts that the ECA had properly exercised its discretion to elaborate the tariff methodology, which amounted to an administrative regulation.\textsuperscript{29} The ECA’s adoption of this methodology did not breach the FET standard: it could not be said that one regulatory regime necessarily prevailed as a matter of international good practice. Therefore, the claimants did not hold any legitimate expectations, and the adoption of such a regulatory regime did not run afoul of the claimants’ rights.\textsuperscript{30}

iii Lao Holdings N.V. v. Lao People’s Democratic Republic, Award, ICSID Case No. ARB(AF)/12/6, 6 Aug 2019

In this arbitration, the claimant alleged that Laos had violated the FET standard in Article 3(1) of the 2005 Netherlands–Laos BIT.

a First, it was claimed that the FET standard had been breached as, among other reasons, it had been deprived of its investment in a company (i.e., Sanum) when Sanum was subject to court proceedings that were allegedly arbitrary, unfair, discriminatory and

\textsuperscript{22} id., at [708]–[710].
\textsuperscript{23} id., at [711]–[716].
\textsuperscript{24} id., at [725]–[761].
\textsuperscript{25} id., at [767].
\textsuperscript{26} id., at [802].
\textsuperscript{27} id., at [823].
\textsuperscript{28} id., at [828].
\textsuperscript{29} id., at [837]–[841].
\textsuperscript{30} id., at [858] to [859].
lacking in due process.\textsuperscript{31} This included allegations that the Laotian courts had been interfered with by the government of Laos, that a trial was called with only 48 hours’ notice, held for only 90 minutes, and had been prejudged.\textsuperscript{32}

\textit{b} Second, the claimant also alleged that the FET standard had been breached as the government of Laos had carried out a tax audit on Sanum in bad faith – and, as a result, the claimant’s investments were subject to taxes in excess of US$23.8 million, or in a discriminatory fashion.\textsuperscript{33}

However, the tribunal rejected both claims.

On the court proceedings, while the tribunal agreed that 48 hours was excessively short notice for a trial, in the absence of evidence from the Sanum representatives present at the trial, it accepted the evidence of Laos that, when the trial was called, Sanum was present and did not object to the trial proceeding with its participation. It also accepted that the Laotian court had not prejudged the case or been subject to any interference by the Laotian government. The claimant’s case on a violation of the FET standard thus failed because of a lack of evidence.

As for the audit, the tribunal found there was no basis for the allegations made. Among other reasons, the tribunal found that the Laotian government had good cause for concern to carry out the audit as Sanum had not complied with its reporting obligations, and such suspicion was vindicated when the serious financial irregularities were disclosed.\textsuperscript{34}

\textit{iv} \textit{Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, Award, ICSID Case No. ARB/16/6, 27 Aug 2019}

This arbitration concerned the FET standard under Article 4(2) of the Switzerland–Colombia BIT, and allegations by the claimants that it had breached the same by: (1) denying one of the claimants (i.e., Prodeco) due process in a fiscal liability proceeding which held it liable for damages to Colombia’s finances; (2) acting with bias and bad faith; and (3) breaching the claimants’ legitimate expectations.

On due process, the claimants said that Colombia had wrongfully seized assets of witnesses to cause them to change their prior witness statements and incriminate Prodeco, and had also denied Prodeco the opportunity to submit additional evidence in its defence.\textsuperscript{35}

The tribunal held that, while a breach of due process could violate the FET standard, in the context of administrative proceedings (where the decision-maker is also the investigator, accuser and adjudicator) due process would, at a minimum, only require that the decision be subject to full judicial review.\textsuperscript{36} Nonetheless, the tribunal rejected the claimants’ due process allegations. First, the decision against Prodeco was based on documentary evidence (not the evidence of the witnesses), and no concerns were voiced by Prodeco at the material time.\textsuperscript{37} Second, the claimants had not proven that Colombia had wrongfully caused the witnesses to

\begin{itemize}
\item \textsuperscript{31} \textit{Lao Holdings N.V. v. Lao People’s Democratic Republic} at [241].
\item \textsuperscript{32} id., at [242]–[245].
\item \textsuperscript{33} id., at [260]–[261].
\item \textsuperscript{34} id., at [265]–[269].
\item \textsuperscript{35} \textit{Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia} at [1313].
\item \textsuperscript{36} id., at [1319].
\item \textsuperscript{37} id., at [1331]–[1333].
\end{itemize}
change their earlier evidence to incriminate Prodeco. Last, the decision to deny Prodeco the opportunity to submit additional evidence had been duly reasoned, Prodeco’s appeals against it had been dismissed, and Prodeco had not alleged any wrongful conduct with respect to its appeals.

As for bias and bad faith, the claimants alleged that its conviction had been predetermined by a Ms Morelli Rico, the head of the Colombian agency tasked with investigating and coming to a decision in the fiscal liability proceeding. The tribunal agreed that bias would violate the FET standard and that Ms Rico had made public statements which showed that she had ‘already made up her mind, without having properly analysed Prodeco’s defences and its arguments on appeal’. However, the tribunal held that the claimant’s bias and bad faith claim had to be dismissed as Ms Rico had left office before deciding Prodeco’s appeal.

Finally, on legitimate expectations, the claimants alleged that, by way of the fiscal liability proceeding, Colombia had contravened its legitimate expectations created by the mining contract it signed with the claimants by: (1) using its fiscal control powers to nullify its commitments in the eighth amendment to the mining contract for the year 2010; (2) adopting decisions of various Colombian authorities that were inconsistent with each other; and (3) ignoring the basis of the parties’ negotiations on the eighth amendment to the mining contract (i.e., the expansion of the mine).

None of these arguments found favour with the tribunal.

First, the tribunal found that the claimants did not have any legitimate expectations that Colombia would abstain from using its fiscal control powers given that: (1) administrative contracts (like the mining contract) had been subject to such fiscal control powers for more than a decade prior to the mining contract’s execution; and (2) the claimants must have been aware of the same.

Second, the tribunal disagreed that Colombia had adopted inconsistent decisions (and thus that there was a breach of legitimate expectations on this basis). This was because the different Colombian authorities had different legal and policy responsibilities or objectives. In the present case, the decisions in question were not inconsistent because one concerned the law of contract, the other concerned the fiscal liability regime – and both were applicable to administrative contracts.

Last, the tribunal held that ignoring the basis of the parties’ negotiations on the eighth amendment to the mining contract alone did not give rise to any legitimate expectation that there would be no application of Colombia’s fiscal liability regime to review the eighth amendment.
III CASES AGAINST SPAIN RELATING TO THE RENEWABLE ENERGY INDUSTRY

The past year saw a number of awards issued in relation to claims brought against Spain for alleged breaches of Article 10(1) of the ECT, in particular the FET standard therein, the relevant part of which provides:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security.

For the most part, tribunals have found Spain liable for breaches of the FET standard; in several cases, the claimants’ legitimate expectations were found to be frustrated by Spain’s changes to its renewable energy regime.49

In most of these awards, the tribunals were conscious of and made comparisons to analyses by tribunals in other Spanish renewable energy (RE) cases, particularly where the very same regulatory measures were at issue. However, whereas some tribunals readily adopted the factual conclusions in previous cases, other tribunals took a more cautious approach in this respect.

i Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID Case No. ARB/15/20, 19 Feb 2019

This was a claim against Spain under the ECT arising out of changes to the state’s renewable energy policies. The claimants alleged a breach of the FET standard.

The tribunal stated at the outset that: ‘[I]t is only in so far as the negation of expectations constitutes unfair or inequitable treatment that there can be a breach of this provision in the ECT. The fact that an investor’s expectations have been defeated will not necessarily imply that there has been a breach of the FET standard’.50

The majority of the tribunal held that the claimants did not necessarily have to show that every point of their understanding was confirmed by external counsel nor that it had obtained a legal report on issues of regulatory stability or the risk of the regulatory regime being revoked ‘provided that the investor has given careful consideration to the legal position and has acted in reliance upon representations by the State concerning the stability of the regulatory regime’.51 They found that Spain ‘held out the assurance of the stability of specific regulatory provisions as an inducement to invest in the renewable energy sector’, which investors were entitled to rely on as a firm commitment, and therefore Spain was bound to not renege on it.52

The majority found that the first claimant, Cube, had appraised the regulatory regime and made the considered decision to invest in photovoltaic and hydro facilities on the

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49 The exception is BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16, 2 December 2019.
50 Cube Infrastructure Fund SICAV and others v. Kingdom of Spain at [387].
51 id., at [396].
52 id., at [397].
understanding that a particular regulatory regime would not be significantly amended or abolished retroactively in respect of plants already registered and operating under that regime. The majority held that the claimants’ reliance was justified, among others, because the representations and assurances in a particular law, RD 661/2007 were clear and specific, were re-emphasised, and such representations had to be viewed under the lens of international law, not Spanish law.53

Relatedly, the tribunal held a co-claimant Demeter was ‘so closely engaged and involved in the decision to invest that the investment can properly be regarded as a joint venture between the co-claimants’ such that the representations made to Cube could be regarded and made to Demeter, and Demeter did not have to show it had undertaken its independent due diligence.54

In relation to what would amount to a breach, the tribunal referred to Saluka Investments B.V. v. Czech Republic55 and held that while the FET obligation does not require a State to ‘petrify’ its laws, where a State ‘represented that certain provisions would be maintained for a certain time, those provisions either are maintained for that time or are adjusted in a manner that does not significantly alter the fundamental economic basis of investments made in reliance on that representation’.56

Hence, the tribunal held that regulatory changes had to be considered in totality, and while in themselves might be considered reasonable and fair, there would be a breach of the FET standard ‘in the face of an express statement that the tariff regime applicable to existing plants registered under the Special Regime would not be withdrawn, and after investments had been made with a view to profitability over a long term’.57

Hence, the claimants were in principle entitled to recover losses shown to have been caused by replacement of a 2007 regime of fixed tariffs and premiums with a later ‘reasonable rate of return’ regime.58 In relation to investments in hydro facilities, the majority of the tribunal considered that the regulatory changes in the meantime did not prevent the claimants from relying on the commitment made by Spain, and the claimants expectations were thereafter defeated by the ‘significant retroactive changes’ put into place.59

Generally, the tribunal found that Spain had not acted in bad faith, and dismissed the claimants’ claim alleging failure to act in good faith.60 The tribunal found that Spain had not adopted discriminatory measures against the claimants, as opposed to other investors, because the measures were directed at the renewal electricity energy as a whole, finding that the measures were reasonable public policy choices. The tribunal also found that the Spanish measures were not unreasonable save insofar as they breached the assurances given by Spain and the claimants’ legitimate expectations.61

One arbitrator, Professor Christian Tomuschat, issued a separate and partial dissenting opinion disagreeing with the majority’s conclusion that the claimants had justifiably relied

53 id., at [398]–[404].
54 id., at [406].
55 Saluka Investments B.V. v. Czech Republic, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006 at [305].
56 Cube Infrastructure Fund SICAV and others v. Kingdom of Spain at [411]–[413].
57 id., at [419]–[431].
58 id., at [434].
59 id., at [435]–[442].
60 id., at [444]–[446].
61 id., at [448]–[451].
on Spain’s commitment. Among others, he took the view that the claimants were ‘clearly negligent in assessing the regulatory risks inherent in their planned investment decisions’, and that over time the ‘factual framework’ around Spain’s original commitment was slowly dismantled. He noted that Spain still maintained a guarantee of reasonable profitability or reasonable return and the claimants were therefore not entitled to claim compensation for the damage they allegedly suffered in relation to their hydro activities through the introduction of the new regulatory regime.

ii NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, 12 Mar 2019

This case again concerned a claim under Article 10(1) of the ECT. The tribunal stated that the claimants should have been aware that changes could be made to the regulatory regime in question, Regulatory Framework I, and could not reasonably have an expectation that they would be entitled to receive precisely the benefits prescribed in regulation. However, the tribunal observed that it had to examine whether ‘in light of the assurances that they were given by Spain, the claimants had a legitimate expectation that the regime would not be changed in a way that would undermine the security that the claimants had in respect of the economic regime set out in RD 661/2007’.

The tribunal concluded that the claimants ‘had a legitimate expectation that the regulatory regime in RD 661/2007 would not be changed in a way that would undermine the security and viability of their investment’, for reasons including the following:

a) use of terms such as such as ‘guaranteeing’ and ‘preserv[ing] legal security’, in letters from a Spanish minister could reasonably interpreted to understand the Spanish government had no intention of making significant changes to the investment regime set out in RD 661/2007;

b) the claimants would also have expected Spain not to unilaterally change the solar energy regime without industry consultation, reinforcing the notion that the regime would not be radically changed; and

c) the tribunal observed that statements made in writing by Spanish officials constitute the best evidence of its assurances that could be the basis for legitimate expectations.

The new regime of Regulatory Framework III, the tribunal noted, put in place an economic regime ‘substantially different’ from that under Regulatory Framework I, and noted that the claimants were deprived of the security and certainty that they otherwise could have expected.

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62 id., at [18]–[22].
63 id., at [23]–[25].
64 id., at [26].
65 9REN Holding S.a.r.l v. Kingdom of Spain at [584].
66 id., at [591].
67 id., at [596].
68 id., at [593].
69 id., at [594].
70 id., at [590].
71 id., at [599].
In response to Spain’s argument that all the claimants could have expected was a reasonable return on their investment, the tribunal held that the assurances made by Spanish authorities were, however, about ‘regulatory certainty and stability’, and by failing to provide that, Spain had denied the claimants their legitimate expectations.72

iii 9REN Holding S.a.r.l. v. Kingdom of Spain, ICSID Case No. ARB/15/15, 31 May 2019

In this matter, the parties disputed whether Spain owed an irrevocable obligation under international law to the claimant to pay the feed-in tariff established by a certain law (RD 661/2007) for 25 years and thereafter at 80 per cent of the original base rate for the life of a certain renewable energy facility. The claimant argued that it had a legitimate expectation in view of, among others, the circumstances and Spain’s statements and conduct, that the benefits set out in RD 661/2007 were irrevocable.

The tribunal concluded that the claimant reasonably relied upon a legitimate expectation that the benefits of RD 661/2007 would continue for the useful life of seven of the claimant’s eight facilities. In particular, the tribunal found that the Spanish Supreme Court judgment affirming the modification of regulatory measures did not mean that such changes could be made without financial consequences under the ECT.73 In addition, Spain’s authority to amend its regulations did not necessarily mean that the costs of such changes should fall on investors.74

The tribunal agreed that the claimant was unable to point to any specific communication from Spain affirming the irrevocability of RD 661/2007 entitlements.75 However, the tribunal held that the regulation could give rise to a ‘commitment of the requisite clarity and specificity’ particularly where such a commitment is made for the purpose of inducing investment, and did in fact succeed in attracting the claimant’s investment that subsequently resulted in losses to the claimant.76

In addition, the tribunal concluded that the legitimate expectations of the claimant under RD 661/2007 were frustrated. Among others, Spain had made a clear and specific representation of non-retroactivity in Article 44(3) of RD 661/2007, the claimant’s expectations of tariff stability were reasonable and legitimate in the circumstances, and the claimant reasonably relied upon Spain’s representation when it made its investment.77 The tribunal concluded that the frustration of the claimant’s legitimate expectation violated the FET standard: it led to one-sided advantages with only Spain benefiting from rising energy prices but yet being able to resile from any guarantee of price stability in the event of prices falling.78

The tribunal, however, rejected the claimant’s argument that there was a breach of the FET standard because Spain’s measures lacked transparency or were unreasonable or

72 id., at [600].
73 id., at [242]–[244].
74 id., at [253]–[259].
75 id., at [292].
76 id., at [295].
77 id., at [307].
78 id., at [311].
discriminatory, noting that a regulatory measure ‘rationally connected to a legitimate State objective, where the means chosen are proportionate to achievement of the objective . . . is neither unreasonable nor arbitrary’.79

iv SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, 31 July 2019

The claimant, a German company which Spanish subsidiary owned two photovoltaic (PV) plants located in the Autonomous Region of Extremadura, alleged that Spain’s measures between 2010 and 2014 constituted a breach of Article 10(1) of the ECT. In particular, the claimant argued that Spain had failed to respect its legitimate expectations and implemented unreasonable and disproportionate regulatory measures in relation to the feed-in tariff (FIT) payable to RE producers.

While the tribunal referred to and relied on previous Spanish RE cases at times, it was careful to note the differences in the factual matrix of each case, ‘[e]ven when cases arise under the same treaty (the ECT) and involve the same regulatory regime’.80

In setting out the legal tests for legitimate expectations, and unreasonable and disproportionate measures, the tribunal referred to previous Spanish RE cases.81 Notably, the tribunal adopted the test for proportionality in Charanne:82

The Arbitral Tribunal considers that the proportionality requirement is fulfilled inasmuch as the modifications are not random or unnecessary, provided that they do not suddenly and unexpectedly remove the essential features of the regulatory framework in place.

Considering Spain’s regulations and regulatory reports, statements regarding those regulations, the case law of Spain’s Supreme Court and the economic circumstances as of March 2010 (the date of the claimant’s investment), the tribunal held that the claimant had the legitimate expectation that it would receive a FIT that was stable for the first 25 years of a plant’s operation (save for inflation adjustment).83

The tribunal reached this finding despite observing that prudent investors during this period would have been aware of Spain’s tariff deficit in this sector and of the prospect that Spain would take steps to address this.

The tribunal also rejected Spain’s argument that the claimant could not have had such a legitimate expectation to receive stable FITs because a prudent investor would have realised that there was no right to state aid under EU law and Spain’s aid provided pursuant to RD 1578/2008 ‘could eventually be seen as excessive’. The tribunal held that Spain’s argument was speculative and there was no basis to say that an investor should have anticipated that as of March 2010, Spain’s regulatory regime on and before 2008 would eventually have found to be inconsistent with EU requirements.84

79 id., at [320]–[325].
80 SolEs Badajoz GmbH v Kingdom of Spain at [334].
81 id., at [315]–[317].
82 id., at [316], citing Charanne B.V. Construction Investments S.à r.l. v. Kingdom of Spain, SCC Arbitration, Arbitration No. 062/2012, 21 January 2016 at [517].
83 id., at [375]–[444].
84 id., at [441]–[442].
The first set of measures (taken between 2010 to 2013) did not breach the claimant’s legitimate expectations and could not be considered disproportionate according to the definition in Charanne, because they did not ‘remove the essential features of the regulatory regime in place when the claimant invested’. These measures related to an imposition of a cap on the number of hours per year during which PV installations could sell electricity under the FIT, an imposition of a tax on electric energy production, and a change to the inflation index used to update FITs. The tribunal also noted that its conclusion in relation to this first set of measures was aligned with the reasoning of other tribunals in other Spanish RE decisions, such as in Charanne, Eiser and Novenergia II.

The second set of measures (taken between 2013 and 2014), in contrast, both breached the claimant’s legitimate expectations and were disproportionate. These measures eliminated the FITs that had been assigned to the claimant’s plants and changed the basic features of the regulatory regime; remuneration under these measures was uncertain because the FITs were subject to periodic revision, thereby frustrating the claimant’s legitimate expectations for a stable FIT. Further, the measures were disproportionate because they ‘suddenly and unexpectedly removed the essential features of the regime in place when Claimant invested’ and the severe impact on the value of the claimant’s investment exceed that which a prudent investor could have reasonably anticipated.

BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16, 2 December 2019

The claimants, the Spanish subsidiaries of two German companies, that owned and managed wind farms in the province of Zaragoza, Spain, alleged that Spain’s measures between 2012 to 2014 amounted to a breach of the FET standard under Article 10(1) of the ECT.

In contrast to the SolEs Badajoz tribunal, the tribunal here relied significantly on the factual conclusions of the tribunals in previous Spanish RE cases.

The tribunal held that the despite the absence of any specific commitment given by Spain as to the immutability of the FIT regime, the claimants had legitimate expectations that the subsidies would continue, though not to the extent that the subsidies regime of RD 661/2007 would be maintained unchanged for the life of the investment. In this regard, the tribunal noted that the tribunals in previous Spanish RE cases had reached different conclusions in relation to the same regulatory measure.

In NextEra, the tribunal held that the claimants could not have expected, from RD 661/2007 itself, that the regime would never be changed, although it ultimately found that Spain had given specific assurances to such effect to the investors.
In contrast, the tribunals in *9REN* and *Cube Infrastructure Fund* decided that RD 661/2007 itself constituted a clear and specific commitment.

Further, the tribunal found that the measures were not disproportionate, with the exception of Spain’s decision to claw back benefits that had already been paid.

The tribunal held that it was not unreasonable for Spain to calculate subsidies by reference to when a standard facility was regarded to have recovered its investment, the operation costs through market revenues and subsidies received. The tribunal considered 25 years to be an appropriate regulatory life for wind plants and considered that all tribunals in other Spanish RE cases had similarly conclusions, even though those cases did not involve wind turbine plants.

In relation to the claw-back of profits, the tribunal held that this was disproportionate:

> To claw back those profits on the basis of a subsequent judgment that they were ‘excessive’ was inconsistent with the principle of stability in Article 10.1 of the ECT and has not been shown to have been necessary to resolve the tariff deficit problem, which would have been solved in any event by the Disputed Measures without much further delay and without the element of claw-back of payments earlier lawfully made.

In coming to this conclusion, the tribunal agreed with the approach by the RREEF tribunal and noted that different approaches had been taken by the Charanne and Isolux tribunals, which formulated the question as being ‘to what extent the State can modify, with immediate effect, generally applicable regulatory provisions’. The tribunal disagreed with this position:

> But although some claimants may have put it in these terms, that is not the question . . . it is one thing to give new regulatory measures immediate effect for existing installations, and quite another to eliminate future subsidies otherwise payable by reference to amounts lawfully paid and received in earlier years on a quite different basis.

Finally, the tribunal observed that the measures were overall proportionate, by reference to ‘the aim of the legislative amendment, and . . . due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime’. The tribunal agreed with the RREEF tribunal that the only legitimate expectation the claimants could have had was that of a ‘reasonable return’ in terms of Law 54/1997. Therefore, because the internal rate of return after the enactment of the measures was above the pre-tax target of the Spanish regulator and above the RREEF tribunal’s reasonable rate of return calculated, the measures were proportionate.
IV CASES AGAINST THE CZECH REPUBLIC RELATING TO THE PHOTOVOLTAIC SECTOR

The claimants in the arbitrations listed below alleged that the Czech Republic had violated the FET standard by cancelling the legal, tax and regulatory inventive regime that had previously been established in its photovoltaic sector:

a WA Investments Europa Nova Ltd v. Czech Republic, Award, PCA Case No. 2014-19, 15 May 2019;

b Voltaic Network GmbH v. Czech Republic, Award, PCA Case No. 2014-20, 15 May 2019;

c Photovoltaic Knopf Betriebs GMBH v. Czech Republic, Award, PCA Case No. 2014-21, 15 May 2019; and

These decisions are examined together as they concerned the same measures by the Czech Republic, were analysed in an identical fashion by the same tribunal (with respect to the material parts), and the FET obligation in question was also identical (i.e., Article 10(1) of the ECT, cited above).  

In these arbitrations, the claimants asserted that the Czech Republic had violated the FET standard in two ways: by failing to provide a stable and predictable legal framework and by failing to protect the claimants’ legitimate expectations. In addition to this, the tribunal also examined whether the Czech Republic’s actions were taken in a non-transparent manner in violation of the FET standard.

In contrast, the Czech Republic argued, among others, that a mere change of the legal framework applicable to the claimant’s investment, in the absence of a specific stabilisation arrangement or guarantee to that effect, did not amount to violation of the treaty obligation to provide FET. The Czech Republic argued it did not provide a guarantee of stabilisation to photovoltaic investors. The Czech Republic also argued, among others, that legitimate expectations could only derive from specific legislative provisions (whereas in this case the claimant had not referred to specific provisions of the Act on Income Tax), a legislative purpose is not in itself sufficient to create legitimate expectations, even if the purpose itself is clear, and further the claimant anticipated possible legislative changes in the scheme. The Czech Republic argued that there had not been evidence of reliance on the claimant’s part, and in any case any such reliance was not reasonable. In any event, no legitimate expectations were violated, among others because there had not been any drastic, discriminatory or radical change in the regulatory environment.

102 For ease of reference, and unless otherwise stated, references are to WA Investments Europa Nova Ltd. v. Czech Republic.

103 For completeness, the claimant in Photovoltaic Knopf Betriebs GMBH v. Czech Republic also relied on Article 2(1) of the Germany–Czech Republic BIT: see Photovoltaic Knopf Betriebs GMBH v. Czech Republic at [478]. However, no different analysis ensued from this.

104 WA Investments Europa Nova Ltd. v. Czech Republic at [476]–[483].

105 id., at [505]–[513].

106 id., at [515].

107 id., at [527]–[534].

108 id., at [540]–[542].
On the allegation regarding a stable and predictable legal framework, the tribunal distinguished between an express stabilisation commitment in relation to the claimant’s investments (which it did not find present)\(^{109}\) – and a ‘general obligation’ to provide a stable and predictable framework as part of the FET standard (which was held to be present).\(^ {110}\)

The tribunal held that the latter obligation was not absolute and, in the absence of a specific stabilisation promise, a state was not precluded from changing its legislation.\(^ {111}\) In the circumstances, the changes introduced by the Czech Republic were a legitimate exercise of its sovereign right to regulate tariffs in light of the adverse consequences arising from the solar boom in the Czech solar energy sector in or around 2009. In particular, the tribunal noted that even after the change: the fundamental features of the previous incentive scheme remained\(^ {112}\) and the claimants continued to secure a more than reasonable return, and were in fact more profitable than envisaged when the support system was created.\(^ {113}\)

As for legitimate expectations, the tribunal considered the following factors: (1) whether there was an assurance; (2) whether there was reliance on the assurance; (3) whether the reliance was reasonable; and (4) whether the legitimate expectations arising from the aforementioned had been violated.\(^ {114}\) However, none of these were satisfied. First, there was no assurance because, among other things, the relevant legislation, measures and other conduct of the Czech Republic did not indicate or mention that the incentive regime they created were meant to be long-term guarantees or not meant to be withdrawn.\(^ {115}\) Second, even if there had been an assurance, the claimants had not reasonably relied on the same (i.e., the second and third parts) because: (1) there was no evidence that the claimants were aware of the conduct allegedly giving rise to the assurances when they had made their investments; (2) there were warnings that the incentive regime might change; or (3) the wording of documents allegedly giving rise to the assurance were equivocal.\(^ {116}\)

Notably, the tribunal considered that, in any event, the law of the European Union on State Aid precluded any legitimate expectations. This was because: EU law amounts to mandatory rules which would have primacy over the Czech Republic’s domestic law and under EU law, state aid was only permitted after it had been approved by the European Commission. Following from this, the tribunal concluded that there could not have been any legitimate expectations by the claimants because, at the time the investments were made, the incentive regime had not been notified to, and approved by, the European Commission.\(^ {117}\)

Finally, the tribunal considered that the FET standard required there to be transparency, as confirmed by the express text of Article 10(1) of the ECT. However, this was not violated

\(^{109}\) id., at [569], [573].

\(^{110}\) id., at [570]–[571]

\(^{111}\) id., at [571].

\(^{112}\) id., at [574].

\(^{113}\) id., at [577].

\(^{114}\) id., at [583].

\(^{115}\) id., at [585]–[588].

\(^{116}\) This was different in each of the awards, the relevant parts of which are: (1) Voltaic Network GmbH v Czech Republic at [506]–[517]; (2) WA Investments Europa Nova Ltd. v. Czech Republic at [589]–[604]; (3) Photovoltaik Knopf Betriebs GMBH v. Czech Republic at [502]–[513]; and (4) I.C.W. Europe Investments Limited v. Czech Republic at [548]–[557].

\(^{117}\) WA Investments Europa Nova Ltd. v. Czech Republic at [605]–[623].
as there was an obvious need for the incentive regime to be changed and the Czech Republic was as transparent as it could have been in light of the political vacuum until July 2010 and the dramatic increase in photovoltaic plant grid connections shortly after.  

118 id., at [624]–[630].
MOST FAVOURED NATION TREATMENT

Arthur Ma

I  INTRODUCTION

Most favoured nation (MFN) treatment is a core element in bilateral investment treaties (BITs) and other international investment agreements. Like many other standards of investment protection offered under BITs, MFN treatment is designed to avoid discrimination. The purpose of an MFN clause is to provide a mechanism to ensure that each party to a treaty receives at least as favourable terms as the other party offers to any third party.

The increase of investment disputes settled by international arbitration has had a strong impact on the substantive standards of investment protection provided by investment agreements. Before 2000, judicial and arbitral arguments regarding MFN clauses largely focused on the application of its substantive protection arising from the provisions of an investment treaty. Since the Maffezini v. Spain decision before the International Centre for Settlement of Investment Disputes (ICSID) in January 2000, there has been a large shift in the discussion in international investment dispute practice from substantive protections to the possibility of importing more favourable procedural provisions from other third-party BITs, such as international dispute resolution mechanism. While a number of cases have looked into the scope and interpretation of MFN clauses regarding dispute resolution provisions, the decisions among the arbitral tribunals have been inconsistent.

1 Arthur Ma is a partner at DaHui Lawyers.
4 ibid.
While the MFN clause is still a cornerstone of modern commercial treaties,\(^\text{10}\) it has now become a controversial issue in investment treaties and the subject of differing and unexpected interpretations by arbitral tribunals.\(^\text{11}\) Conflicting arbitral awards regarding the interpretation of MFN clauses have created difficulties in accurately assessing commercial and litigation risks for contracting parties.\(^\text{12}\)

This chapter will review the background of MFN treatment, examine arbitral cases with differing decisions on the application of MFN clauses to dispute settlement and finally introduce some recent recommendations on drafting MFN clauses suggested by the United Nations Conference on Trade and Development (UNCTAD) that are likely to shape MFN provisions going forward.

## II BACKGROUND

MFN treatment has been a central pillar of commercial treaties for centuries.\(^\text{13}\) MFN clauses are first found in international trade agreements going back to at least the eleventh century.\(^\text{14}\) The earliest structure of an MFN clause resembling the current form was found in the fifteenth century,\(^\text{15}\) with the use of MFN clauses in investment treaties becoming a common practice in the seventeenth century.\(^\text{16}\) The MFN clause was originally used mainly with the aim of preventing discrimination in international trade. It was then extended to the area of international investments, first appearing in friendship, commerce and navigation treaties, and then BITs, with an aim to promote and protect international investments.\(^\text{17}\)

MFN treatment is intended to establish a ‘level playing field’ and ensure ‘equality of competitive opportunities’ among foreign investors from different countries.\(^\text{18}\) The International Court of Justice (ICJ) also states that the purpose of the MFN clause in BITs is ‘to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned’.\(^\text{19}\)

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\(^{11}\) Nikiëma, p. 1.


\(^{19}\) Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America) (1952) ICJ Rep 176, p. 192.
While there is no universal, internationally recognised definition and form of an MFN clause, as the MFN clause has become a standard of international investment treaties, the International Law Commission (ILC) in 1964 started a multi-year project to compose a set of draft articles on MFN clauses, which was finally published in 1978 as the Draft Articles on Most-Favoured-Nation Clauses (ILC Draft Articles).\(^{20}\) The ILC Draft Articles provide a general analysis of MFN clauses and insight into the ejusdem generis principle (discussed below), which has been used in the interpretation of a number of judicial and arbitral cases.\(^{21}\) Although the ILC Draft Articles is not a binding agreement, it does explore the definition and provide guidance and rules governing the operation of MFN clauses.\(^{22}\)

Article 4 of the ILC Draft Articles on MFN clauses states that: ‘[a] most-favoured-nation clause is a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in agreed sphere of relations’.\(^{23}\)

Article 5 of the ILC Draft Articles defines MFN treatment as follows:

\[
\text{Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting state to a third State or to persons or things in the same relationship with that third State.}\(^{24}\)
\]

The ILC Draft Articles also describe the basic structure of the operation of MFN clauses, including the source\(^{25}\) and scope\(^{26}\) of MFN rights.

According to Article 9 of the ILC Draft Articles, the beneficiary state of MFN treatment can only request for more favourable treatment accorded to a third state when it falls within the limits of the subject matter of the MFN clause. Such article reinforces the \textit{ejusdem generis} principle (meaning ‘of the same kind’), which is a generally recognised principle of international law.\(^{27}\)


\(^{22}\) Radi, p. 758.

\(^{23}\) Article 4 of the ILC Draft Articles.

\(^{24}\) Article 5 of the ILC Draft Articles.

\(^{25}\) Article 8 of the ILC Draft Articles states that ‘1. The right of the beneficiary State to most-favoured-nation treatment arises only from the most-favoured-nation clause referred to in article 4, or from the clause on most-favoured-nation treatment referred to in article 6, in force between the granting State and the beneficiary State. 2. The most-favoured-nation treatment to which the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, is entitled under a clause referred to in paragraph 1, is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.’

\(^{26}\) Article 9 of the ILC Draft Articles states that ‘1. Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause. 2. The beneficiary State acquires the rights under paragraph 1 only in respect of persons or things which are specified in the clause or implied from its subject-matter.’

\(^{27}\) \textit{Anglo-Iranian Oil Co. Case (United Kingdom v. Iran) (Preliminary objection)} [1952] ICJ Rep 93, p. 110.
In the context of the application of MFN clause, many arbitral tribunals have invoked *ejusdem generis* to limit applicability to issues belonging to the same subject matter or the same category of subjects to which the treaty or clause relates. For example, in *Maffezini*, the tribunal explained that ‘if a third-party treaty contains provisions for the settlement of disputes that are more favourable 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 favoured nation clause as they are fully compatible with the ejusdem generis principle’.28 This principle restricts the application of an MFN clause to the subject matter regulated by the treaty in question.

To better understand the scope of application of MFN clauses to be discussed in the following section, it is important to consider the legal nature and qualifications of MFN treatment, which are summarised by UNCTAD as follows:

1. It is a treaty-based obligation that must be contained in a specific treaty;
2. It is a relative standard, which means that it implies a comparative test;
3. It is governed by the ejusdem generis principle;
4. It requires a legitimate basis of comparison, i.e. similar objective situations;
5. It relates to discrimination on grounds of nationality;
6. It requires a finding of less favourable treatment;
7. It operates without prejudice to the freedom of contract;
8. It works differently from the MFN clause in the trade context; and
9. It has to be interpreted in the light of general principles of treaty interpretation.29

### III APPLICATION OF AN MFN CLAUSE TO DISPUTE SETTLEMENT PROVISIONS

In the past two decades, one of the most controversial issues regarding MFN treatment before arbitral tribunals has been whether a party can import procedural rules from a third-party treaty,30 and in particular, whether the MFN clause can allow for the incorporation of dispute settlement provisions contained in a third-party treaty when the wording of the MFN clause does not explicitly provide for such terms.31

#### i Maffezini v. Spain

*Maffezini* was the first case in which a tribunal held that an investor could import favourable dispute settlement provisions from a third-party treaty through an MFN clause. This ICSID arbitration case arose from a dispute between an Argentine investor who had invested in an enterprise in Spain. Spain raised an objection to the jurisdiction of the arbitral tribunal on

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28 *Maffezini*, para. 55.
30 Basic treaty is the treaty with MFN clause, which governs the rights of the beneficiary under the MFN clause.
31 Radi, p. 760.
the ground that the claimant failed to fulfil a condition precedent provided in the Argentina–Spain BIT that required the claimant to first bring the dispute to Spanish courts for 18 months before resorting to international arbitration.32

The claimant failed to meet the condition precedent and averred that the arbitral tribunal had jurisdiction because of the MFN clause contained in the Argentina–Spain BIT provided that: ‘In all matters subject to this agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country’ 33

The claimant pointed out that the Chile–Spain BIT contained no condition precedent equivalent to that contained in the Argentina–Spain BIT. The claimant therefore argued that chilean investors were treated more favourably than Argentine investors in Spain and therefore it relied on the more favourable dispute resolution provisions of the Chile–Spain BIT to forego Spanish courts. The tribunal upheld the claimant’s position.

The tribunal considered that ‘[t]oday 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’.34 The tribunal also welcomed the fact that the ‘application of the MFN clause to dispute settlement arrangements in the context of investment treaties might result in the harmonisation and enlargement of the scope of such arrangements’.35

The subject matter of the MFN clause at issue in Maffezini was particularly broad and sufficiently vague, which explicitly referred to ‘all matters subject to this agreement’.36 Being aware of the revolutionary nature of its decision, the tribunal tried to set limits to the application of MFN clauses:37

As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor . . .

. . . in any event, that 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.38

In addition, the tribunal also emphasised the importance of identifying the contracting parties’ intention and assessing the past practice of states regarding the MFN clauses in BITs with other countries.39

33 Maffezini, para. 38.
34 id., para. 54.
35 id., para. 62.
38 Maffezini, paras 62–63.
39 id., paras 49, 57–58; See also ‘Most Favoured Nation Treatment Application in International Investment Arbitration: A Study on Conflicting Precedence in International Dispute Settlement Procedure’, p. 31.
**ii Plama v. Bulgaria**

The *Plama* case stands in contrast to the *Maffezini* decision. This ICSID arbitration case arose from a dispute between a Cypriot investor and the Republic of Bulgaria, concerning damages caused to a company owned by the investor by the alleged actions of the Bulgarian government.\(^{40}\)

The claimant insisted that the arbitral tribunal had jurisdiction by invoking the MFN clause of the Cyprus–Bulgaria BIT of 1987, and Part V of the Energy Charter Treaty. The Cyprus–Bulgaria BIT was limited to ICSID arbitration of disputes concerning setting the amount of compensation after Bulgarian courts had ruled on the merits of the underlying dispute. By relying on the MFN clause in the Cyprus–Bulgaria BIT, which provided that ‘[e]ach Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states’, the claimant sought to overcome such limitations, by importing the dispute resolution provisions of the Bulgaria–Finland BIT, which provided for wider jurisdiction.\(^{41}\)

In *Plama*, the arbitral tribunal found that the ‘basket of treatment’ and ‘self-adaptation’ of the MFN treatment would lead to ‘the option to pick and choose provisions from the various BITs’.\(^{42}\) The tribunal considered that, in principle: ‘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’.\(^{43}\)

The tribunal further explained that: ‘[d]ispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting states cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context’.\(^{44}\)

However, the tribunal in *Plama* agreed with the decision of *Maffezini* to the extent that there is a need to make a distinction between ‘a legitimate extension of rights and benefits through the operation of MFN clause’ and ‘disruptive treaty-shopping that would be disastrous for policy objectives reflected in specific treaty provisions’.\(^{45}\)

Further, the *Plama* tribunal specifically distinguished its ruling from *Maffezini*, highlighting that *Maffezini* had unique and unprecedented circumstances as it ‘concerned a curious requirement that during the first 18 months the dispute be tried in the local courts’ and the wording of its MFN clause was rather broad and vague. Therefore, the *Plama* tribunal stated that *Maffezini* should not be treated as a statement of general principle providing guidance to arbitral tribunals in future cases where such special circumstances are not present.\(^{46}\)

\(^{40}\) *Plama*, para. 21.

\(^{41}\) ‘Most Favoured Nation Treatment Application in International Investment Arbitration: A Study on Conflicting Precedence in International Dispute Settlement Procedure’, p. 43.

\(^{42}\) *Plama*, para. 219.

\(^{43}\) id., para. 223.

\(^{44}\) id., para. 207

\(^{45}\) id., paras 222–223.

\(^{46}\) id., para. 224.
iii Analysis

Despite numerous criticisms of the Maffezini award and the fears that it raised, several tribunals have followed the same direction to import procedural provisions of more favourable BITs, including in Siemens v. Argentina,47 Gaz Natural v. Argentina,48 National Grid v. Argentina,49 AWG v. Argentina,50 Hochtief AG v. Argentina,51 Suez v. Argentina,52 Impregilo v. Argentina53 and Garanti Koza LLP v. Turkmenistan.54 Notably, several cases in which the importation of dispute resolution provisions was upheld involve Argentina, whose BITs often require investors to bring disputes before national courts for 18 months before international arbitration, which has been considered – at least by the Plama tribunal – practically nonsensical.55

Other arbitral tribunals, such as in Salini v. Jordan,56 Vladimir Berschader v. Russian Federation,57 Wintershall v. Argentina,58 ICS Inspection v. Argentina,59 Daimler v. Argentina,60 Kilic v. Turkmenistan61 and Professor Christian Doutremepuich v. Mauritius,62 have rejected the course set out by Maffezini, and following Plama, decided that an MFN clause could not be used to import procedural rules, unless it is clearly and explicitly indicated in the agreement.

55 Plama, para. 224.
Given that arbitral tribunals seem to be split on this issue, it can be difficult to determine a current practice in international law. For example, Siemens and Wintershall share similar fact patterns and both were against the Argentine government, but the arbitral tribunals reached contradicting decisions. The Wintershall tribunal said that an MFN clause did not apply to dispute resolution provisions ‘unless of course the MFN clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted’, while the Siemens tribunal based its reasoning on the vagueness of the MFN clause in question to conclude that procedural rules can be included unless they are expressly excluded.

In the above cases, to argue in favour of importing other dispute resolution provisions, claimants have mostly focused on the relationship between the availability of arbitration and investor protections as a whole, the overall objectives of investment protection agreements, context of the treaty negotiations, and the language and interpretation of the MFN clause. On the other hand, state respondents have argued that there is a need for clear and unambiguous consent to import procedural elements and that there is no evidence of ‘less favourable’ treatment between the two treaties in question. Furthermore, states frequently highlight the need to limit the extent of MFN clauses to avoid the broader risk of treaty shopping.

Although no consensus has been reached on this issue, the tribunals in Maffezini and Plama, as well as other cases, seem to agree that the application of MFN clause must not lead to treaty shopping, which ‘undermine improved formulations of treaty provisions’. While arbitral tribunals agree about the need to strike a balance between protecting foreign investors and the prevention of treaty shopping, there is still a significant amount of subjectivity on how to balance these contrasting points.

Another fundamental basis agreed upon by all tribunals is that investors will only be able to use MFN clauses as a means incorporating more favourable dispute resolution provisions of other treaties where the circumstances indicate that the contracting states to the primary treaty clearly intended this to be possible. As pointed out in Plama, this will most often be the case where such an intention is clearly and unambiguously expressed by the wording of the MFN clause concerned. However, as most MFN clauses do not contain express language regarding the inclusion or exclusion of dispute resolution provisions, such an intention may also be established by interpretation with reference to those guidelines provided for interpretation of international treaties.

There is no universal tool for interpretation, but guidelines do exist. One of the basic principles of interpretation when interpreting an MFC clause is the ejusdem generis principle mentioned above. Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (VCLT) also provide for general rules of interpretation and other means that can be used for treaty clause interpretation. The ultimate goal of utilising these basic principles of interpretation is to identify the intention of the contracting parties.

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63 Wintershall, para. 167.
64 Siemens, para. 106.
67 Fietta, p. 138.
69 Fietta, p. 132.
IV FUTURE OF MFN CLAUSES

As shown above, many MFN clauses are drafted broadly without a clear indication of their intended scopes, which can lead to conflicting decisions from courts and arbitral tribunals on similar issues. Therefore, recently there has been more significant focus on expressing the parties’ intention more clearly in the MFN clause, with states needing to be ‘careful that the desired effects of newly crafted treaty provisions are not obviated by the application of a broadly worded MFN clause’.70 Further, given the inconclusive decisions of the tribunals in the past two decades, UNCTAD has recently recommended some options for future treaty drafting to address these challenges:71

a to specify in the treaty that the MFN clause does not allow for the importation of substantive or investor-state dispute settlement elements contained in older treaties;
b to specify in the treaty that MFN treatment does not apply to ISDS provisions found in other existing or future third-party treaties;
c to specify in the treaty that the MFN clause does not apply to substantive obligations undertaken in other existing or future third-party treaties;
d to specify in the treaty that certain sectors or industries or certain policy measures are excluded from the MFN obligation through a general exclusion (applicable to both parties) or through country-specific reservations;
e to specify in the treaty that the MFN obligation requires comparison of investors/investments that are ‘in like circumstances’, while preferably setting out criteria for determining whether investors/investments are in ‘like circumstances’;72 and
f simply not to include MFN clause in the treaty;73 such approach preserves a maximum degree of flexibility.

It will be important for those wishing to apply MFN clauses in international arbitration cases to monitor how newly worded clauses may limit their applicability.

V CONCLUSION

MFN treatment has been a basic standard of international economic relations for a long time, providing equal opportunities between nations. Although the application of MFN treatment to international investment is more recent than to international trade, it is broadly recognised as one of the most important provisions of substantive protection in investment treaties.74

70 Simens, para. 136.
72 For example, Azerbaijan–Croatia BIT (2007).
73 For example, the Free Trade Agreement (FTA) between the EU and Singapore (2014), the FTA between India and Malaysia (2011), the ASEAN-Australia-New Zealand FTA (2009), the Japan-Singapore FTA (2002) and the SADC Model BIT (2012).
74 Marie-France House & Fabrizio Pagani, p. 16.
The large number of treaties with varying substantive and procedural standards has created a particular challenge to the question of the scope of MFN clauses.\textsuperscript{75} Since \textit{Maffezini} in 2000, even procedural provisions of third-party BITs can be invoked to settle disputes arising out of a treaty, causing uncertainty and instability for investors and states.\textsuperscript{76}

The application of broadly-worded MFN clauses to dispute settlement mechanisms has given rise to various problems as arbitral tribunals attempt to ascertain the contracting parties’ intention while simultaneously striking a balance between the protection of investors and potential treaty shopping.

There seems to be some concern in the international community that the further extension of the scope of MFN clauses could be endless if states and tribunals do not set limits in a uniform and definitive manner.\textsuperscript{77} While UNCTAD has set out some recommendations which seek to advise states how to limit overly-extensive MFN clauses,\textsuperscript{78} it remains to be seen how these may affect future treaties and arbitral decisions.

\textsuperscript{75} 'Most Favoured Nation Treatment Application in International Investment Arbitration: A Study on Conflicting Precedence in International Dispute Settlement Procedure', p. 73.
\textsuperscript{76} Thulasidhass, p. 24.
\textsuperscript{77} Nikiëma, p. 25.
\textsuperscript{78} UNCTAD, 'Most-favoured nation treatment', p. 84.
Chapter 18

FULL PROTECTION AND SECURITY

Ulyana Bardyn and Levon Golendukhin

I INTRODUCTION

The guarantee of full protection and security (FP&S) appears in the vast majority of investment protection treaties. Although its formulation varies (some treaties refer to ‘full protection’ or ‘constant protection,’ and yet others provide for ‘continuous protection’), the key purpose of this guarantee is to protect the security and integrity of an investment.1

The FP&S standard requires states to refrain from actively interfering with foreign investments, and imposes on the state an obligation of due diligence and vigilance in protecting investments from actions of third parties. These two components are sometimes referred to as the duty to abstain and the duty to protect.2 The former is a negative obligation (i.e., the host state must not engage in actions that may jeopardise the security of aliens). The latter is a positive obligation (i.e., the state’s obligation to protect foreign investments from unlawful activities carried out by third parties on its territory and to punish the wrongdoers).3

II OBLIGATION NOT TO INJURE

i Duty to abstain from interference

It is widely accepted that the FP&S standard imposes on a state hosting a foreign investment the duty to refrain from undue interference with the investment. ‘The Arbitral Tribunal also does not consider that the “full security” standard is limited to a State’s failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself.’4 This duty can be breached when a state takes specific actions that harm the integrity

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1 Ulyana Bardyn and Levon Golendukhin are associates with Eversheds Sutherland (US) LLP, and, until March 2020, they were associated with Dentons US LLP.
4 id.
5 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, (22 July 2008), para. 730.
of the investment, or fails to prevent another state organ from taking such action.\(^6\) One example of interference by the state is undue harm to an investment sustained as a result of raids undertaken by the state’s military or police force.

However, not every claimed harassment purportedly at the hands of state officials immediately constitutes a breach of the FP&S clause. In *Eureko v. Poland*,\(^7\) the tribunal did not see sufficient evidence that the state was orchestrating the harassment\(^8\) and was not convinced that the ‘disturbing’ acts of harassment (which the award does not describe) ‘breached the standard of the full security and protection of the Treaty’.\(^9\)

**ii Whose actions can lead to a breach of the host state’s duty?**

A necessary element of any claim for breach of the FP&S standard for affirmative actions taken by state parties (as distinct from omissions by the state from its duty to protect discussed below) is the determination that the action in question is legally attributable to the respondent state. Only conduct attributable to the state can form the basis of state responsibility and liability. Determinations of state attribution are made with reference to the rules of customary international law of state responsibility. These customary law rules have been codified in the International Law Commission’s (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (the ILC Articles).\(^10\) Under the ILC Articles, there are a handful of principal types of actors from whose conduct state responsibility arises.

First, under Article 4, state responsibility extends to all organs of the state, as well as any person or entity holding the status of state organ under domestic law.\(^11\) State organs are defined in the commentary as ‘all the individual or collective entities which make up the organization of the State and act on its behalf’, and includes organs of the state’s central government and territorial units.\(^12\) Included within the scope of state organs are all branches of all levels of government. Notably, some tribunals have suggested that the involvement of acts by the judiciary engages a new dimension of the duty of non-interference. As the *Frontier Petroleum v. Czech Republic* tribunal elaborated:

_In this Tribunal’s view, where the acts of the host state’s judiciary are at stake, “full protection and security” means that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor. On the other hand, not every failure to obtain redress is a violation of the principle of full protection and security. Even a decision that in the eyes of an outside observer, such as an international tribunal, is “wrong” would not automatically lead to state responsibility so

\(^6\) *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award (12 November 2010), para. 261 (‘[T]he host state is under an obligation to take active measures to protect the investment from adverse effects that stem from private parties or from the host state and its organs.’).

\(^7\) *Eureko B.V. v. Republic of Poland*, Partial Award (19 August 2005).

\(^8\) id., para. 237. See also below for a discussion of attribution of conduct of state officials and other individuals and entities.

\(^9\) id., para. 236. The *Eureko* tribunal, however, noted that a repetition of such harassment at the hands of state officials could establish a failure on the part of the state to prevent undue interference with the investment by state representatives. id., para. 237.


\(^11\) id.

\(^12\) id., Article 4(1) & comment (1).
Second, Article 5 of the ILC Articles holds conduct of persons and entities empowered with and exercising elements of governmental authority to be attributable to the state. This includes state agencies, as well as certain state-owned enterprises exercising public, regulatory or other non-commercial governmental authority. Thus, in addition to the decisions and orders made by the military or police – which are state organs – the conduct of individual soldiers and officers is too attributable to the state.

Further, under Article 8 of the ILC Articles, state attribution applies to conduct by persons or groups of persons under the direction and control of the state. For example, paramilitary groups not officially affiliated with a state but acting under its specific direction or control are deemed to act on behalf of the state. The key determinant of attribution under Article 8 is the degree of control exercised by the respondent state. For example, a paramilitary group’s activities may still be attributable to a state even if it was not acting under the state’s control where the state subsequently adopts the acts as its own, or if the acts took place in the context of a civil uprising and regime change.

iii What is the relationship to other international standards of protection?

Much debate has arisen about the exact contours of the FP&S standard, especially in comparison with other international standards of protection. First, the FP&S standard’s roots in the customary law of diplomatic protection and the state’s obligation to protect foreign-owned property in its territory give rise to questions about whether the standard is equivalent to or greater than the international minimum standard of treatment. Second, the FP&S standard’s at-times flexible interpretation and application by prior investment arbitration tribunals has raised questions about the distinctions between FP&S and other investment protection standards dealing with state actions interfering with foreign investments, such as, for example, the fair and equitable treatment (FET) standard.

iv Distinction from the international minimum standard

The distinction between the treaty-based FP&S standard from the customary law minimum standard of treatment has not always been viewed consistently by different tribunals and publicists. Given that the international minimum standard itself encompasses a duty to provide full protection and security, there has been a split of opinion as to whether the treaty-based standard reiterates the protection available in customary international law, or whether it promises an additional level of protection.

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13 Frontier Petroleum Services Ltd. v. Czech Republic, UNCITRAL, Final Award (12 November 2010), para. 273. See also Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (11 September 2007), paras 360–361.
14 ILC Articles, Article 8.
15 id., Article 8 comments (2), (4), (5).
16 id., Article 11.
One reasoned approach advanced by commentators has been to distinguish standalone FP&S clauses in bilateral investment treaties (BITs) from those where the FP&S clause is subservient to an international minimum standard of treatment clause,18 as for example in the case of Article 1105(1) of NAFTA.19 Conversely, a standalone FP&S clause not stated in the context of the international minimum standard of treatment would carry with it a heightened ‘BIT standard’ that exceeded the customary international law standard.

Ultimately, the more suitable inquiry in most cases is not whether the FP&S clause provides protection beyond the international minimum standard, but what the international minimum standard itself provides. Whatever the gap between the BIT FP&S standard and the customary FP&S standard may have been before, it may now be more of an academic question than one with significant practical consequences. This is because tribunals have increasingly been finding that the traditional conception of the customary minimum standard of treatment has evolved substantially and moved towards the BIT standard.20

v Distinction from FET

The flexible interpretations of FET and FP&S clauses adopted by prior tribunals have in some ways blurred the distinction between FET and FP&S with regard to claims for interference or harm to an investment caused by the state’s exercise of regulatory or other policing powers with the investment. For example, in *Rusoro v. Venezuela*, the tribunal suggested that the lack of any breach of the FET standard meant that ‘such measures can never imply a breach of the FP&S standard, however widely interpreted’.21 Tribunals identifying distinctions of FP&S from FET have thus increasingly reverted their focus to physical integrity and protection. Thus, in a 2019 ICSID decision in *OperaFund and Schwab v. Spain*,22 the tribunal considered that the constant protection and security obligation under the Energy Charter Treaty (ECT) differed from the ECT’s FET protection in that the ECT’s standard of constant protection and security does not imply strict liability but rather obliges states to use due diligence to prevent harassment and injury to investors. Similarly, in another 2019 case under the ECT, *BayWa r.e. v. Spain*, the tribunal stated the constant protection and security provision in the ECT obliges the state to ensure the physical protection of the investor and to protect it against physical violence and harassment, and observed ‘in this respect, at least, it is not a re-statement of the fair and equitable treatment standard in different words’.23

Moreover, the principle of effectiveness counsels in favour of a meaning for FP&S distinct from FET. The principle of effectiveness is a principle of treaty interpretation

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19 North American Free Trade Agreement, 32 I.L.M. 289, 605 (1993), Article 1105(1) (‘Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security’).
20 See, e.g., *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014), para. 567.
21 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016), para. 548.
23 *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), para. 529.
according to which all provisions of a treaty shall be given effective meaning. However, if FP&S was indeed subsumed within FET, that would render the FP&S clause meaningless in the BITs in which it appears alongside the FET clause. If the state parties to the BIT believed that the FP&S standard was subsumed with the FET standard, there would have been no need to expressly include the FP&S clauses in their treaties.

### III OBLIGATION TO PROTECT

#### i What does the obligation to protect comprise?

The unique feature of the FP&S standard is that it requires the host state to not only abstain from conduct that may interfere with the operation of foreign investment but also to affirmatively protect and secure such foreign investment from injurious acts by third parties. As noted above, the latter obligation is sometimes referred to as the duty to protect.

Under the umbrella of that duty, host states have an obligation to prevent injury to investment by third parties. Where the circumstances causing injury nevertheless occur, they have an obligation to take steps repressing the harmful conduct and punishing the perpetrators. These two obligations are sometimes referred to as the ‘duty of prevention’ and the ‘duty of repression’. A failure to take appropriate steps in either regard may result in the host state’s violation of its FP&S obligation.

#### ii Whose actions may give rise to international responsibility of the host state?

Significantly, the host state’s responsibility may be implicated under this rubric even without attribution of the injurious conduct to the state. That is because the internationally unlawful conduct that the state is responsible for in such circumstances is its own inaction that allowed third parties to loot or otherwise injure the investment.

#### iii What level of protection is required from the host state?

The level of protection required from the host state is not absolute. Absent a specific treaty provision obligating the host state to protect foreign investment against ‘any possible loss of value’ caused by persons whose acts could not be attributed to such state, the host state is not responsible for preventing ‘each and every injury’ to foreign investment. Rather, it is required to exercise due diligence in its efforts to protect and secure the investment.

24 AES Summit Generation Limited v. Republic of Hungary, ICSID Case No. ARB/07/22, Award (23 September 2010), para. 13.3.2; Oxus Gold v. Republic of Uzbekistan, UNCITRAL, Final Award (17 December 2015), para. 353.


26 Ampal-American Israel Corp. and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017), para. 245.

27 Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), para. 7.83; see also, Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 181; Allard v. Government of Barbados, PCA Case No. 2012-06, Award (27 June 2016), para. 244; Técnicas Medioambientales Tecom, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), 19 ICSID Rev.-
The concept of due diligence has a long pedigree in international law. Coined by jurist Hugo Grotius in the seventeenth century, it has received wider recognition because of its frequent use in the mixed claims commission jurisprudence in the nineteenth century.28

In the Cutler case (US v. Italy), an American citizen complained about the destruction of his property that resulted from a mob attack in Florence. Italy accepted that it had an obligation of vigilance but not an obligation from preventing any harm. The United States conceded that, to state a claim, it would have to argue that the Italian authorities ‘had knowledge, or should have had knowledge, of the impending attack, or failed to take precautions to thwart it’.29 The arbitrator agreed with the United States’s position, noting:

[I]t cannot be said with absolute confidence that the State is responsible merely because the event could have been averted if sufficient police had been present. It must be established that the situation caused for more police which could have been provided in time and were not. Obviously there will be disagreement about the judgment that was made, and that might have been made, and the most that can be said is that a prima facie case exists when it is established that the facts were known to the authorities and that the action which they took, if any, proved inadequate.30

In Sambiaggio (Italy v. Venezuela), the case’s umpire held that Venezuela could not be found responsible for acts of uncontrolled revolutionists in the absence of any evidence that the state had ‘failed to exercise due diligence to prevent damages’.31 In Youmans (US v. Mexico), the US–Mexican mixed claims commission held that a state may be responsible for damage caused by mob violence where the state failed to punish the persons implicated in the crime.32

Although the early decisions have not defined all the contours of this due diligence obligation, they have identified a series of factors to be considered by tribunals, including the degree of effectiveness of the state’s control over parts of its territory, the degree of predictability of harm and the significance of the interest to be protected.33

This obligation of due diligence was subsequently developed further in modern investment treaty jurisprudence. Investment arbitration tribunals have sometimes
Full Protection and Security

characterised this obligation as one calling for ‘vigilance’, ‘prudence’, ‘reasonable care’, ‘best efforts’ or responsiveness. However, tribunals have generally agreed that the host state is to exercise reasonable care to protect and secure foreign investment. Some tribunals held that the host states are required to use ‘all possible measures that could be reasonably expected’ for purposes of protection and security of investment. Others noted that the obligation of due diligence is ‘nothing more nor less than the reasonable measures of prevention which [a] well administered government could be expected to exercise under similar circumstances’. In determining the parameters of such ‘reasonable measures,’ some tribunals considered it appropriate to take into account the state’s particular circumstances, including factors such as its level of development and stability, and availability of resources and capacity to deal with the circumstances that give rise to the injury.

For example, in Pantechniki v. Albania, the claimant, a contractor selected for infrastructure works in Albania, complained that violent riots taking place over several days had damaged its investment, and that Albania had breached its FP&S obligation by failing to prevent the damage. The sole arbitrator held that the state’s FP&S obligations depend on the state’s ability to accord protection. The arbitrator compared the standard for denial of justice (which traditionally is not calibrated to the host state’s particular circumstances) with that for FP&S, concluding that the two standards are substantially different. The proportionality factor has not been accepted in the context of denial of justice claims because the state’s compliance with those obligations does not depend on physical infrastructure -- 'states are not liable for denial of justice because they cannot afford to put at the public’s disposal spacious
buildings or computerized information banks’, instead what matters is ‘the human factor of obedience to the rule of law’. To apply the same reasoning to the FP&S protection would be ‘parlous’.

In the context of a denial of justice claim, the two standards are fundamentally different in that:

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\text{i}f\text{he minimum requirement is not high in light of the great value placed on the rule of law. There is warrant for its consistent application. A failure of protection and security is to the contrary likely to arise in an unpredictable instance of civic disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and fragile.}^{55}
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The sole arbitrator ruled that it is necessary to take into account the state’s actual circumstances and, in particular, its ability to prevent the complained-of damage to the investment. The sole arbitrator reasoned that ‘it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places.’ Having found that Albania police was ‘unable’ to intervene in the riots, which is ‘crucially different from a refusal to intervene’, the sole arbitrator held that Albania was not in breach of its FP&S obligation.

In a similar vein, the Tulip v. Turkey tribunal noted that ‘[t]he question of whether the State has failed to ensure FP&S is one of fact and degree, responsive to the circumstances of the particular case.’

In sum, when considering the host state’s obligation, ‘tribunals will likely consider the state’s level of development and stability as relevant circumstances in determining whether there has been due diligence.’ An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo. The host state’s security context – including present security risks and the state’s capacity to respond to them – is an important consideration under the due diligence standard. Thus, the tribunal in the Louis Dreyfus v. India case held that the host state merited deference on judgement calls it made about security threats. The tribunal said ‘tribunals should be wary of second-guessing these judgment calls, except where the evidence suggests bad faith, improper intent, or a serious lack of due diligence in response to a reasonably foreseeable and otherwise manageable threat.’

Central to the tribunal’s conclusion was the finding that the state’s security apparatus was acting in good faith in

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42 id., para. 76.
43 id., at 77.
44 id.
45 id., at 82.
46 Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award (10 March 2014), para. 430.
48 id.
50 id.
choosing its approach, based on available information ‘on the foreseeability of unrest in a
particular area, the extent of available resources, and competing demands for allocation of
those resources among other areas potentially also in need of law enforcement protection’.51

iv What types of measures are required from the host state?
The nature of measures required of the host state will vary depending on the circumstances
giving rise (or threatening to give rise) to the injury. Because this standard requires host
states to act with vigilance and due diligence, it also provides these states with a substantial
latitude in deciding what actions to take to prevent or repress unlawful and injurious actions.
A wide spectrum of measures is available to host states, from ‘preventive’52 to ‘coercive’53 or
‘restorative’ measures,54 among others.

IV SCOPE OF SUBSTANTIVE PROTECTIONS
The scope of FP&S protection remains an open question even today. Specifically, there is
a split of opinion as to whether the FP&S standard accords protection to physical security
alone, or whether legal security is covered as well. Though some tribunals – for example,
those in Siemens v. Argentina, Azurix Corp. v. Argentine Republic, Biwater Gauff (Tanzania)
Ltd v. Tanzania, CME v. Czech Republic and Consutel Group v. Algeria55 – have been willing
to extend the FP&S standard to legal protection, others – for example, those in Gold
Reserve v. Venezuela, Saluka v. Czech Republic, AWG v. Argentina and Belenergia v. Italy –

51 id., paras 382 and 383 (‘In general, tribunals should be wary of second-guessing these judgment calls,
except where the evidence suggests bad faith, improper intent, or a serious lack of due diligence in response
to a reasonably foreseeable and otherwise manageable threat. Nonetheless, in appropriate cases, tribunals
must wade into the delicate assessment of this due diligence question.’).
52 Oi European Group B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25, Award
(10 March 2015), para. 580; Toto Costruzioni Generali S.P.A. v. Republic of Lebanon, ICSID Case
No. ARB/07/12, Award (7 June 2012), para. 229; El Paso Energy International Company v. The Argentine
Republic, ICSID Case No. ARB/03/15, Award (31 October 2011), para. 523; Parkering-Compagniet AS v.
Republic of Lithuania, ICSID Case No. ARB/05/8, Award (11 September 2007), para. 355.
53 Oi European Group B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25, Award
(10 March 2015), para. 580; Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania,
ICSID Case No. ARB/07/21, Award (30 July 2009), para. 82.
54 WENA Hotels Limited v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award (8 December 2000),
41 ILM 896 (2002), para. 84; Parkering-Compagniet AS v. Republic of Lithuania, ICSID Case
No. ARB/05/8, Award (11 September 2007), para. 355.
55 Siemens A.G. v. Argentine Republic, ICSID Case No. ARB02/8, Award (6 February 2007), para. 303; Azurix
Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (23 June 2006), paras 406–408; Biwater
Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (24 July 2008),
para. 729; CME Czech Republic B.V. v. Czech Republic, UNCITRAL Arbitration Rules, Partial Award
(13 September 2001), para. 613; Consutel Group S.p.A. in liquidazione v. People’s Democratic Republic of
Algeria, PCA No. 2017-33, Sentence Finale (French) (the tribunal notes that except in the event of an
express commitment made by the state, or its statements that may have generated a legitimate expectation,
the physical and legal security protection standard does not require the state to guarantee the proper
performance of the contractual obligations assumed by a public company).
have been reluctant to do so.\textsuperscript{56} Political and economic volatility frequently impacts a state's legal framework as much as its physical infrastructure, and therefore it is expected that more arbitral decisions addressing this issue will become available in the near future.

\section*{V CONCLUSION}

Once one of the lesser-developed standards of international investment law, FP&S has now become a hallmark of that law. As this investment protection gains greater recognition, it also opens new horizons. For example, historically, FP&S has been viewed as a standard providing for exclusively physical protection to foreign investment, but nowadays many tribunals hold that it also promises legal protection. Though it remains to be seen whether, going forward, the already broad purview of the FP&S protection will be expanded even further, the authors posit that the standard has the potential to assume an even more prominent role in investment law. Cyberattacks, environmental pollution and health crises threaten modern life and investments. The FP&S standard has the capacity to address many of these threats.

The debate about the seemingly innocuous ‘observance of obligations’ or ‘umbrella’ clause is ongoing, despite those who would believe that there is nothing left to be said on the matter. On key questions of scope and effect, the investment arbitration community remains divided. This chapter provides a brief review of the existing authorities and highlights the more recent cases to illustrate the main current open questions.

I INTRODUCTION

The framework for large-scale foreign investment is often set out in a contract with the state or a state-owned entity. These contracts may provide for international arbitration of disputes before a delocalised tribunal. In many cases, however, they do not, and the investor’s recourse is to the local courts or domestic arbitration. If the state of the investor’s nationality has concluded a bilateral investment treaty (BIT), multilateral treaty or free trade agreement with an investment chapter with the state in which the investment has been made, the investor might seek to bring its contract dispute before an international arbitral tribunal, rather than the local courts, and under the treaty rather than its contract. But how to get there when, generally, the violation of a contract governed by internal laws does not alone constitute a violation of international law in the absence of any exercise of puissance publique? Enter the umbrella clause, found in a number of BITs that, on the face of it, requires states to observe obligations that they have entered into with respect to investments.

One of the first investors to seek to enforce an umbrella clause was SGS Société Générale de Surveillance SA (SGS), a Swiss company that provides, among other things, certifications based on pre-shipment inspections of goods. SGS was involved in three separate

1 Anthony Sinclair is a partner and Hafsa Zayyan is an associate at Quinn Emanuel Urquhart & Sullivan, LLP.
2 The clause is commonly seen in investment treaties in the form ‘[e]ach Party shall observe any obligation it may have entered into with regard to investments’: see, e.g., Article II(2) of the 1984 and the 1987 United States Model BITs.
3 See e.g. early ICSID cases such as Holiday Inns v. Morocco, discussed by Pierre Lalive, ‘The First World Bank Arbitration (Holiday Inns v. Morocco) – Some Legal Problems’, British Yearbook of International Law, 123, 156–159, 1980.
observations, under three separate treaties, each invoking a form of umbrella clause and giving rise to diverging findings. In each case, SGS’s claims involved breaches of an underlying pre-shipment inspection contract, although the nature of the disputes differed slightly.

II JURISDICTIONAL DECISIONS

i SGS v. Pakistan

The first of those decisions, *SGS v. Pakistan*, is widely considered to be the first decision discussing the scope and effect of an umbrella clause in any detail. The dispute concerned, among other things, a claim that Pakistan had wrongfully terminated a pre-shipment inspection contract, which itself contained a domestic arbitration clause. The tribunal considered whether it had jurisdiction to hear SGS’s claims under Article 11 of the Switzerland–Pakistan BIT, which required Pakistan to ‘constantly guarantee the observance’ of commitments entered into with respect to investments. The question for the tribunal, as it put it, was whether Article 11 of the BIT transformed ‘purely contractual claims into BIT claims’.

Citing to customary canons of interpretation, the tribunal said that the wording of the clause did not signal the creation and acceptance of a new international law obligation where there was none before. Moreover, Article 11 of the BIT was not placed in the treaty ‘together with the substantive obligations undertaken by the Contracting Parties’ (Articles 3 to 7), but rather was towards the end. Given that the consequences of the claimant’s interpretation were, in the tribunal’s view, so ‘far reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact’, the claimant was required, and had failed, to show ‘clear and persuasive evidence’ that the interpretation it sought had been the BIT contracting parties’ intent.

The ‘indefinite expansion’ concerning the tribunal was explained as the ‘incorporat[ion] by reference [of] an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments including unilateral commitments’. That concern presumed a certain interpretation of the scope of the obligations to which the umbrella clause applies, which remains in contention. In reaching its conclusions, the tribunal also expressed concern that a broad interpretation of the umbrella clause would ‘nullify any freely negotiated dispute settlement clause in a State contract’, and render the substantive provisions of the BIT ‘superfluous’ as, it contended, there would be no need to demonstrate a violation of treaty standards if a simple breach of contract or municipal regulation would suffice to engage international responsibility. The tribunal concluded that it did not have jurisdiction under the treaty to hear SGS’s claims that Pakistan breached the contract.

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6 id., para. 164.
7 ibid.
8 id., paras 165–166.
9 id., para. 169.
10 id., para. 167.
11 id., para. 173.
12 id., para. 166.
13 id., para. 168.
14 ibid.
Although the tribunal’s ruling left considerably in doubt what would be covered by the clause at issue, the tribunal indicated that the clause may be violated in ‘exceptional circumstances’ such as where a state ‘materially impedes’ an investor from going to international arbitration, having previously agreed to such arbitration in a contract.15

ii SGS v. Philippines

The SGS v. Philippines16 jurisdictional decision, rendered a little over half a year later, concerned a dispute about the amount of money owed under a similar contract, which itself provided for resolution of disputes before local courts. The tribunal considered Article X(2) of the Switzerland–Philippines BIT, which required the Philippines to ‘observe any obligation it has assumed’ with regard to investments.

The tribunal said that Article X(2) ‘means what is [sic] says’,17 namely that breaches of legally binding commitments made by states towards specific investments may be brought within the framework of the BIT,18 on the basis that the object and purpose of the BIT (to promote and protect investments) supported an effective interpretation of the relevant clause.19 After reaching this ‘provisional conclusion’,20 the tribunal went on to consider the SGS v. Pakistan tribunal’s findings, noting the distinction between the wording of the two treaties but stating that the SGS v. Pakistan findings were nevertheless still relevant to consider.21 The tribunal criticised the Pakistan tribunal’s reasoning as ‘unconvincing’, and stated that it had failed to give any clear meaning to the clause.22 In particular, the tribunal cautioned that the clause did not transform a domestic obligation into an international obligation.23 It said that the ‘extent or content’ of the obligations to which the umbrella clause might apply were still matters of contract, ascertained and governed by the contractual proper law, which was Philippine law. It was only the performance of the obligation, once ascertained, that was an international law matter.24

Although the tribunal disagreed with the SGS v. Pakistan tribunal’s conclusion that there was no jurisdiction to hear pure contract claims, it had sympathy with the concern that the general provisions of the BIT should not override the specific exclusive dispute settlement arrangements in the contract.25 The tribunal concluded that the claim was for the time being inadmissible, given that the parties had agreed to an exclusive jurisdiction clause in the contract,26 and stayed the proceedings on the basis that the Philippine courts were to decide the scope or extent of the respondent’s obligation to pay before it could make a ruling on the umbrella clause.27

15 id., para. 172.
17 id., para. 119.
18 id., para. 117.
19 id., para. 116.
20 id., para. 119.
21 ibid.
22 id., para. 125.
23 id., para. 126.
24 ibid.
25 id., para. 134.
27 id., para. 155.
How did two tribunals, coincidentally seized with claims from the same claimant, come to such starkly opposite conclusions? Or, in the words of one tribunal, how can we ‘defend the coherence of the arbitration system in the face of apparently contradictory awards involving the same claimant’? Some tribunals and commentators have sought to explain the differences by distinguishing the wording of the treaty clauses, but others – including the tribunal in the final SGS case described next – have found that clauses with the wording that a state shall ‘constantly guarantee the observance of commitments’ can operate as umbrella clauses.

iii SGS v. Paraguay

In the SGS v. Paraguay case, which, like the Philippines case, concerned a dispute about the payment of outstanding invoices, the tribunal considered Article 11 of the Swiss–Paraguay BIT, which contained the same language as the Swiss–Pakistan BIT: ‘constantly guarantee the observance of commitments’. The tribunal stated that it had little difficulty in establishing jurisdiction over the umbrella clause claims based on a reading of the ‘plain language’ of the clause and its ‘ordinary meaning’. The tribunal refused to read into the text any requirement that a breach could only be established through an abuse of state power: Article 11 had ‘no limitations on its face’ and was ‘unqualified’. The tribunal acknowledged that its findings directly contradicted those of the SGS v. Pakistan tribunal, but insisted upon its right to disagree.

The underlying contract in the SGS v. Paraguay case had an exclusive jurisdiction clause in favour of the Paraguayan courts. Unlike the tribunal in the SGS v. Philippines case, the tribunal in SGS v. Paraguay found that the claims were admissible. The tribunal stated that it would be ‘incongruous’ to find jurisdiction but then dismiss the claims on admissibility grounds because ‘the effect would be, once again, to divest the provision of its core purpose and effect, to the same extent as if we had denied jurisdiction outright’.

iv Conclusions

Since the initial SGS decisions, opinion on the proper scope and effect of the umbrella clause has been divided among tribunals and commentators alike. Three often-cited cases decided in the early years following the Pakistan and Philippines decisions espoused the view that an umbrella clause does not confer jurisdiction on a tribunal to hear claims for ‘pure’ breaches
of contract: *Joy Mining v. Egypt*,35 *Pan American v. Argentina*36 and *El Paso v. Argentina*.37 Two of these cases – *Pan American* and *El Paso* – shared the same presiding arbitrator and respondent-nominated arbitrator.38 These tribunals reasoned, among other things, that commercial transactions should be distinguished from state interference with the operation of a contract,39 and that the broad interpretation of the umbrella clause should not be upheld, as it would allow investors to invoke an umbrella clause for trivial disputes.40 Instead, the tribunals suggested that the umbrella clause was intended to safeguard ‘additional investment protections contractually agreed by the State as a sovereign – such as a stabilisation clause – inserted in an investment agreement’;41 however, the umbrella clause would operate only where an independent violation of the substantive treaty standards was also established.42 The tribunals concluded that they had no jurisdiction over pure contract claims.43

The *Pan American* and *El Paso* decisions, published in 2006, caused waves in the international arbitration community, as they appeared amid several awards that had without manifest difficulty found umbrella clauses effective to protect contractual rights.44 The nature of the debate continues to evolve. Although it might be said that the majority of published awards since the *El Paso* and *Pan American* decisions have sought to

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35 *Joy Mining Machinery Limited v. Arab Republic of Egypt (Joy Mining v. Egypt)*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 30 July 2004; cf. also *Salini Costruttori S.p.A and Italsitrade S.p.A. v. Hashemite Kingdom of Jordan (Salini v. Jordan)*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, paras 120–130, where the tribunal distinguished the relevant wording of the Italy–Jordan BIT in concluding that the clause did not have the effect of transforming contractual undertakings into international law obligations. See E Gaillard, ‘A Black Year for ICSID’, TDM 5, 2007; David Foster, ‘Umbrella Clauses: A Retreat from the Philippines’, 2006, 4 Int’l Arb. L. Rev. 100, 107 noting the differences between the residual meaning ascribed to the clauses in *SGS v. Pakistan* and *El Paso v. Argentina* and suggesting a ‘degree of arbitrariness in this approach’.  
38 *Pan American v. Argentina* and *El Paso v. Argentina* were both presided over by Lucius Caflisch, and Brigitte Stern was the respondent’s appointed arbitrator.  
40 *Pan American v. Argentina*, paras 106 and 110; *El Paso v. Argentina*, paras 76, 82.  
42 *Pan American v. Argentina*, para. 112; *El Paso v. Argentina*, para. 84.  
44 *CMS v. Argentina*, n.3, cf. para. 299, cf. *CMS v. Argentina*, Decision on Annulment, 25 September 2007 (the CMS Annulment Decision), para. 97; *Eureko B.V. v. Poland*, ad hoc, Partial Award, 19 August 2005, para. 250; *Noble Ventures v. Romania*, n.28, para. 61, although the tribunal did not find that the parties had in fact concluded a contract in respect of which any violation could be established.
give an umbrella clause substantive meaning over and above the other substantive provisions of the BIT, there are still a number of issues that remain. The remainder of this chapter briefly highlights the direction of the debate on these issues.

III FORUM SELECTION CLAUSES

In *BIVAC v. Paraguay*, the tribunal followed the approach of the *SGS v. Philippines* tribunal, and declined to hear the claim on the grounds of non-admissibility. The dispute concerned Paraguay’s failure to pay invoices under a pre-shipment inspection contract. The tribunal concluded that although the umbrella clause in the Netherlands–Paraguay BIT ‘has to be interpreted in such a way as to give it some meaning and practical effect’ and thus it ‘establishes an international obligation for the parties to the BIT to observe contractual obligation with respect to investors’, the claim was inadmissible because of the forum selection clause in the contract. The tribunal characterised the dispute as a purely contractual claim and concluded that the parties were not ‘free to pick and choose’ only parts of a contract to incorporate into an umbrella clause and to ignore others, especially their contractually negotiated dispute settlement arrangements.

In *Bosh v. Ukraine*, the tribunal stated obiter that it would follow the *BIVAC v. Paraguay* tribunal’s ruling and decline to hear the claim. In *Toto v. Lebanon*, the tribunal declined jurisdiction altogether over ‘pure contract’ claims brought under the umbrella clause on grounds that the underlying contract in question contained a conflicting dispute settlement clause. The dispute arose out of a contract to construct a highway. The claimant alleged both breaches of contract as well as breaches

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47 The tribunal joined to the merits the issue of whether inadmissibility led to the claim being dismissed or stayed.

48 *id.*, para. 141.

49 *id.*, para. 149.

50 *id.*, para. 148.

51 *Bosh International, Inc. and B&P LTD Foreign Investments Enterprise v. Ukraine* (*Bosh v. Ukraine*), ICSID Case No. ARB/08/11, Award, 25 October 2012, paras 252, 259. The tribunal stated obiter that given the Ukrainian courts had terminated the contract in accordance with applicable Ukrainian legislation, the claimants were not now entitled to assert that they had rights under the contract protected by the umbrella clause.

of treaty. In relation to the contract claims, the tribunal stated that it agreed with a view espoused by Judge Crawford, that ‘an umbrella clause is operative and may form the basis for a substantive treaty claim, but that it does not convert a contractual claim into a treaty claim’. For the tribunal, this meant that the umbrella clause did not change the proper law of the contract or its legal incidents, including provisions for dispute settlement, and although the clause could be used as a ‘mechanism for the enforcement of claims’, it did not ‘elevate pure contractual claims into treaty claims’. Thus, it found it had ‘no jurisdiction over the contractual claims arising from the contract referring disputes to Lebanese courts’.

In *Garanti Koza v. Turkmenistan*., which concerned a contract for the planning and construction of a highway, the tribunal indicated that if the claimant’s claims amounted merely to claims for breach of contract, they would be ‘beyond the jurisdiction of an ICSID tribunal and also that they would be subject to the forum-selection clause in the Contract’. However, given that a breach of the umbrella clause was asserted by the claimant in addition to other substantive BIT claims, and was ‘pleaded as a breach of the [BIT]’, the tribunal considered that it had jurisdiction over the umbrella clause claims.

In *Gavrilovic v. Croatia*, the tribunal adopted the analysis of the *SGS v. Paraguay* tribunal when considering whether a forum selection clause in a contract would impact its jurisdiction. The tribunal stated that it would not be ‘fulfil[ling] its mandate’ if it declined to ‘decide whether or not contractual obligations have been observed and, as a consequence, whether or not there has been a violation of the umbrella clause’. A similar approach was followed by the Tribunal in *Stuar Eiendom and ors v. Latvia*, where the tribunal said that unless it was ‘manifest’ that the claims advanced could ‘only be’ contract claims and not conceivably treaty claims, it would not be appropriate for the tribunal to decline jurisdiction – particularly given the claims were made against a number of actors other than the contractual party. In that case, the umbrella clause claim failed on grounds that a contract entered into by a state-owned entity was not an obligation entered into by the state of Latvia.

In *Belenergia v. Italy*, a case brought under the Energy Charter Treaty, the tribunal said that it could not agree with the approach taken in *SGS v. Philippines* in respect of forum selection clauses in the underlying contract, because such an approach ‘would automatically

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53 id., para. 200.
55 ibid. See also *Consutel v. Algeria*, UNCITRAL, PCA Case No. 2017-33, Award, 3 February 2020, under the Algeria–Italy BIT, where the tribunal said that the umbrella clause would not apply where the contract had its own dispute resolution clause – the claimant could not pick and choose which of the contractual obligations with which to comply.
57 id., para. 244.
58 id., paras 246–247.
60 id., paras 856–860.
61 id., para. 422.
63 id., para. 519.
64 *Belenergia SA v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, see para. 355.
deprive the umbrella clause under Article 10(1) ECT of its meaning because each and every contract, even one without a choice of forum clause, would inherently be subject to a State court based on default rules on conflicts of jurisdiction.

In *Nissan Motor v. India*, the tribunal ‘express[ed] discomfort with the dividing line, in this particular context, between jurisdiction and admissibility’. It said that the parties to the Japan–India Comprehensive Economic Partnership Agreement (CEPA) must have understood at the time of its conclusion that many state contracts have their own forum selection clauses, but gave no indication in the text of the treaty that such jurisdiction clauses could be relevant to the scope or reach of the umbrella clause itself. The tribunal declined to read in such a requirement, which it explained would be ‘a significant limitation on the reach of the umbrella clause’. The tribunal recognised that its approach was not the same as the approaches followed by some other tribunals, but it said that it ‘[d]id not see it as its role as delineating a proper sequence for proceedings in two potential venues, each of which has a legitimately designated basis of jurisdiction over a type of dispute’. While it was possible that overlapping sources of jurisdiction could result in parallel proceedings interpreting contractual obligations, the tribunal said that nothing in the CEPA forbade that possibility.

**IV PRIVITY OF CONTRACT**

One of the concerns driving the *SGS v. Pakistan* tribunal had been a fear that a certain interpretation of the umbrella clause might have opened the floodgates to a multitude of claims. Subsequent attention to the scope of obligations protected by the umbrella clause, and the parties who might avail of its protection, suggests those fears may have been overstated.

The majority view appears to be that umbrella clauses cannot be invoked by claimants who are not themselves party to the underlying contract (a question that commonly arises when the claimant’s local subsidiary has concluded the contract, rather than the claimant). In *WNC v. Czech Republic*, the tribunal identified and distinguished the few cases that have allowed claimants that were non-parties to the underlying contract to invoke an umbrella clause.

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65 *Nissan Motor Co, Ltd (Japan) v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, see paras 277–280.

66 id., para. 279.

67 id., para. 280.


69 *WNC v. Czech Republic*, ibid., at paras 331–333 (identifying *Continental Casualty v. Argentina* on the basis, among other things, that the tribunal’s statements in that case referred to general obligations of the host state and not obligations as a matter of contract); and paras 338–339 (identifying *EDF v. Argentina* on the basis that the claimant entities were named obligors in the underlying concession agreement, which ‘imposed a positive contractual obligation on the claimant companies’; thus, the claimants ‘were parties to the transaction, not merely beneficiaries’).
There is less consensus when it comes to the matter of privity concerning the state party to the underlying contract. A number of tribunals have found that where a legal entity separate to the state concludes a contract with the claimant, and under the proper law of the contract, the state itself cannot be found to be a party to that contract, no umbrella clause claim can be brought. These tribunals reject the application of the rules of attribution under general international law, which do not open avenues to sue the state for breach of contractual obligations for which it is not directly bound. In *Impregilo v. Pakistan*, for example, the tribunal found that Pakistan’s Water and Power Development Authority (over which Pakistan exercised control) was properly characterised as an autonomous corporate body, legally and financially distinct from Pakistan by reference to Pakistan’s domestic laws. In rejecting jurisdiction over the claimant’s contract claims, the tribunal said that international law rules on state responsibility and attribution apply only to conduct that violates international law and not to responsibility of a state for the conduct of an entity that breaches a municipal law contract. Similarly, in *Gavrilovic v. Croatia*, the tribunal reminded the parties that the rules of attribution could not operate to impose primary obligations on a state under a contract to which the state was not a party.

Other tribunals, however, have indicated that they would apply a different approach. The tribunals in *Alpha Projektholding v. Ukraine*, *Bosh v. Ukraine* and *CC/Devas v. India* premised their findings that the umbrella clause was inapplicable on the basis that the conduct of the entities involved was not attributable to the state. In *CC/Devas v. India*, the tribunal said that because the relevant state-owned entity that had concluded the contract was not acting as an organ of the state under rules of attribution when entering into the contract, the contract did not constitute an obligation the state had entered into within the meaning of the umbrella clause.

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70 Generally considered to be codified and developed in the ILC Articles, n. 3.
74 *Gavrilovic v. Croatia*, n. 58: para. 856, distinguishing findings made in *Noble Ventures v. Romania* and *Amoco v. Iran*. On the facts, the tribunal found the umbrella clause to be inapplicable, given Croatia was not party to the purchase agreement, and even though the liquidator’s actions were attributable to Croatia, neither that nor the umbrella clause transformed the contract obligations into obligations of Croatia.
75 *Bosh v. Ukraine*, n. 50, para. 246; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, 8 November 2010, Award, para. 424; *CC/Devas (Mauritius) Ltd and ors v. Republic of India* (*CC/Devas v. India*), PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, para. 281.
76 *CC/Devas v. India*, id., para. 281.

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V ‘GOVERNMENTAL’ OR ‘MERELY COMMERCIAL’ CONDUCT

Although there is a line of decisions emphatically rejecting the notion that obligations protected by the umbrella clause must be governmental or sovereign in nature,\textsuperscript{77} in Gavrilovic \textit{v.} Croatia, the tribunal reasoned along the same lines as the CMS \textit{v.} Argentina and EDF \textit{v.} Argentina tribunals,\textsuperscript{78} when it cautioned that not just any breach of contract could amount to a breach of the treaty’s umbrella clause:

\begin{quote}
A failure by a government agency to pay for a box of pencils delivered pursuant to an agreement to provide office supplies, for example, would not come within the reach of Article 2(2), because it would have nothing to do with an investment. But an act of an organ of a state that results in the breach of a contractual obligation relating to an investment of a national or company of the other state party to the BIT does seem to this tribunal to come within the reach of that article, especially where the immediate cause of the breach is an action by an organ of the state other than the agency that is the party to the agreement. This is the situation presented by the facts of this case.\textsuperscript{79}
\end{quote}

VI UNILATERAL COMMITMENTS

The final question is whether, in addition to contractual commitments, relevant obligations may be found in general legislation or unilateral commitments. Although there is arbitral support for the application of the umbrella clause to unilateral or legislative commitments,\textsuperscript{80} several tribunals have found that where the umbrella clause refers to obligations or commitments that have been ‘entered into’ by the state, the BIT is concerned with contractual

\textsuperscript{77} See cases cited at n. 43, SGS \textit{v.} Paraguay, n. 29, para. 168.
\textsuperscript{78} See CMS \textit{v.} Argentina, n. 3, para. 299 (‘not all contract breaches result in breaches of the Treaty. The standard of protection of the treaty will be engaged only when there is a specific breach of treaty rights and obligations or a violation of contract rights protected under the treaty. Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor’); EDF \textit{v.} Argentina, n. 44, para. 940 (‘This does not mean that all contractual breaches necessarily rise to the level of treaty violation.’).
\textsuperscript{79} Gavrilovic \textit{v.} Croatia, n. 58.
\textsuperscript{80} See LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. \textit{v.} Argentina, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras 174–175; (concerning both contractual and legislative commitments) Enron Corporation and ors \textit{v.} Argentina, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 274; Noble Energy \textit{v.} Ecuador, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, para. 157; Total \textit{v.} Argentina, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 13.
obligations alone.⁸¹ In *Micula v. Romania*, the tribunal stated that the question of whether the state had an obligation was a matter of Romanian law, and the claimants had not proven that the relevant commitment was an obligation under such law.⁸²

While arbitral practice appears to have moved on from the early SGS cases and, in particular, there appears to be growing acceptance towards ascribing substantive meaning to the umbrella clause, separate from the other provisions of the treaty,⁸³ there are still a number of unsettled questions. The umbrella clause continues to provide fertile ground for creative lawyering and further debate.

⁸¹ See CMS Annulment Decision, n. 43, paras 90, 95; *Al-Bahloul v. Tajikistan*, n. 44, para. 257; *SGS v. Philippines*, n. 15, para. 121; *Noble Ventures v. Romania*, n. 28, para. 51; *Philip Morris v. Uruguay*, n. 27, para. 478. Several recent analyses in the renewable energy arbitrations have rejected the application of article 10(1) of the Energy Charter Treaty (‘shall observe any obligations it has entered into with an Investor or an Investment of an Investor’) to general legislative measures: *Cube Infrastructure Fund SICAV and ors v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019 (para. 452); *BayWa R.E. Renewable Energy Gmbh And BayA R.E. Asset Holding Gmbh v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 (paras 442–455).

⁸² id., n. 44, para. 447. See also *Garanti Koza v. Turkmenistan*, n. 55, para. 331 (albeit in the context of contract).

⁸³ An interpretation that would render a treaty provision ineffective or meaningless is not likely to be the correct one and should be avoided: Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law*, Longman, 1992, 1280.
Part V

DAMAGES
Chapter 20

COMPENSATION FOR EXPROPRIATION

Konstantin Christie and Rodica Turtoi

I INTRODUCTION

Generally, under customary international law, when a state breaches its obligations or exercises its power in a way that deprives a party of its property, that party is entitled to one of the following forms of reparation: restitution, compensation or satisfaction. Among these forms of reparation, when it comes to investment treaty arbitration (ITA), compensation is most often invoked by claimants as the pre-eminent means of reparation for expropriation. Investors also have a tendency to claim expropriation, as it ‘is the most severe form of interference with property’ (and therefore could potentially lead to a decision awarding them higher damages) and because this type of compensation is typically explicitly provided for in the relevant international investment agreement (IIA).

This chapter explores the treatment of compensation by tribunals composed under IIAs and the various approaches that have emerged. The authors focus on the distinction between lawful and unlawful expropriation to the extent it is still relevant for the applicable compensation standards, and discuss some of the valuation methods most commonly used by the arbitral tribunals to compensate investors for expropriation and the issue of valuation date.

II GENERAL PRINCIPLES OF COMPENSATION FOR EXPROPRIATION

Under international law, the obligation to pay reparation for damages caused by wrongful acts has been considered an essential obligation. The seminal 1928 decision of the Permanent Court of International Justice (PCIJ) in the Chorzów Factory case recognised the function of full reparation in international law and identified the general principles of reparation as follows:

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.

1 Konstantin Christie is a partner, and Rodica Turtoi is an associate at Peter & Kim Ltd in Geneva. The authors would like to thank Esra Ogut for her past contribution to the chapter.
2 Draft ILC Articles on the Responsibility of States for Internationally Wrongful Acts, Article 34.
Compensation for Expropriation

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.5

After the Chorzów Factory case, several tribunals established following the nationalisation in Libya and Iran grappled with the appropriate measures and meanings of reparation, restitution and compensation concepts, without developing a single standard.6 The International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (the ILC Articles) of 2001 arguably represented a first successful attempt in solidifying the main principles of international law on reparation and compensation.

Pursuant to Article 31(1) of the ILC Articles, ‘[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.’ As the commentary to the ILC Articles makes clear, ‘reparation’ has a broad definition that covers both restitution and compensation.

The ILC Articles essentially followed the Chorzów Factory case – determining that reparation meant to ‘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’,7 with restitution deemed to come ‘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’.8 The ILC Articles also adopted the customary international law view that where restitution is unavailable or inadequate, including when ‘the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the status quo ante for some reason,’9 compensation is more appropriate.

In ITA practice, claims for restitution as expressed in the ILC Articles, and the PCIJ’s decisions have largely been replaced by claims for compensation.10 Most of the bilateral and multilateral international investment treaties today contain provisions with respect to the standard of compensation giving comfort and guidance to the investors and tribunals alike in terms of determining the appropriate measure of compensation (or reparation) to be provided to an investor.11 Further, many situations involving violations of IIAs do not allow for a restoration of the status quo ante, leaving only compensation as an option. Therefore, the more pertinent question in recent ITA practice has been the relevance of the distinction

5 Factory at Chorzów (Germany v. Poland), Merits, 1928 PCIJ (Ser. A) No. 17 (13 September), Composition of the Court: President Anzilotti; Former President Huber; Judges Lord Finlay, Nyholm, de Bustamante, Altamira, Oda, Pessoa; Deputy Judge Beichmann; National Judges Rabel, Ehrlich.
6 For further discussion on the historical development of the compensation standard, see I Marboe, Calculation of Compensation and Damages in International Investment Law, 2017, pp. 44–50.
7 ILC Articles, commentary 2 to Article 31; See also S Ripinsky and K Williams, Damages in International Investment Law, 2015 (reprinted), p. 53.
8 M W Friedman and F Lavaud, Damages Principles in Investment Arbitration in the Guide to Damages in International Arbitration, 2017, page 97; ILC Articles, commentary 3 to Article 35.
9 ILC Articles, commentary 4 to Article 35.
11 I Marboe, p. 46.
between lawful and unlawful expropriation with respect to the determination of an applicable standard of compensation and the valuation method (including the valuation date). These subjects will be discussed in more detail below.

III  THE IMPACT OF THE UNLAWFUL NATURE OF EXPROPRIATION ON COMPENSATION

  i  Whether the payment of compensation is a prerequisite for lawful expropriation

Examination of recent ITA cases demonstrates that whether an expropriation is lawful or unlawful can have a significant impact on the applicable valuation method and the recovery process for the investor.

Traditionally, expropriation was deemed lawful only if it has been followed by compensation. However, over the years, and especially in the postcolonial debates, some commentators and tribunals started considering expropriation lacking the payment of compensation as lawful. With the proliferation of bilateral investment treaties (BITs) and other IIAs providing for specific mechanisms of compensation for lawful expropriation, the distinction has lost some of its poignancy; however, some variations in the treatment of this issue by tribunals remain.

Several decisions from the cases of nationalisation by Venezuela provide useful examples. Thus, in Mobil Cerro Negro v. Venezuela, the dispute arose out of taxation and eventual nationalisation of two oil projects in which the claimants had interests, and subsequent disagreements concerning the amount of compensation owed to the investor. It was not controversial that Venezuela made proposals during the negotiations with the investors but did not make any payment. The tribunal considered that compensation not being paid was insufficient to find that the expropriation was unlawful, commenting that:

> the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful. An offer of compensation may have been made to the investor and, in such a case, the legality of the expropriation will depend on the terms of that offer. In order to decide whether an expropriation is lawful or not in the absence of payment of compensation, a tribunal must consider the facts of the case.

Having reviewed the evidence before it, the tribunal found that the claimants did not demonstrate that the proposals made by Venezuela were incompatible with the requirement of ‘just’ compensation as required under the BIT and that, therefore, an unlawful expropriation did not occur.

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12 id., p. 55.
13 See for instance Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27, Award of 13 November 2019, Tribunal: Gabrielle Kaufmann-Kohler (President), Stanimir A Alexandria, Inka Hanefeld, para. 368, where the tribunal concluded that ‘It is undisputed that Hungary has not compensated the Claimants for the expropriation of their statutory pre-lease right. Thus, the expropriation is unlawful for lack of compensation. Whether an expropriatory measure is unlawful for additional reasons may have an impact on the calculation of damages in certain instances.’
16 Mobil Cerro Negro v. Venezuela, para. 301.
In *Tidewater v. Venezuela*, the tribunal engaged in a similar analysis. After noting that the claimants agreed that their investment was expropriated for a public purpose, it analysed whether such expropriation was lawful or unlawful.\(^{17}\) The tribunal recalled a number of cases and scholarly opinions that considered that an expropriation only requiring fair compensation was lawful, and found that in the given case the expropriation represented a ‘provisionally lawful expropriation’ until the determination of compensation due in accordance with the BIT.\(^{18}\) The tribunal also rejected the claimants’ argument that the expropriatory decree limiting the compensation due to investors to the book value of the investment was contrary to the standard of ‘market value’ under the BIT.\(^{19}\)

However, in *Rusoro Mining v. Venezuela*, the mere offer by the state to provide compensation limited to the net worth of the expropriated companies and unsuccessful negotiations for six consecutive months were found to be insufficient to comply with the terms of the BIT.\(^{20}\) As part of its analysis, the tribunal found that although Venezuela made an offer to compensate Rusoro, this offer – which was even below the cap provided for in the Nationalisation Decree – was found insufficient to render the expropriation lawful, especially where the amount offered was never paid or deposited.\(^{21}\)

Similarly, in *Koch Minerals v. Venezuela*, the tribunal agreed in principle with the approach taken by the ICSID tribunal in *Mobil Cerro Negro v. Venezuela* that the lack of paid compensation does not in itself render an expropriation unlawful. However, the tribunal noted that in the case before it, Venezuela did not make ‘any meaningful offer of compensation’ or ‘any meaningful procedure for compensation’ that would satisfy the ‘effective and adequate compensation’ requirement of the BIT. The tribunal therefore considered the expropriation as unlawful.\(^{22}\)

As the cases above demonstrate, the offers or the circumstances under which the non-payment of compensation occurred still remain relevant for the distinction between lawful and unlawful expropriation. The timing of the offer and the length of negotiations may have an effect on the tribunals’ findings as to whether an expropriation is lawful. In each case, the tribunals tend to consider the facts and the specific wording used under the agreements as suggested in the *Mobil Cerro Negro v. Venezuela* decision.

\(^{17}\) *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe CA et al v. The Bolivarian Republic of Venezuela*, Award of 13 March 2015, ICSID Case No. ARB/10/5, Tribunal: C McLachlan (President), A R Sureda, B Stern, paras 122–146.

\(^{18}\) *Tidewater v. Venezuela*, paras 141; 145–146.

\(^{19}\) *Tidewater v. Venezuela*, para. 145.


\(^{21}\) *Rusoro Mining v. Venezuela*, para. 408.

\(^{22}\) *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, Award of 30 October 2017, ICSID Case No. ARB/11/19, Tribunal: V V Veeder (President), M Lalonde, Z Douglas, paras 7.28–7.29. See also *Bear Creek Mining Corporation v. Republic of Peru*, Award of 30 November 2017, ICSID Case No. ARB/14/21, Tribunal: K-H Böckstiegel (President), M C Pryles, P Sands, paras 448–449, where the tribunal held that ‘Article 812.1 of the FTA provides that an expropriation, in order to be lawful, must be effected in a non-discriminatory manner and on prompt, adequate and effective compensation. It is undisputed that Supreme Decree 032 did not provide for any compensation to Claimant. Therefore, also for this reason, the Decree is a breach of the FTA. . . . In view of its above considerations, the Tribunal concludes that Supreme Decree 032 constituted an unlawful indirect expropriation, in violation of Article 812.1 of the FTA.’
The distinction between lawful and unlawful expropriation in turn bears on the applicable standard of compensation. Scholars generally agree that it has been ‘rightly pointed out that compensation of lawful and unlawful expropriation cannot be the same’. 23 Hence, the distinction between lawful and unlawful expropriation could be relevant for valuation purposes because the resulting compensation may be different. 24

Notably, most of the provisions and guidelines for awarding compensation under IIAs today deal with lawful expropriation and usually do not contain separate standards of compensation for unlawful expropriation. 25 Thus, questions arise as to the differences that apply to the applicable standard of compensation with respect to unlawful expropriation.

On this topic, the decisions of tribunals relating to the applicable valuation standards diverge significantly. 26 One often-cited decision in this respect is *ADC v. Hungary*, where the tribunal emphasised the difference between lawful and unlawful expropriation and held that:

*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.* 27

The tribunal further noted that the BIT did not contain rules on the issue of the standard of compensation for an unlawful expropriation and stated that the default standard contained in customary international law would apply in this case. 28 Accordingly, the tribunal applied the *Chorzów Factory* standard to compensate the claimants. 29

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26 S T Ratner classified the decisions in terms of remedies provided into four groups: Group 1 – Compensation based on Treaty Formula, Silence on the Lawful/Unlawful Distinction; Group 2 – Lawful/Unlawful Distinction Noted, but Damages the Same as a Legal Matter; Group 3 – Lawful/Unlawful Distinction Noted, but Treaty Formula Used Due to Special Facts; and Group 4 – Lawful/Unlawful Distinction Noted, with an Effect on Damages. See S T Ratner, ‘Compensation for Expropriations in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction’, the American Society of International Law, 2017, pp. 15–17.

Other tribunals, such as in *Rumeli Telekom v. Kazakhstan*, *Siag v. Egypt* and *Koch Minerals v. Venezuela*, citing practical and other reasons, did not consider the relevance of the distinction between lawful and unlawful expropriation to be significant in terms of the applicable standard of compensation.

What is then the practical significance of the finding of unlawful expropriation to the investors? Ripinsky and Williams summarise the consequences of the unlawful qualification in three main points:

- in case of unlawful expropriation: 1) the primary remedy would be restitution, not compensation; 2) if the value of the expropriated property has increased between the date of the taking and the date of the arbitral decision, this increased value is to be awarded; 3) compensation may include incidental expenses or other consequential damages.

As seen from this enumeration, investors may benefit from the finding that an unlawful expropriation took place. Another potential benefit is that tribunals may award higher amounts as punitive or moral damages. Although international practice does not generally

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31 ConocoPhillips and others v. Venezuela, Decision on Jurisdiction and the Merits of 3 September 2013, ICSID Case No. ARB/07/30, Tribunal: K Keith (President), L Y Fortier, G Abi-Saab, paras 342–343.
33 Tidewater v. Venezuela, paras 141–142.
35 Caratube International Oil Company LLP and Devinci Salah Houmani v. Republic of Kazakhstan, Award of 27 September 2017, ICSID Case No. ARB/13/13, Tribunal: L Lévy (President), I Aynès, J Sales, para. 1082 et seq.
36 Bear Creek v. Peru, paras 448–449.
38 Rumeli Telekom AS and Tekim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan, Award of 29 July 2008, ICSID Case No. ARB/05/16, Tribunal: B Hanotiau (President), S Boyd, M Lalonde, para. 793.
39 Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, Award of 1 June 2009, ICSID Case No. ARB/05/15, Tribunal: D A R Williams (President), M C Pryles, F Orrego Vicuña, para. 541.
40 Koch Minerales v. Venezuela, para. 9, 194.
41 S Ripinsky and K Williams, pp. 86–87.
42 I Marboe, p. 78. To date, only two tribunals have awarded moral damages – in *Desert Line v. Yemen* (Award of 2008) and *Benvennuti & Bonfant v. Congo* (Award of 1980) – although more claimants have put forward moral damages as one of the claims. See further I Marboe, p. 315 et seq.
recognise punitive damages, tribunals’ decisions awarding higher damages and lost profits in the case of unlawful expropriation have been considered to represent a deterrent effect against the unlawful conduct of states akin to punitive damages.

In summary, it appears that although there is a trend towards recognising the distinction between lawful and unlawful expropriation with respect to the financial consequences, case law still does not provide a clear guidance in terms of standard of compensation applied in the case of unlawful expropriation, especially as this applies to valuation standards and valuation dates used to award appropriate compensation.

ii Methods of compensation for unlawful expropriation

Most commonly, in cases of expropriation, arbitral tribunals are requested to award claimants the fair market value (FMV) of their investment as compensation. It has been noted that the FMV determines ‘how much the asset is worth, or would be worth on the market’. As the Crystallex tribunal recently observed:

> it is well-accepted that reparation should reflect the "fair market value" of the investment. Appraising the investment in accordance with the fair market value methodology indeed ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is reestablished.

Because compensation is but one form of reparation, the FMV standard would appear to be an appropriate standard for the measure of such compensation. However, a tribunal in another recent ICSID case observed that the FMV standard is only ‘sometimes applied . . . in case of unlawful expropriations’. Yet, in its 2012 study, the United Nations Conference on Trade and Development concluded that:

> While in theory, compensation for lawful expropriation should be different from reparation for an unlawful one, in many cases the two are determined by reference to the same fair market value of the expropriated investment.

While FMV is defined by multiple sources of secondary international law, it is often referred to in a significant number of IIAs and model BITs in the context of the expropriation clause.

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43 The tribunal in Siag v. Egypt explicitly rejected the claimants’ request for punitive damages. Siag v. Egypt, paras 544–546; Bear Creek v. Peru, para. 657. See also Marboe, p. 79.
44 See Bear Creek v. Peru, para. 596, stating that ‘damages for an unlawful expropriation should at least be as much as the compensation for a lawful expropriation.’
46 S Ripinsky and K Williams, page 188. This is confirmed by the tribunal in Magyar Farming v. Hungary, see footnote 13, para. 405: ‘It is uncontroversial that the fair market value of an asset is a price at which the asset would change hands between a willing seller and a willing buyer in an arm’s length transaction’.
50 See, for example, the World Bank Guidelines on the Treatment of Foreign Direct Investment that indicate: ‘In the absence of a determination on agreed by, or based on the agreement of, the parties, the fair market
For instance, Article 6 of the 2012 US Model BIT provides that ‘[t]he compensation . . . shall . . . be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place’. The 2004 Canadian Model BIT includes virtually the same language as its southern neighbour.\(^{51}\)

To determine the FMV of an investment that was expropriated, several valuation methodologies are used. The most common method used by the markets is the discounted cash flow (DCF) method that represents an income-based approach to valuation that ‘generates the value of an asset at a particular date by computing the present value of earnings the asset is likely to generate during its useful life’.\(^{52}\) The DCF method has been recognised in investment arbitration as an efficient and realistic valuation method for assessing the FMV.\(^{53}\)

Although the DCF method ‘is considered to be theoretically the strongest’,\(^{54}\) given the uncertainties involved, other valuation methods were accepted by tribunals in certain expropriation cases, such as the book value of a business or an asset, the replacement value, the comparative transactions method\(^ {55}\) or the market-based approach.\(^ {56}\) In other instances, the tribunals opted for an FMV based on the ‘amounts actually invested by Claimant’.\(^ {57}\)

iii The valuation date

The valuation date plays a significant role in the valuation of an expropriated investment, principally because ‘[t]he value of an object changes constantly in the course of time.’\(^ {58}\) Numerous model BITs and IIAs specify the valuation date in their clauses dealing with expropriation, that is, typically selecting as the valuation date the date on which the expropriation occurred or ‘the date before the impending expropriation became public

value will be acceptable if determined by the State according to reasonable criteria related to the market value of the investment, i.e., in an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.’ See also the International Glossary of Business Valuation Terms (National Association of Certified Valuators and Analysts) that defines Fair Market Value as follows: ‘the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts’.

\(^{51}\) See Article 6 of the US Model BIT (2012); Article 13 of the Canadian Model BIT (2004).

\(^{52}\) S Ripinsky and K Williams, pp. 195–196.

\(^{53}\) W Peter, ‘Compensation and Damages – What is different in Investment Arbitration?’ in: ASA Special Series No. 34, May 2010, p. 193. See also S Ripinsky and K Williams, p. 201, noting that investment tribunals are generally cautious in using the DCF method.

\(^{54}\) S Ripinsky and K Williams, p. 193.


\(^{56}\) In the Crystallex award, the tribunal used the ‘stock market approach’, in which the tribunal’s wording ‘reflects the market’s assessment of the present value of future profits, discounted for all publicly known or knowable risks (including gold prices, contract extensions, management, country risk, etc.) without the need to make additional assumptions’ (para. 890).

\(^{57}\) See, for instance, Bear Creek v. Peru, para. 604. For further examples, see I Marboe, pp. 290–294.

\(^{58}\) I Marboe, p. 129.
knowledge, whichever is earlier’. In the two cases mentioned above where the tribunals held that the expropriation was lawful, the ‘recovery was limited to fair market value of the asset at the moment of dispossession’.

The practice is more nuanced and less straightforward when the expropriation is deemed unlawful, as the tribunals have more leeway to depart from provisions of the relevant BIT. In addition, it is established that the tribunals ‘are not bound to accept a party’s proposed date of valuation’. In particular, the tribunals dealing with unlawful expropriation ‘have been increasingly confronted with the issue of increases in value of property after an expropriation’. For instance, in two such cases against Venezuela and one against Hungary, the tribunals considered that the valuation date must be the date of the award. Similarly, the *Yukos v. Russia* tribunal held that ‘in the event of an illegal expropriation an investor is entitled to choose between a valuation as of the expropriation date and as of the date of the award’ and decided that the date of the award was appropriate as it yielded a higher value. In this sense, very recently, the tribunal in *Magyar Farming v. Hungary* noted that ‘a finding that expropriation is unlawful for reasons other than the lack of compensation may entitle a claimant investor to request compensation for the value of the expropriated asset on an *ex post* basis, i.e. on the date of the award’.

In creeping expropriation cases, where a series of expropriatory measures are found to constitute a ‘taking’, establishing the time of the expropriation and, subsequently, the valuation date, becomes less obvious. Marboe observes that the tribunals have taken different approaches in setting the valuation date, with one tribunal deciding that the first action or omission that led to the breach is determinant, with another tribunal making a discretionary choice for a date that it considered ‘fair and reasonable’, and several tribunals relying ‘on the last date of the actions which in their totality amounted to an indirect expropriation’.
The risk of double counting in function of the approach favoured by the tribunal

When dealing with DCF and compensation for lost profits, the tribunals run the risk of awarding a double compensation. This situation can be the result of the wrongful application of the distinction between the concepts of *damnum emergens* (invested capital) and *lucrum cessans* (lost profits).\(^68\) The double counting problem appears where the DCF method is used by the tribunal to compensate the investor for lost profits only (and in addition to *damnum emergens*), because ‘a DCF calculation does not simply measure lost profits, but includes by definition both lost profits and the recovery of the investment value’.\(^69\) To avoid the double counting, Marboe suggests that ‘international investment tribunals should either award amounts that represent the investment undertaken or compensate for the lost future income’.\(^70\)

Proving past profits to demand lost future profits

Another common issue in FMV-based valuations and those based on DCF is whether past profits have to be demonstrated to be able to claim lost profits for the future.\(^71\) Generally, all investment tribunals would usually expect a track record of profitability or at least reasonable assurances of profitability in the future on the basis of all circumstances, such as concession fees, royalties and stabilisation clauses. The commentary to ILC Article 36(2), which provides that ‘[t]he compensation shall cover any financially assessable damage including loss of profits insofar as it is established,’ notes the following:

*In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable. This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.*\(^72\)

The above comments target a notion of predictability because compensation of lost profits involves an element of future damages, which becomes the governing principle and allows for award of lost profits even in the absence of past profitability.\(^73\)
CONCLUSION

As a brief review of the most recent ITA jurisprudence demonstrates, differences continue to exist as to the applicable standard for compensation for expropriation. Often, this is driven by the particular facts of a case, and no one measure or method can cover all of the possible factual scenarios, even though some consensus begins to emerge. However, on the issue of compensation for unlawful expropriation, all parties would benefit from more clarity and consistency in the ITA jurisprudence and model IIAs. One would hope that such a standard might soon evolve with increased scrutiny of IIAs and the decision-making process within arbitral tribunals.
Chapter 21

PRINCIPLES OF DAMAGES FOR VIOLATIONS OTHER THAN EXPROPRIATION

Ruxandra Ciupagea and Boaz Moselle

I INTRODUCTION

In another chapter of this book, ‘Compensation for Expropriation’, Konstantin Christie and Rodica Turtoi discuss the issue of compensation for expropriation from a legal perspective. This chapter is complementary in both subject matter and approach. We proceed from the perspective of economists who do not claim to make legal judgments, and we address the assessment of damages in treaty violations other than expropriation.

We focus on four key questions that, in our experience, arise in most disputes that require the assessment of damages, albeit with differing weights depending on specific circumstances:

a What are the fundamental standards for assessing damages?
b What is the date at which damages should be assessed (the date of assessment)?
c How should estimates of losses incurred at dates before or after the date of assessment be brought forwards or backwards to the date of assessment?
d What interest should be applied to bring the damages estimate forwards from the date of assessment to the date of the award?

This chapter will address each of the four questions in turn. Our discussion is certainly not exhaustive. In any specific matter, a quantum expert will need to undertake further inquiry, guided where necessary by instruction on relevant matters of fact and law, to identify and correctly apply the relevant principles.

i Standards for assessing damages

The choice of standard for assessing damages is a question of law. To our understanding and in our experience, the relevant standard for assessing damages arising from investment treaty violations is usually that of ‘full reparation’. In the frequently cited Chorzow case, the Permanent Court of International Justice stated that ‘reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed.’

1 Ruxandra Ciupagea is a senior vice president and Boaz Moselle is an executive vice president at Compass Lexecon.
2 We only address issues of financial damages (as opposed to, for example, restitution in kind).
3 As a general matter, these questions are equally relevant to both expropriation and other investment treaty violations (and indeed to damages in commercial disputes).
4 Case concerning the Factory at Chorzow (Merits), PCIJ, Series A, No. 17, 1928, p. 47.
The full reparation standard gives rise to a number of questions. One issue is the application of the requirement to compensate for ‘all consequences’, which can give rise to debate as to the level of certainty required before a tribunal will find it appropriate to include certain heads of damages. Here, expert evidence may be relevant to help the tribunal assess the level of certainty, although the question of what level of uncertainty or ‘remoteness’ disqualifies a claimed consequence from meriting compensation is, again, one of law.

A second issue arises from what ‘the situation which would, in all probability have existed if that act had not been committed’ refers to. It begs the question of what date should be considered in making this determination. Is it to restore the situation that would have existed at the date of the treaty violation (the date of violation), at the date of award or at some other point in time?

From the perspective of financial damages, full reparation requires awarding the damaged party with a sum of money that leaves them in the same financial position as if there had been no violation. To estimate the damages required to effect full reparation, quantum experts generally adopt a methodology that, as a first step, maps out two scenarios:

a. The ‘actual’ scenario, which represents the circumstances since the violation occurred. The actual scenario often extends beyond the time at which the expert is performing his or her analysis, and may therefore require forecasting of future events.

b. The ‘but-for’ or ‘counterfactual’ scenario, which represents what would have happened in the absence of the violation. The but-for scenario also often extends into the future, and may therefore require both ‘back-casting’ and forecasting of what past and future outcomes would have been. In some circumstances, there may be significant uncertainty as to what those outcomes would have been, and experts address that uncertainty in various ways that we do not discuss in this chapter.

Thus, we may informally define damages as the sum of money that would make the investor indifferent between the actual scenario (defined to include receipt of that sum of money at the relevant date, the choice of date being an issue that we discuss in Section I.ii) and the but-for scenario. In other words, damages be defined as the sum of money that would place the investor in the same financial position in the actual scenario as it would have held in the but-for scenario.

Having carried out this first step, a number of different approaches are possible, including:

a. estimating the value of the investor’s assets as at the date of assessment in both the but-for and the actual scenarios. Damages as at the date of assessment are then given by the difference between these two numbers. For example, if the investor has an asset that would have been worth US$200 million absent the violation, but instead is worth US$150 million at that date, prima facie, the damages are US$50 million; or

b. estimating the difference between the cash flows that the investor would have enjoyed in the two scenarios, and value that difference to estimate damages (using the method

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5 The definition leaves open the question of whether it is the specific investor, or a hypothetical ‘typical’ investor, who should be considered.

6 We do not touch on additional considerations that might give a different answer (notably the issue of mitigation).
of discounted cash flows (DCF)).\(^7\) For example, if the violation deprived the investor of annual cash flows of US$10 million for five years, damages are the value as at the date of assessment of the five years of annual US$10 million cash flows (the expert applies financial techniques to estimate a figure for this value).

These two approaches do not differ in terms of what is being measured. In both cases, the expert estimates damages as the difference between (1) the financial position in which the investor is actually in; and (2) the financial position that the investor would have been in but for the actions against which damages are claimed. However, from a practical and technical perspective they have some important differences. In particular, the second approach has the advantage that a person does not have to assess the value of the investor’s asset in the two scenarios, only the value of the difference in cash flows. Any elements of the cash flows that are the same across both scenarios are irrelevant and can be ignored.

In some cases, this is a great convenience. For example, in recent years, there have been many disputes arising from investments in renewable generation in various EU Member States. The ‘typical’ picture is that an investor builds renewable generation assets (e.g., solar PV or wind energy generation) under a mechanism whereby it would obtain revenue over many years from ‘support payments’ from the public authorities, as well as from the sale of electricity. At some point, the authorities lower the level of those support payments, and investors claim that those changes are in violation of applicable treaty obligations. To assess damages in this case following the first approach, the assets would have to be valued, and their value at a particular date might depend on a number of uncertain factors such as the expected future level of costs, the expected future level of market prices for electricity and the expected technical life of the plant. However, the impact of the alleged violation is much more certain: it involves the removal of a certain stream of support payments, whose level and longevity was clear.\(^8\)

This is one important difference between estimating damages in the context of expropriation relative to other violations. In cases of expropriation, the investor’s interest in the expropriated asset is typically valued, rather than comparing but-for and actual scenarios, and the option of looking only at the difference in cash flows therefore does not exist (formally, it might be said that it exists because cash flows can be compared in the but-for scenario with cash flows of zero in the actual scenario, but in practice that amounts to saying that the asset is only valued in the but-for scenario).

To value an asset under the first approach, experts typically rely on some combination of the DCF methodology and (depending on the availability of appropriate comparators) certain benchmarking techniques. For example, a company can be valued at a given date by finding a group of comparable companies and estimating the average ratio of enterprise

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7 In brief, DCF methodology entails forecasting cash flows over time, discounting so as to bring them all to a single date (usually, the chosen date of assessment, as discussed later in this chapter), and then summing. Discounting is performed through the use of a ‘discount rate’. For example, if the annual discount rate is 5 per cent, the US$1 million to be received a year from now has a ‘present value’ of US$1 million divided by 1.05 (i.e., approximately US$952,000); whereas US$1 million received a year ago has a present value of US$1 million multiplied by 1.05 (i.e., US$1.05 million). The DCF methodology is explained in detail in any corporate finance textbook (e.g., Richard A Brealey, Stewart C Myers, Franklin Allen, Principles of Corporate Finance, 13th edn, McGraw Hill).

8 The total level of support payments would typically depend on annual plant output, and is therefore not 100 per cent certain. In our experience, however, reliable forecasts exist.
value to earnings before tax, interest, depreciation and amortisation (EBITDA) for those companies. That ‘multiple’, applied to the company’s EBITDA, gives an estimate of its enterprise value. Only the DCF approach is discussed in this chapter.

ii Date of assessment

The standard of full reparation requires compensation so as to ‘reestablish the situation which would, in all probability have existed if that act had not been committed’, but does not identify the date at which the situation should be re-established (i.e., the date of assessment). We consider two possible approaches to the choice of date:

a The ex post approach: estimate the sum of money ‘US$X’ such that if the investor is given that sum on the date of the award, it will be in the same financial position as it would have been had the violation not occurred. The date of assessment is therefore the date of the award. Under the ex post approach, information available as at the date of award is used, not information that only becomes available later.9

b The ex ante approach: estimate the sum of money ‘US$Y’ such that if the investor had been given US$Y at the time the treaty violation occurred, it would have been in the same financial position as if the violation had not occurred. The date of assessment is therefore the date of violation, and therefore information available as at the date of violation is used, and no further. That sum of money is brought forward to the date of the award (as discussed later in this chapter).

Although the question posed by ex ante versus ex post may sound theoretical, it can be of the greatest practical importance. In the Yukos dispute, the tribunal set the date of the treaty violation at 19 December 2004, and estimated damages at that date of US$22 billion, compared with a figure of US$67 billion at the date of award (i.e., 30 June 2014).10 The choice of date of assessment therefore made a difference (before interest) of approximately US$45 billion.11 The main driver of the difference was that oil prices as at December 2004 were much lower than in June 2014 (and that the oil price would increase so much after December 2004 was not known as at that date).

We consider the choice between the ex ante and ex post approaches to be fundamentally a question of law.12,13 However, understanding the economic consequences of each approach may be relevant to the choice.

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9 At least, that is the theory: in practice, the latest date that is practical is used, as it is not possible to finalise calculations on the day the award is given.

10 PCA Case No. AA 227 Yukos Universal Ltd (Isle of Man) v. Russian Federation, Final Award, 18 July 2014, paras 1819 and 1825.

11 id., 1763–1769. The tribunal in that dispute determined that whichever date gave the higher value award should be used.

12 It is not uncommon for investment treaties to specify a standard for compensation in the case of expropriation. For example, Article 13(1) of the Energy Charter Treaty stipulates that ‘[s]uch compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment’.

13 Some economists have, however, opined on the subject. An example is the article of Franklin M Fisher and R Craig Romaine, ‘Janis Joplin’s Yearbook and the Theory of Damages’, Journal of Accounting, Auditing and Finance (1990).
First, the *ex ante* approach can in some circumstances provide damages even if with the benefit of hindsight the violation did not lead to actual harm. Thus, suppose that an investor is deprived of the ability to make an investment that at the date of violation was expected to be very profitable. For example, the investment was in oil and gas production at a time when prices were forecasted to remain high for many years. Suppose subsequently the oil price fell and remained low, such that the investment would have turned out to be loss-making (the profits from sales would not have been sufficient to cover the original expense of developing the field).

More generally, the *ex ante* approach can give rise to damages that are very different from what was actually incurred. Consider a variant of the example above, where the expected value of the investment at the date of violation was US$500 million, but owing to the fall in oil prices it turned out with hindsight to be worth just US$100 million. Under the *ex ante* approach, the investor will receive damages of US$500 million (plus interest), a figure that is considerably higher than what is required to leave them in the same position, as at the date of award, as if the violation had never happened.

However, the *ex post* approach can also give rise to outcomes that may appear unintuitive. Suppose that an investor was going to engage in oil and gas exploration in two separate areas, but that it was improperly deprived of those opportunities for two different reasons, each of which was a separate violation of an applicable investment treaty. Suppose that another company instead undertook exploration in the first area, spent US$200 million but found nothing; and in the second area, where it found reserves, undertook production, and made a profit of US$200 million. If the investor could establish that the deprivation of the opportunity with regard to the second area was a treaty violation, it could receive damages of US$200 million, even though the combined effect of both violations was to leave the investor no better or worse off.14

### iii Estimating damages as at the date of assessment

Damages can be determined on the basis of the additional cash flows that would have accrued to the investor absent the treaty violation. Under the *ex ante* approach, these additional flows necessarily occur in the future (i.e., on or after the date of assessment) because under this approach the date at which the violation occurred is used as the date of assessment, and all consequences of the violation must therefore arise at or after that date. These consequences are future losses.15

To determine the value of future losses as at the date of assessment, one cannot simply focus on the nominal value of these additional cash flows as they would accrue to the investor at the relevant times. For example, if the investor would have had an additional US$10 million in cash flows two years after the date of assessment, one cannot affirm that the investor’s damages as at the date of assessment in respect of these additional cash flows

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14 This relates to the point in Fisher and Romaine, ibid., that it is not possible to seek negative damages. That is, the first of the two violations in this example saved the investor US$200 million, the second one cost it US$200 million: the investor can seek damages of US$200 million for the second violation, but the state cannot seek an award of negative damages (i.e., it cannot ask to be awarded US$200 million) in relation to the first violation. This is less likely to be an issue with the *ex ante* approach, as a state is unlikely to engage in a treaty violation that creates positive value, as of the date of violation, for an investor.

15 Here, the ‘future’ is relative to the date of assessment; and also the consequences may include both losses and gains, so that the stream of ‘losses’ over time may be a mix of positive and negative amounts.
equals US$10 million. The principle of full reparation requires one to find a sum of money as at the date of assessment that is equivalent, from an investor’s perspective, to receiving those cash flows at their actual dates.

Holding all else equal, future cash flows are generally worth less than cash at the present time (owing to the ‘time value of money’). In addition, future cash flows are often uncertain and, therefore, holding all else equal, are worth less than risk-free cash flows. Therefore, future cash flows must be discounted to account for both the passage of time and any additional risk associated with these cash flows.

Applying the DCF methodology under either the \textit{ex ante} or the \textit{ex post} approaches, therefore, generally requires the application of a discount rate to future cash flows. However, under the \textit{ex post} approach the date of assessment is later than the date of violation, typically by some years, and the losses suffered therefore occur in the past as well as in the future. Regarding past or ‘historical’ losses, it is clear that had the investor had the money corresponding to these additional cash flows at the time, it could have made certain use of this money that would have likely generated additional cash flows. Examples of this include: using the money to reduce its existing debt or avoid raising future debt, investing the money in its own business or alternative projects, or simply holding the money in interest-bearing deposits. In describing the but-for scenario, what those uses would have been must be stated.

In our view, the required approach is conceptually clear: the most realistic possible assessment must be attempted of what would have happened as of the date of assessment but for the violation (in essence, this follows from the meaning of date of assessment).\footnote{Albeit, there may be some discussion as to issues such as whether the behaviour of a typical investor or the actual investor is assumed.} However, that leaves potentially challenging practical questions as to how to estimate what the resulting cash flows would have been. Regarding the latter, though it is often easy to determine the correct return on this money assuming that it is held in interest-bearing deposits (or even that the investor uses it to reduce or avoid debt), it is not so straightforward to do so if it is considered that the investor might have used the money to invest in alternative projects (and for some reason was not able to raise money to do so from other sources). The same issue can arise in the context of pre-award interest, and we discuss it in more detail under that rubric.

\paragraph*{Determining the discount rate}

The DCF methodology determines the value of future additional cash flows as of the date of assessment based on the principles discussed above. DCF is very widely used in practice, and is often viewed as the ‘gold standard’ for valuation (in the absence of direct market evidence). Typically, the most material question that arises during arbitration proceedings – which gives rise to the highest number of discussions among experts (apart from estimating the cash flows themselves) – is not related to the use of DCF in itself but to what is the correct discount rate to apply to the specific streams of cash flows in question.

Future cash flows should be discounted for two reasons. First, to compensate purely for the passage of time (ignoring any risks associated with future cash flows); economic theory and evidence indicate that there is a material cost to waiting to receive money, even absent any associated risks.\footnote{Because, inter alia, human beings may die while waiting and because they tend to become wealthier as time goes by, and the marginal value of money, and consumption falls as one becomes wealthier.} Second, to compensate investors for the risk associated with these cash flows.
flows; economic theory and evidence also indicate that there is a material cost to bearing risk: human beings are naturally ‘risk averse’ and require larger rewards to invest in a more risky venture.

A key point in this regard, that unfortunately is frequently misunderstood (by quantum experts as well as lawyers), is that it is the riskiness of the incremental cash flows that must be assessed. This can be very different from the riskiness of the investor’s other assets. For example, suppose that an investor invests in a certain business, whose costs and revenues are uncertain and potentially risky. Suppose, however, that one part of those future revenues comprises ‘support payments’ from a public authority, and that those payments are very certain, until the government changes policy so as to abolish those payments (the example of support payments for investments in renewable generation comes to mind, depending on the specific circumstances of the case). If the government’s actions are found to be a violation of an investment treaty that merits compensation, the compensation will be for the loss of the (previously) certain cash flows arising from the support payments, and the discount rate will be appropriate to that stream of income, which may, for example, be comparable in its level of risk to the payments a person would receive as a holder of government bonds. This discount rate can be significantly lower than the discount rate that would be applied to the cash flows of the whole asset (the project’s ‘cost of capital’). In the example of renewable generation, the latter rate may reflect risks related to construction and the future market price of electricity, etc., that are simply irrelevant to the cash flows that have been lost as a result of the alleged violation.

The discount rate, therefore, can be viewed as the sum of two components: a ‘risk-free rate’ plus a ‘risk premium’. With respect to the first component, experts usually agree on the use of a risk-free rate determined by the yield on highly secure government bonds, such as US or German bonds (as it is considered that the probability of default on these bonds is negligible in this context).18

Greater disagreement usually arises when experts try to determine the second component. As a starting point, experts usually rely on the capital asset pricing model (CAPM), a fundamental ‘workhorse’ of finance theory.19 The CAPM posits that investors hold a wide portfolio of assets, and the risk associated with any individual investment may therefore be hedged through diversification. However, some risks apply to many different assets and are therefore not removed through diversification. The CAPM seeks to use market data to measure the extent to which the relevant asset or cash flows is subject to these non-diversifiable risks, and estimate the appropriate return to reward investors for bearing them.

Beyond the CAPM, factors such as the location of the investment or the currency in which additional cash flows would accrue to the investor are commonly considered by experts (usually referred to as country risk and currency risk premium). The intuition behind this is that investments placed in a country with, for example, an unstable political environment are worth less, holding all else equal, than investments in a stable economy. Similarly, investments that pay off in currencies from unstable environments are worth less than, for example, investments that pay off in dollars or euros.
II PRE-AWARD INTEREST

Finally, once a tribunal finds in favour of the investor, the respondent owes the investor a certain amount in the size of the damages award. The respondent owes the investor this amount from the date of assessment until the moment when the investor is finally compensated, namely the moment when the respondent pays the investor the full amount of the damages award.

It is conventional to distinguish between (1) interest to cover the period between the date of assessment and the date of award (pre-award interest); and (2) interest to cover the period between the date of award and the date when any damages are actually paid (post-award interest). Our comments here focus on pre-award interest, although most of what is said will apply equally to post-award interest.

Pre-award interest only arises if the date of award is later than the date of assessment. Under the ex post approach, therefore, there is in principle no issue of determining pre-award interest. However, this distinction is a formal one because under the ex post approach, the issue of historical damages must be dealt with—here, our discussion will focus on the ex ante approach.

Different pre-award interest rates can have a very significant impact on damages awards. As an example, suppose that damages as at the date of assessment are US$100 million, and the date of the award is 10 years later. Adding on pre-award interest at 3 per cent per annum would give an award of US$134 million, while at 6 per cent per annum the figure would be US$179 million and at 9 per cent it would be US$237 million (in the last case the interest would be greater than the pre-interest damages).

From a legal perspective, a number of factors may determine or influence the choice of a pre-award interest 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). The BIT between Georgia and Kazakhstan specifies that compensation for expropriation should include ‘interest at the London Inter-Bank Offered Rate (LIBOR)’. From an economic perspective, however, the appropriate choice of interest rate follows from the requirement for full reparation. Again, different interpretations are possible (and the choice between them is a matter of law). One of those is the following. In the case of the ex ante approach, to be in the same financial position, the investor must in fact be indifferent between the but-for scenario and the actual scenario, where it understands that as at the date of award it will receive US$Y plus pre-award interest determined according to a specified methodology.

The question therefore arises of what that methodology should be. One approach is to consider what the investor would have done with the US$Y, had it been given that money as of the date of assessment, and then to identify the equivalent interest rate to be applied to the US$Y.
Different options can be considered for the investor’s hypothetical alternative use:

a) If the investor had debt (or was going to incur debt after the date of assessment), it could have used some or all of these sums to reduce existing debt or avoid falling into new debt. In that case, the pre-award interest 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 where the investor was going to incur debt after the date of assessment, the rate at which it would be able to secure this new financing).

b) If the investor did not have (and would not have incurred) debt, the investor would have either kept the money in interest-bearing deposits at the commercial deposit rates in place at the time, or it would have found an alternative use for the money, such as investing it in alternative projects.

c) With respect to alternative uses, the investor could either have invested the money in its own business or into any alternative investment.

A second approach is to consider that the damages award amount represents a loan from the investor to the respondent (the ‘coerced loan theory’). In that case, the pre-award interest rate applied would correspond to the respondent’s borrowing rate, which is usually determined by several factors (the respondent’s credit risk or location, or the currency of the damages award). In sum, in this case the pre-award interest should reflect not only the time value of money, but also the default risk of the respondent.

Correctly estimating the pre-award interest rate can be more or less complex depending on which of the approaches above is used. Determining the investor’s or respondent’s borrowing rate is often simpler than identifying potential alternative investments for the investor (and the corresponding rates of return).

The ‘correct’ approach among the ones listed above is likely a matter of law, and may also depend on the level of proof an investor is able to provide to the arbitral tribunal. However, if a principle based upon the investor’s alternative use of the damages amount is applied, the investor would have chosen the alternative use that would have maximised its financial position and, if employing the money for a new investment, would have made the investor better off than reducing its debt.

The issue with the above is that it is often difficult to assess what this alternative investment may have been, or what rate of return the investor would have obtained from it. Moreover, for both new investments or investments in the investor’s own business, the rate of return usually demanded by the investor reflects, inter alia, the investor’s expectations regarding the risk associated with this investment: in simple words and as explained above, the more risky an investment is perceived to be, the higher the rate of return the investor would require. However, when being deprived of the money for a certain period (and compensated for it afterward), the future risk associated with this presumed investment is fully removed, because the investor did not actually have the opportunity to invest in this opportunity. Therefore, it would no longer make sense to compensate the investor for this risk.

The key subtlety is to identify not only the expected return from what the investor would have done, but also the level of risk it would have incurred. An investor would normally accept a lower rate of interest on the US$Y, if it is given for certain, than the expected return on a risky investment. Identifying the specific risk associated with the investment that has been removed (and the corresponding reduction in the required rate of return) is often a very complex task.
THE DISCOUNTED CASH FLOW METHOD OF VALUING DAMAGES IN ARBITRATION

Jeff D Makholm and Laura T W Olive

I  INTRODUCTION

The discounted cash flow (DCF) model is a widely used and effective method for valuing enterprises. As such, it is suitable for assensing damages associated with business valuation and enterprise lost profits in international arbitration. The strengths of the DCF model relate to its straightforward simplicity, the way in which it embraces the income and growth prospects for an enterprise, and the way it incorporates the market’s assessment of investment risk in any part of the world. Particularly for cases involving infrastructure assets, such as regulated enterprises or those supporting competitive energy or transportation markets, the DCF model is popular among tribunals as an objective method that focuses on the essential underlying elements that spur such arbitrations – the interruption of stable, going-concern profitability.

Being so computationally straightforward, a paradox in the use of the DCF model is that it was invented only recently. Economist Myron Gordon sought to bring together economic theory and the long-standing rule-of-thumb practices of financial analysts of the late 1950s: what he called the ‘imprecise’ finance literature. He grounded those financial practices with a theoretical economic foundation. The resulting DCF model he described soon came to the attention of administrative regulatory agencies, courts and arbitral tribunals as a tractable tool for deriving enterprise value and the cost of capital when used with objective market, industry or enterprise data. Gordon’s success made him famous. The ‘Gordon growth model’ is part of all modern finance courses and textbooks.

II  THE DCF AMONG ITS PEERS FOR ENTERPRISE VALUATION

In cases where courts or arbitral tribunals must value an enterprise in a dispute, it is widely accepted that there are three available methods of doing so. The first looks to the cost of the enterprise’s assets. The second is based on the market value drawn from comparable companies or the arm’s-length sale of similar enterprises. The third charts the expected
capitalised income from the enterprise as a going concern brought back to the present – of which, the DCF model is the principal method. All three have useful attributes under the right circumstances.

i  The cost method

Valuation based on the cost of the assets involved – either recorded-book cost or replacement cost – has some direct applicability to regulated enterprises whose values may be built more or less directly on such costs. But the method is sharply limited when assessing the going-concern value of infrastructure assets that draw their value from unregulated markets. For infrastructure assets that provide services over time, the cost method has sharp practical limitations based on the way that capital costs are handled by accountants – principally, because of depreciation. There has always been an unresolved tension between economists’ and accountants’ views of such depreciation. To economists who must value enterprises, depreciation charges merely reflect an allocation of the costs for investment decisions already made. In other words, such depreciation charges:

> refer to an expenditure that has already taken place, and are merely a special method of writing history. Depreciation accounting enables the business firm to make several ledger entries, instead of one, when a capital expenditure occurs.

As such, depreciation charges are only useful in determining the value of enterprises if future profitability is somehow a function of those depreciation charges – as is the case with regulated enterprises for which consumers’ prices are derived from investment costs, including depreciation.

ii  The market value method

Valuations based on market value depend on comparable companies or comparability in arm’s-length sales. As awards in court or before arbitral tribunals are designed to assess an objective value for an enterprise, a market price is generally only applicable to demonstratively similarly situated enterprises. This would be the case for a dispute related to land or housing where reasonable markets exist involving related transactions of sufficient numbers to create a usable sample of comparative transactions. But the nature of international arbitration often involves disputes with unique firms for which comparable companies or transactions can be rare or non-existent either because of the site-specific nature of the investments or the unique nature of the international market in question.

Economists have long studied whether the technologies inherent in particular businesses permit reasonable comparisons for regulation, damage assessment or the evaluation of

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3 Financial literature mentions other income-based approaches, such as the adjusted present value and capitalised cash flow, but they are simply variants of the basic DCF model. See M Kantor, Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence, Kluwer Law International, 2008.


organisational efficiency. Literature points to the problems inherent in making comparisons across enterprises in the private sector. Market comparisons between private enterprises are sharply limited in situations where input choice or ‘environmental factors’ (a broad category, including differing countries, institutional environments and industrial histories) cannot be controlled. Any direct comparison of sales prices among enterprises assumes that they all can attain the same level of production given their factor endowment – that is, that they belong to what economists would call the same ‘production function’. Although this assumption may hold for some public sector enterprises (such as public schools) or for particular private sector applications (such as the ubiquitous Starbucks coffee shops), it does not generally hold for the types of assets involved in international arbitration.

iii The income capitalisation method
The inherent difficulties associated with cost or market prices is a principal reason why the income approach represented by the DCF method is so evidently popular among tribunals. To be sure, the DCF method also draws the cost of capital specific to the type of enterprise in question from market benchmarks, and its location in the world from the competitive capital markets. Nevertheless, the principal innovation of the DCF method is how it uses that market information to tie finance and enterprise valuation to a reliable underlying economic theory.

III ORIGIN OF THE DISCOUNTED CASH FLOW MODEL
In an era of intense interest and research into stock valuation models and methods, and highly sophisticated markets in financial instruments, it is useful to reflect briefly on the comparatively backward nature of the field of business valuation in the 1950s. When it came to valuing business enterprises at that time, there was no intersection between the practical rules of thumb developed by stock analysts or insurance actuaries and neoclassical theoretical economics.

Gordon wished to fill that gap. In 1962, he published, in book form, his theoretical work on the value of corporations, reflecting his published research in the late 1950s. His book constituted both a deconstruction of economists’ various theories of investing and a straightforward presentation of a new method of valuing business enterprises. Prior to Gordon, economists had only highly abstract theoretical models of firm investment flowing from Keynesian theories of income determination. They had to rely on ‘business practices’ to investigate problems of investment and financing. Gordon offered something better: a theoretical foundation for explaining the value of a corporation that could, in turn, be used to find the cost of capital without resorting to ad hoc business methods.

The economic theories of the era embodied the assumptions that the future is certain and the firm can borrow freely at a given rate of interest. When trying to bring uncertainty

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into their theoretical analyses, economists became irretrievably bogged down in particular complicated cases that did little more than provide ‘a very able statement of the generalization found in the unprecise literature of finance’, as Gordon wrote.10

Gordon sought a cogent tie between neoclassical economic theory and the generally accepted notions that a firm’s value is a function of its investment. As he wrote:

> under neoclassical theory, the objective of the firm is to maximize its value, the value is a function of its future income, and the future income is a function of its investment. The task of the theory is to provide information on the nature of these two functions.11

As is often the case in economics, advances in theory are often less like Darwin’s ‘gradualism’ and more like the late evolutionary biologist Stephen J Gould’s ‘punctuated equilibrium’ – with episodic evolutionary leaps. Gordon’s theoretical discovery was such a leap, taking one page of not-too-difficult mathematics to tie maximising value to future income and to future investment. The result was the first statement of the DCF model in economic literature:12

Equation 1

\[
P_0 = \frac{(1 - b)Y_0}{k - rb}
\]

Where:
- \( P_0 \) = price of a share of common stock;
- \( b \) = the fraction of income retained in future period (i.e., not paid out as dividends);
- \( Y_0 \) = income per share;
- \( k \) = required return on investment; and
- \( r \) = expected return on investment.

Gordon recognised that for his theory to be of any practical use, it had to have some means for establishing \( k \), an enterprise’s cost of capital. Using his model to solve for the cost of capital using discrete time periods gives the following:

Equation 2

\[
k_e = \frac{D_0 \times (1+g)}{P_0} + g
\]
Where:
\[ g = (r) \times (b), \] expected dividend growth rate;
\[ P_0 = \text{price of stock}; \]
\[ D_0 = (1 - b)Y_0, \] previous dividend paid; and
\[ k_e = \text{cost of equity}. \]

Here, the rate of profit investors require on a share of stock is equal to the dividend yield at which it is selling (the first term on the right-hand side of the equation) plus the rate of growth in the dividend (the second term).

IV WHY THE DCF METHOD WORKS

As outlined by Gordon when he first presented the theory, the key theoretical advance of the DCF model was that it did not presume that investors knew more than they could reasonably know. They had only broad notions of how investment conditions would change in future years. The DCF model worked because it simplified the future by not overstating the kind of information that investors use to make decisions in the market. Specifically, the values of \( r \) and \( b \) (the expected return on investment and the retention rate) are not dated – Gordon assumed them to be constant. Without such an assumption, any investment model would quickly become empirically unmanageable, which was the very problem that had vexed those earlier economists trying to link economic theory with finance. But, as Gordon correctly observed, investors rarely have any clear notion of how these variables change over time. And in any event, without specific information to the contrary it is reasonable to conclude that retention ratios and expected returns are stable for going concerns. Established corporations commonly follow a policy of paying a stable fraction of their earnings as dividends \( (b) \). Investors will also only, at best, have a broad idea as to any future change in the expected return on investments \( (r) \). With such an assumption, the value of a share of stock is merely a function of the current dividend and the rate of growth of those dividends (which is the product of \( b \times r \)).

Equation 1 can be written out to include the whole future income stream discounted by a constant expected cost of capital, \( k_e \), as follows:

**Equation 3**

\[
P_0 = \frac{D_1}{(1+k_e)} + \frac{D_2}{(1+k_e)^2} + \ldots + \frac{D_n}{(1+k_e)^n} + \ldots
\]

Alternatively:

**Equation 4**

\[
P_0 = \frac{D_0 (1+g)}{(1+k_e)} + \frac{D_0 (1+g)^2}{(1+k_e)^2} + \ldots + \frac{D_0 (1+g)^n}{(1+k_e)^n} + \ldots
\]

This is the form of the DCF model (for which Equation 1 is merely a mathematically reduced form) that populates the values supporting damages estimates before arbitral tribunals. This DCF model values a share of stock according to a discounted stream of future dividends growing at a constant rate, \( g \). Although the basic Gordon model uses dividends to compute a share value, dividend payments are not necessary for such an analysis – cash flow or
earnings can be used instead as these are more reflective of the value that investors place in the future profitability of the enterprise. That assumption of a constant growth rate can be changed if data on near-term expected growth differs from long-term growth. For example, corporate business plans may specify near-term income growth, \( g \), reflecting particular business conditions known by management – after which, a long-term growth rate deals with future years.

V THE STRENGTH OF THE DCF MODEL IN INDUSTRIAL AND INSTITUTIONAL SETTINGS

The attraction of this theory for administrative agencies and arbitral tribunals soon revealed itself. Gordon himself describes how he was retained in 1966 to provide evidence before the US Federal Communications Commission (FCC) on the cost of capital of AT&T. The FCC appreciated the straightforward simplicity of such a theoretical model that rendered AT&T’s cost of capital as the sum of a measurable dividend yield and a growth rate. The agency was highly complementary regarding Gordon’s analysis, structuring its findings to be consistent with it, and encouraging further study of the DCF model. As a result of that first application to regulated enterprises, the DCF model has dominated tariff proceedings in the United States and Canada to find the cost of capital for regulated firms.

Used to derive the price of a share of stock, \( P_0 \), as in Equation 4, the DCF model has become the principal ‘income-based’ method for valuation. In this form, the model has wide-ranging applicability in many contexts. It is useful to assess the loss of a business in its entirety and lost profits within an ongoing concern. It is also useful for both measuring direct damages (e.g., for the loss a productive asset) and indirect damages (e.g., flowing from changes in risk – affecting return – or prospective growth rates). Essentially, the DCF model is a framework within which to apply financial and operating information, from both the enterprise in question and from the surrounding markets (including capital markets). The accounting and operational data used to populate the model in any setting depends on what is available and, if none is readily available, the obvious alternative is to use the shortest and most objective path to developing useful proxies. This work is conceptually straightforward but, often enough, complex and subject to dispute in such settings as international arbitration.

The DCF model has specific applicability to industries characterised by the dedication of capital to certain sorts of going concerns relating to regulated or competitive markets – those industries where the assumptions of constant retention ratios and growth rates work well. Such businesses include regulated utilities, and oil and gas companies with capital facilities that support competitive markets (such as liquefied natural gas terminals, refineries, etc.).


port facilities or airports) where long-lived infrastructure investments, in specific locations with specific supply and demand conditions and risks, require a valuation method that takes into account a long-term payoff for unique arrangements of assets.

VI MODERN PERMUTATIONS OF THE DCF METHOD

Gordon gave an economic foundation to the ‘imprecise’ financial literature and the reasonably effective rules of thumb of financial analysts of the 1950s. But Gordon was not the only economist looking for a theory by which to value corporations in the 1950s. His contemporaries, Franco Modigliani and Merton Miller were looking for the same thing. Their model, called the Capital Asset Pricing Model (CAPM) first appeared in 1958.15 CAPM looks at the behaviour of stock prices in the market at large – not simply prospective earnings – to judge what investors require as the return on equity investments. It began to appear before administrative agencies (in North America and elsewhere) in the late 1970s and early 1980s.16

Both methods propelled an explosion of scholarly literature on how practically to value businesses using each.17 This literature displays endless permutations, adjustments and increasingly thin slivers of time (with fractional exponents) to derive ever-finer special cases of the DCF model. To a certain extent, the complexity evident in this literature tends to obscure the essential nature of what Gordon provided – the method by which, with limited information in the capital market, capital cost and expected earnings from an enterprise relate to each other in an uncertain world. Mathematical models may be sliced in endless ways. But genuinely objective information, in the market, to drive the DCF model – reflecting what investors expect for the market’s growth rate – is rare. More complicated modelling does not make this information any less rare.

VII THE CENTRAL ROLE OF THE GROWTH RATE

Gordon’s DCF model uses enterprise value and future income as two sides of a coin: either side can face up. Equation 1 shows the enterprise value on top with the income capitalised at the growth rate \((r \times b)\) underneath. Equation 2 has the cost of capital on top, with the additive terms of dividend plus the growth rate underneath. Either way, the growth rate is on the bottom of the coin, operating unseen. The DCF model rests on that unseen growth rate – it either permits observed income to translate into value, or it permits an observed dividend yield to translate into the cost of capital (which is how Gordon himself used it in finding the regulated cost of equity for AT&T). Where is that growth rate from?

In the capital markets that tie the top and the bottom of the DCF coin together, the growth rate is in the mind of the investors: they price the shares in question based on the way the capital markets reflect their collective expectations. The growth rate in the DCF model exists in the world – the problem is to find it in a sufficiently objective way to be credible before judges or tribunals.

The long-standing depth of the US capital market provides many sources by which to
gauge investors’ growth expectations. The accuracy of these analyses, in the sense of whether
they are predictive of the future, is not the issue. The crux of the matter is whether they reflect
widely held expectations. In recent years, the availability of sources of financial analysis has
expanded to include the following, widely considered objective and credible.

Duff & Phelps, founded in 1932 in Chicago as an investment research firm, took over the
widely respected publication of Roger G Ibbotson and Rex A Sinquefield, begun in 1977
(with stock, bond and inflation data reaching back to 1926), in 2014. Duff & Phelps uses
data from Standard & Poor’s and Barclay’s to develop annual industry statistics, including
return on equity, CAPM betas, enterprise valuation multiples and long-term earnings per
share growth projections.18

ii  Institutional Brokers Estimate System (I/B/E/S), Refinitiv
Refinitiv, a new company built from the Financial & Risk business of Thomson Reuters,
publishes I/B/E/S, which compiles estimates from 18,000 analysts pertaining to companies
in more than 90 countries. Established in 1976, available metrics include traditional financial
indicators and I/B/E/S Key Performance Indicators that vary by industry.19

iii  NYU Stern School of Business, Aswath Damodaran
Aswath Damodaran, professor and holder of the Kerschner Family Chair in Finance Education
at the NYU Stern School of Business, publishes several useful current and historical data sets
on his website. Professor Damodaran annually updates industry averages for US and global
companies on corporate finance and valuation metrics, including return, capital structure,
dividend yield, capital expenditures and depreciation, multiples and growth rates. He also
provides data on country risk premiums and corporate tax rates. He uses various published
sources of data.20

iv  Value Line
Founded in 1931, Value Line is one of the oldest and largest independent, subscription-funded
investment research services. Value Line employs independent analysts to assess various
financial metrics such as individual company growth anticipated from new products, overall
financial health and three-to-five-year projections.21

v  Zacks Investment Research
Founded in 1978, Zacks uses mathematical models combined with industry analyst
research to estimate earnings growth of particular companies and industries. Analysts
provide commentary and quantitative research to provide expectations for stock prices, fund
performance and other financial metrics.22
vi  Final thoughts
The DCF model does not presume that investors are omniscient with perfect knowledge of
the future. Similarly, those who employ the DCF model do not have perfect knowledge –
but they do have the ability to draw objective, disinterested assessments, from sources such
as those above.

VIII  CONCLUSION
There have been a number of recent assessments of the DCF model available to the audiences
of legal practitioners in the field of international arbitration.23 Some look closely at the
accounting inputs needed for the model, and others on the particular facts of the model’s use
in specific cases. Although such reviews are useful, they do not reflect what, to economists,
is the ultimate underlying attraction of the model among the various methods of deriving
value. That ultimate attraction is that the DCF model links together finance and economic
theory in an uncertain world in a highly effective way. Far from being unduly abstract or
restrictive as a model of investment behaviour, the DCF model has a demonstrated track
record among administrative agencies, courts and arbitral tribunals. The method reasonably
ties market expectations with measurable features of current markets, yet makes no aggressive
claims about what is known about future business conditions. Its underlying economic
assumptions strengthen the DCF model’s use by international tribunals for whom objectivity
is of paramount importance.
I INTRODUCTION

In this chapter, we set out the basic principles of a loss-of-profits calculation, together with some of the specific issues that commonly arise and need to be considered by the quantum expert, the lawyers and the arbitration panel. We do not consider damages in the context of an expropriation or damages calculated on the discounted cash flow basis, as these commonly used approaches are covered in other chapters.

Any damages claim needs to be calculated on the basis of the law that applies to the loss, and this may vary depending on the law that is claimed or the jurisdiction that governs the claim; for example, some legal systems may not permit loss-of-profit or *lucrum cessans* claims at all. The basic starting point for the quantum expert is to put the claimant back into the position in which it would have been but for the intervening event that caused loss, whether that is a breach of contract, an expropriation, or a fire or flood. This means that a loss of profit is calculated as the difference between:

a the profit that would have been generated in the absence of the intervening event.

Quantum experts commonly refer to the profits the company would have generated as the ‘but-for’ or counterfactual scenario; and

b the profit actually generated.

The profit the company actually generated should be quite straightforward to calculate. However, calculating the profit in the but-for scenario may be rather more complicated, and may require a combination of legal analysis, accounting skill and industry knowledge, in terms of forecasting what would have happened if the contract had not been breached or what may happen in an uncertain future.

II THE LENGTH OF THE LOSS

A key issue is the length of time the damages last for, or for which one can claim. In practice, this may depend on the legal principles in the jurisdiction or the length set out in a business interruption insurance policy. However, theoretically, it is simply the length of time from the breach of contract or other event until the company is once again earning the profits it would have earned had the event not taken place. In the case of a supermarket that is closed for a certain number of weeks, it is reasonably clear that the loss lasts for the period of closure plus

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1 Gervase MacGregor is international head of advisory, risk and quality at BDO LLP. The authors would like to thank Andrew Maclay, formerly of BDO, for his help with this chapter.
a lesser loss for some weeks after it reopens while it is rebuilding its sales to the level it would normally have expected. In other cases, the breach may have caused a factory never to be able to operate at capacity, in which case the damages may continue in perpetuity.

III  THE BASIC CALCULATION

While in theory one can calculate the overall loss of profit in the but-for scenario directly, in practice, it is usually easier to break the calculation down into its constituent parts, namely:

a  loss of revenue;
b  gross profit margin;
c  variable overheads; and
d  fixed overheads.

We also find it helpful to carry out an overall reasonableness check on the loss calculated, by adding the loss to the actual profits earned, and comparing the resulting figure to the company’s profits before and after the period of loss. It may be useful to illustrate this check on a graph, which may also bring the loss calculation to life for the arbitral tribunal. For example, such an overall reasonableness check may illustrate an error if the recalculated profit spikes up or down during the period of the loss.

IV  CALCULATING THE LOSS OF REVENUE

The key driver of a loss-of-profit calculation tends to be the company’s revenue. This is because the gross profit margin and the overhead costs generally vary less over time, and so are easier to calculate. The loss of revenue also tends to be the most tendentious parameter in the calculation because it may be subject to major fluctuations depending on whether the company wins a particular contract or not, and by its very nature it involves forecasting what would have happened in the future, which is simply unknown and speculative. At this point, it is worth emphasising that estimating what would have happened or forecasting the future is not an exact science, and the goal of the quantum expert is to calculate the most likely outcome, but without normally being able to say that that outcome is the only possible outcome.

For this reason, some arbitrators find it difficult to award damages for loss-of-profit claims. Equally, however, it is necessary for the quantum expert to work out the most reliable way of calculating what the revenue would have been absent the breach of contract or other intervening event. There are various ways of doing this, such as those detailed in the subsections below.

i  Identified contracts lost

For a construction or engineering company, the most reliable way of calculating future revenue may be by identifying specific contracts that the company is likely to have won or identifying specific contracts that it did actually win, but that it would probably have won at an earlier date.
ii  **The company’s own forecast**

If the company had its own forecast of the future profits it expected to make, this may be the best data to use to estimate what would have happened but for the breach. However, before relying on a forecast, one needs to consider the purpose for which it was prepared, and how accurate it is likely to be. If the forecast was prepared for the company’s bank, which had carried out due diligence and lent the claimant money based on this forecast, and if the company’s actual results over the past five years had always been within 5 per cent of its forecasts, then one could feel reasonably confident in relying on the forecast. If, on the other hand, the company’s forecast was limited to a single sheet of paper prepared by the directors after the breach of contract occurred, and it had never actually achieved its budget in the past, one would not feel confident in relying on the forecast without first making serious adjustments to it or discounting it for uncertainty.

iii  **Extrapolating from the past to the future**

Where a company has been operating for many years, and has a track record of always achieving a certain level of sales and profit, and where profits have grown consistently at, say, 5 per cent per year, the best estimate of future profits may be an extrapolation of past profits. This may be based on professional judgement or it may be based on a statistical regression line, which estimates the future based on the past.

iv  **Comparison with what actually happened to a similar company or retail outlet**

If one can find a similar company operating in the same field and show that the claimant’s results have closely correlated with the results of that company in the past, the best way of estimating what would have happened may be to consider what actually happened to the comparator company in the same period.

In circumstances where the loss of revenue is uncertain, it may be appropriate to calculate it by calculating the loss on a number of scenarios, and then applying a percentage likelihood to each scenario to calculate an overall estimate of the loss of revenue.

There are particular statistical tools that one can use in estimating the loss of revenue. These include:

- **Regression analysis:** this is a statistical tool that estimates unknown results based on historic data and relationships, and also generates an indication of the reliability of the projections. So, if a company has been growing over the previous five years, one might be able to take its revenues for the previous five years and project those into the future. Alternatively, one might be able to estimate the relationship between sales and the size of a supermarket, and use the trend of these to project the sales lost by a different supermarket store.

- **Seasonal adjustment:** if one is estimating the loss of profit for a short period of time, it may be important to consider the impact of seasonality on sales. So, for example, sales for a retailer may be much higher in the run up to Christmas, or sales by a heating company may be much higher in winter. In such circumstances, it will be necessary to adjust the damages calculation to take account of seasonality; for example, by using an adjustment factor calculated from previous Christmases or winters.
V  CALCULATING THE GROSS PROFIT PERCENTAGE  

The reason for calculating the gross profit separately and after the revenue is that the gross profit of many companies tends to remain fairly constant over time. For example, a retailer may always reckon on marking up its purchases by 30 per cent, and it is common to find that companies’ gross profit margins, as set out in their published financial statements, do not vary greatly from year to year. Alternatively, if they do vary, this may be because of the breach of contract or interruption itself, and so a comparison of the gross profit margin over time may itself help to indicate the loss of profit.

For a company that is dependent on a small number of very large contracts, the profitability of which varies, one may instead need to base the estimated gross profit margin on the estimated gross profit margin in the company’s bid documents when it tendered for the contract.

Alternatively, for a natural resources company, the costs of extracting the minerals may be relatively fixed, but the revenue may fluctuate dramatically based on world prices; so the most reliable calculation of the loss of gross profit may be based on the quoted futures market price for the commodity less the cost of mining it. And, in a period of low commodity prices, if the selling price is lower than the cost of extraction, it may be that an interruption to a mine actually saves the mining company from losses that it might otherwise have incurred.

VI  FIXED AND VARIABLE OVERHEADS  

It is very important to understand the difference between fixed and variable costs in loss-of-profit claims and how to treat them, as this is an area where errors and misunderstandings frequently occur. It is important to understand the distinction between costs that a company does not incur during the period in which it suffers a loss of profits, and costs that continue in any event.

If costs continue irrespective of the interruption, then the company’s position would have been the same in the but-for scenario as in the actual scenario, so there is no basis for any claim for loss of these fixed costs in a loss-of-profits claim. Examples of fixed costs may be head office costs, which continue to be incurred irrespective of the closure of any factory or the loss of any particular contract, or rent that continues to be incurred even if a factory or supermarket is closed.

On the other hand, variable costs are costs that are directly linked to revenue, and so may be saved when the breach of contract occurs; such saved variable costs, thus, need to be deducted from the loss-of-profit claim. Examples of variable costs may be employee overtime, which is not incurred when the factory is closed, heating and lighting, or transport costs if no vehicles are used in the period of closure.

VII  SUNK COSTS  

A similar cost that causes confusion is sunk cost – for example, the cost of building a factory. If a factory is idle as a result of a breach of contract, it may be tempting to claim for the cost of building that factory as part of the loss-of-profit claim because the factory is not making anything or generating any income. However, to do so would be to double count the loss of profit; this is because the company cannot generate any profits at all or suffer any loss of profits if it has not incurred the cost of building a factory (i.e., the cost of building the factory would have been incurred in both the but-for and the actual scenarios).
VIII OTHER ISSUES THAT ARISE

i Overhead recovery rates and intra-group charges
An issue that often arises is the definition of what a cost exactly is. For example, the cost of employees may be measured as the amount actually paid to them (e.g., overtime, pension) divided by the number of hours they work, or as their hourly ‘charge-out rate’ (which may be equal to direct salary cost multiplied by a factor of three or four, to take account of the general and administrative, and other fixed cost overheads of the company) or the rate that is charged by a service company in the group.

Related to this is the impact of costs recharged between companies in the same group at a mark-up, sometimes to move profits around a group. Thus, where the company has been charged employee costs based on a mark-up over direct costs, it may be important to consider whether the variable costs that have been suffered as damages should be based on the costs charged to the company or the original lower costs actually suffered by another group company.

ii Management time
The principles here may vary between jurisdictions, but generally the rule is that one can only claim damages for lost management time if the claimant can demonstrate that this management time would otherwise have been spent on generating profits on other projects (i.e., it is an opportunity cost). This is because management time is a fixed cost that would have been incurred whether or not the event causing the loss had occurred.

iii Tax
If the goal of a damages award is to place the claimant in the same position as it would have been in if the relevant breach had not occurred, the damages calculation needs to take account of tax. Thus, both the actual and the but-for calculations need to be carried out on a post-tax basis. If the tax rates have changed considerably over time, or if damages awards are taxed on a different basis to income, or if dividends from a project would have been subject to withholding tax but a damages award is not, the impact of tax may be considerable. Consequently, care must be taken to make sure that tax has been treated consistently in the loss-of-profit calculation.

iv Currency
The choice of which currency a claim is made in may have a considerable impact on the size of the claim, particularly in developing economies or economies with hyperinflation. Again, legal principles may vary between jurisdictions, but the general principle is that the claimant should be compensated for what it has lost. Thus, the loss should generally be calculated in the currency in which the loss of profit has been suffered. A claimant generally also has a right to be compensated in a freely convertible currency – so, even if the damages are calculated in a local currency, the tribunal may translate the award into US dollars or euros at the rate of exchange on the date of the award.

v Discounting
If the loss of profits continues into the future, into a period after the date of the award, it will be necessary to discount the future losses back to the date of the award, to take account of risk and the time value of money. There may be different rates that could be used to discount
the claim, depending on the circumstances – the most common approach is to calculate the
discount rate on the basis of the company’s weighted average cost of capital, which includes
consideration of the risk suffered by the company, but if there is no risk premium needed, the
appropriate discount rate may be the company’s borrowing rate or some other rate of interest.

IX CONCLUSION

Throughout this chapter, we have set out in detail the normal approach for calculating loss
of profits in damages claims. However, we conclude by touching briefly on two very different
methods that may be used to calculate damages.

i Loss-of-chance claims

The first method is the loss of a chance method. This method is commonly used in litigation
in the United Kingdom, but is not so prevalent elsewhere. It is based on the principle that
losses of profits are uncertain, and that it is up to the judge or arbitrator to assess the degree
of uncertainty and to take this into account in awarding damages. Thus, the approach assesses
the loss of profits on the assumption that the company would have been able to make the
profits claimed – but then reduces the damages by a percentage to take account of the fact
that in reality the company might not have made those profits as some other event might
have impacted on its ability to generate the profits or simply that the calculation of loss of
profits is by its very nature uncertain.

ii Wasted cost claims

Finally, although it is not really a method for calculating loss of profits, a method commonly
used by tribunals in assessing damages, particularly in circumstances where the loss of profits
is very uncertain or speculative, where the company has never in fact traded or generated any
profits or where the future projections are unreliable, is for damages to be awarded on the
basis of wasted costs.

This method compensates the claimant for the costs it has incurred, but from which it
has not benefited, but does not award any additional damages to the claimant on the basis of
its expected future profits. It is, thus, an alternative claim to a claim for loss of profits, rather
than a claim in addition to a loss-of-profits claim; so, for example, a company may claim for
the sunk costs of building a factory as a wasted costs claim as an alternative to a loss-of-profits
claim, but not in addition to a loss-of-profits claim.
Chapter 24

CAUSATION

Chudozie Okongwu and Erin B McHugh

I INTRODUCTION

Most investment treaty arbitrations involve a claim that a respondent state has breached its obligations under an investment treaty. A claimant’s recoverable damages are limited to those caused by the respondent state’s wrongful act (or acts). Establishing causation or a ‘causal link’ between the wrongful act and the harm claimed is thus a critical element in a damages determination.

In this chapter, Section II sets out the principles of causation as described in the International Law Commission Articles on State Responsibility (the ILC Articles). Section III discusses some arbitral awards that have dealt with certain key issues that have arisen in interpreting these principles of causation. Section IV describes how a statistical technique called ‘regression analysis’ can be used to help assess causation and addresses some of the questions raised in the awards discussed in Section III.

II PRINCIPLES OF CAUSATION

The ILC Articles codify customary rules of international law concerning the responsibility of states for ‘internationally wrongful acts’. Article 2 states that ‘a breach of an international obligation of the State’ (such as an investment treaty) is considered an ‘internationally wrongful act’. Article 31 articulates the principle of causation in the context of assessing damages for such acts, stating:

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.  

1 Chudozie Okongwu is a managing director and Erin B McHugh is an associate director at NERA Economic Consulting. The authors would like to thank Timothy McKenna, Robert Patton and Raphael Starr for their assistance in relation to this chapter.
2 Some treaties may provide a jurisdictional basis for arbitrating other types of disputes, such as contractual disputes arising from investment agreements. See Abby Cohen Smutny, ‘Principles Relating to Compensation in the Investment Treaty Context’, 19 September 2006, pp. 1–2.
4 Crawford, p. 201.
Thus, reparation is to be made only for the injury ‘caused by’ (i.e., ‘resulting from and ascribable to’) the wrongful act. Losses because of unforeseeable events or other concurrent factors may be excluded in the calculation of recompense.

Arbitral awards have clarified that establishing causation entails showing both ‘factual causation’ (also referred to as ‘cause in fact’) and ‘legal causation’. Factual causation is typically determined through an analysis of whether the injury would have occurred ‘but for’ the state’s wrongful act (i.e., in the ‘counterfactual’ or ‘but-for’ scenario). Economic tools can be used (as described in Section IV) to isolate the injury caused by the wrongful act from that caused by other factors (e.g., an economic downturn).

Even if an injury can be factually linked to a wrongful act, there may be legal limits on liability. Legal causation relates to whether the causal link between the wrongful act and the claimed injury is sufficiently proximate to require reparation. The commentary to Article 31 of the ILC Articles states:

[C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may be used, in others “foreseeability” or “proximity”.

Here, foreseeability concerns whether the state could have reasonably foreseen that its wrongful act would cause the claimed damages. The commentary to Article 31 explains that other factors may also be relevant in establishing legal causation. Moreover, the relevant criteria may differ from case to case depending upon the specifics of the breach.

### III DISCUSSION OF CAUSATION IN ARBITRAL AWARDS

#### i Biwater v. Tanzania: Factual causation

A frequently cited investment treaty arbitral award analysing issues of causation is that rendered by the ICSID tribunal in *Biwater v. Tanzania*. Biwater, a British water company, had invested in the water and sewerage system of Dar es Salaam and the surrounding area. Biwater claimed that actions by Tanzania constituted an expropriation of Biwater’s investment and unreasonable or discriminatory treatment in violation of the Tanzania–United Kingdom bilateral investment treaty (BIT).

In its award dated 24 July 2008, the tribunal analysed the issue of causation at length, finding that the claim failed on factual causation grounds. The award states:

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5 Crawford, p. 204.
7 Crawford, p. 204.
8 ibid.
9 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.

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Causation

There is little guidance as a matter of international law on the precise test of causation to be applied (there being a number of different possible formulations) . . . . The key issue in this case is the factual link between the wrongful acts and the damage in question, as opposed to any issue as to remoteness or indirect loss.¹⁰

Although the tribunal considered the respondent's actions to constitute an illegal expropriation, the tribunal was persuaded by the respondent's expert that Biwater's investment was of no economic value at the date of the expropriation because of serious problems already existing with its performance.¹¹ Thus, the tribunal found that none of the respondent's violations of the BIT 'in fact caused the loss and damage in question, or broke the chain of causation that was already in place'.¹²

One of the arbitrators in the matter, Gary Born, disagreed with the conclusion by the other tribunal members (representing the majority) that the claim failed on causation grounds. In a 'Concurring and Dissenting Opinion' issued in connection with the award, Mr Born stated that it was clear that the respondent's actions had caused injury to Biwater by 'depriving it prematurely of the use and enjoyment of its property'.¹³ However, Biwater's claim for monetary damages failed because the injury 'had no quantifiable monetary value'.¹⁴ Mr Born considered the majority's analysis to have confused issues of causation with the quantum of damages.

ii  Metalclad v. Mexico: Remoteness

The 30 August 2000 award rendered by the tribunal in the Metalclad v. Mexico ICSID arbitration considered the issue of remoteness with respect to causation.¹⁵ Metalclad claimed that Mexico had interfered with its development and operation of a hazardous waste landfill (the La Pedrera development), thereby violating the investment provisions of the North American Free Trade Agreement.

Although the tribunal awarded Metalclad damages for its investment in the project, the tribunal disallowed an additional claim made by Metalclad on causation grounds. In particular, Metalclad had sought an additional US$20–25 million in damages for the alleged negative impact that the respondent's conduct had on its other business operations by reference to the change in the company's share price during the relevant period. The award states:

The Tribunal disallows this additional claim because a variety of factors, not necessarily related to the La Pedrera development, have affected Metalclad's share price. The causal relationship between Mexico's actions and the reduction in value of Metalclad's other business operations are too remote and uncertain to support this claim. This element of damage is, therefore, left aside.¹⁶
Hence, here the claim failed because the tribunal considered the causal link between the respondent’s actions and the claimed damages to be ‘too remote and uncertain’. Specifically, the claimants had failed to show that factors related to the La Padrera development, and not other factors, led to declines in Metalclad’s share price.

iii Micula v. Romania: Sufficient certainty
The 11 December 2013 award in Micula v. Romania clarified the degree of certainty required to establish a causal link between an alleged wrongdoing and claimed damages. Claimants were Swedish nationals who claimed that they had made investments in several manufacturing companies in Romania in reliance upon certain economic incentives introduced by the state in 1998. These economic incentives were revoked in 2005 in the context of Romania’s accession to the European Union. The claimants alleged that the revocation caused damage to their investments and breached their rights under the Sweden–Romania BIT.

In addition to claims for actual or realised losses directly resulting from the revocation, claimants also advanced several claims for lost profits. The tribunal acknowledged in its award that lost profits must be established with ‘sufficient certainty’. The tribunal stated that ‘the sufficient certainty standard is usually quite difficult to meet in the absence of a going concern and a proven record of profitability’, but that these claims must be considered ‘on a case by case basis, in light of all the factual circumstances’.

The claimants’ first such claim was for lost profits on sales of finished goods. The claimants alleged that increased costs (resulting from the revocation) caused them to increase prices on finished goods and thereby lose market share and profits. The claimants’ expert employed the statistical technique of regression analysis (which will be described in the next section) to estimate the relationship between prices and market share for the relevant goods, and used the regression results to estimate a but-for market share had the price increases not been made. The claimants’ expert assumed that revocation of the economic incentives had caused claimants to increase prices, relying upon witness evidence as well as ‘the evidential pattern and timing of the price increase’.

The tribunal accepted the claimants’ arguments with respect to causation in the absence of ‘another, more plausible explanation’ for the price increase. The tribunal also found that the claimants had proved this claim with ‘sufficient certainty’. However, the tribunal rejected the claimants’ other claims for lost profits, as they related to new lines of business in which claimants never actually engaged (but purportedly would have entered but for the respondent’s wrongful acts).

iv Conclusion
These decisions make clear that empirical evidence that supports or refutes an alleged causal link between a state’s actions and any claimed injury would be of assistance to an arbitral tribunal in reaching a fully informed decision. The claim in Metalclad v. Mexico failed because the claimants had not distinguished the effect of the wrongful act from other (concurrent) factors affecting the share price. Interestingly, in Micula v. Romania, the tribunal’s award stated that the presence of other concurrent factors contributing to the injury does not necessarily break the chain of causation from the state’s wrongful act. The tribunal considered that under
the ILC Articles, a state is held responsible for all consequences ‘not being too remote’ of its conduct, unless there is contributory fault by the injured party or an identifiable element of injury can be allocated to the concurrent causes.24

Economic tools can help to distinguish harm resulting from an alleged wrongful act from losses attributable to other factors. In the next section, we discuss one of these tools – regression analysis.

IV THE USE OF REGRESSION ANALYSIS TO ASSESS CAUSATION

In the previous section, we discussed one arbitral award (Micula v. Romania) where a regression analysis was used by one of the experts (in concert with witness testimony and other evidence) to establish causation with respect to damages. To our minds, however, regression analysis remains an underutilised tool in investment treaty arbitration. For example, where there is a claim for lost profits, regression analysis can be used as a control for other factors affecting a company’s profits (e.g., economic conditions) to isolate any decline in profits attributable to an alleged wrongful act.

Regression analysis allows an economist to evaluate the relationship between a variable of interest (the dependent variable) and one or more other factors that may help explain movements in the variable of interest (these are referred to as explanatory or independent variables). This technique allows an economist to isolate the impact of a particular factor on the variable of interest, by controlling for other factors. The results of a regression model can shed light on whether the proposed explanatory variables meaningfully explain the observed variation in the dependent variable (i.e., whether the estimated ‘coefficients’ on the explanatory variables are deemed ‘statistically significant’).25 Regression analysis also produces estimates with known rates of statistical error. This means, for example, that using regression analysis we may find that the probability that the observed change in a company’s profits results from chance alone (rather than as a result of the alleged wrongful act) is one in 20 (5 per cent) or less.26 If the regression results support the proposition that, after controlling for other relevant factors, there is very little chance that the observed decline in profits was attributable to anything other than the alleged wrongful act, these findings could...

24 ibid., paras. 925–926.
25 The estimated coefficients show the relationship between the dependent variable and the explanatory variables.
26 In broad terms, this is done by examining the covariance of the explanatory variable and the dependent variable, and determining whether the observed degree of covariance is unlikely to occur exclusively owing to chance (say, only 5 per cent of the time). Common standards used to deem something ‘unlikely’ include if an outcome has a probability of occurring of only 1 per cent (or less) or 5 per cent (or less). For details, see Federal Judicial Center, Reference Manual on Scientific Evidence, 3rd edition (Washington, DC: National Academies Press, 2011), pp. 249–253.
27 The assessment of the probability that an observed result is owing to chance is an inference from a statistical test. The typical framework for this test is to assume that a factor (in this case, the alleged wrongful act) has no impact on the variable of interest (in this case, profits). Under this assumption, one then computes the probability that the estimated size of the effect on profits could occur owing to chance. See Robert V Hogg and Allen T Craig, Introduction to Mathematical Statistics, 5th edition, Englewood Cliffs, NJ: Prentice Hall, 1995, pp. 280–287.
provide powerful evidence of causation to an arbitral tribunal. However, the regression results may attribute some or all of the observed decline in profits to factors other than the alleged wrongful act – thereby providing evidence to refute a claimed causal link.

In this section, we present two hypothetical scenarios inspired by the types of disputes that can arise in the context of investment treaty arbitration. For each of these hypothetical scenarios, we discuss how regression analysis could be employed to assist the tribunal in limiting the losses under consideration to those caused by the alleged wrongful act or acts.

i Hypothetical scenario 1: Claimed lost profits owing to fair and equitable treatment violation

Consider the example of Global Construction Enterprises Ltd (GCE), a (fictional) privately held, UK-based construction firm. GCE builds commercial office space worldwide, but over 40 per cent of the firm’s profits come from its operations in the Republic of Freedonia.

On 1 April 2010, the Freedonian government announced a new construction-permitting policy that allegedly discriminated against non-Freedonian firms, breaching the fair and equitable treatment standard under the Freedonia–UK BIT. The allegedly discriminatory policy remained in place until the end of 2012, when it was rescinded. GCE is now pursuing compensation for lost profits from Freedonia under the BIT, asserting that the firm’s revenues and profits during the period from April 2010 to December 2012 would have been greater but for Freedonia’s allegedly discriminatory policy.

How one might establish causation will depend upon the available evidence. For instance, if there was clear evidence indicating specific projects for which GCE would have won contracts but for the new construction permitting policy, this would assist in establishing causation for losses associated with those projects. However, let us assume that here no such unambiguous evidence is available. GCE’s profits during the relevant period were affected not only by the allegedly discriminatory policy, but also by other factors. It is therefore necessary to isolate the impact of the state’s actions on GCE’s profits. Regression analysis lends itself to such an exercise.

An economist would consider the market forces that drive GCE’s business in Freedonia. Potential explanatory variables for GCE’s profits might include commercial mortgage interest rates, central bank rates, commercial real estate prices, overall construction activity and proxies for the overall business climate, such as GDP growth or business confidence.

To perform a regression analysis, one would collect data for each of these variables at regular intervals (for instance, on a monthly basis). One could then estimate a regression model using the data for these variables to explain GCE’s monthly profits (as the dependent variable).28 To estimate the impact of the alleged discriminatory policy, one could add a binary ‘indicator’ variable to the model specification. This indicator variable would take a value of one during the months where the allegedly discriminatory policy was in place – April 2010 to December 2012 – and zero in the other months.

In this model, the estimated coefficient for the indicator variable measures the average difference between GCE’s profits during the months where the allegedly discriminatory policy was in place and the months where it was not, controlling for the other factors that explain GCE’s profitability. If the estimated coefficient is negative and statistically significant, this

28 For ease of understanding, we explain the approach using profits as the dependent variable. In some cases, it may be more appropriate to estimate the model using revenues as the dependent variable. Cost assumptions would then be used to estimate the profit impact of the alleged wrongful act.
could provide compelling evidence to an arbitral tribunal that the allegedly discriminatory policy caused a reduction in GCE’s profits. It could also form the basis for a damages estimate. This estimate would be limited to the injury caused by the alleged wrongful act, as the regression model controls for the other factors affecting GCE’s profitability.

ii Hypothetical scenario 2: Claimed discriminatory tax policy

Let us assume that PubliCo is a publicly traded manufacturing company operating in Freedonia. The majority owner of PubliCo is a UK-based holding company, HoldCo. In early 2015, Freedonia unexpectedly announced a substantial tax increase applicable to PubliCo, from 25 per cent to 50 per cent (the first tax increase). Six months later, Freedonia unexpectedly announced a second tax increase applicable to PubliCo, from 50 per cent to 75 per cent (the second tax increase). Both tax increases applied only to manufacturing companies whose majority owners were based outside Freedonia.

Let us further assume that PubliCo submits a request for arbitration claiming damages for discriminatory treatment under the UK–Freedonia BIT. Respondent Freedonia disputes causation with respect to PubliCo’s damages, claiming that other factors, such as a concurrent economic downturn, affected PubliCo’s profitability.

Although there are several methods that could potentially be used to assess damages in such a case, discussing all such methods is outside the scope of this chapter. We will focus on one method and its relevance to issues of causation – the application of regression analysis to perform an ‘event study’. The event study is a well-established empirical technique that is used to measure the market’s assessment of the impact of a specific event or announcement on a company’s market value – here, for example, the announcements of the two tax increases.

An event study is a particularly effective technique for assessing damages in cases where, as here, there is a discrete announcement or announcements of the alleged breaches. Because, as elaborated upon below, the price of a company’s shares reflects the present discounted value of the cash flows expected to accrue to shareholders, the event study can be thought of as the market’s assessment of the effect of the breach on discounted future cash flows. An advantage of the event study method is that it employs actual market data rather than potentially subjective assumptions. It can be used where the company in question has shares that are publicly listed and are traded in a liquid market.

It is particularly useful in the context of establishing causation as it allows one to isolate the impact (if any) of an alleged wrongful act from other factors influencing the company’s share price (e.g., market and industry-wide factors). Regression analysis is used to model the counterfactual scenario – namely, the predicted change in share price (share price ‘return’) but for the alleged wrongful act. Tests of statistical significance may allow one to conclude, for example, that there is only a 5 per cent chance or less that the observed share price movement is owing to chance alone (rather than resulting from the alleged wrongful act). An arbitral tribunal could arguably find such results compelling for the purposes of determining causation.

Recall that in the Metalclad v. Mexico award, the tribunal rejected a claim for damages where the claimants had not isolated the impact of the alleged wrongful act from other factors affecting the share price. It is possible, depending on the timing and nature of these factors, that an event study may have been able to assist in such an exercise.
The event study method is extensively used and has been applied in hundreds of articles in leading academic journals.\textsuperscript{30} It is also the most widely used method for proving and establishing loss causation and damages in US securities litigation.\textsuperscript{31} The method is premised on two assumptions: (1) that a company’s share price equals the market’s estimate of the present value of the cash flows expected to accrue to holders of those shares; and (2) that the company’s share price reflects all publicly available information and adjusts quickly to new information (i.e., semi-strong market efficiency).\textsuperscript{32} Market efficiency, like liquidity, is a continuum, with shares trading in more well-developed and liquid markets generally exhibiting a higher degree of market efficiency. An economist can perform tests of market efficiency to determine whether the event study method is applicable for a particular company’s shares, in a particular market and at a particular point in time.

Let us assume for present purposes that one has performed tests of market efficiency for PubliCo and has determined that the event study method is applicable. The steps involved in estimating damages using the event study method are described in the following subsections.

\textit{Prepare a detailed chronology of events and identify the relevant dates}

The first step is to prepare a detailed chronology of all news potentially affecting the company’s share price during the period of examination. This would include company-specific news, as well as news relating to the industry in which the company operates. The contents of the chronology might also be supplemented with fact witness testimony to the extent that this provides further context to events potentially affecting the company.

With regard to the first and second tax increases, it is necessary to determine the exact timing of the announcements (including whether they occurred before or after the market close for the day). Let us assume that PubliCo’s share price declined by 30 per cent following the announcement of the first tax increase and by 50 per cent following the announcement of the second tax increase. In the steps that follow, ‘excess’ share price returns (i.e., the returns after controlling for market and industry movements) associated with these announcements are estimated.

It is important to thoroughly examine the chronology on and around the relevant event dates to determine whether any other news released concurrently could have also affected the price of PubliCo’s shares. In the absence of any other factors that would affect PubliCo’s share price, one would assume that any statistically significant excess share price returns are attributable to the alleged wrongful acts.


\textsuperscript{31} See, for example, \textit{In re Imperial Credit Indus Inc. Sec. Litig.}, No. CV 98-8842 SVW, 2003 WL 1563084 (C.D. Cal.), which granted the defendants’ motion for summary judgment on all claims ‘because, after viewing the evidence in the light most favorable to Plaintiffs and with all reasonable inferences drawn in favor of Plaintiffs, there is no legally sufficient evidentiary basis for a reasonable jury to find for Plaintiffs as to the existence of loss causation and damages. Plaintiffs’ expert report on damages . . . is deficient for failure to provide an “event study” or “similar analysis”’. Also see \textit{In re Executive Telecard Ltd. Sec. Litig.}, 979 F. Supp. 1021 (S.D.N.Y. 1997).

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Estimate a market model
An economist would then estimate a regression model (market model) to determine the
typical relationship between PubliCo's share price movements and the movements of the
market (as proxied by one or more indices: a market index, an industry index or an index of
comparable companies). The regression model is ideally estimated over a 'clean period' that is
unaffected by the alleged wrongful acts.33 Alternate model specifications might be examined
to determine the one that best explains PubliCo's share price movements.34 As described
below, the market model is used as a control for market and industry movements to isolate
the effect of the announcement being studied on share price.

Estimate predicted share price returns
For each event date (here, the first and second tax increases), an economist would need to
decide upon the appropriate 'event window' for examination (i.e., the period over which one
examines share price movements following the announcement). The event window typically
begins immediately before the announcement (e.g., at the end of the previous trading day,
if daily price data are used) and concludes within a few days following the announcement.35

One would then estimate the predicted returns for PubliCo's shares during each event
window, using the market model. First, the returns over each event window of the indices
chosen as explanatory variables for the purposes of estimating the market model are observed.
To determine a predicted share price (i.e., the price that would be observed if the only factors
affecting the price that day were those captured by the indices), those returns are then
adjusted to reflect the typical relationship between the returns of the indices and the returns
of PubliCo's share price. For example, if the market return was –2.5 per cent on the day the
first tax increase was announced, and the coefficient estimate was 2, then one would predict a
return of –5 per cent (–2.5 per cent multiplied by 2) for PubliCo on that date.36

Estimate excess share price returns on relevant dates and test for statistical significance
The next step is to compare the predicted returns with PubliCo's actual returns in each event
window, with the difference representing the abnormal or excess return. As noted above,
absent any other company-specific news released concurrently that could have also affected
the price of PubliCo's shares, one assumes that any statistically significant excess return is
attributable to the alleged wrongful act. This is because the event study procedure controls for
price changes attributable to the factors affecting the broad market and the industry.

If there is only a small difference between the actual return and the predicted return in
an event window (meaning that the excess return is close to zero), it is likely that the alleged
wrongful act announced at that time did not affect the share price. The larger the excess
return, the more likely it is that the alleged wrongful act affected the share price. Economists
use standards of statistical significance to determine the threshold at which an excess return is

33 See Tabak and Dunbar, pp. 8–10 for further information on selecting the appropriate estimation window.
34 For example, an economist could review regression statistics such as the r-squared.
35 For further information on selecting the appropriate event window, see Tabak and Dunbar, pp. 7–8, and
Dmitry Krivin, Robert Patron, Erica Rose, and David Tabak, ‘Determination of the Appropriate Event
36 For ease of understanding, we assume that the estimated value of the constant in the regression is zero for
this calculation.
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considered large enough to be attributable to an announcement (i.e., statistically significant).\(^{37}\) If the observed price movement is statistically significant, one can draw an inference that the alleged wrongful act caused the excess share price return.

For example, recall that PubliCo’s share price had a return of –30 per cent following the announcement of the first tax increase. Using the market model, a predicted return of –5 per cent was estimated on that date in the previous step. This would imply an excess return of –25 per cent (the difference between –30 per cent and –5 per cent). If this excess return were determined to be statistically significant, one could infer that this price movement was attributable to the announcement of the first tax increase.

Let us assume, however, that on the same date of the second tax increase there was another announcement by the company earlier in the day (e.g., that the earnings forecast would be revised downwards). This would be considered an example of confounding news or a concurrent event, in which case one would separate the effects of this announcement from the effects of the alleged wrongful act, where possible. There are techniques used to deal with such situations and the manner in which one might do so would depend upon the nature of the announcements and the available data.\(^{38}\)

Estimate aggregate damages

An economist would treat the two unanticipated tax increases spaced six months apart as separate disclosure events. For each tax increase, the change in share price implied by any statistically significant excess return would be estimated separately. By multiplying by the appropriate number of shares, one can then estimate the effect of each announcement on PubliCo’s market capitalisation.

These estimates can form the basis for a damages claim that isolates the impact of the announcements from that of other market and industry factors through use of the event study method. The event study method could be used alone, or to support the results of another method (e.g., a discounted cash flow method). However, if an economist found no statistically significant share price movement following either the first or the second tax increase, these results could potentially be used to dispute a claim for damages.

If PubliCo’s parent company HoldCo’s shares are publicly traded and trade in a liquid market, an economist could also analyse HoldCo’s share price movements following the announcements of the two tax increases. The efficacy of this approach would depend on various factors, including the proportion of HoldCo’s profits (or cash flows to equity) that PubliCo contributes.

As both of these examples show, the economic tool of regression analysis can be used to assess causation with respect to claimed damages. Regression analysis can isolate alleged injury resulting from an alleged wrongful act from that caused by other factors (i.e., to show that the causal link is not ‘too remote’). Moreover, because regression analysis relies upon empirical data, arbitral tribunals may find the results compelling for the purposes of establishing or refuting ‘sufficient certainty’.

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\(^{37}\) As noted above, testing for statistical significance involves determining whether the probability that the observed share price movement was owing to chance (rather than the alleged wrongful act) meets or is less than a pre-specified level (e.g., 1 per cent or 5 per cent).

\(^{38}\) See Tabak and Dunbar, p. 11, for further information.
V CONCLUSION

Because of their usefulness in assessing issues of causation, we expect that in the future we will see the increasing use of economic and statistical tools in investment treaty arbitration. The reliance of these methods on empirical data – in contrast with potentially subjective opinion – and their ability to specify a known rate of error will provide arbitral tribunals with important information when considering issues of both factual and legal causation. Ultimately, these tools will allow both claimants and respondents to make a quantitative case for their positions with regard to causation. As one legal academic recently posited, ‘Close cooperation between lawyers and economists may lead to more rigorous causation analyses in future.’39 Our strong belief is that it will.

INTRODUCTION

As the title suggests, the twin principles of contributory fault (that a tribunal may take into account the extent to which a claimant’s own conduct contributed to its loss) and mitigation (that a claimant has a duty to mitigate that loss) are two of the ways in which a respondent can mount a defence against a damages claim. It is generally recognised that any relevant contribution on the part of the claimant will generally take place prior to the breach that forms the substance of a claim (or prior to the claimant reasonably having knowledge of that breach); while any opportunities for mitigation will generally arise subsequently.

Other defences covered here include corruption (that the agreement under which the original investment was made may have been procured corruptly), on which there are several recent cases that deserve comment. Also covered is the (potentially) more quantitative issue of investment risk (and, in particular, country risk, which may feature directly in circumstances where losses are assessed using discounted cash flow (DCF) models). Investors take on risk in making investment decisions abroad, including – potentially – the risk of expropriation. The question of whether expropriation risk should be taken into account when assessing damages is topical.2

II CONTRIBUTORY FAULT

The possibility that a claimant may have contributed to his or her own loss is recognised within the International Law Commission’s Articles of State Responsibility (ILC Articles), adopted in draft form by the Commission in 2001, and generally cited in the cases reviewed below. Under Article 31, an infringing state ‘is under an obligation to make full reparation for the injury caused by the internationally wrongful act’; while Article 39 recognises that:

\[\text{In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.}\]

Contributory fault has been taken into account, through a proportionate reduction in the losses identified, in a small number of cases, as discussed below. Principles established in these

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1 Chris Osborne is the managing partner and Dora Grunwald is a partner at Osborne Partners. The authors wish to express their gratitude for the help provided by M Gaspard Clarou of Dentons in Paris.

2 Covered in more detail in Part V of this Investment Treaty Arbitration Review, Chapter 27.

cases are that the contribution needs to be material; that the respondent bears the burden of proof; and that the tribunal has discretion in deciding on the scale of the proportionate reduction applied. Those reductions have varied from 25 per cent (Occidental; Yukos) to 50 per cent (MTD).

The MTD case involved the development of a large-scale real estate project in Chile; and required rezoning permits to be secured from the Chilean Ministry of Housing and Urban Development, which were not granted. The tribunal found Chile (the Foreign Investment Commission (FIC), who were the counter-party to the agreement with MTD) at fault in authorising the investment; but also found MTD to have acted unwisely in proceeding as far as it had without greater due diligence; and therefore reduced damages by 50 per cent. The tribunal did not explain their reasons for choosing a 50 per cent reduction rather than any other number, but the ICSID annulment committee that reviewed the award in 2007 supported the decision, noting the different nature of the parties’ contributions to the claimant’s loss, and the corresponding margin of discretion available to the tribunal.7

The finding against Chile was narrow (not relating to the failure on Chile’s part to grant the permits, but rather to the FIC’s initial approval of the project in circumstances in which the permits were unlikely to be granted); and the contribution of MTD’s business decisions to their ultimate loss was found to be significant. The tribunal noted:

*The BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen. Their choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development permits, are risks that the Claimants took irrespective of Chile’s actions.*

The Occidental case was lengthy and complex; and defies straightforward summarisation. The original breach in the underlying agreement was one by Occidental, but the subsequent termination of the agreement by Ecuador was found to be a disproportionate response, for which Occidental was entitled to damages. The tribunal allocated a 75 per cent responsibility for those losses to Ecuador (and 25 per cent to Occidental).10

The reasons for the split (as against any other number) were again not set out. The tribunal cited the decision of the ICSID annulment committee in MTD in explaining the discretionary nature of the allocation.
In a strongly worded dissenting opinion, however, Professor Brigitte Stern, referring to the same case, disagreed with the split adopted by the majority:\footnote{11}

\textit{It is interesting to note that in the MTD case both the tribunal and the ad hoc committee have endorsed a 50/50 split on the sole ground that the claimant had acted imprudently from a business point of view though not illegally. Here the split 50/50 would have been even more justified, as the Claimants have acted both very imprudently and illegally.}

In the \textit{Yukos} suite\footnote{12} of arbitrations, the tribunals\footnote{13} also adopted a 75/25 split based on contributory fault. The Yukos awards are lengthy and wide-ranging. On the question of contributory fault, the tribunal noted that there needs to be a ‘sufficient causal link between any wilful or negligent act or omission of the Claimants . . . and the loss Claimants ultimately suffered’.\footnote{14}

The tribunal also noted that the contribution ‘must be material and significant’ and, following MTD, that ‘In this regard, the Tribunal has a wide margin of discretion in apportioning fault’. Helpfully, the tribunal also noted three points that emerged from their review of cases in which the issue of contributory fault had been at issue. Those are:\footnote{15}

\begin{itemize}
  \item Firstly, the legal concept of contributory fault must not be confused with the investor’s duty to mitigate its losses . . .
  \item Secondly, there are cases where the contributory fault of the investor, while it may have increased the loss which it sustained, was unrelated to the wrongdoing of the State . . .
  \item Finally, the Tribunal identified certain decisions where the tribunals found that the victim contributed to the State’s wrongful conduct. The contributory fault of the investor in those cases provoked the wrongful conduct of the State.
\end{itemize}

The \textit{MTD} case was highlighted by the tribunal as being of the first type (unrelated to the wrongdoing); while the \textit{Occidental} case was identified as being of the second type (provoking the wrongful conduct of the state). The circumstances of the \textit{Yukos} case, in which the tribunal found that some elements of Yukos’ tax minimisation strategies were abusive and unlawful, are likewise of this kind. The tribunal noted:\footnote{16}

\begin{itemize}
  \item While . . . Respondent’s tax assessments and tax collection efforts against Yukos were not aimed primarily at the collection of taxes, but rather at bankrupting Yukos and facilitating the transfer of its assets to the State, it cannot ignore that Yukos’ tax avoidance arrangements in some of the low-tax regions made it possible for Respondent to invoke and rely on that conduct as a justification of its actions against Mr. Khodorkovsky and Yukos.
\end{itemize}

There was, as a result ‘a sufficient causal link between Yukos’ abuse of the system in some of the low-tax regions and its demise’ to lead to a finding of contributory fault.
Subsequent cases in which the issue of contributory fault have been considered include Bear Creek,17 Burlington Resources18 and Perenco.19 None of these led to a finding of contributory fault. In Bear Creek, the tribunal noted the principles involved in such a finding:20

the doctrine of contributory fault under international law requires that the party advocating for its application demonstrate – in addition to contribution to the investor’s harm – that the investor’s willful or negligent conduct or omission materially and significantly contributed to its harm, directly causing it. There must also be a sufficient causal link between the negligent or willful act or omission and the harm, in accordance with ILC Article 31. Respondent cannot meet its burden of proof for such a finding.

A partial dissenting opinion from Professor Philippe Sands QC disagreed on this point – suggesting that the claimant’s actions in and around their mining operations in Peru had themselves contributed to the social unrest in the region that had in turn led to the withdrawal of the mining concession. There was, in Professor Sands’ view, enough evidence to establish a connection – at least a ‘partially causal relationship’ – between the claimant’s actions and the loss that was suffered.21

In the Burlington Resources case, the argument put forward by Ecuador was that Burlington’s failure to pay certain taxes was the triggering factor that led to their operations being taken over by Peru (and therefore constituted a contributory fault). A majority of the tribunal disagreed, finding that Burlington’s failure to pay the taxes was neither a triggering nor a decisive factor behind the eventual expropriation.22 The tribunal appear to have relied in part on the commentary to Article 31 of the ILC Articles:23

The Commentary to Article 31 clarifies that “unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct”.

The fact that there was a (firm) dissention on what is effectively a factual issue – whether the expropriation would have occurred, absent the failure on Burlington’s part to pay the taxes – only emphasises the difficulties involved in a finding of contributory fault. That is notwithstanding the several expositions of, and some convergence in, the tribunals’ understanding of the underlying principles (as set out in summary form above).

There appear to have been no such difficulties in the Perenco case, in which Ecuador argued, again, that the claimant had contributed to its own losses, by a failure to pay the same taxes that were at issue in the Burlington Resources case (but instead paying the amounts due into an escrow account). In this instance, the non-payment occurred only after the initiation

17 Bear Creek Mining Corporation v. Republic of Peru; ICSID Case No. ARB/14/21; Award; 30 November 2017.
18 Burlington Resources Inc. v. Republic of Ecuador; ICSID Case No. ARB/08/5; Award; 7 February 2017.
19 Perenco Ecuador Ltd v. Republic of Ecuador; ICSID Case No. ARB/08/6; Award; 27 September 2019.
20 Bear Creek; Award; 30 November 2017, paragraph 555.
21 Bear Creek; Dissenting opinion; 30 November 2017, paragraph 5.
22 Burlington Resources; paragraph 580. The third tribunal member, Professor Brigitte Stern, was firmly of the opposite view.
23 id., paragraph 574.
of arbitration by Perenco; and turned out to be compatible with provisional measures ordered by the tribunal after the arbitration commenced. The tribunal concluded that ‘it is wrong to equate a party’s zealous protection of its legal rights and interests with wilful conduct or contributory negligence within the meaning of the ILC Articles’.24

III MITIGATION

The duty to mitigate arises after a breach, and is therefore relevant in relation to quantum, rather than in relation to liability. It is not that the duty to mitigate imposes any kind of legal obligation; but rather that a failure to mitigate will reduce the relevant component of losses (to the extent that it was reasonably capable of being mitigated).25

The circumstances in which a tribunal will identify a failure to mitigate (and the underlying principles of international law) were extensively discussed and usefully summarised in Clayton/Bilcon v. Canada,26 in an award delivered in January 2019. Any failure needs to consist of an ‘unreasonable failure by the claimant to act subsequent to the breach of the treaty, where it could have reduced the damages arising’ or the ‘unreasonable incurring of expenses by the claimant subsequent to a treaty breach, which results in increasing the size of its claim’.27

Both points demonstrate that a failure to mitigate might equally be thought of as a break in the chain of causation. Expenses that were unreasonably incurred, for example, could not be said to have been caused by the breach itself. The test of reasonableness operates to constrain the circumstances in which a failure to mitigate will be recognised.

The nature of that constraint was discussed in another recent award: the Inicia case.28 There, the issue concerned actions taken by Hungary in relation to agricultural land, with the respondents arguing that the claimants could have mitigated their losses by leasing alternative land. The tribunal noted that it was ‘not prepared to speculate whether the Claimants should have exercised a better business judgment’.29

It is perhaps unsurprising that tribunals will not generally wish to second-guess the actions taken by a claimant in response to a breach. The principle that the reasonableness of any given action needs to be assessed against what was known at the time precludes any sort of hindsight-based assessment of the claimant’s actions, and claimants must generally be entitled to a presumption that they have at least tried to act in their own self-interest.

That may be why, although discussions of the duty to mitigate feature regularly in arbitral awards, actual findings of a failure to mitigate are rare.30 Rather, the primary effect of the existence of a recognised duty to mitigate may be to discourage claims for losses being

24 Perenco; Award; 27 September 2019, paragraph 359.
26 Clayton and Bilcon v. The Government of Canada, PCA Case No. 2009-04; Award on Damages; 10 January 2019.
27 id., paragraph 205.
28 Inicia and others v. Hungary, ICSID Case No. ARB/17/27; Award; 13 November 2019.
29 id., paragraph 427.
30 One exception being BRIDAS v. Turkmenistan (ICC Case No. 9058/FMS/KGA) in which the Third Partial Award, dated 2 September 2000, notes, at page 12, that ‘The situation in this case is not usual’.
framed in such a way that the losses would in principle have been straightforwardly mitigable. As the tribunal noted in the *Clayton/Bilcon* case:31 ‘By its nature, the duty to mitigate is a restriction on compensatory damages’.

Thus, for example, losses relating to a failure of supply of a given good might be straightforwardly mitigable if an alternative source of supply were easy to identify. In such circumstances the claimable loss would be limited to the price differential between the two supply sources (plus any other incremental costs incurred). The limitation on losses might in principle be imposed by a tribunal, following a finding of a failure on the claimant’s part to mitigate; but would arise more normally as a consequence of the claimant, or the claimant’s quantum expert, limiting the amount of losses identified or damages sought.

Similarly, losses claimed in relation to a lost opportunity to invest will in principle be mitigable if alternative opportunities were available. Such losses will in principle be claimable only to the extent that the opportunity that was lost would have provided returns in excess of those otherwise available. Tribunals are typically reluctant to interpret a duty to mitigate as a duty to seek, or accept, alternative investment opportunities (as in *AIG v. Kazakhstan*, for example);32 but such opportunities are built into the logic of any DCF calculation.

That is because the discount rate used in a DCF calculation – typically described as a cost of capital – is better understood as an opportunity cost of capital (reflecting the returns otherwise available on an investment of equivalent scale and risk).33 Any DCF calculation (for a lost opportunity) therefore already carries within it an implicit reflection of the investor’s duty to mitigate.

Put another way, the results of such a calculation are in reality the excess profits (those in excess of the profits otherwise available on investments of equivalent size and risk) that are said to have been available in relation to the investment opportunity said to have been lost. We return to this topic further below.

**IV CORRUPTION**

Corruption and bribery have been invoked as a defence by host states on many occasions; on the basis that an investment obtained through corruption is not protected by the treaty under which the action is brought.34

The very nature of corruption and bribery, namely disguise and opacity, makes their identification difficult, however. Several awards made during 2019 show the lengths to which tribunals have been obliged to go to reach a decision on the facts before them. One such is the *Niko Resources* case, in which a 500-page decision, dealing only with the corruption claim, was issued in February 2019.35

31 *Clayton and Bilcon*, paragraph 204.
32 *AIG Capital Partners INC and CJSC Tema Real Estate Company LTD v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6; Award; 7 October 2003, paragraph 10.6.4(5)(a).
33 ‘For investors in companies, the cost of capital is an opportunity cost in the sense that it is the rate of return that they would expect to make in other investments of equivalent risk.’ Aswath Damodoran, *The Cost of Capital: The Swiss Army Knife of Finance*, April 2016.
34 *Metal-Tech Ltd v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3; Award; 4 October 2013, paragraph 422.
35 *Niko Resources (Bangladesh) Ltd v. Bangladesh Petroleum Exploration & Production Company Limited (Bapex) and Bangladesh Oil Gas & Mineral Corporation (Petrobangla)*, ICSID Case Nos ARB/10/11 and ARB/10/10, Decision on the Corruption Claim; 25 February 2019.
The Niko Resources case related to a joint venture agreement and a gas sale and purchase agreement in Bangladesh. It had been established in the prior Decision on Jurisdiction that there had been acts of corruption, but not that those had been instrumental in securing the agreements under which the investments were made: ‘there is no link of causation between the established acts of corruption and the conclusion of the agreements, and it is not alleged that there is such a link’.36

In their decision in relation to the corruption claim, the tribunal set out an extensive review of each of the allegations made by the respondent, before concluding that they were unfounded. The tribunal noted also that, had they been upheld, the effect would have been an unjust advantage to the respondent (which had received gas for which it had not paid). In the tribunal’s view ‘granting such advantage to the alleged victims of corruption cannot be the purpose of the fight against corruption’.37

A second case in which corruption issues were addressed is that of Lao Holdings, for which the award was issued in early August 2019.38 The case concerns the fallout of the Dutch Lao Holdings and its Laotian business partner, ST Holdings. The companies originally planned to build casinos and slot machine clubs in Laos. Although the tribunal dismissed the case on the grounds that Lao Holdings failed to establish the facts necessary to establish liability, it nevertheless reviewed the corruption claim asserted by the government of Laos.

The tribunal laid out their view as to the appropriate standard of proof required to reach a finding of corruption:

In the Tribunal’s view there need not be “clear and convincing evidence” of every element of every allegation of corruption, but such “clear and convincing evidence” as exists must point clearly to corruption. An assessment must therefore be made of which elements of the alleged act of corruption have been established by clear and convincing evidence, and which elements are left to reasonable inference, and on the whole whether the alleged act of corruption is established to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt, although of course proof beyond a reasonable doubt would be conclusive. This approach reflects the general proposition that the graver the charge, the more confidence there must be in the evidence relied on.

The tribunal in the Glencore/Prodeco case followed similar reasoning, referring to a ‘time-honoured methodology to establish truth’.40 On the corruption issue, the tribunal found against the respondent. They made a point, however, of explaining their overall views on corruption, noting not just that it is ‘morally odious’ but also that it is:41

36 Niko Resources; Decision on Jurisdiction; 19 August 2013, paragraph 455.
37 Niko Resources; Decision on the Corruption Claim; paragraph 2008.
38 Lao Holdings N.V. v. Lao People’s Democratic Republic, ICSID Case No. ARB(AF)/12/6; Award 6 August 2019.
39 id., paragraph 110.
40 Glencore and Prodeco v. Colombia, ICSID Case No. ARB/16/6; Award; 27 August 2019; paragraph 670.
41 id., paragraph 663.
Contributory Fault, Mitigation and Other Defences to Damages

economically deleterious: it restrains economic development and subdues nations into under-development and poverty, as bribes enriching well-connected civil servants or politicians are financed via inflated prices paid or reductions in income suffered by the poorest citizens. Scarce public funds are misdirected by enriching privileged individuals, at the expense of the common good.

In a very recent decision, in November 2019, the Hague Court of Appeal overturned an International Chamber of Commerce (ICC) award against a subsidiary of Venezuela’s state-owned oil and gas company, PDVSA, on the ground that the underlying contract was procured through corruption. In the domestic court’s view, the ICC tribunal had applied overly strict requirements by demanding ‘clear and convincing evidence’ although the allegations ‘undoubtedly raise questions as to the (legitimate) nature of [the company’s] conduct’.42

Recent decisions, therefore, show some consistency in applying a flexible approach to rules of evidence in arriving at a decision where corruption has been alleged. The two standards – that evidence should be either ‘clear and compelling’ or that it should establish corruption ‘on a balance of probabilities’ – have been seen as extremes within which tribunals should form their own views as to whether they are satisfied that the existence of corruption has been established.

V INVESTOR RISK

The MTD award noted above, in relation to contributory fault, made the point that ‘the BITs are not an insurance against business risk’. The question that has arisen – particularly in the context of valuing an investor’s investment – is the extent to which investors are protected from the risk that their investment might be expropriated.

The question arises particularly in relation to the discount rate to be applied in a valuation based on discounted cash flows: the discount rate is often adjusted to reflect country risk;43 but if there is a component of that country risk that relates to the possibility of expropriation, should that component be included? Including a country risk premium serves to increase the discount rate applied, and thereby to reduce the resulting valuation. A recent award in the ConocoPhilips case included some discussion on this point.44

The tribunal noted first that quantifying a country risk premium using government bond yields would, in the case of Venezuela, be inappropriate: ‘to apply to the Projects a country risk premium that reflects the likelihood that Venezuela will default on billions of dollars of sovereign debt is entirely unjustified’.45 The rationale follows in the following paragraph: ‘The inclusion of unlawful state action would result in higher discount rates and thus allow Venezuela to benefit from its own unlawful acts’.46

As the award demonstrates, however, it is easier to elucidate a principle than it is to apply it in practice. There is no settled view among the valuation community as to how to

42 S. Perry, ‘Dutch court sets aside PDVSA award because of corruption’, GAR, 6 November 2019 (the decision is only accessible in Dutch).
43 See the discussion in Chapter 27, Part V of this Investment Treaty Arbitration Review.
45 id., at paragraph 842. It is not entirely clear whether the tribunal are here setting out their own view; or recounting the claimants’ position; but the proposition is consistent with the tribunal’s subsequent conclusions.
46 id., at paragraph 843. The same caveat applies.

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calculate a country risk premium, let alone how to identify a component of the result that relates to the risk of lawful or unlawful expropriation. There was, perhaps for the same reason, no convergence of views between the quantum experts involved in this case.\textsuperscript{47}

In concluding, the tribunal clarified that while the BIT provides protection against illegal acts, the same level of protection is not provided in respect of ‘legal intrusions from the state affecting the economics of an investment’,\textsuperscript{48} and therefore modified the position put forward by the claimants:\textsuperscript{49}

\begin{quote}
one of the basic assumptions of the Claimants’ experts, i.e. that “in these proceedings the discount rate must be free of expropriation risk and of the risk of wrongful taxation” must be tampered. The Projects were not free of the risk of expropriation, provided it was lawful within the framework of Article 6 of the BIT.
\end{quote}

This same issue – the boundary between lawful acts that affect the economics of an investment, and unlawful measures – has been explored in a number of recent awards on the solar cases; which concern the legality or otherwise of measures taken by EU governments to reduce the level of regulatory support provided to investors in renewable electricity projects.

In 2007, Spain introduced a feed-in-tariff scheme under which investors in solar, wind and other renewable assets were to receive a fixed price for every kWh of electricity produced.\textsuperscript{50} For photovoltaic solar plants, the tariff was provided for the lifetime of the plant (albeit with a 20 per cent reduction in the rate after 25 years). From 2010 to 2013, Spain enacted a series of measures, including a cap on the number of operating hours that would be eligible for the tariff; and in 2014, replaced the original tariff scheme with a different, new scheme for existing solar plants.

The various tribunals dealing with the numerous arbitrations that resulted generally agreed that ‘[T]he fair and equitable treatment standard does not give a right to regulatory stability per se. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability’.\textsuperscript{51}

They also, however, agreed that ‘the right to regulate must be subject to limitations if investor protections are not to be rendered meaningless’.\textsuperscript{52} Those limitations were expressed

\begin{footnotes}
\item[47] id., at paragraph 831 – the experts were ‘deeply divided in respect of the so called “country risk”. The division of opinion is such that the comparison of the numerous and sometimes confusing arguments is difficult to follow, and in large part not useful’.
\item[48] id., paragraph 907.
\item[49] id., paragraph 910.
\item[50] The discussion here is illustrative and ignores details such as whether tariffs were indexed to inflation, for example.
\item[51] Taken from \textit{Eiser Infrastructure Ltd and Energia Solar Luxembourg SARI v. The Kingdom of Spain}, ICSID Case No. ARB/13/36; Award; 4 May 2017; at paragraph 362.
\end{footnotes}
by the Charanne tribunal: ‘as long as the changes are not capricious or unnecessary and do not amount to suddenly and unpredictably eliminate the essential characteristics of the existing regulatory framework’. 53

In all of the cases covered here, the tribunals found that the several piecemeal changes made by Spain prior to the introduction of the new regulatory scheme in June 2014 did not violate the treaty. Their opinions diverged, however, and quite significantly, with respect to the new scheme.

In a majority of cases the tribunals found that the introduction of the new regulatory scheme was unlawful. The change was described as ‘total and unreasonable’ in the Eiser case; 54 as falling ‘outside the acceptable range of legislative and regulatory behaviour’ in the Novenergia case; 55 and as having ‘crossed the line from a non-compensable regulatory measure to a compensable breach’ in the Foresight case. 56

In some cases, however, the tribunals found that investors’ could not reasonably have anticipated that the tariff regime would remain unchanged throughout the life of their investments; and that Spain’s reforms had not breached its obligation of ensuring a return at reasonable levels. 57 In Isolux, for example, the tribunal noted their view that ‘[t]he only legitimate expectation of the claimant was a reasonable return on its investment’. 58

VI CONCLUSIONS

The twin principles of contributory fault (that a tribunal may take into account the extent to which a claimant’s own conduct contributed to its loss) and mitigation (that a claimant has a duty to mitigate that loss) are perhaps the longest standing of the defences against a damages claim; and appear to be the most settled.

The other defences covered in this chapter: corruption (that the agreement under which the original investment was made may have been procured corruptly); and investor risk (that the actions from which the investor has suffered reflect normal commercial risk) appear to have seen more development during 2019. The recent conclusions of some of the tribunals involved in the solar cases – to the effect that investors’ legitimate expectations cannot be of anything more than a reasonable return on their investment – are potentially far reaching in their application and seem set to be the subject of debate for some time.

53 Charanne BV and Construction Investments SARL v. The Kingdom of Spain; SCC Case No. 062/2012; Award; 21 January 2016 (unofficial translation); at paragraph 517.
54 Eiser Infrastructure Ltd and Energia Solar Luxembourg SARL v The Kingdom of Spain; ICSID Case No. ARB/13/36; at paragraph 363.
55 Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain; SCC Case No V2015/063; Award; 15 February 2018; at paragraph 559.
57 Isolux Infrastructure Netherlands BV v. The Kingdom of Spain; SCC Case No V2013/153; Award; 17 July 2016 (unofficial translation); at paragraph 811, and BayWear Renewable Energy GmbG and BayWear. Asset Holding GmbH v. The Kingdom of Spain; ICSID Case No. ARB/15/16; 2 December 2019; at paragraph 515.
58 Isolux Infrastructure Netherlands BV v. The Kingdom of Spain; SCC Case No V2013/153 (unofficial translation); at paragraph 787.
Chapter 26

THE DETERMINATION OF FINANCIAL INTERESTS IN INVESTMENT ARBITRATION

Mikaël Ouaniche

The question of interest is fundamentally linked to the time lags that exist in all arbitration proceedings.

The date of expropriation and the date of the arbitration decision never coincide, and neither do the date of the arbitration decision and that of effective payment of compensation.

The time elapsed between these dates represents a value for the parties that can be measured by financial interests.

I PRE-AWARD INTEREST

Pre-award interest concerns the period from the date of expropriation to the date of the arbitration decision. It applies to sums of which the investor has been unjustly deprived and requires the application of a market rate.

Quantifying pre-award interest therefore implies determination of the basis (i.e., the basis for calculating the interest) and the interest rate applicable to this basis. These two parameters are examined below.

i Determination of the basis

Determination of the basis for calculating interest requires an examination of what the investor’s financial position would have been if the alleged acts had not occurred.

This question requires a distinction to be made between two situations:

a The expropriation is unlawful only because of the absence of fair or prior compensation. In the absence of the alleged acts, the investor would certainly have been expropriated, but would have received fair and prior compensation in exchange. The interest base, therefore, corresponds to the amount of compensation that should have been received on the date of expropriation (fair compensation standard).

b The expropriation is unlawful because of a series of violations not limited to the sole absence of fair and prior compensation. In the absence of the alleged acts, the investor would not have been expropriated (full reparation standard). Consequently, he or she would not have received any compensation. He or she would, however, have kept his or her property and generated funds from its operation that would have

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1 Mikaël Ouaniche is chair of the OCA.
2 This case is also called ‘potentially lawful expropriation’.
been available to him or her between the date of expropriation and the date of the decision. Consequently, the interest base corresponds to these funds between the date of expropriation and the date of the arbitration decision.

ii Determination of the applicable rate

In the context of the limits set by the bilateral investment treaties, arbitration tribunals may have a wide range of possibilities available to them in choosing the interest rate to be applied. The choice of interest rate may significantly change the total amount of compensation awarded to the investor. Adopting the interest rate is therefore neither simple nor easy for the arbitration tribunal.

The payment of pre-award interest must compensate the investor for the financial loss suffered as a result of the deprival of funds of which he or she was a victim by putting the investor in the position in which he or she would have been if the event that generated the loss had not occurred. To decide on the interest rate, arbitration tribunals must thus determine the use the investor would have made of the sums of which he or she was deprived had they been available to him or her between the date of expropriation and the date of the decision.

Several questions must therefore be asked:

- Would the investor have used all or part of these funds to clear his or her debts or avoid falling into debt?
- Would he or she have invested these sums in liquid assets?
- Would he or she instead have used these funds to make alternative investments? If so, which ones?
- Would he or she have invested them in his or her own business?

According to the responses given to these questions by the tribunal (depending on the investor’s claims and the proof provided), different approaches may be considered, which can be divided into two broad categories: approaches in terms of costs incurred and approaches in terms of lost profit.

Approach in terms of costs incurred

This approach consists of considering that, in the absence of harmful events, the investor could have avoided resorting to debt in the amount that he or she should have received if the event that generated the loss had not occurred. The purpose of pre-award interest is, therefore, to compensate for the cost of the additional debt resulting from the loss of funds of which the investor was a victim. The financial loss is therefore analysed as a cost incurred. In this context, the interest rate to be adopted is logically the interest rate relative to the investor’s additional debt.

Two approaches may then be considered: an approach via the rate of the investor’s own debt and an approach via market debt rates.

Approach via the interest rate of the investor’s own debt

The interest rate of the investor’s own debt is that corresponding to the investor’s borrowings between the date of expropriation and the date of the arbitration decision.

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3 The question of whether or not the fair compensation standard should constitute a compensatory floor for unlawful expropriations is outside the scope of this chapter.
Because this is an incurred financial cost, it is up to the investor to provide proof of the interest rate that he or she actually had to pay as a result of the harmful event.

If the investor had several outstanding loans during the period, it seems logical to adopt the highest interest rate, namely a marginal interest rate rather than an average interest rate over the period. Indeed, if the investor had the funds of which he or she was deprived at his or her disposal, he or she would reasonably have used them in such a way as to avoid falling into debt or to clear his or her debt with regard to the most costly loan instalments.

In practice, however, arbitration tribunals do not seem to refer to this approach, which nevertheless seems to be the most appropriate for calculating the financial costs incurred by the investor.

Approach via market debt rates

In practice, tribunals predominantly have recourse to LIBOR, EURIBOR or EONIA as a rate of reference. These average rates are those at which banks can borrow from other banks on the London interbank market (for LIBOR) or on the Eurozone interbank market (EURIBOR, EONIA).

The advantage of these rates is that they are published daily for different maturities and currencies, and are recognised as a calculation base for different interest rates.

Tribunals customarily add a premium to these rates, most often in the order of 2 per cent, to extend the rate towards that at which the investor borrowed money to fund his or her activities.

In the Lemire v. Ukraine case, the six-month average US-dollar LIBOR rate was used as the rate of reference to which the arbitration tribunal added a 2 per cent margin, a margin considered ‘adapted’ in reference to Article III(1) of the bilateral investment treaty that was in force for this case:

Since the compensation is expressed in USD, the appropriate rate of reference for the calculation of interest should be the LIBOR rates for six month deposits denominated in USD, calculated as of the date of delivery of this Award. The rate shall be adjusted every six months thereafter, to reflect changing market conditions.

In the Meerapfel Söhne AG v. Central African Republic case, the tribunal adopted simple interest at the one-year EURIBOR rate, to which it added two points:

However, the tribunal adopts simple interest at the one-year Euribor rate + 2 points, which it considers likely to ensure adequate and full compensation for the prejudice suffered by the Claimant.


5 For example, we refer to a one-week EURIBOR or a three-month EURIBOR.

6 Joseph Charles Lemire v. Ukraine, footnote 4 herein, § 353.

Finally, in the *Crystallex v. Venezuela* case, the tribunal also opted for the six-month average US-dollar LIBOR rate as the rate of reference, to which it added a margin of 1 per cent per year:

> In the Tribunal’s view, taking into account the circumstances of the case, the most appropriate interest rate which will adequately compensate Crystallex is the 6-month average U.S. dollar LIBOR plus 1 per cent per year at the valuation date. In the tribunal’s view, this approach approximates a commercially reasonable rate and provides adequate compensation for the financial loss caused to a company engaged in international business.8

In certain cases, tribunals have used another rate of reference from the money market: the central banks’ marginal lending rate (marginal lending facility). The marginal lending rate corresponds to the rate at which central banks lend liquidities to commercial banks. This is the highest rate at which the latter can finance themselves (because interbank lending rates are necessarily lower than or equal to this rate). In the *Mitchell v. Congo* case, the arbitration tribunal adopted the Federal Reserve Board’s marginal lending rate (called the prime lending rate):

> The Claimant considered that the interest rate to be applied to this amount is the prime lending rate of the “Federal Reserve Board of Governors Bank”, which was at 7.75% in March 1999 . . . . The tribunal is of the opinion that the rate indicated by the Claimant is appropriate and, consequently, the sum of USD 750,000 bears interest at the rate of 7.75% per year as from 6 March 1999.9

However, the reliability of interbank rates may be questionable: the scandals involving manipulation of these interbank rates, particularly in 2012, may have led certain arbitration tribunals, as in the *Cyprus v. Russia* case, to question the use of these rates, which are suspected to have been manipulated by banks:

> 1646. In response to a question by the Chairman whether Claimants “still rely on LIBOR”, counsel for Claimants noted that he had “avoided making any comment on the reliability of LIBOR.”

> 1679. LIBOR, as Claimants’ counsel implicitly recognized during the Hearing, has been discredited.10

Above all, the recourse to rates of reference by arbitration tribunals poses a real conceptual difficulty. The interbank lending rates are effectively average market lending rates, which do not correspond to the rates at which banks actually lend to investors. In an attempt to come close to them, tribunals adapt the market rates to the investor’s profile by applying premiums. This very approximate approach is never clearly documented.

There is, however, no reason to have recourse to average market rates when it is up to the investor to quantify the amount of financial interest he or she was effectively forced to pay

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9 *Patrick Mitchell v. Democratic Republic of Congo*, footnote 4 herein, § 94. This decision was subsequently invalidated on 1 November 2006 by the ad hoc committee on procedural grounds.
10 *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Award, 18 July 2014, § 1646 and 1679.
as a result of the debt to which he or she was exposed during the period from expropriation to the date of the decision. The use of rates of reference by tribunals thus falls short of our sense of economic foundation insofar as it leads to approximations.

**Approach in terms of lost profit**

In certain particular cases, the investor may not have been forced to borrow or maintain his or her debt to compensate for the loss of cash suffered as a result of expropriation. In these situations and in the absence of the alleged acts, the investor could consequently have been able to place or invest the sums of which he or she was deprived to derive interest from them for which he or she is henceforth entitled to obtain compensation.

If it is considered that the funds would simply have been deposited in the investor’s bank account, the approach based on the remuneration rate for bank deposits will be adopted. Several other approaches may be adopted according to whether it is considered that the funds would have been invested by the investor between the date of expropriation and the date of the decision:

- **a** in risk-free assets: approach based on the risk-free rate;
- **b** in certain well-identified projects: approach based on the rate of return on an alternative investment;
- **c** in the expropriating state’s debt bonds: forced loan approach; and
- **d** in the investor’s general activities: approach based on the average return on capital employed.

**Approach based on the remuneration rate for bank deposits**

Considering that the investor would have been able to place the funds in a deposit account, his or her lost profit must be calculated with reference to the remuneration rate for the investor’s bank deposits. These rates vary according to the currency and maturity of the deposits in question.

However, this hypothesis is rarely adopted insofar as the remuneration of bank deposits is low and that an investor, in theory, does not keep his or her liquidities, but rather invests them to increase the return on his or her funds.

Thus, the scenario according to which the investor would have invested this money in an alternative investment is more frequently adopted.

**Approach based on the rate of return on an alternative investment**

The approach based on the return on an alternative investment is based on the logic according to which the investor would have used the sums that he or she was deprived of to make investments other than those that were the subject of the expropriation proceedings.

This approach was adopted by majority opinion in the *Sylvania Technical Systems v. Iran* case:

> "The tribunal will derive a rate of interest based approximately on the amount that the successful claimant would have been in a position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country."
The difficulty with this approach consists of determining what the nature of this alternative investment would have been and the rate of return that would have been associated with it.

In theory, a rational investor's interests will always lie in using his or her money in such a way as to maximise his or her expected gains, while at the same time taking into account the probability of the investment's failure. Although this approach is based on a theoretical principle – the rationality of investors – that is not exempt from criticism, it does have the merit of allowing the establishment of an operational decision rule for the appraiser and subsequently for the tribunal.

Among the possible alternative investments offered to the investor, it would therefore be necessary, in the application of this rule, to adopt the highest interest rate from among those possible, on the condition that the investor has submitted a request to this effect and provided proof of the existence of these alternative investment opportunities. This may prove to be complicated when the alternative investment appears too uncertain or the causal link to the harmful event is not sufficiently established. For example, in the Crystallex v. Venezuela case, the tribunal rejected the interest rate proposed by the investor because the latter was unable to prove that he would have used the amount of the monetary compensation to invest in the bonds indicated (causal link not proven). The tribunal preferred to use the six-month average US-dollar LIBOR rate plus 1 per cent per year. It considered that this rate was a more accurate reflection of a 'commercially reasonable' interest rate:

With regard to the interest rate, the tribunal is unable to accept the Claimant's proposed rate, i.e. 8% per annum based on the coupon rate of bonds used by PDVSA. In the tribunal’s view, the Claimant has not proven that either pre- or post-award Crystallex would have used any awarded amounts to purchase or invest in PDVSA bonds or, for that matter, any instrument or investment producing a similar return.

In the tribunal’s view, taking into account the circumstances of the case, the most appropriate interest rate which will adequately compensate Crystallex is the 6-month average U.S. dollar LIBOR plus 1 per cent per year at the valuation date. In the tribunal’s view, this approach approximates a commercially reasonable rate and provides adequate compensation for the financial loss caused to a company engaged in international business. At the hearing, experts of both sides confirmed that LIBOR plus a certain percentage constituted a normal commercial rate in the circumstances.12

In the same vein, in the M Meerapfel Söhne AG v. Central African Republic case, it is specified:

The OHADA law, while providing for the principle of payment of interest on sums due, does not include indications relative to the applicable rate. CAR law does not include any further indications relative to this matter either. The tribunal considers that the rate of 12% claimed by MMS has no basis whatsoever, no more than the capitalisation of interest, which is also claimed. MMS did not provide proof that it could have invested the sums claimed at a rate of 12% with capitalisation of interest, particularly in CAR. However, the tribunal adopts simple interest at the one-year Euribor rate + 2 points, which it considers will ensure adequate and full compensation for the loss suffered by the Claimant.13

The alternative investment approach is thus frequently rejected by tribunals because of insufficient demonstration of the existence and expected return of these investment opportunities and the causal link to the harmful event.
Forced loan approach

The forced loan approach consists of resorting to use of the expropriating state’s lending rate. The investor’s loss of funds as a result of the harmful event implicitly forces him or her to lend money to the expropriating state insofar as the state has been in possession of the funds that should have been in the hands of the investor during the period from the expropriation to the date of the decision. In this context, the investor finds himself or herself exposed to the risk of the expropriating state failing to reimburse this forced loan so that the interest rate should include this default risk.

The interest rate associated with the forced loan is thus measured by the rate at which the expropriating state effectively borrowed on the financial markets during the period in question (i.e., from the date of expropriation to the date of the decision). This rate includes a risk premium, which compensates for the risk of the sovereign state defaulting on its financial commitments.

Certain authors have reproached this logic for taking into account the state’s default risk when this risk no longer exists on the date of the decision. 14

Approach based on the risk-free rate

Tribunals have sometimes resorted to risk-free lending rates, such as the American Treasury bond rate. The reasoning adopted consists of considering that the premium for the risk with which the investor is faced is already taken into account by the arbitration procedure on the date of the decision. The investor should not receive compensation for risks he or she no longer bears. Recourse to the risk-free rate therefore consists of simply adopting the value of the compensation on the date of the decision to take the monetary erosion linked to elapsed time into consideration.

This approach seems inappropriate for several reasons. First, it may be argued that the monetary erosion linked to elapsed time can only be measured by the rate of inflation. In the logic adopted by the tribunal, the sole objective of calculating interest is to express the amount of compensation in constant currency. However, there may be differences between the rate of inflation in a particular country and the rate of return on state bonds.

Second, if the risk with which the investor was confronted between the date of expropriation and that of the decision concerns a period elapsed on the date of appraisal, the fact remains that the investor may not necessarily have invested his or her money in risk-free assets during this period.

Approach based on the average return on capital employed

This approach consists of considering that the investor would have used the sums of which he or she was deprived to invest in his or her own activity. To measure the corresponding financial interest, tribunals frequently adopt the weighted average cost of capital (WACC) indicator for the investor.

This cost measures the average rate of return expected by the investor’s capital providers – namely shareholders on the one hand and financial creditors on the other. The WACC therefore simultaneously measures: (1) the investor’s financing cost on the debt and capital market; and (2) the return expected by the investor on the investment of his or her resources.

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14 In this context, see Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law (2009).
This measurement could therefore be used both for an approach in terms of costs incurred and an approach in terms of lost profit. However, we consider that the WACC is not appropriate for implementation of the approach in terms of costs incurred, which implies recourse to an interest rate directly linked to the investor’s debts.

Similarly, recourse to the WACC for implementation of the approach in terms of lost profit poses a problem because this indicator measures a rate of return expected and hoped for by the capital providers (shareholders and creditors) and not a rate of return necessarily realised.

To measure the effective return on the capital invested by the investor, it is necessary, in our opinion, to adopt the return on the capital invested in the past. The return on capital employed (ROCE) rate corresponds to the ratio of the after-tax operating result for the sum of the investor’s equity and financial debts.

Recourse to the investor’s ROCE nevertheless presents a major difficulty with regard to its implementation. If the return on the capital invested by the investor is calculated for the period from the date of expropriation to the date of the decision, it will quite logically be negatively affected by the expropriation for which compensation is claimed by the investor. It will therefore be up to the appraiser to calculate the return on the capital invested as it would have been noted with the investor in the absence of the alleged acts.

Although this exercise is theoretically possible, it may often be faced with insufficient proof or an insufficiently supported causal link. A more operational solution will consist of adopting the average return on capital invested in the investor’s sector of activity during the period from the date of expropriation to the date of the decision.

Where appropriate, it may be justified to take into account a premium or discount according to the proven past capacity of the investor to outperform or underperform the market.

Summary of applicable interest rates

It is up to the arbitration tribunal to determine the appropriate interest rate for each case according to the proof provided by the investor to support the existence of a causal link between the financial loss calculated and the event that generated the loss.

Ripinsky and Williams favour the use of the approach via return on alternative investments except when expropriation forces the investor to resort to a loan, in which case the lending rate of the latter will be more appropriate:

> In most cases, the “alternative investment” approach would thus best meet the objective of fully compensating a claimant for the loss of the use of money as well as give much-needed uniformity to the practice and predictability of the parties. However, in situations where the debtor's actions force the claimant to borrow funds, it would be correct to award interest at the claimant’s actual borrowing rate, in order to place the claimant in a position it would have been in the absence of the breach.\(^{15}\)

In other words, when it is proved that, in the absence of a harmful event, the investor could have avoided falling into debt or maintaining his or her debt, the corresponding financial

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\(^{15}\) S Ripinsky & K. Williams (2008), footnote 11 herein, p.373.
costs are analysed as a compensable incurred cost. It is therefore necessary to calculate the financial cost incurred on the basis of the funding rates that the investor effectively had to face, which must lead to excluding recourse to interbank rates of reference.

On the contrary, when it is proved that, in the absence of a harmful event, the investor would have placed or invested the sums of which he or she was deprived, the corresponding financial products are analysed as compensable lost profit.

As such, recourse to approaches in terms of forced loan or risk-free assets to determine pre-award interest appear to lack any economic foundation and, moreover, appear contrary to the principle of full compensation for the investor's loss.

However, the approach in terms of ‘return on alternative investments’ or ‘average return on capital employed by the investor’ appears more appropriate than that based on the rate of remuneration of bank deposits if the rationality of investors principle is accepted.

In the context of the approach based on returns on capital, we have reservations concerning use of the WACC because this indicator is based on a return expected by the markets and not on the return the investor would have actually realised from his or her investments.

To determine the rate of return on capital invested that the investor could have obtained in the absence of a harmful event, recourse to the ROCE rate appears to be the most appropriate indicator. In practice, determination of the internal ROCE rate that the investor could have realised in the absence of the alleged acts may prove to be very complicated to implement. As an alternative, reference could be made to the rate of return observed in the investor's sector of activity for the period from expropriation to decision. This rate could be adjusted upwards or downwards, as the case may be, according to the investor's past recorded individual performance compared with that of his or her sector of activity.

Finally, it is essential to determine the applicable interest rate in line with the currency into which the compensation will be converted. An economic relationship effectively exists between the interest rate and the exchange rate. A fall in the interest rate on loans and deposits in a country, in theory, brings about a depreciation of the currency in the country in question. Thus, it is essential to choose the interest rate in line with the currency used for payment of the monetary compensation. For example, if the monetary compensation is expressed in US dollars, the interest rate to use must itself be relative to US assets, loans or deposits.

### Compound interest or simple interest

Interest is called simple when it is not added to the capital at the end of each term. The initial capital therefore generates interest alone during each period.

Interest is called compound when it is added to the capital at the end of each term. The interest itself generates interest during the following period. Consequently, the amount of interest generated during the following periods is higher than the interest generated during the preceding periods.

Calculation of compound interest thus leads to higher amounts than that of simple interest. Is it therefore more appropriate to have recourse to one method of calculation rather than another?

Remember that pre-award interest compensates the investor’s financial loss resulting from not being able to use the funds of which he or she was deprived. Had he or she had this cash at his or her disposal, he or she would either have put it to work by placing or investing it (approach in terms of lost profit) or used it to clear his or her debt or avoid falling into debt (approach in terms of costs incurred). At the end of each term, the investor would either have
obtained the financial products of his or her placement or investment – interest that he or she would have invested again – or he or she would have avoided having to pay interest to his or her bank – interest that, more often than not, is subject to capitalisation.

In our opinion, only the recourse to compound interest makes it possible to respect the full compensation principle because it puts investors back in the financial position they would have been in if the alleged acts had not taken place.

In the lost profit approach, using compound interest is tantamount to acknowledging that an investor never lets his or her money ‘sleep’ in an account without receiving interest. This calculation method is thus realistic and in keeping with the business world.

Moreover, compound interest compensates for the unjustified enrichment of the state, which has had the opportunity to put the money of which it deprived the investor to work to generate interest.

Although the approach predominantly followed has been that of simple interest, over the past 20 years we have nevertheless observed a progressive change in the practice of tribunals, which now increasingly opt for compound interest. The *Costa Rica v. Santa Elena*\(^\text{16}\) case marks a major turning point with the decision of the arbitration tribunal to compound interest semi-annually.

Following the date of this decision, many arbitration decisions have taken the side of compounding due interest annually. For example, in the *Metalclad v. The United Mexican States* case, it is specified: ‘So as to restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place, interest has been calculated at 6% p.a., compounded annually’\(^\text{17}\).

In the *Crystallex v. Venezuela* case, the pre-award interest is also compounded: ‘Thus, for the reasons stated above, the tribunal awards interest on the principal sum awarded, compounded annually, at the rate of the 6-month average U.S. Dollar LIBOR plus one percent, which shall accrue from 13 April 2008 until the date of the Award’\(^\text{18}\).

However, the discretionary powers of tribunals in this matter remain intact. It may thus be regretted that, in the famous *Yukos v. Russia* case, the arbitration tribunal, while acknowledging that compound interest was now the subject of *jurisprudence constante*, decided to resort to simple interest for the pre-award interest:

*As to whether the interest awarded should be simple or compound, while the tribunal recognizes that the awarding of compound interest under international law now represents a form of “jurisprudence constante” in investor-state expropriation cases, the tribunal has concluded that, in the circumstances of this case, it would be just and reasonable to award Claimants simple pre-award interest and post-award interest compounded annually if Respondent fails to pay in full to Claimants the damages for which it has been held liable before the expiry of the grace period hereinafter granted.*\(^\text{19}\)
II POST-AWARD INTEREST

This interest applies from the date of the arbitration decision until the date of effective payment of the monetary compensation. In practice, the tribunal may grant a grace period starting on the date of the decision, a period during which interest does not run. This was decided in the Yukos v. Russia case:

*In the circumstances of the present case, in view of the significant amount of damages which Respondent owes Claimants as a result of this Final Award, the Tribunal considers it reasonable to grant to Respondent a grace period of 180 days following the date of the Award before interest will accrue if not paid in full to Claimants by then.*

A more accurate qualification of post-award interest lies in the term ‘default interest’. It is ‘intended to compensate for the loss resulting from lateness in executing an obligation’. In the Aucoven v. Venezuela case, the arbitration tribunal considered: ‘post-award interest is intended to compensate the additional loss incurred from the date of the award to the date of final payment.’

Post-award interest therefore differs fundamentally from pre-award interest insofar as post-award interest aims to favour execution that is fast or within the deadlines imposed by the arbitration decision. In practice, we nevertheless note that pre-award interest is rarely dissociated from post-award interest by tribunals, which, more often than not, adopt an identical rate and calculation method.

Although this practice certainly has the advantage of ensuring greater simplicity in decisions, it has the major disadvantage of maintaining confusion between two very different logics: one, economic (pre-award interest calculated in application of the full compensation principle) and the other, legal (post-award interest aiming to favour fast execution of arbitration decisions).

As for pre-award interest, tribunals have a certain amount of discretion when awarding post-award interest, whether it be the interest rate adopted or its method of calculation. There are effectively no rules specifically established in the matter apart from those established in the context of bilateral investment treaties.

i Applicable interest rate

A possible approach for determining the post-award interest rate is the forced loan approach described above. Between the date of the decision and the date of payment, the investor is exposed to a risk of default by the expropriating state with regard to effective payment of the monetary compensation. An investor who is the holder of a compensatory debt obligation by virtue of an arbitration decision effectively becomes a creditor of the state in the same way as holders of treasury bonds, and it seems, therefore, logical to consider that the interest rate relative to his or her debt must include a premium covering the default risk of this state.

ii Compound interest or simple interest

For the reasons indicated above, when post-award interest is pronounced, it seems to us preferable to adopt compound interest. This was particularly the case in Crystallex v. Venezuela:
The Respondent shall thus pay post-award interest on the total amount of damages, compounded annually, at the rate of the 6-month average U.S. Dollar LIBOR plus one percent, from the date of the Award until full payment.\textsuperscript{24}

In the \textit{Cyprus v. Russia} case, the arbitration tribunal also decided to compound the post-award interest fully:

\begin{quote}
In the event that Respondent fails to pay in full to Claimants the costs awarded to them in Part XIII of the present Award before the expiry of the grace period, post-award interest will accrue on any outstanding amount, compounded annually.\textsuperscript{25}
\end{quote}

Finally, it seems necessary to compound interest in line with the post-award interest rate adopted. For example, if the treasury bonds held in the expropriating state generate interest every six months, it is necessary to compound the post-award interest over the same period (i.e., over six months).

\textsuperscript{24} \textit{Crystallex International Corporation v. Bolivarian Republic of Venezuela}, footnote 4 herein, § 940.

\textsuperscript{25} \textit{Veteran Petroleum Limited (Cyprus) v. The Russian Federation}, UNCITRAL, PCA Case No. AA 228, § 1690.
Chapter 27

COUNTRY RISK PREMIUM

Ronnie Barnes and Phillip-George Pryce

I INTRODUCTION

The treatment of expropriation risk in quantum assessments in international arbitration is an issue that has recently received a lot of attention, and it is fair to say that nothing that even vaguely resembles a consensus has yet to emerge. The objective of this chapter is to provide a simple and clear overview of the challenges faced by a quantum expert when addressing expropriation risk, and, in particular, to show how a pragmatic approach may be needed to address what is a conceptually complex issue. Relatedly, this chapter explains the importance of distinguishing between country risk and expropriation risk (the former a broader concept that has the latter as one of its components), and ensuring that attempts to incorporate expropriation risk into a quantum assessment do not inadvertently lead to the double counting of other components of country risk.

II DISCOUNTED CASH FLOW ANALYSIS

In many international arbitrations, whether an investor–state dispute or an international commercial arbitration, the role of the quantum expert is to determine the value of an asset or project, with the results of this valuation exercise being used as an input to the assessment of compensation. In recent years, quantum experts have increasingly relied upon, and arbitral tribunals have increasingly accepted, the discounted cash flow (DCF) method as an approach to these valuations. The implementation of the DCF method requires an estimation of the stream of future cash flows that the asset or project is expected to generate over its lifetime, followed by the discounting of these cash flows back to the date of valuation using a discount rate that accounts for both the time value of money and the risk or uncertainty that is associated with the future cash flow stream.

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1 Ronnie Barnes is a principal and Phillip-George Pryce is a senior analyst at Cornerstone Research in London.
However, although opposing quantum experts might agree as to the appropriateness of the DCF valuation method, they often fundamentally disagree on its inputs, in particular, the discount rate. As even a cursory review of any corporate finance textbook will indicate, this is far from unique to international arbitrations – the estimation of expected future cash flows and the determination of the appropriate discount rate are inherently complex exercises. However, there is a specific feature of international arbitrations that potentially make such disagreements particularly pronounced, namely that these disputes typically arise out of cross-border investments whereby an investor in one country invests in a second, often emerging market country, thus exposing itself to the ‘country risk’ associated with that second country. Consequently, it is often the case that one of the main points of contention between the quantum experts on a given matter relates to the definition and quantification of this country risk, and how it should be incorporated into the asset’s or project’s valuation.

### III COUNTRY RISK

Broadly, country risk ‘is a . . . concept that encompasses both the potentially adverse effects of a country’s political environment and its economic and financial environment’. In simple terms, it refers to those risk factors the foreign investor would not face in its domestic market, such as political instability in the host country and potential shifts in a government’s economic policy; for example, the nationalisation of private industries and the imposition of protective tariffs. In principle, to account for the effect of country risk on value, the quantum expert could either adjust downwards the expected cash flows stemming from the asset or project, or incorporate a ‘country risk premium’ into the discount rate. The rationale for the latter approach – one that is frequently advocated for by quantum experts – is that the higher the degree of uncertainty arising from actions taken by the government in the host country, the higher the discount rate, and therefore the lower the stream of discounted future expected cash flows and, consequently, the value of the asset or project.

However, as explained in a related article, from a conceptual point of view, this approach is problematic. That article introduces the capital asset pricing model (CAPM), which is ‘by far the most commonly used approach for determining discount rates in a wide range of practical settings’, and explains how the CAPM – originally developed in a single country setting – can be modified to an international setting.

The article goes on to lay out the following ‘recipe’ for cross-border valuations:

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5 This is not necessarily the case. A quantum expert might argue that any assessment of future cash flows is too speculative, and that a valuation based on book value or the original cost of investment is appropriate. Alternatively, the quantum expert may be a proponent of the ‘multiples-based’ approach to valuation, which relies on the identification of comparable investments or transactions, or both. A discussion of the relative merits of these different valuation methodologies is beyond the scope of this chapter.


10 id., p. 20.
a Estimate expected future cash flows, taking account of country risk – in other words, ensure that any factors that contribute to country risk are accounted for through a reduction in the expected cash flows from the asset or project being discounted.

b Determine the discount rate as the sum of a risk-free rate, plus a risk premium. The latter is not a country risk premium – rather, it is the premium that investors demand to compensate them for what is referred to as the systematic risk of the cash flows being valued.

c Do not increase the discount rate to reflect country risk, because ‘[i]ncreasing the discount rate to reflect country risk would be either double counting the project’s systematic risk, or bringing diversifiable, non-systematic risk into the discount rate calculation, neither of which is appropriate’.11 Discount rates should not reflect risks that are diversifiable.12

That a country risk premium should not be added to the discount rate does not mean that the international nature of the valuation is irrelevant to the determination of the appropriate discount rate. To the contrary, an important assumption that a quantum expert is required to make – but one that is often overlooked – when estimating the risk premium component of the discount rate relates to the extent to which capital markets across the globe are integrated. Assuming fully integrated capital markets implies that investors in all countries hold portfolios that are well diversified internationally. However, assuming fully segmented capital markets implies that investors hold portfolios of assets in a particular country (e.g., US investors hold only US investments). The two assumptions lead to potentially quite different risk premiums and, consequently, discount rates, although the degree of difference is essentially an empirical question.

In reality, capital markets are neither fully integrated nor fully segmented. For example, in many countries there are restrictions with regard to foreign investments. Furthermore, even if there were no such restrictions, investments in assets or projects are often not divisible into smaller fractions. As a consequence, for instance, a firm investing in a large power plant or mining operation may have to commit a substantial portion of its capital to a single project, making it impossible to diversify the risk exposure to the host country in which the investment is located.

This, therefore, necessitates a pragmatic approach to the determination of the discount rate, and in particular the risk premium element.13 The recommendation is that risk premiums


11 id., p. 22.
12 Tim Koller, Marc Goedhart and David Wessels Valuation: measuring and managing the value of companies, 6th edn, John Wiley and Sons, 2015, p. 714.
13 The determination of the risk-free rate is somewhat more straightforward, although there are moderately complex issues to address regarding, for example, the maturity or tenor of the rate to use. The key point is that the rate used must match the currency in which the expected future cash flows are denominated. Even if the investment is located in an emerging market country, if the forecasts of expected future cash flows are denominated in US dollars, a US risk-free rate should be used in the discount rate. The rationale is as follows: the emerging market risk-free rate is higher than the US risk-free rate because of an anticipated depreciation of the emerging market currency with respect to the US dollar. However, this anticipated depreciation will (or at least should, if the exercise has been performed properly) have been incorporated into the expected future cash flow forecasts. Consequently, discounting this expected US dollar denominated future cash flow stream at a discount rate that includes the emerging market risk-free rate, would lead to a double counting of the expected future weakness of the emerging market currency.
should be estimated under both assumptions (fully integrated and fully segmented capital markets). To the extent that these differ significantly, the relative weighting given to the two estimates should be driven by a consideration of the level of diversification in the portfolio of the investor from whose perspective the valuation is being assessed. This is an admittedly imprecise recommendation. However, that there is no single clear-cut right answer to the question should not be taken to mean that the issue can be ignored – a failure to even address the question can potentially lead to the use of a risk premium, and consequently a discount rate, that is wildly inappropriate.

IV COUNTRY RISK AND INTERNATIONAL ARBITRATIONS

Though motivated by questions of quantum in an international arbitration setting, the preceding discussion regarding the appropriate treatment of country risk is in fact applicable to any situation where there is a need to incorporate the cross-border nature of an investment into a valuation.14 A question that is, however, specific to an international arbitration quantum assessment is whether the resulting valuation is an appropriate starting point for the determination of compensation. Specifically, such a valuation is what may be termed a ‘fundamental value’ or a ‘fair market value’, and is the value that is appropriate when considering an arm’s-length transaction between a willing buyer and a willing seller, because it properly and fully accounts for all of the risks that the investment is exposed to, including country risk. As such, it may also be a suitable basis for a quantum assessment in an international commercial arbitration. Once we move to the investor–state arena, however, the situation becomes considerably less clear.

A key element of country risk is political risk, which may be defined as ‘a special case of country risk in which a government or political action negatively affects a company’s cash flow’.15 In turn, a key element of political risk is expropriation risk; namely the risk that the host government takes some action that diverts some or all of the cash flows generated by the asset or project being valued away from the investors in the asset or project, and towards that government.16 Consequently, a valuation that fully and properly accounts – by adjusting downwards the expected cash flows – for country risk will, by definition, reflect expropriation risk. Of critical importance to the investor–state arbitration community is the question of whether this is appropriate – in other words, should expropriation risk be taken into account when determining a measure of compensation?

The argument made in certain investor–state arbitrations against the inclusion of expropriation risk is as follows: the more a host state takes actions that increase the perceived17 expropriation risk, the greater are the downward adjustments to the expected cash flows and

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14 For example, an investment banker advising a US client on a potential investment in South Africa.
16 id., p. 605.
17 The repeated use of the word ‘perceived’ in the following discussion is deliberate. Even if a host government knows with certainty that it will take actions in the future that will, in whole or in part, expropriate an investment, what matters when determining the value of the investment at a given point in time is the perceived likelihood that such actions will be taken. Different perceived likelihoods will lead to different valuations – by definition, when attempting to determine the fair market value, what is sought is an estimate of the market consensus as to this likelihood. Though easy to articulate, this is of course an extremely challenging exercise in practice.
the lower is the resulting valuation. If this valuation is then used as the basis for an award of compensation after an expropriation has actually taken place, the host state has benefited – in the form of having to pay a lower amount of compensation – from its actions. This can be analysed with a simple example. Suppose that: (1) an international investor owns a project located in a host country and expects this project to generate a single cash flow of US$100; (2) there is a perceived probability ‘\( p \)’ that the government of the host country will expropriate the project with no compensation; and (3) the discount rate is zero. The fair market value of this project is US$100 multiplied by the perceived probability that the government does not expropriate.\(^{18}\) If \( p \) is equal to 50 per cent, the fair market value of the project is US$50.\(^{19}\) The more the government’s actions increase \( p \), the lower the fair market value of the project is. For example, if \( p \) increases from 50 to 75 per cent, the fair market value of the project decreases from US$50 to US$25.\(^{20}\) Suppose that the government then exercises its sovereign right to expropriate. If \( p \) becomes very high immediately prior to the expropriation, the fair market value of the project and, therefore, the compensation that the investor receives would be reduced, potentially significantly. However, the host country would pay the investor an amount of compensation that is lower than the compensation that the host country would have paid if this had been based on the fair market value prior to the increase in \( p \). A tribunal deciding a dispute between the investor and the host state could, in principal, decide to account for the increase in \( p \) in determining compensation. Whether this is appropriate is of course a legal question. Nonetheless, determining how to handle expropriation risk in that valuation generates a number of challenges from the perspective of a quantum expert. In this simple case, the arbitral tribunal could require different calculations depending on its determinations regarding the expropriation:\(^{21}\)

\[a\] Consider the expropriation risk on the eve of the expropriation of the project without any adjustment. This approach appears to be consistent with tribunal awards in which the expropriation was found to be lawful.\(^{22}\)

\[b\] Eliminate the expropriation risk in its entirety and compensate the investor at the ‘full’ value that the project would have had absent the expropriation. That is, \( p \) would be set to zero. As explained below, this appears to be the approach undertaken by certain tribunals in the case of an unlawful expropriation.\(^{23}\) In other words, even if \( p \) was greater than zero, because investors feared a lawful expropriation, if the form of the actual expropriation was unlawful, the concept of full reparation\(^{24}\) could lead the tribunal to compensate the investor with the full value of the project, eliminating the effect of any government conduct on the expropriation risk.

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18 If the perceived probability that the government expropriates is \( p \), the perceived probability that it does not expropriate is \( 1 - p \).
19 That is, US$100 \times (1 − 50 per cent) = US$50.
20 That is, US$100 \times (1 − 75 per cent) = US$25.
21 These approaches include a list of examples and are not intended to be exhaustive.
22 See, for example, Tidewater Investment SRL and Tidewater Caribe C.A. v. The Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5), Award, 13 March 2015, paragraph 146.
24 id., p. 526 citing the Factory at Chorzów judgment (‘It follows that the compensation due . . . is not necessarily limited to the value of the undertaking at the moment of disposition, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the
c Eliminate the expropriation risk in part and compensate the investor accordingly. The perceived probability of expropriation could be set to the level that prevailed at the time when the investor made its investment. Alternatively, it is possible that expropriation risk has increased after the investment was made because of legal or legitimate policies enacted by the government. In this case, the tribunal may wish to attempt to isolate the perceived increase in the probability of expropriation that can be traced back to unlawful conduct on the part of the host state.

A number of arbitral tribunal awards have focused on the distinction between lawful and unlawful expropriation, and the impact of expropriation risk on the value of the assets or project at issue. For example, in the *Gold Reserve v. Venezuela* award, the tribunal found that the manner by which the state regulatory powers were exercised led to the finding of a serious breach by the state of the fair and equitable treatment standard under the bilateral investment treaty (BIT). The tribunal award stated that the ‘seriousness of the breach shall be duly taken into account when determining the amount of the compensation due to Claimant in that regard’. It appears that, based on this conclusion, the tribunal decided to adjust the expropriation risk component of the discount rate. In particular, the tribunal stated that ‘it is not appropriate to increase the country risk premium to reflect the market’s perception that a State might have a propensity to expropriate investments in breach of BIT obligations’. The tribunal did not engage the parties’ quantum experts to provide a quantification of the effect of the state’s propensity to expropriate on country risk. Instead, the ‘Tribunal decide[d] to adopt a country risk premium of 4% as used’ in one of the source documents provided by the claimant’s quantum expert, and explained that it accepted the respondent’s quantum expert explanation that this ‘premium appropriately considers political risks, together with other risks, but has not been over-inflated on account of expropriation risks’.

just price of what was expropriated; in the present case, such a limitation . . . would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned. The essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed’). See *Factory at Chorzów (Germany v. Poland)*, Merits, Judgment, PCIJ (Ser. A) No. 17 (13 Sept. 1928), p. 47.


26 *Gold Reserve Inc. v. Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014, paragraph 668.

27 id., paragraph 841. Almost without exception, tribunal discussions regarding expropriation risk have been framed around the question of the appropriate country risk premium to add to the discount rate to capture expropriation risk. As explained above, this is conceptually problematic – country risk (including expropriation risk) should be accounted for via adjustments to expected cash flows, rather than the discount rate – although the practical complexities of adjusting expected cash flows in this way are acknowledged. That notwithstanding, the tribunal rulings referenced here are informative in that they address the question of the extent to which (rather than how) expropriation risk should be incorporated into an award of compensation.

28 id., paragraph 842.

29 ibid.
There were two main questions that the tribunal believed needed to be taken into account. First, had the expropriation policy enacted by the state led to an effective increase in the expropriation risk between the time Gold Reserve undertook its investment and the time the state expropriated Gold Reserve’s investment? If the answer to this question is no, excluding the expropriation risk might lead to an excessively low discount rate, which, in turn, would lead to an overvaluation of the investment. Second, is it reasonable to assume that a sophisticated investor, such as Gold Reserve, would evaluate the existence of expropriation risk – among other political risks – when undertaking its investment decision in an emerging market country such as Venezuela? If the answer to this question is yes, excluding the expropriation risk in its entirety might lead to an excessively low discount rate, which, in turn, leads to an overvaluation of the investment.

V ACCOUNTING FOR EXPROPRIATION RISK – SOME PRACTICAL CONSIDERATIONS

Given that quantum experts and tribunals face the challenge of measuring expropriation risk, and incorporating this risk into valuations and compensation, an obvious question to ask is how this is actually done in practice. A recent academic article tabulates a number of widely used methods for addressing the question of how to adjust the discount rate to reflect country risk, and, based on anecdotal evidence and a review of arbitral practitioner publications, it appears that the vast majority of the approaches used to account for expropriation risk are based on these methods. In other words, it appears that many quantum experts bring expropriation risk into the picture by adjusting the discount rate using methods that were developed to address country risk. This is potentially problematic for a number of reasons. First, as noted earlier, expropriation risk is only one component of country risk – to the extent that a given method leads to a risk premium that covers components of country risk other than expropriation risk, this may lead to an inappropriately high discount rate, and an inappropriately low valuation. Second, the methods themselves (as noted by Bekaert et al. (2016)) are created and modified ad hoc, and are therefore based on strong assumptions. Third, the methods all involve adjustments to the discount rate, whereas (as noted earlier) country risk should ideally be accounted for through adjustments to expected cash flows.

This clearly puts a quantum expert into a difficult position. Valuation is a practical endeavour, and the fact that the conceptually ‘pure’ approach cannot be implemented does not mean that he or she should simply throw up his or her hands and admit defeat. Rather, a pragmatic approach is needed whereby there is a clear identification of the risks that the expert is seeking to incorporate into the valuation, followed by a careful qualitative consideration of how closely the various available methods match what the quantum expert is looking to do. In other words, it may be that in many cases, there is no practical alternative to addressing

30 Geert Bekaert, Campbell R. Harvey, Christian Lundblad and Stephan Siegel, ‘Political Risk and International Valuation’. Journal of Corporate Finance 37, 2016, pp. 1–23 at Table 1 on p. 5.  
32 ‘Over time, several ad hoc modifications to the base case were proposed.’ See Geert Bekaert, Campbell R. Harvey, Christian Lundblad and Stephan Siegel ‘Political Risk and International Valuation’. Journal of Corporate Finance 37, pp. 1–23, 2016, p. 4.
Country Risk Premium

expropriation risk via the discount rate, and that the best a quantum expert can do is identify the risk premium that best accounts for the degree of expropriation risk that is to be included in the valuation.

With that in mind, we now summarise the various approaches to determining a country risk premium – these include different variants of the sovereign spread model, the use of country credit ratings and the use of political risk sovereign spreads.

The starting point for the models that are based on sovereign spreads is, unsurprisingly, the sovereign spread itself – namely, the difference between the yield on a bond issued in US dollars by the host country in which the project is located and a US Treasury bond with similar maturity. The first variation of this model was introduced by Mariscal and Lee (1993), and several ad hoc modifications of this approach were made thereafter by Mariscal and Dutra (1996), Godfrey and Espinosa (1996), Mariscal and Hargis (1999), Damodaran (1999 and 2003), Zenner and Akaydin (2002), and Abuaf (2015).33 For example, Mariscal and Dutra introduced an adjustment to the sovereign spread by multiplying it by the ratio of the volatility in equity returns in the country at issue and the volatility in equity returns on the world or US markets.34 Godfrey and Espinosa proposed a similar adjustment, but in the attempt to reduce the potential double counting of political risk, they used a downward adjustment of 60 per cent.35 Damodaran (1999) proposed adjusting the sovereign spread by multiplying it by the ratio of the volatility in equity returns and the volatility in bond returns in the country at issue, arguing that risk premiums on bonds have to be adjusted upward to be similar to risk premiums on equity.36

However, it has long been recognised that a sovereign spread reflects a number of local macroeconomic factors and fiscal conditions beyond political spreads. Therefore, these methods cannot be directly used to measure political or expropriation risks. A similar critique can be levied against the country credit rating model developed by Erb, Harvey and Viskanta (1996). This model focuses on the use of credit ratings, which are assumed by these authors to be a proxy for country risk. Specifically, the model empirically estimates the relationship between equity returns and country credit ratings published by Institutional Investor. The results of this empirical analysis are then used to estimate country risk premiums.37

Perhaps the most promising approach to identifying the risk premium to be added to the discount rate is to use the concept of the political risk sovereign spread proposed by Bekaert, Harvey, Lundblad and Siegel (2014). This is based on a framework that allows for

33 See footnote 28.
the disaggregation of that element of the sovereign spread that arises from political risk.\textsuperscript{38} However, even this framework does not allow for the separation of expropriation risk from political risk.

VI CONCLUSIONS

There is no question that measuring expropriation and country risks are two of the most challenging issues faced by quantum experts in international arbitrations, and that a careful balance needs to be struck between what is conceptually appropriate and what is practically feasible.

There are three key takeaways from this chapter:

\textbf{a} The extent to which expropriation risk should be incorporated into a valuation that is to be used as a basis for an award of compensation is a legal question – the job of the quantum expert is to ensure that his or her valuation comports with the answer to this question.

\textbf{b} Expropriation risk is a subset of country risk – consequently, methods used to address country risk need to be reviewed carefully before being adopted to address questions relating to expropriation risk, with a failure to do so likely leading to a biased estimate of expropriation risk, an inappropriate discount rate and an unreliable valuation.

\textbf{c} Addressing either expropriation risk or country risk via the discount risk is conceptually problematic and, to the extent possible, these risks should be accounted for via adjustments to expected cash flows. To the extent that this is not possible, the expert should strive to reduce the element of ad hoc subjectivity in the approach taken and to match any adjustment to the discount rate as closely as possible to the risks he or she is seeking to capture.

\textsuperscript{38} In other words, ‘the political risk spread takes the fraction of the predicted value for the sovereign spread accounted for by the political risk . . . and multiplies it with the current sovereign spread. The computation . . . embeds up to date information from the forward looking sovereign spread at the same time as the current information in the current political risk rating in a particular country (relative to the U.S.).’ See Geert Bekaert, Campbell R Harvey, Christian Lundblad and Stephan Siegel ‘Political Risk and International Valuation’, \textit{Journal of Corporate Finance} 37, 2016, pp. 1–23 at p. 12. Interestingly, this approach can also be couched in terms of the required adjustments to expected cash flows. R Barnes, ‘Issues in Cross-Border Valuation and the Implications for Damages Assessments in Investor-State Disputes’ in \textit{Investor-State Arbitration 2019}, ICLG, 1st edn, 2018, pp. 22–23.
Part VI

POST-AWARD REMEDIES
ANNULMENT OF INVESTMENT ARBITRATION AWARDS

Asian International Arbitration Centre

Chapter 28

I INTRODUCTION

The finality of the award is one of the main features associated with arbitration. It is based on the general principle that arbitral awards are not subject to review on the merits. Generally, the correctness of the award is subordinate to its finality. However, like all general principles of law, its operation is defined by limited exceptions, such as found in the remedy of annulment.

II DISTINGUISHING BETWEEN ANNULMENT AND SETTING-ASIDE APPLICATIONS

Although in terms of procedure there are many similarities between International Centre for Settlement of Investment Disputes (ICSID) and non-ICSID arbitrations, the annulment mechanism is unique to the former.

Particularly, in arbitrations conducted outside the framework of the ICSID Convention, including that under the Additional Facility Rules, awards may be challenged by way of a setting-aside application in national courts at the seat or otherwise resisted at the enforcement stage. Yet, ICSID tribunals’ awards ‘shall not be subject to any appeal or to any other remedy’ other than the annulment. The ad hoc committee in CDC v. Seychelles noted:

[The annulment] mechanism protecting against errors that threaten the fundamental fairness of the arbitral process (but not against incorrect decisions) arises from the ICSID Convention’s drafters’ desire that Awards be final and binding, which is an expression of “customary law based on the concepts of pacta sunt servanda and res judicata,” and is in keeping with the object and purpose of the Convention. Parties use ICSID arbitration (at least in part) because they wish a more efficient way or resolving disputes than is possible in a national court system with its various levels of trial and appeal, or even in non-ICSID Convention arbitration (which may be subject to national courts’ review under local laws and whose enforcement may also be subject to defenses available under, for example, the New York Convention).3

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1 This chapter is based on earlier revisions prepared by Sundra Rajoo, the former director of the Asian International Arbitration Centre (AIAC), with the assistance of Eleo Szulc and Smrithi Ramesh. All have since left the AIAC. The information in this chapter was accurate as at April 2019.
2 Article 53 of the ICSID Convention.
3 CDC Group plc v. Republic of the Seychelles, (ICSID Case No. ARB/02/14), Decision on Annulment, 29 June 2005, at para. 36.
Together with the provisions on the enforcement of awards,4 the annulment mechanism manifests the self-contained nature of the ICSID regime. The same nature dictates that the grounds for annulment of ICSID tribunals' awards are limited to those set out in the ICSID Convention.

III GROUNDS FOR ANNULMENT

Article 52 of the ICSID Convention specifies that either party may request annulment of the award on any of the following grounds:

- the tribunal was not properly constituted;
- the tribunal has manifestly exceeded its powers;
- there was corruption on the part of a member of the tribunal;
- there has been a serious departure from a fundamental rule of procedure; or
- the award has failed to state the reasons on which it is based.

The ad hoc committee in Wena Hotels v. Egypt observed:

> These grounds for annulment are enumerated exhaustively. . . . The power for review is limited to the ground of annulment as defined in this provision. These grounds are to be interpreted neither narrowly nor extensively.5

As such, more often than not a party seeking annulment of the award would rely on several grounds listed in Article 52 in its application to the Secretary-General. In any event, an ad hoc committee is not bound by the scope of the annulment application and can annul the award in whole or in part.6

However, an ad hoc committee is not authorised to provide its determination of the issues contained in the annulled parts of the award or substitute the reasoning of the tribunal for its own.7

A brief analysis of the grounds for annulment is given below.

i Improper constitution of the tribunal

Article 52(1)(a) of the ICSID Convention mirrors other instruments providing for post-award remedies (e.g., Article V(d) of the New York Convention and Articles 34(2)(a)(iv) and 36(1)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration). Professor Schreuer notes that Article 52(1)(a) 'was intended to cover a variety of situations such as absence or invalidity of the agreement between the parties, non-compliance with a nationality requirement or another form of ineligible.8

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4 Articles 53-55 of the ICSID Convention.
7 Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, p. 38.
However, as the procedural irregularities are closely monitored by the Secretariat of the ICSID, this ground is seldom relied on in the annulment proceedings and does not play a role in practice.

ii  **Manifest excess of powers**

According to Article 52(1)(b) of the ICSID Convention, the excess of powers must be manifest, meaning clear, obvious, easily recognisable or evident, as interpreted by ad hoc committees. In addition, some ad hoc committees have added the requirement of seriousness or materiality to the outcome of the case.

According to Professors Dolzer and Schreuer, ‘[a]n excess of power occurs where the tribunal deviates from parties’ agreement to arbitrate’. An analysis of annulment decisions’ discussions on this ground indicates that such a deviation is deemed to have occurred when the tribunal either exceeds its jurisdiction or erroneously declines it, or fails to apply the applicable law.

A jurisdictional excess of powers takes place when the tribunal wrongly assumes jurisdiction over a dispute, exceeds the scope of its jurisdiction or erroneously declines its jurisdiction. While deciding on its jurisdiction, the tribunal must consider the jurisdictional requirements set out in Article 25(1) of the ICSID Convention and other requirements as may be set by the relevant treaty or contract. The tribunal is bound to decline its jurisdiction if one or more of these requirements are not fulfilled, even if the parties do not raise jurisdictional objections.

A failure to apply the proper law may take the form of either a total disregard of the applicable law or applying a law other than law determined pursuant to Article 42(1) of the ICSID Convention.
ICSID Convention. Therefore, a mere error in application of the law may not constitute a ground for the annulment. This is in line with the principle that an annulment is not an appeal, a principle that ad hoc committees routinely stress.

iii Corruption

Article 52(1)(c) of the ICSID Convention allows an ad hoc committee to annul the award should it be proved that there was corruption on the part of a member of the tribunal. This ground closely resembles that set out in Article 52(1)(a) and its purpose is to safeguard the integrity of the arbitral process.

iv Serious departure from a fundamental rule of procedure

Article 52(1)(d) of the ICSID Convention sets a double threshold for a violation capable of annulment to be found. First, the infringed rule must be of fundamental character. Second, the violation of the rule must be serious.

The requirement of a ‘fundamental rule’ means that only violations of the most important procedural principles may amount to a ground for annulment, such as the right to be heard, impartiality of the arbitral tribunal, equality between the parties, and rules of treatment of evidence and burden of proof, as well as deliberation between the members of the tribunal. Further, a violation has to be serious.

v Failure to state the reasons

Article 48(3) of the ICSID Convention states that the award shall consider every issue put before the tribunal and shall state the reason for the tribunal’s decision. This provision is closely connected to Article 52(1)(c) of the ICSID Convention, which gives the ad hoc committee the power to annul the award if the tribunal failed to motivate its award.

The rationale behind the duty to state reasons is to enable the parties to follow and understand the tribunal’s thinking. It is not material whether the tribunal’s reasons are correct or convincing.

A failure to state reasons can take different forms. It may be a total absence of reasons or a failure to deal with every question. Contradictory or frivolous reasons also fall within the notion of the failure to state reason.

19 Article 42(1) of the ICSID Convention reads: ‘The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, 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.’
20 Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, at para. 90.
21 Article 52(1)(c) of the ICSID Convention.
22 Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, at para. 99.
24 Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, at para. 105.
IV PROCEDURE

The procedure for annulment of an ICSID award is set in Article 52 of the ICSID Convention and supplemented by the ICSID Arbitration Rules, that apply mutatis mutandis, similarly to Articles 41 to 45, 48, 49, 53 and 54, and of Chapters VI and VII. 26

According to Article 52(2), the annulment application shall be made to the Secretary-General within 120 days of the date the award being rendered. However, when the applicant invokes Article 51(1)(c) of the ICSID Convention (‘corruption on the part of a member of the tribunal’), the 120 day-period starts to run from the date when such grounds were discovered, yet in any event within three years of the date the award was rendered.

As it follows from Article 52(2), only an award can be subject of annulment. Any decision made before the award is rendered, such as decision on jurisdiction or interim measures, must become a part of the award. As such, a party needs to await the award before bringing the application for the annulment. 27

Upon receipt of the application, the chair of the Administrative Council of ICSID shall appoint a three-member ad hoc committee to hear the annulment application. The members of the ad hoc committee are appointed from the ICSID panel of arbitrators, provided that none of the members of the committee:

a have been a member of the tribunal that rendered the award;
b are of the same nationality as any such member;
c are a national of the state party to the dispute or of the state whose national is a party to the dispute;
d have been designated to the panel of arbitrators be either of those states; or
e have acted as a conciliators in the same dispute. 28

The parties’ procedural agreements entered into with regard to the arbitration in which the challenged award was rendered will often apply to the annulment proceedings. Yet, during the first session of an ad hoc committee, the parties may diverge from their original agreements. 29

The ad hoc committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. 30 Granting a stay of the enforcement may be made subject to furnishing a security. 31

In addition, any of the parties applying for the annulment may also request the Secretary-General for a provisional stay of the award’s enforcement. As soon as the ad hoc committee is constituted it shall, if either party requests, rule within 30 days on whether the stay should be continued and, unless it decides to continue the stay, the provisional stay is automatically terminated. 32

26 Article 52(4) of the ICSID Convention.
27 Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, at para. 30.
28 Article 52(3) of the ICSID Convention.
30 Article 52(5) of the ICSID Convention.
31 See e.g., Adem Dogan v. Turkmenistan, (ICSID Case No. ARB/09/9), Decision on Annulment, 15 January 2016.
32 Rule 54(2) of the ICSID Arbitration Rules.
When considering the application for annulment, the *ad hoc* committee shall neither interpret the invoked grounds in a restrictive nor a broad manner, rather its interpretation should be appropriate and reasonable.\(^{33}\) There is no presumption in favour of either annulment or validity of the award.\(^{34}\) The annulment of the award is at the discretion of the *ad hoc* committee.\(^{35}\)

According to Article 52(6), if the award is annulled, the dispute shall, at the request of either party, be submitted to new a tribunal for reconsideration.

**V CONCLUSION**

Annulment is the exceptional remedy. It is intended to protect the fundamental principles of due process and be balanced against a principle of finality of arbitral awards. As such, annulment is available only on a limited number of grounds expressly provided in Article 52 of the ICSID Convention.

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I INTRODUCTION

Despite calls for reform and controversial public debate in the last years surrounding the negotiation of chapters on investment protection in free trade agreements, the practice of investment arbitration continues. It remains a popular means for investors worldwide to seek the protection of their rights under bi- or multilateral investment treaties. This holds especially true for the Energy Charter Treaty (ECT), which in 2019 again saw an influx of new cases and remains the international investment agreement most used by investors.

In the past, the prominence of the ECT could be explained by its geopolitical and economic origin. At times, it protected investors in the highly profitable but also often strictly governed energy sectors, especially after the breakdown of the Soviet Union, when several countries had regained – for the first time in decades – sovereignty over their natural resources.

However, in the past few years, the key factor for the activity surrounding the ECT is its availability for investors in the solar energy sector to challenge the revocation of incentives states had granted to them during the 2000s. The number of cases brought by investors is still expanding, with Spain and Italy still being the most targeted states.

In 2018, the arbitration world was turned upside down when the Court of Justice of the European Union (CJEU) issued its judgment in *Slovak Republic v. Achmea BV*. The shockwaves of it were still felt in 2019. There are several reasons why the judgment is of particular importance to the ECT. First, it is simply because of the number of intra-EU cases that are brought under the ECT. In 2019, all of the 18 decisions taken by tribunals under the ECT concerned intra-EU disputes. Second, it may be argued that the *Achmea* judgment is not that surprising in what it explicitly states, but in what it implies. Although the ECT is not mentioned in the judgment, its potential implications on the application of the ECT remain subject to debate. Finally, besides its legal implications, its effect on the investment climate – especially given the created uncertainty by the *Achmea* judgment – is significant.

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1 Patricia Nacimiento is the co-head of the German dispute resolution team at Herbert Smith Freehills LLP.
3 See UNCTAD overview of investment arbitration cases filed, http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableliia. Investors filed a total of three new cases under the ECT in 2019, see https://energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases.
4 See footnote 3. Spain was hit with an additional four arbitrations under the ECT in 2018 and a further one in 2019, while other claims were filed against Italy.
number of claims initiated against Spain and Italy after the judgment may have been guided by the awareness of investors to act quickly before the Member States of the European Union start to implement the Achmea judgment, which might also involve changes to the ECT.\(^6\)

This year’s chapter will deal with such possible changes to the ECT in more detail. The reason for this focus is a new dynamic that started in 2019: The Charter Conference has established and mandated a ‘Modernisation Group’ to start negotiations on the modernisation of the ECT. The process is part of a wider reform discussion on the design of a next generation of investment agreements that is already taking place in forums such as the UNCITRAL Working Group III and frequent UNCTAD conferences. With a view to the ECT, this chapter will shed some light on the legal framework for treaty change and on possible amendments to substantive provisions.

II  THE ECT AND AN OVERVIEW OF ITS INVESTMENT PROTECTION REGIME

The ECT\(^7\) is a multilateral treaty with its inception and origin dating from the early 1990s. The breakdown of the Soviet empire, the fall of the Berlin Wall and the following reunification of Germany led to a general reconfiguration of east–west relations. Russia and its eastern European neighbours’ richness of energy resources combined with western Europe’s general anxiety to diversify its sources of energy supply led to an initiative by the European Communities to establish a new legal basis of commercial relations in the energy sector.

In 1991, both western and eastern European states signed the European Charter, the political foundation of the ECT and as such a non-binding declaration of principles, including guidelines for the negotiation of a subsequent binding treaty. The result of the ensuing negotiations was the conclusion of the ECT, which was signed in December 1994 and entered into effect in April 1998.\(^8\)

The following is an overview of the ECT’s most pivotal provisions, limiting itself to Article 13 (i.e., the protection against undue and uncompensated expropriation), Article 10(1) (guaranteeing fair and equitable treatment (FET)) and Article 26 of the ECT (i.e., the dispute settlement mechanism under the ECT).

i  Protection against direct or indirect expropriation under the ECT

The ECT follows the standard under customary international law and investment treaty practice and does not per se prohibit expropriation – whether it be ‘direct’, by transfer of legal title, or ‘indirect’ by measures doing without the transfer of legal title, leading to a substantial

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6 Compare the declaration by 22 of the 28 Member States regarding the implementation of the Achmea judgment.


8 As at the time of writing, 52 states have signed the Energy Charter Treaty. All EU Member States are individual signatories, but the Treaty has also been signed collectively by the European Union and Euratom bringing the total number of parties to the Treaty to 54, although five of these states have not ratified the Treaty yet. Belarus expressly applies the Treaty provisionally.
loss of control or economic value. The ECT recognises a host state’s right to expropriate the property of investments made in that state by investors but predicates the lawfulness of the expropriation on the conditions set out in Article 13(1):

Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as ‘Expropriation’) except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the “Valuation Date”).

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

For the purpose of determining a breach of Article 13(1), tribunals will simply try to establish: (1) the transfer of title or a measure having the same effect; (2) whether the transfer was made for a public purpose; (3) whether the transfer was conducted in a non-discriminatory manner; (4) whether the transfer was carried out under due process of law; and (5) whether the transfer was followed by payment of adequate and prompt compensation.

In the context of expropriation, tribunals are inclined to not only take into account the effect of the measure, but also the purpose, the manner and context in which the state acted (the ‘police powers doctrine’).

ii Guarantee of FET under the ECT

The FET clause of the ECT can be found in sentence 2 of Article 10(1), which, in its pertinent parts, reads:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.


10 Saluka Investments BV v. The Czech Republic, Permanent Court of Arbitration, Partial Award, 17 March 2006. However, the ECT itself is silent on the question of whether requirements other than those listed in Article 13(1) are to be included in a tribunal’s analysis.
As a result of the generally broad and unspecific definition of the FET standard, a great range of attempts to define the standard exist. Over the years, jurisprudence made clear that to find the FET standard violated, it is of the greatest importance to assess the specific factual elements of the state’s conduct with regard to the investor.

Based on this analysis, tribunals will analyse, inter alia, whether the state acted in accordance with its representations of a stable and predictable business and legal environment.11

As indicated above, any analysis of the FET standard under the ECT is first and foremost based on the facts of the case. There are certain indications on which tribunals place special importance. For example, not every violation of the host state’s law is a violation of the FET standard.12 However, changes in the legal framework of the investment have to be communicated and applied in a transparent, non-arbitrary manner and with consistency. Otherwise, the host state’s conduct may very well be an infringement of the investor’s rights under Article 10(1).

As stated by Dolzer:

Inconsistent conduct by the host state confuses the investor, stands in the way of proper planning, and is not conducive to an investment-friendly climate. Not surprisingly, arbitral tribunals have confirmed that inconsistency of conduct by the host state, as regards the investor’s obligations, is not compatible with the requirement of FET.13

Prominently featuring in the discussions on investment arbitration, the issue at heart is the host state’s ‘right to regulate’. The jurisprudence on the ECT has not developed consistent case law in dealing with this matter. Rather, the decisions may be divided into two categories.

A narrower approach demands that expectations must be based on clear and concrete assurances from the host state expressed in direct communication aimed at the investor regarding the specific business or relationship.

The more flexible approach only requires the investor to prove that it identified a basis for its expectations in generally applicable laws – namely the legal and regulatory framework that existed at the time of making the investment.

When balancing investor rights and the host state’s right to regulate, tribunals will, however, accord to states a right to change policies over time.14

As stated by Dolzer:

Consistency may not be required under circumstances in which the host state had convincing reason to change course. As regards its legislative power, the host state will, in principle, have the right to pursue its interests in the light of the new circumstances, but not ignore the interests of the investor who had earlier adjusted his conduct to the previous course required by the host state. The power to regulate operates within the limits of rights conferred upon the investor. Correspondingly, it will have

11 Schreuer, footnote 14.
12 ibid.
to be assumed that the reversing of a position in a dramatic manner with serious negative effects upon
the investor will be consistent with FET only in the presence of serious exceptional reasons, compelling
the host state to reverse its previous decision and to require the investor to re-adapt its business.\footnote{15}

As stated by Patrizia et al:

\begin{quote}
While the existing arbitral decisions on claims asserted under the ECT do not provide clear guidance, arbitral decisions applying other investment treaties indicate that tribunals will examine the specific circumstances of each case when considering whether the investor’s expectations were reasonable under the FET standard. The tribunals . . . will likely consider, on a case-by-case basis, the conduct of the state as a whole, including whether the state made any specific assurances to investors and the reason for, and form of, the changes in legal framework, as well as any other circumstances surrounding the investment.\footnote{16}
\end{quote}

\section*{iii Dispute settlement under the ECT}

The dispute settlement mechanism of the ECT is enshrined in its Article 26(1), which sets out that disputes between ‘a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former’ shall be resolved amicably. If an amicable resolution of the dispute cannot be reached within three months, the investor is entitled to submit the dispute to either the national courts or administrative tribunals of the contracting party, the forum previously agreed by the parties or international arbitration. Should the investor choose to submit the dispute to arbitration, the investor will face the decision of whether it wants the case to be administered under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention),\footnote{17} ad hoc arbitration under the UNCITRAL Arbitration Rules or arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

\section*{iv The provisional application of the ECT}

Because of its immediate implications in practice, it is worth taking a look at Article 45(1) of the ECT regulating the treaty’s provisional application. Article 45(1) reads: ‘Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.’

The following paragraphs of Article 45 set out the regulatory framework for a declaration to not apply the Treaty provisionally (Article 45(2)) or to terminate the provisional application once a state has subjected itself to it (Article 45(3)). Article 45 follows the international standard of multilateral treaties and economic-related treaties of being applied provisionally, while containing quite elaborate language. Indeed, when comparing Article 25 of the Vienna Convention on the Law of Treaties (VCLT) with Article 45 of the ECT, the sophisticated wording of the latter is striking.

\footnotetext{15}{Footnote 18.}
\footnotetext{16}{Patrizia et al., op. cit., footnote 15, pages 78–79.}
\footnotetext{17}{If one but not both of the host state and investor’s state have not ratified the ICSID Convention, the investor may elect arbitration under the ICSID Additional Facility Rules.}
The ECT’s tax carve-out

One of the ECT’s provisions that features heavily in solar claims as well as other proceedings is the tax carve-out. Article 21(1) of the ECT provides that: ‘Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties’. Therefore, the provision effectively seeks to carve out measures relating to tax from the ECT’s investor protection regime.

However, Article 21(5) of the ECT stipulates that Article 13, protection against unlawful expropriation, still applies to taxes. In this case, a special regime applies. Article 21(5) of the ECT requires the investor to refer the issue of whether the tax amounts to an expropriation or is discriminatory to the competent tax authority of the host state.

Tribunals are split over the question of whether this stipulates a compulsory requirement for the investor to fulfil before initiating arbitral proceedings. In Plama v. Bulgaria, the tribunal ruled that it was, in fact, a compulsory requirement. The tribunal in Yukos et al. v. Russia came to the opposite conclusion for cases where referral to relevant authorities would be an exercise in futility. In addition, Article 21(1) of the ECT does not apply, according to the Yukos et al. v. Russia tribunal, if the alleged action does not constitute a bona fide exercise of a state’s regulatory powers.

III THE ECT CASES OF 2019

The table below contains decisions of arbitral tribunals that emerged during 2019 and up to the time of writing. All of the 18 decisions rendered in 2019 concern intra-EU disputes. In no case has the intra-EU objection based on the Achmea judgment been raised successfully.

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18 Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 266.
19 Yukos Universal (Isle of Man) et al. v. Russian Federation, PCA Case No. AA 228, Final Award, 18 July 2014, para. 1422 et seq.
20 id., para. 1407.
### IV  A CLOSER LOOK AT THE 2019 ECT DECISIONS

The following is a closer look at the impact of the *Achmea* judgment on the ECT. As almost all awards dealt with this issue, the analysis will, instead of looking at each case individually, provide an overview of the general notions that the tribunals applied in 2019 to assess the potential impact of *Achmea*.

#### i  The intra-EU objection and the CJEU’s *Achmea* judgment

In 2008, the Dutch insurance company Achmea BV (formerly known as Eureko BV) commenced an arbitration against the Slovak Republic under the Dutch–Slovakian bilateral investment treaty (BIT) claiming compensation based on the state’s repeal of the liberalisation of its healthcare market.\(^{22}\) In its 2012 award, the tribunal constituted under the UNCITRAL rules found the state in breach of the FET standard and awarded Achmea damages in the amount of €22.1 million.\(^{23}\) Slovakia decided to bring set-aside proceedings before the Higher District Court of Frankfurt of Main, Germany, the court of the seat of the arbitration. The Higher District Court rejected all of Slovakia’s arguments, which had, inter alia, argued that the tribunal lacked jurisdiction over the dispute because the BIT’s arbitration clause was incompatible with EU law.\(^{24}\)

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**Table 1:**

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<td>Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain</td>
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<td>The PV Investors v. Kingdom of Spain</td>
<td>Final Award, 28 February 2020</td>
<td>PCA Case No. 2012-14</td>
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On appeal, the German Federal Court of Justice made use of its power under Article 267 of the Treaty on the Functioning of the European Union (TFEU) and referred several questions to the CJEU, including the question on the compatibility of the ECT’s arbitration clause with EU law.\(^{25}\)

The starting point for the CJEU’s judgment is its understanding of the primacy and uniform application of EU law, which Member States, including their domestic courts, are obliged to enforce. Member State courts, especially, as noted by the CJEU, are given the opportunity through Article 267 of the TFEU to resolve potential conflicts between national and EU law by referring questions in cases before them to the CJEU.

The CJEU then went on to find that an arbitral tribunal constituted under a BIT might have to rule on matters of EU law where, based on the text of the BIT, it must apply the law of the respondent state, which automatically also includes EU law. A potential safeguard against possible divergent judgments and awards was supported by Advocate General Wathelet in his opinion. He stated that the arbitral tribunal enjoyed the power of requesting a ruling from the CJEU on referred questions, as the arbitral tribunal constituted a ‘court or tribunal of a Member State’ pursuant to Article 267 of the TFEU.

The CJEU departed from these considerations of its Advocate General and held that an arbitral tribunal constituted under the BIT is outside of the jurisdiction of the European Union and its Member States, this being the reason for the existence of the arbitration clause in a BIT in the first place. Accordingly, it is not open for arbitral tribunals constituted under BITs to call on the CJEU to have contentious issues of EU law resolved.

In a next step, the CJEU examined the award, which it found to be final and only subject to a very limited review by the courts of the Member States. The CJEU found that by virtue of concluding the BIT, the Member States established a regime that effectively prevents ‘disputes from being resolved in a manner that ensures the full effectiveness of EU law’.\(^{26}\) The violation of the principle of the effectiveness of EU law then leads to the CJEU’s final ruling ‘that Articles 267 and 344 TFEU must be interpreted as precluding a dispute settlement clause in an intra-EU BIT.’\(^{27}\) This means, in practice, that a valid arbitration agreement between a Member State of the European Union and an investor of another EU Member State cannot be concluded. The lack of a valid arbitration agreement is one of the limited grounds under the New York Convention, and most national arbitration laws, on which an award may be set aside or refused recognition and enforcement.\(^{28}\)

The referring court, the German Federal Court of Justice, set aside the Achmea award. Thereby, the German Federal Court of Justice followed the decision by the CJEU in substance and rejected any arguments presented by the investors as to why the CJEU’s Achmea judgment would not lead to an annulment of the award.\(^{29}\)

\(^{25}\) Decision of the German Court of Justice, 3 March 2016.

\(^{26}\) id., para. 56.

\(^{27}\) id., para. 60.

\(^{28}\) See, New York Convention, Article 1(a): ‘the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.’

\(^{29}\) Para. 14 Achmea argued, inter alia, that Slovakia was barred from invoking the invalidity of the arbitration agreement according to the principle of good faith enshrined in Section 242 of the German Civil Code.
ii Dismissal of objections to jurisdiction in recent ECT decisions

In 2019, arbitral tribunals constituted under the ECT have continued to dismiss all objections to jurisdiction raised in different intra-EU cases.

In the past, the European Commission and Member States argued that the ECT’s investment protection regime does not apply to inter-EU proceedings. The crux of this issue lies in the wording of Article 26 of the ECT. Member States on the receiving end of intra-EU arbitrations argued that intra-EU proceedings are ‘disconnected’ from the ECT’s scope because of an implicit disconnection clause, incorporated in the ECT through the 2007 EU Lisbon Treaty, which modified EU Member States rights and obligations, and removed intra-EU disputes from the scope of Article 26 of the ECT.\textsuperscript{30} The Lisbon Treaty qualifies, according to their argument, as a ‘successive trea[ty] relating to the same subject-matter’ pursuant to Article 30 of the VCLT. Under this article, such a modification is possible if the earlier treaty provides that ‘it is subject to, or that it is not to be considered as incompatible with, [a] later treaty’.

The European Commission, which appears as amicus curiae in almost all intra-EU disputes, further argues that it was not the European Union or its Member States’ intention to create obligations between the Member States, as they acted throughout the negotiations of the ECT as one block with the Commission as their voice.\textsuperscript{31}

A second line of argument advanced by the European Commission highlights certain provisions of the ECT, which, according the European Commission, show that the ECT acknowledges that EU Member States never offered to arbitrate with investors from another EU Member State.\textsuperscript{32} One of the requirements for an investor to submit a dispute to arbitration according to Article 26(1) of the ECT is that it made an investment in the area of another contracting party. Pursuant to Article 1(10) of the ECT, ‘area’ is defined as the territory of a state or as ‘the areas of the member states of a [Regional Economic Integration Organisation]’. The European Commission argued that an investment made by an investor from an EU Member State on the territory of another EU Member State is made within the same area, meaning the area of the European Union as a Regional Economic Integration Organisation.\textsuperscript{33} The Commission also takes the view that ‘EU law forms part of the “applicable rules and principles of international law” under Article 26(6) ECT, and the “relevant rules of international law applicable in the relations between the parties” pursuant to Article 31(3)(c) VCLT’.\textsuperscript{34} As such, EU law is part of the applicable law determinant for assessing the validity of an arbitration. Adherence to ‘systemic coherence’ and the principle of autonomy of EU law requires an interpretation avoiding any conflict with EU law, which ‘leads to the conclusion that there is no offer to arbitrate’.\textsuperscript{35}

On 15 January 2019, the Member States of the European Union issued a political declaration in which the consequences of the \textit{Achmea} judgment were discussed. Exposing

\footnotesize{\textsuperscript{30} Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095, Award, 23 December 2018, para. 265.\textsuperscript{31} id., para. 283.\textsuperscript{32} id., para. 279.\textsuperscript{33} id., para. 280.\textsuperscript{34} Vattenfall AB et al. v. Germany, ICSID Case No ARB/12/12, Decision on the \textit{Achmea} Issue, 18 August 2018, para. 81.\textsuperscript{35} id., para. 83.}
divergences among the Member States, two additional declarations (one by Finland, Luxembourg, Malta, Slovenia and Sweden, and another by Hungary) were issued because of different positions regarding the impact of the Achmea judgment on the ECT.36

The arguments and the declarations mentioned above have so far not succeeded to convince arbitral tribunals since the Achmea judgment has been delivered. The starting point for tribunals is an interpretation of Article 26 of the ECT pursuant to Article 31(1) of the VCLT, which provides that treaties ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’. As the plain wording of Article 26 of the ECT does not include a qualification of any kind with regard to intra-EU arbitrations – and circumstances and context of the ECT do not suggest otherwise – tribunals conclude that the ECT continues to apply to intra-EU arbitrations.37

Also, the argument that an investment has been made in the same area has been quickly dealt with by tribunals. In Landesbank Baden-Württemberg et al. v. Spain, the tribunal referenced the decision in Foresight38 where the tribunal found that the term ‘in the area’ in Article 26(1) of the ECT must be seen in light of the specific dispute.39 If an investor chooses to initiate arbitration proceedings against an EU Member State and not the European Union, ‘the area’ referenced in Article 26(1) of the ECT means the territory of that particular Member State.

Taking into account the specific circumstances of the Achmea judgment, tribunals found throughout 2019 that the CJEU carefully limited its ruling to BITs concluded between EU Member States, and left it open for investors to initiate arbitral proceedings under other international instruments that are not solely intra-EU BITs. There are indeed significant differences between an intra-EU BIT and the ECT. The former is concluded between two EU Member States, while the latter is signed by the European Union, its Member States and 25 other countries that are not Member States of the European Union.40 This distinction was made by Advocate General Wathelet in his opinion predating the CJEU’s Achmea judgment and not rejected by the CJEU in its judgment.41

Furthermore, tribunals in Landesbank Baden-Württemberg et al. v. Spain and in SolEs Badajoz GmbH v. Spain emphasised that even if EU law prohibited Spain from making an offer to arbitrate, such a prohibition would not take priority over the ECT because of

36 The separate declaration issued, inter alia, by Sweden is of particular relevance to the ECT, as Sweden, diverging from the majority of Member States, will not direct its state-owned companies to end any commenced arbitration. Thus, the Vattenfall AB et al. v. Germany arbitration will not be affected.


39 Landesbank Baden-Württemberg et al. v. Kingdom of Spain, ICSID Case No. ARB/15/45, Decision on an Objection to Jurisdiction, 25 February 2019, paras. 96, 124–127. See also, Vattenfall AB et al. v. Germany, ICSID Case No ARB/12/12, Decision on the Achmea Issue, 18 August 2018, para. 179 et seq.


41 Slovak Republic v. Achmea B.V., Case C-284/16, Judgment of 6 March 2018, para. 58

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Article 16 of the Treaty.\textsuperscript{42} In case of conflict, Article 16 of the ECT produces a prevailing effect of such rules that are more favourable to the investor. In addition, Article 16 is an express collision clause and thus constitutes \textit{lex specialis} in relation to other general conflict rules as the \textit{lex posterior} principle in Article 30 VCLT.\textsuperscript{43}

Since January 2019, respondents also referred to the declaration of 22 Member States of the EU on the legal consequences of the \textit{Achmea} judgment to support their objections to jurisdiction. Yet, tribunals have so far not followed the argument, mainly for two reasons. First, the declaration has not been signed by all Member States leading tribunals to the conclusion that it does not establish a subsequent agreement within the meaning of Article 31 (3)(b) VCLT.\textsuperscript{44} According to the tribunal in \textit{LBBW}, the declaration was ‘too fragile a foundation on which to construct an agreement between the ECT Contracting States that Article 26 means something radically different from what it appears to say’.\textsuperscript{45} Second, the declaration itself distinguishes between bilateral agreements and intra-EU claims under the ECT by stating ‘Member States together with the Commission will discuss without undue delay whether any additional steps are necessary to draw all the consequences from the \textit{Achmea} judgment in relation to the intra-EU application of the Energy Charter Treaty’. Finally, the tribunal in \textit{Rockhopper} found that the declaration could not be viewed as a declaration of interpretation in the sense of general international law because the effect would be that of a treaty change.\textsuperscript{46} It is to the topic of treaty change that the chapter will now turn – in the light of a different development: The modernisation process of the ECT.

\section*{V \hspace{1em} NEW CHAPTER IN THE MODERNISATION PROCESS OF THE ECT}

Calls for reform of traditional dispute mechanisms as well as demands for renegotiation of substantive provisions in international investment agreements have been voiced for some time. As a result, a general reform discussion on the design of a next generation of investment agreements is taking place in forums as the UNCITRAL Working Group III and frequent UNCTAD conferences.\textsuperscript{47} With its decision of 9 November 2019, the Energy Charter Conference has now turned to another chapter in the reform discussion. It establishes and

\begin{footnotes}
\footnote{\textit{Landesbank Baden-Württemberg et al. v. Kingdom of Spain}, ICSID Case No. ARB/15/45, Decision on an Objection to Jurisdiction, 25 February 2019, paras. 177, 183; \textit{SolEs Badajoz GmbH v. Kingdom of Spain}, ICSID Case No. ARB/15/38, Award, 31 July 2019, para. 250.}{\textsuperscript{42}}
\footnote{\textit{Vattenfall AB et al. v. Germany}, ICSID Case No ARB/12/12, Decision on the \textit{Achmea} Issue, 18 August 2018, para. 217.}{\textsuperscript{43}}
\footnote{\textit{The PV Investors v. Kingdom of Spain}, PCA Case No. 2012-14, Final Award, 28 February 2020, para. 549; \textit{Landesbank Baden-Württemberg et al. v. Kingdom of Spain}, ICSID Case No. ARB/15/45, Decision on an Objection to Jurisdiction, 25 February 2019, para. 166}{\textsuperscript{44}}
\footnote{\textit{Landesbank Baden-Württemberg et al. v. Kingdom of Spain}, ICSID Case No. ARB/15/45, Decision on an Objection to Jurisdiction, 25 February 2019, para. 166.}{\textsuperscript{45}}
\footnote{See the latest Report of the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 28 January 2020, A/CN.9/1004/Add.1.}{\textsuperscript{47}}
\end{footnotes}
mandates a ‘Modernisation Group’ to start negotiations on the modernisation of the Energy Charter Treaty. The negotiations will take into account already identified topics and suggested policy options issued earlier in 2019 and 2018.48

Suggested policy options include almost all core provisions of the ECT such as the definition of ‘Investment’ and ‘Investor’, the FET clause, the MFN clause and the notion of ‘indirect investment’. Proposals also touch on new provisions dealing with questions as security for costs, third-party funding, transparency and sustainable development. The comments to different policy options given by the parties to the ECT show widespread agreement on some topics while there also seem to be visible divergence on others.49 For example, there has been substantial agreement that the MFN clause should not extend to dispute settlement provisions and also include for MFN obligations to apply only to investors in ‘like circumstances’ or ‘like situations’. Similarly, most comments agree on the inclusion of a clause requiring investments to be made in accordance with host state law. Little agreement could, however, be found on what a modernisation of the FET clause could look like. The EU and Turkey favoured a closed list of specific FET obligations – as in recent EU investment treaties. By contrast, Switzerland wanted an open-ended list, while Azerbaijan proposed only that a list of actions breaching FET should be included, without clarifying whether this was inclusive or exclusive. A connection between FET and the international minimum standard of treatment of foreigners under customary international law was supported by Azerbaijan and Georgia. Azerbaijan added that the definition should clarify that a violation of other clauses was not a violation of FET. Meanwhile, five of the eight submissions (Albania, the EU, Georgia, Switzerland and Turkey) clarified their view that the full protection and security obligation covered only the physical security of investors and investments.

Interestingly, only the EU and its Member States have so far commented on possible changes to the investor–state dispute mechanism in Article 26 of the ECT. The EU highlighted that it strives to ensure that its ongoing multilateral reforms of investor–state dispute settlement, such as those within the UNCITRAL Working Group III and ICSID, will be applied to the ECT. This includes the ambition that a future Multilateral Investment Court applies to the ECT.50

With a view to the technical frame for treaty change, one has to recall the multilateral nature of the ECT. Amendments to the ECT have to follow the procedure set out in Article 42 of the ECT. Pursuant to this Article, proposed amendments must be adopted by the Charter Conference and even if the amendment is adopted by the Charter Conference, it cannot come into effect (between parties having ratified the amendment) until it has been ratified by at least three-quarters of the ECT Member States.

The Conference Decision of October 2019 includes a provisional timetable that plans for quarterly negotiation rounds to take stock of the progress at the end of 2020. This schedule might, however, be delayed taking into account the latest developments and necessary efforts in combating the coronavirus in 2020.

49 See the comments by the ECT-Parties in ECT Secretariat, Decision of the Energy Charter Conference, 6 October 2019, CCDEC 2019 08 STR.
VI  LOOKING BACK AT 2019

The cases discussed above from 2019 exemplify the importance of investment arbitration between EU Member States under the ECT. From the outset of 2018, it was to be expected that the European Union and its Member States will spend much of 2019 dealing with issues between themselves, issues that were already clearly identified in the three different notes issued by EU Member States in January 2019, which differ as to the application of the judgment to the ECT. At the same time, it is remarkable that awards against eastern European and central Asian countries remain a rarity nowadays. That may be, inter alia, explained by the fact that the Ukrainian–Russian crisis, which resulted in a couple of arbitrations, falls outside of the scope of the ECT.

The intra-EU objections might lead to attempts by the European Union to modify, reform or renew the ECT as is already evidenced by the Council’s mandate given to the European Commission on 15 July 2019. The undertaking of modernising the ECT is, however, not only of interest to the EU Member States. The modernisation process of the Treaty is now in full swing with several parties from different regions of the world having commented on proposed treaty changes. It remains to be seen how concrete the next proposals and comments during the year will become and how close this will lead the ECT parties to a possible adoption by the Charter Conference in 2021.

VII  OUTLOOK

The 2019 arbitral decisions surrounding the ECT mainly concerned the western European community. In the upcoming year, renewable energy cases will most likely continue to play an important role in investment arbitration under the ECT. Before that backdrop, it can be expected that it will still take some time for the European Union and its Member States to identify common ground regarding the implications of the Achmea judgment with respect to the ECT.

However, it should not be overlooked that the ECT’s signatories are not only western European states, but also many capital-importing countries in eastern Europe and central Asia. With China’s belt and road initiative now well underway and the commencement of construction of the Nord Stream II project, the focus might again shift east. Not least because of the dozens of treaty claims pending against western European states, being a politically contested subject, the ECT will therefore remain an important legal instrument of investment protection in the years to come.

51  Compare footnotes 6 and 36.
Chapter 30

NAFTA AND USMCA: THE NEXT STAGE OF THE SAGA

Lisa M Richman

I  THE ‘NEW NAFTA’ – INTRODUCTION TO NAFTA AND USMCA

After multiple rounds of negotiation, and years of speculation and discussion about the fate of the North American Free Trade Agreement (NAFTA), a revised North American trade pact, known in the United States as the United States–Mexico–Canada Agreement (USMCA), was signed by US President Donald Trump, then Mexican President Enrique Peña Nieto and Canadian Prime Minister Justin Trudeau on 30 November 2018 to replace NAFTA, originally executed in 1994. This new trade agreement was modified on 10 December 2019 through a protocol of amendment agreed by the three countries. The amended USMCA was ratified by Mexico in June 2019, the US in early 2020 and by Canada on 13 March 2020 (immediately before Canada’s parliament suspended itself for six weeks because of the novel coronavirus). On 24 April 2020, US Trade Representative Robert Lighthizer notified Congress that Canada and Mexico have taken all measures necessary to comply with their commitments, and that the Agreement will enter into force on 1 July 2020.

The soon-to-be-abandoned NAFTA, born with popularity as well as controversy, was initially negotiated by the governments of the United States, Canada and Mexico in an effort to liberalise trade by eliminating tariffs on products traded between and among these three countries. NAFTA also offered other innovations, including cross-border intellectual property protection and a dispute resolution mechanism under which private investors from one of the Member States were permitted to bring claims directly against one of the other Member States. The idea was to create greater trade opportunities, broader protection for investors and innovative mechanisms to create the world’s largest international free trade zone. In fact, NAFTA helped contribute to a tremendous increase in trade among the United States, Canada and Mexico, and substantially reshaped North American economic relations. Apart from its economic contributions to both regional and world economy, NAFTA also plays a significant role in foreign relations and in promoting political stability within the region.

However, NAFTA has been a perennial target for President Trump, who describes it as ‘the worst trade deal ever’. Soon after his election, he proposed the renegotiation of

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1 Lisa M Richman is a partner in the Washington, DC office of McDermott Will & Emery LLP. She represents both investors and states in investment disputes. The author wishes to thank the following individuals for their assistance with this chapter and the previous version of this chapter: Xingyu Wan, Hernan Chiriboga Novillo and Christos Ntemian Vorkas, all of whom are or were LLM candidates at the Georgetown University Law Center.

NAFTA to Congress as part of his plan to reduce the trade deficit. After more than a year of negotiation, a new agreement, USMCA, was signed. It addressed some of the major concerns of certain constituents arising from NAFTA.

Although USMCA and NAFTA contain many similarities, there also are important changes. For example, USMCA expands intellectual property protection and adjusts treatments on important industries, such as automobile and agriculture. Perhaps the most significant change relates to the investment dispute resolution mechanism available under USMCA. Although the substantive protections for foreign investments in USMCA Chapter 14 largely mirror those contained in NAFTA Chapter 11, the scope of investor–state dispute settlement (ISDS) is reduced considerably. Additionally, in a significant departure from NAFTA, Canada has not agreed to the investment arbitration mechanism. This means that neither US nor Mexican investors will be able to bring claims against Canada under USMCA, nor will Canadian investors be entitled to bring such claims against Mexico or the United States. Other important changes to the substance of investment protections contained in USMCA as compared with NAFTA will be discussed in more detail in Section III.

USMCA has been ratified by Mexico and the United States and, most recently, Canada. Investors therefore should be prepared for the upcoming transition from NAFTA to USMCA, and be aware of the significant changes USMCA introduces.

II HOW AND WHEN COULD USMCA BE RATIFIED?

i The process in the United States

In the United States, the President has the authority to negotiate trade agreements without interference, but members of Congress have the power to vote on trade promotion agreements without amendment.

Under normal ‘fast-track’ procedures for trade agreements, a simple majority vote is needed in the House of Representatives (within 60 session days), followed by a simple majority vote in the Senate within 30 session days thereafter to approve or refuse a trade agreement. Before the final text of the agreement is introduced to Congress, a report describing the required changes to US law drafted by the US Trade Representative (USTR) and a study on the agreement’s economic impact drafted by the International Trade Commission (ITC) also are to be provided to Congress.

With regard to USMCA, the USTR report was submitted to Congress by Representative Lighthizer in February 2019. The ITC’s impact study was issued on 18 April 2019, delayed because of the 35-day government shutdown in early 2019. In June 2019, Nancy Pelosi, the Speaker of the House, appointed various representatives to negotiate several amendments to the USMCA with the Trump administration. This negotiation concluded with a revised USMCA text that all three Member States adopted as a protocol of amendment to USMCA on 10 December 2019.

On 13 December 2019, the Trump administration submitted the proposed USMCA implementing legislation to Congress, and the House of Representatives approved it on
19 December 2019. The USMCA implementing legislation was approved by the Senate Finance Committee on 7 January 2020, and the Senate approved the implementing legislation on 16 January 2020.

The final step was for President Trump to sign the implementation bill into law for the ratification of USMCA in the United States, which he did on 29 January 2020. As all of the steps necessary to implement the new trade agreement in the US have been completed, and because Mexico and Canada both ratified the agreement, and all three countries certified their preparedness (with the US having done so on 24 April 2020), USMCA is expected to take the place of NAFTA and become the new law in the US governing the commercial relationships between the United States, Mexico and Canada in summer 2020.

ii The process in Canada

In Canada, the decision of whether USMCA is ratified domestically lies in the hands of Parliament. Finalising the implementing legislation was delayed because the Liberal party lost the majority in Parliament in October 2019. The House of Commons ratified USMCA on 13 March 2020 and Governor General Julie Payette signed it shortly thereafter.

Typically, the ratification process in Canada contemplates that, after signature, the new agreement, along with an explanatory memorandum, is tabled in the House of Commons for debate. If there is sufficient support in the House of Commons, it proposes a motion to recommend action within 21 sitting days, including ratification of the agreement. A vote is not required. The cabinet exercises full control over the ratification process. It is empowered to authorise the Minister of Foreign Affairs to sign an Instrument of Ratification. Then, an implementing bill, which contains the changes required to Canadian law at the national level, is tabled and debated in the House of Commons and Senate, respectively. Members of Parliament may suggest changes to the implementing laws and ask questions of the government, but they cannot change the substance of the new agreement. In this instance, given the ‘extraordinary circumstances’ presented by the novel coronavirus, the third and final reading of USMCA was deemed approved without a recorded vote as part of an omnibus adjournment motion unanimously approved by the members present. Canada certified its preparedness to implement the Agreement on 2 April 2020.

iii The process in Mexico

The ratification process in Mexico is simpler than that of the United States and Canada. It contemplates that, after signature, the new agreement is sent to the Senate for a vote. On 19 June 2019, the Mexican Senate approved the implementing legislation for USMCA on a simple majority vote and thereafter was published and entered into force. On 12 December 2019, Mexico approved the amendments to USMCA, becoming the first country to ratify USMCA and its amendment. Mexico certified its preparedness to implement the Agreement on 2 April 2020.

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iv Concluding thoughts regarding ratification

As of 13 March 2020, all three signatories ratified USMCA and took the required steps to comply with the USMCA rules. Given the national implementations have occurred, the agreement will come into force the first day of the next month at least 90 days from the final date of ratification, and certification of preparedness, 1 July 2020.5

Until 1 July 2020, NAFTA will remain in place and offer broader protection for investors. But even after USMCA enters into force, investors with ‘legacy investments’6 will still have a three-year period to bring a dispute under NAFTA,7 even though NAFTA will terminate upon entry into force of USMCA, three months after the Member States have all ratified it.8 Investors with potential claims concerning legacy investments will want to take all necessary preliminary steps and submit a formal notice of arbitration no later than three years after USMCA enters into force (or July 2023) to avoid risks and uncertainties caused by the transition. Investors who establish investments after the entering into force of USMCA will not be able to bring claims under NAFTA.

III MOST SIGNIFICANT DIFFERENCES BETWEEN USMCA AND NAFTA

i Dispute resolution mechanism9

Compared with NAFTA, some of the biggest changes in USMCA are set forth in its Chapter 14. Perhaps the biggest change is that Canada has not signed on to Annex 14-D (US–Mexican investment disputes) or Annex 14-E (covered government contracts). As a result, other than for legacy investments and pending claims under Annex 14-C, neither US nor Mexican investors can bring arbitration claims against Canada under USMCA, nor can Canadian investors bring such claims against the United States or Mexico. Canadian investors in Mexico and Mexican investors in Canada, however, have access to investment arbitration under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force in December 2018. However, the application of ISDS in CPTPP Chapter 9 is not as broad as in NAFTA. For example, Mexico has carved out its consent to investment arbitration under the CPTPP with respect to government contracts-related infrastructure projects.10

USMCA also contains numerous changes to the availability and terms of ISDS for claims against Mexico (by US investors) or the United States (by Mexican investors). The

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6 USMCA, Annex 14-C, Article 6 (a) (‘“legacy investment” means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement’).
7 USMCA, Annex 14-C, Articles 1 and 3.
8 Protocol Replacing the North American Free Trade Agreement, Paragraphs 1 and 2; USMCA, Chapter 34, Article 5.
9 USMCA, Annex 14-D.
four most significant changes relate to the restriction of covered claims under Article 14.6, the requirement to exhaust local remedies under Article 5 of Annex 14-D, the definition of ‘investment’ under Article 14.1 and the definition of ‘claimant’ under Article 1 of Annex 14-D.

First, USMCA limits the types of claims that can be brought in arbitration as compared with NAFTA. Two of the most common claims under NAFTA, for indirect expropriation or for a breach of the minimum standard of treatment, are no longer covered under the new agreement. Nonetheless, investors who enter into government contracts related to oil and natural gas, power generation, telecommunications, transportation services, or ownership or management of infrastructure, are exempted from those changes (in part) and offered a broader set of ISDS protections. Additionally, USMCA limits the scope of ‘fair and equitable treatment’ and ‘full protection and security’ by giving these terms specific definitions under minimum standard of treatment. Moreover, Annexes 14-D and 14-E provide that the Most-Favoured-Nation (MFN) clause (Article 14.5) cannot be used to import substantive or arbitration provisions from other treaties. This change is unprecedented – no other investment treaty explicitly restricts an MFN clause in this way.

Second, the new procedural requirements in USMCA create additional burdens for investors. They must pursue national court proceedings to completion or for at least 30 months before submitting claims to arbitration under USMCA, unless they can demonstrate that this would be ‘obviously futile’. Meanwhile, the four-year overall time limit for bringing claims from the date on which the investor first acquired, or should have acquired, knowledge of the alleged breach includes the 30 months that must be spent before the domestic courts. This means that, in practice, investors who plan to bring claims under USMCA will need to watch the calendar very carefully and consider preparing a notice of claim even before or while national proceedings are pending. In what has been described as an ‘asymmetrical fork-in-the-road provision’, a US investor may not bring to arbitration a claim for a breach of USMCA, as distinguished from a breach of other obligations under Mexican law, that the investor previously has submitted to national court proceedings or an administrative tribunal of Mexico. Although this provision has not been tested in practice, this seems to suggest that US investors who intend to bring claims for violation of USMCA need not exhaust domestic remedies and, in fact, would waive their right to arbitrate in doing so.

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13 USMCA, Chapter 14, Article 6.
14 USMCA, Annex 14-D, fn 22. Chapter 17, fn 18, also contains similar limitations as it relates to investment arbitrations relating to the financial services sector. Chapter 17 contains a slightly different set of procedures.
18 USMCA, Annex 14-D, Appendix 3.
19 There are no such restrictions for Mexican investors; presumably, because unlike Mexico, where the international treaties automatically become domestic law, meaning it is possible for US investors to directly
arbitration also does not apply to an investor who is a party to certain government contracts, as mentioned above. And, the overall time limit of claims involving such government contracts is three years instead of four.\textsuperscript{20}

Finally, certain clarifications were made in USMCA to the definition of ‘investment’, and ‘claimant’ was added as a new term (which modifies the definition of ‘investor’).

Under Article 1139 of NAFTA, investment is defined by a finite list of 10 examples, which include ‘an enterprise’, ‘credit security’ and ‘debt security’ in an enterprise, a ‘loan . . . [or] interest in an enterprise’, ‘real estate or other property, tangible or intangible’ and ‘claims to money’. In contrast, Article 14.1 of USMCA defines investment more broadly, and like many other investment treaties (including more modern US free trade agreements), as ‘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’.\textsuperscript{21} This general definition is followed by an open list of examples, which includes an express exclusion only for ‘an order or judgment entered in a judicial or administrative action’ or ‘claims to money that arise solely from commercial contracts for the sale of goods or services’, and related extensions of credit. It is unclear whether this change to the definition of investment will be interpreted in a different and more expansive way than investments under Article 1139 of NAFTA.

Under Article 1 of Annex 14-D of USMCA, claimant is defined as ‘an investor of an Annex Party [i.e., the United States or Mexico] that is a party to a qualifying investment dispute, excluding an investor that is owned or controlled by a person of a non-Annex Party that, on the date of signature of this Agreement, the other Annex Party has determined to be a non-market economy for purposes of its trade remedy laws and with which no Party has a free trade agreement’.\textsuperscript{22} This restriction is new. Though both NAFTA (in Article 1113) and USMCA (in Article 14.14) already contain denial of benefits clauses, those clauses only allow a respondent state to deny the benefits of the investment chapter, including access to ISDS, to an enterprise of another party that is owned or controlled by third-state nationals and that has no substantial business activities in the territory of the party in which it is incorporated. The new exclusion of US or Mexican claimants owned or controlled by a national or enterprise of a non-market economy is broader because it excludes a potential claimant from arbitration even if the US or Mexican company engages in substantial business activities in its state of incorporation.

When NAFTA was initiated, private investors’ wide range of rights were strongly supported by the United States and Canada to obtain the maximum protection against what was perceived to be ‘Mexican nationalism’.\textsuperscript{23} It seems the tides have turned and that there is a greater emphasis in USMCA on the Member States’ sovereign right to regulate public policy, especially with respect to environmental regulation.

\textsuperscript{20} USMCA, Annex 14-E, Article 4(b).
\textsuperscript{21} USMCA, Chapter 14, Article 1.
\textsuperscript{22} USMCA, Annex 14-D, Article 14.D.1.

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ii Arbitral proceedings

In addition to the changes described above, USMCA contains additional changes that appear to be focused on streamlining arbitral proceedings and making them more transparent. Whether the changes will lead to a more effective, efficient and fair dispute settlement system remains to be seen.

USMCA includes new provisions intended to increase the transparency of arbitral proceedings by explicitly providing that the public have access to relevant arbitration documents and the hearings, whereas NAFTA contained provisions relating to publication of the award, and of the notice and request for arbitration. In practice, many of the written submissions, awards and other documents relating to NAFTA cases have been made publicly available (at least in redacted form) already such that this provision may have little practical effect.

USMCA contains new requirements to prevent ‘double-hatting’. Annex 14-D provides that arbitrators must comply with the International Bar Association Guidelines on Conflicts of Interest and are prohibited from acting as ‘counsel or as party-appointed expert or witness in any pending arbitration under the annexes to this Chapter’ for the duration of the proceedings. Given the already relatively small pool of arbitrators with investment arbitration experience, this change will further limit the available pool of arbitrators, but also may help to avoid a perception that arbitrators could be involved as counsel in a dispute with related issues and therefore have an underlying if indirect conflict of interest.

In contrast with the NAFTA requirement that the arbitration be seated in a NAFTA state, USMCA allows the tribunal to choose the place of arbitration in any state that is a party to the New York Convention. As the seat of arbitration can influence the proceedings in many ways, from the commencement of arbitration to the annulment of a final award, more choice over the seat of arbitration could introduce more flexibility, but will also require the parties to be on guard and ensure they provide input to ensure selection of a seat strategically best suited to the dispute at issue.

Another new feature of USMCA is that the disputing parties are given the right to review and comment on the tribunal’s award on liability prior to its issuance. Again, it remains to be seen how this innovation will play out in practice and whether it will simply lead to a never-ending circle of post-hearing and pre-final award briefings.

USMCA also provides an expedited hearing procedure for certain objections; for example, jurisdictional objections and objections that a claim is manifestly without legal merit. Again, whether these changes will lead to more efficient or just more expensive and drawn-out proceedings remains to be seen; much will depend on arbitrators’ willingness to kick out claims at the jurisdictional stage.

iii Investment fields

Apart from the dispute resolution mechanism, changes were also made in several investment fields.

24 USMCA, Annex 14-D, Article 8.
25 NAFTA, Chapter 11, Section C, Articles 1126 and 1137.4.
**Auto industry**

Significant changes were made to provisions relating to rules of origin and minimum wages. While NAFTA requires only 62.5 per cent of cars produced in the trade zone to be made in North America, the new agreement increases the percentage to 75 per cent. A new requirement on minimum wages was added in USMCA, which provides that at least 40 per cent of automobile parts have to be made by workers who earn at least US$16 an hour by 2023. The change was intended to encourage the signing countries to enhance their labour protections, particularly in Mexico. In addition, the amended USMCA added a requirement that 70 per cent of a vehicle’s steel and aluminum must originate in North America to receive duty-free benefits. For steel to be considered as originating in North America, the melting and pouring of this metal must occur in this region. However, this provision only begins seven years after the USMCA enters into force.

**Agriculture**

USMCA creates new market access opportunities for US exports to Canada of dairy, poultry and eggs. In return, the United States will provide new access to Canada for dairy, peanuts, processed peanut products, and a limited amount of sugar and sugar-containing products. The most significant change was made relating to the dairy industry, where the United States will be able to export to Canada the equivalent of 3.6 per cent of Canada's dairy market, up from the existing level of about 1 per cent. Additionally, USMCA changes market access, sale and distribution regulations, relating to wine and other alcoholic beverages in a significant win for US wine and other alcohol exporters.

**Intellectual property rights**

Generally, as compared with NAFTA, USMCA offers broader protection in respect of intellectual property rights. Although NAFTA offers statutory protection for intellectual property rights, USMCA contains clarified definitions and stronger language. These changes appear to offer a wider range of protection in respect of addressing digital trade, expanding the scope of intellectual property rights and enhancing the remedies for infringement. The deal also established a copyright protection period of 70 years after the author’s death, increasing Canada’s current protection period of 50 years.
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Procurement

Although the public procurement provisions between the United States and Mexico essentially stay the same, Canada is excluded from the procurement chapter\(^\text{37}\) in USMCA. Instead, Canada’s relationship with the United States regarding procurement would be governed by the World Trade Organization Agreement on Government Procurement (GPA); and, procurement as it relates to Canada and Mexico would be governed by the CPTPP.

The exclusion of Canada from the procurement chapter of USMCA is not expected to have a significant impact as between the United States and Mexico, or Mexico and Canada. However, it may slightly reduce US companies’ access to procurement in Canada as the procurement thresholds for goods and services in Canada under NAFTA will no longer apply.\(^\text{38}\) Also, while under NAFTA, all services except for those Canada lists as excluded in NAFTA are available for procurement;\(^\text{39}\) GPA provides a narrower list of services.\(^\text{40}\) This difference in the scope of applicable services may reduce US companies’ access to procurement opportunities in Canada as well.

US national security tariffs

During negotiation, Mexico and Canada asked the United States to lift its national security tariffs on steel and aluminum under Section 232 of the 1962 Trade Expansion Act. But USMCA does not mention this protection. Instead, the United States reached two separate side agreements with Mexico and Canada respectively to reduce national security tariffs on automobiles and automobile parts.\(^\text{41}\) Under these agreements, 2.6 million passenger vehicles and US$32.4 billion in auto parts from Canada will be exempt from duties. For Mexico, 2.6 million passenger vehicles will also be exempt, as well as US$108 billion in auto parts.\(^\text{42}\)

Labour

The amended version of USMCA released in December 2019 created a new ‘rapid response’ mechanism to resolve labour dispute issues between the member countries. Once a complaint is made, the host country has the opportunity to take action and investigate the allegation. If no action is taken, a panel of experts may be sent to the facility at issue to determine if a labour violation has occurred. A list of panelists will be maintained by the Member States and renewed every four years. Despite the detail of this mechanism outlined in the amended USMCA, there is little information on how this mechanism will be implemented. It remains unclear the specific activities the panel will perform once a labour issue arises and a panel is sent to a facility.\(^\text{43}\) This mechanism has been established for disputes between the US and Mexico and between Canada and Mexico, but not between the US and Canada as it was intended principally to address Mexican labour concerns.\(^\text{44}\)

\(^{37}\) id., Chapter 13, Article 2.

\(^{38}\) id., Annex 13-A, Section A; NAFTA, Chapter 10, Article 1001.

\(^{39}\) NAFTA, Chapter 10, Annex 1001.1b-2.

\(^{40}\) WTO GPA, Canada Annex 5: Services.


\(^{42}\) ibid.


\(^{44}\) USMCA, Annexes 31-A and 31-B.
Sunset clause
Unlike NAFTA, a sunset clause was included in Chapter 34 of USMCA. The Member States settled on a 16-year expiry term. Every six years, the United States, Mexico and Canada will conduct a joint review and decide whether to extend the term of the agreement for another 16-year period.45

IV STATUS OF CURRENT CLAIMS UNDER NAFTA CHAPTER 11
Although various US constituents have expressed significant concerns about and opposition to the NAFTA dispute resolution mechanism, it is notable that the United States has not lost in a single investor-state case as a respondent. However, US (and other) investors have benefited from NAFTA protections.

Approximately 97 known disputes have been initiated under Chapter 11 of NAFTA. While about half of the claims were brought against Canada, only 21 claims have been brought against the United States and approximately 30 claims have been brought against Mexico. Among the cases that went through to a final award on the merits, Canada and Mexico lost six and five cases, respectively, while the United States lost none. Eleven of the 21 claims filed against the United States were dismissed by the arbitrators, and the remainder were either settled without damages (one case), withdrawn (two cases) or are inactive (seven cases).46

Although USMCA contains several substantial changes to NAFTA, there are approximately 19 claims pending under NAFTA that should not be affected by the coming into force of USMCA.47 Information about available details and status of each of these claims is set forth in the table in the Appendix to this chapter.

Of these claims, one prominent NAFTA claim is notable in light of recent court litigation that may cause the NAFTA arbitration to be (re)activated. In 2016, a Canadian company, TransCanada PipeLines Ltd, brought claims for US$15 billion against the United States.48 TransCanada alleged that the delay and eventual rejection by the Obama administration of the Keystone XL pipeline discriminated against the company, denied it fair and equitable treatment, and expropriated its investment under NAFTA Chapter 11. After the Trump administration approved the project, the investor and the US government agreed to discontinue the NAFTA claims. In March 2017, the ICSID Secretary-General formally discontinued the arbitral proceedings. In November 2018, in response to a lawsuit brought by environmental and Native American groups against the US Department of State and TransCanada, a federal court in Montana ordered a pause in the construction of the Keystone XL pipeline. The 9th Circuit dismissed the suit as moot after President Trump issued a new

45 USMCA, Chapter 34, Article 7.
47 This excludes approximately 23 claims that have been inactive for an extended period.
48 TransCanada Corporation and TransCanada PipeLines Limited v. The United States of America, ICSID Case No. ARB/16/21.
permit for the project in 2019. The Montana lawsuit continues with pending motions for summary judgment as well as a request by the plaintiffs for a preliminary injunction. At the same time, TransCanada is reporting that it plans to begin construction in April 2020. Presently, it is unclear whether TransCanada will seek to revive its NAFTA claims if the project experiences another setback.

V RECOMMENDATIONS FOR INVESTORS

The ISDS arbitration provisions in USMCA represent a significant departure from those in NAFTA. US and Mexican investors in Canada will be unable to bring claims against Canada under USMCA, and Canadian investors also will be prevented from bringing such claims against the United States or Mexico. US and Mexican claimants also will have fewer potential grounds for claims, except where they are relying on a government contract in a covered sector, and will be required to comply with domestic litigation requirements (under certain circumstances) before commencing arbitration.

The full impact of the changes in USMCA remains to be seen. Though investors may not need to rethink their investment plans, there are some issues investors should consider before USMCA enters into force.

For those who have NAFTA claims pending, the possible transition from NAFTA to USMCA will likely not have an impact on the ongoing procedure. The NAFTA dispute resolution mechanism will still be in place until the end of the dispute. This would likely not be the case, however, if a case relating to a legacy investment is annulled and later resubmitted if the resubmission occurs more than three years after NAFTA is terminated.

Investors with legacy investments who have potential claims and want to take advantage of the NAFTA dispute settlement mechanism will want to submit a formal notice of arbitration no later than two years and nine months after the entry into force of USMCA. That is because legacy investment claims must be brought within three years after NAFTA is terminated; NAFTA contains a (minimum) 90-day notice provision, so investors will want to closely watch the clock and submit their claims in good time. Investors should be watching that clock, which started to tick and will elapse 90 days after Canada ratified USMCA and all countries have certified preparedness to implement the Agreement (or 1 July 2020). Because of the 90-day notice provision, investors may be out of time already for any investments that do not relate to ‘legacy’ claims. In any event, investors will want to submit any legacy NAFTA claims as soon as possible and no later than 90 days before 13 March 2023, when the sunset clause elapses.

For investors who intend to establish or acquire investments after the entry into force of USMCA, special consideration should be given to address how to avoid or resolve potential conflicts when drafting agreements with government entities. NAFTA remedies will no longer be available and USMCA does not provide investors the same broad rights to initiate arbitration directly against the Member States. As a result, investors will want to include in such agreements clear and unambiguous language concerning their dispute resolution rights, including, if applicable, the right to resort to arbitration.

In spite of the fact that USMCA has narrowed the scope of available procedure and remedies in the dispute resolution context, the progress made in other areas could provide certain benefits. For instance, the inclusion of broader intellectual property protections and new market access may prove more favourable.
Although President Trump has described USMCA as ‘the largest, most significant, modern and balanced trade agreement in history’, the real impact of USMCA remains to be seen. Investors awaiting the ultimate fate of NAFTA and USMCA will want to carefully consider their current and future investments. Given USMCA’s limitations, beyond considering whether they should bring claims now rather than waiting until USMCA comes into effect or the sunset clause elapses, investors should evaluate other potential means of protecting their investments in the Member States beyond those contained explicitly in USMCA. In any event, investors will want to be prepared to move swiftly to protect their current and future rights.


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APPENDIX: NAFTA CHAPTER 11 CLAIMS

The table below is drawn in part from Scott Sinclair, Trade and Investment Research Project, Canada Center for Policy Alternatives and builds on a prior version of this table reproduced in the 4th edition of the *Investment Treaty Arbitration Review*.50

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<th>Case and date</th>
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<th>Arbitration information</th>
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<tr>
<td>Signa SA v. Canada</td>
<td>Notice of Intent submitted on 4 March 1996</td>
<td>The investor alleged Canada expropriated its investment and violated the minimum standard of treatment. Damages sought: C$50 million.</td>
<td>Notice of intent was withdrawn by investor. Arbitration never commenced. Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<td>Metalclad Corp v. Mexico, ICSID Case No. ARB(AF)/97/1</td>
<td>Notice of Intent submitted on 2 October 1996</td>
<td>US waste management company challenged decisions by a Mexican local government to refuse it a permit to operate a hazardous waste treatment facility and landfill site. Damages sought: US$90 million.</td>
<td>In August 2000, the tribunal ruled that Mexico’s failure to grant the investor a municipal permit and the state decree declaring the area an ecological zone was ‘tantamount to expropriation’ without compensation and breached the ‘minimum standard of treatment’ in NAFTA 1105. Mexico was ordered to pay US$16.7 million (of the US$90 million requested) in compensation. Mexico applied for statutory review of the tribunal award before the BC Supreme Court on the ground that the tribunal had exceeded its jurisdiction. The court set aside part of the award dealing with minimum standards of treatment, but it allowed US$15.6 million of the tribunal’s original award of damages to stand. Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Elihu Lauterpacht (President), Benjamin R Civiletti (appointed by claimant), José Luis Squeeros (appointed by respondent)</td>
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<td>Robert Azizian v. Mexico, ICSID Case No. ARB(AF)/97/2</td>
<td>US waste management company challenged Mexican court ruling revoking its contract for non-performance of waste disposal and management in Naucalpan de Juarez. Damages sought: more than US$17 million.</td>
<td>On 1 November 1999, the tribunal dismissed the investor's claims. It held that the annulment of the concession contract was not an act of expropriation and based on the circumstances of this case, if there was no violation of Article 1110, there was none of Article 1105 either.</td>
<td>Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Jan Paulsson (President), Benjamin R Civiletti (appointed by claimant), Claus Von Wobeser (appointed by respondent)</td>
</tr>
<tr>
<td>Marvin Roy Feldman Karpa v. Mexico, ICSID Case No. ARB(AF)/99/1</td>
<td>US cigarette exporter challenged Mexican government decision not to rebate taxes on its cigarette exports. Damages sought: US$50 million.</td>
<td>On 16 December 2002, the tribunal rejected the investor's expropriation claim, but upheld the claim of a violation of national treatment. Mexico was ordered to pay compensation of US$10.9 million plus US$1 million in interest. Mexico appealed the award in the Ontario Superior Court of Justice. In December 2003, the court dismissed Mexico's application. Mexico's appeal of this decision was rejected by the Ontario Court of Appeal on 11 January 2005.</td>
<td>Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Konstantinos D Kerameus (President), Jorge Covarrubias Bravo (appointed by claimant), David A Gantz (appointed by respondent)</td>
</tr>
<tr>
<td>Waste Management, Inc v. Mexico, ICSID Case No. ARB(AF)/98/2</td>
<td>US waste management company challenged state and local government actions in contract dispute with a Mexican subsidiary over waste disposal services in Acapulco. Damages sought: US$60 million.</td>
<td>Case registered at ICSID on 18 November 1998; tribunal was constituted on 3 June 1999. In its award rendered on 2 June 2000, the tribunal held it lacked jurisdiction because Waste Management had not properly waived domestic legal remedies as required by NAFTA. One of the arbitrators, Mr Keith Hight, issued a dissenting opinion.</td>
<td>Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Bernardo M Cremades (President), Keith Hight (appointed by claimant), Eduardo Siqueiros T (appointed by respondent), Julio C Treviso (appointed by respondent) (replaced)</td>
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<tr>
<td>SD Myers, Inc v. Canada, ad hoc (UNCITRAL) Notice of Intent submitted on 21 July 1998</td>
<td>Waste disposal firm challenged temporary ban on export of toxic PCB waste. Damages sought: US$20 million.</td>
<td>Tribunal held that Canada violated NAFTA Articles 1102 and 1105. It awarded the investors around C$2 million in compensation (including C$850,000 in interest), plus C$500,000 in costs. Canada applied to the federal court to set aside the tribunal's award. On 13 January 2004, the court dismissed Canada's application.</td>
<td>Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: J Martin Hunter (President), Bryan P Schwartz (appointed by claimant), Edward C Chiasson (appointed by respondent), Bob Rae (appointed by respondent) (replaced)</td>
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<td>The Loewen Group Inc and Raymond Loewen v. US, ICSID Case No. ARB(AF)/98/3</td>
<td>Loewen, a Canadian funeral home operator, challenged a jury verdict in a Mississippi state court that awarded US$500 million in compensation against it. Loewen also alleged that bond requirements for lease to appeal were excessive. Damages sought: US$725 million.</td>
<td>In June 2003, the tribunal determined that it 'lacked jurisdiction' to determine the investor's claims and dismissed them. The Loewen Group went bankrupt and assigned its NAFTA claims to a newly created Canadian corporation owned and controlled by the US corporation. The panel ruled that this entity was not a genuine foreign investor capable of pursuing the NAFTA claim. On 31 October 2005, a US court denied Raymond Loewen's petition to vacate the tribunal's award.</td>
<td>Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Anthony Mason (President), Abner J Mikva (appointed by claimant), Michael Mustill (appointed by respondent), L Yves Fortier (appointed by claimant) (replaced)</td>
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<td>Pope &amp; Talbot Inc v. Canada, ad hoc (UNCITRAL) Notice of Intent submitted on 24 December 1998</td>
<td>Challenge to lumber export quota system implementing Canada–US softwood lumber agreement. Damages sought: US$500 million.</td>
<td>Tribunal ruled that Canada violated NAFTA Article 1105. Canada ordered to pay US$460,000 in compensation (plus interest) and part of the investor’s legal costs, for a total of nearly US$600,000.</td>
<td>Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Lord Dervaird (President), Benjamin J Greenberg, Murray J Belman (arbitrators)</td>
</tr>
<tr>
<td>Mondev International Ltd v. US, ICSID Case No. ARB(AF)/99/2 Notice of Intent submitted on 6 May 1999</td>
<td>The investor alleged that a Massachusetts law immunising local governments from tort liability violates minimum standards of treatment under NAFTA. Damages sought: US$50 million.</td>
<td>In October 2002, the tribunal dismissed the investor’s claims. It ruled that Mondev’s claims were time-barred because the underlying dispute pre-dated NAFTA.</td>
<td>Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Ninian Stephen (President), James R Crawford (appointed by claimant), Stephen M Schwebel (appointed by respondent)</td>
</tr>
<tr>
<td>Methanex Corp v. US, ad hoc (UNCITRAL) Notice of Intent submitted on 2 July 1999</td>
<td>Challenge to California’s phase-out of MTBE, a gasoline additive that contaminated ground and surface water throughout California. Damages sought: US$970 million.</td>
<td>On 9 August 2005, the tribunal dismissed the investor’s claims. It ordered Methanex to pay the US government legal costs of US$3 million and the full cost of the arbitration.</td>
<td>Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: V V Veeder (President), James R Crawford (appointed by claimant), Stephen M Schwebel (appointed by respondent)</td>
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<tr>
<td>Fireman’s Fund Insurance Co v. Mexico, ICSID Case No. ARB(AF)/02/1 Notice of Intent submitted on 15 November 1999</td>
<td>US insurance company alleged that the Mexican government discriminated against it by facilitating the sale by Mexican financial institutions of peso-denominated debentures, but not the sale of US dollar-denominated debentures by Fireman’s Fund. Damages sought: US$50 million.</td>
<td>On 17 July 2006, tribunal dismissed the investor’s claim. It determined that, while the investor had been subjected to discriminatory treatment, under the NAFTA financial services chapter rules only claims involving expropriation were open to investor-state challenge. It ruled that Mexico’s treatment of the investor did not rise to the level of expropriation.</td>
<td>Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Albert Jan Van Den Berg (President), Andreas F Lowenfeld (appointed by claimant), Alberto Guillermo Saavedra Olavarria (appointed by respondent), Francisco Carrillo Gambua (appointed by respondent) (replaced)</td>
</tr>
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<td>United Parcel Service of America Inc v. Canada, ICSID Case No. UNCT/02/1 Notice of Intent submitted on 19 January 2000</td>
<td>Multinational US courier company alleged that Canada Post’s limited monopoly over letter mail and its postal service infrastructure enable it to compete unfairly in express delivery. UPS also alleged that Canada Post enjoyed other advantages denied to the investor (e.g., favourable customs treatment). Damages sought: US$160 million.</td>
<td>Notice of Arbitration filed on 19 April 2000. On 24 May 2007, the tribunal dismissed the investor’s claims. It determined that key NAFTA rules concerning competition policy could not be invoked by an investor under Chapter 11, and that certain activities of Canada Post were essentially at arm’s length from the Canadian government and therefore not subject to challenge by the investor. (Such activities could be scrutinised in a government-to-government dispute.) It also rejected claims that Canada Post unduly benefited from more favourable treatment.</td>
<td>Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Kenneth Keith (President), Ronald A Cass, L Yves Fortier (arbitrators)</td>
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<td>ADF Group Inc v. US, ICSID Case No. ARB(AF)/00/1 Notice of Intent submitted on 1 March 2000</td>
<td>Challenge to US ‘Buy America’ preferences requiring that US steel be used in federally funded state highway projects. Damages sought: US$90 million.</td>
<td>In January 2003, the tribunal dismissed the investor’s claim. It concluded that the measures in question were procurement measures exempted under Article 1108.</td>
<td>Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Florentino P Feliciano (President), Armand De Mestral (appointed by claimant), Carolyn B Lamm (appointed by respondent)</td>
</tr>
<tr>
<td>Waste Management Inc v. Mexico, ICSID Case No. ARB(AF)/00/3 Notice of Arbitration submitted on 19 June 2000</td>
<td>US waste management company challenged state and local government actions in contract dispute over waste disposal services in Acapulco. Damages sought: US$60 million.</td>
<td>The investor resubmitted its Notice of Arbitration in this case to address the deficiencies in its waiver of domestic remedies (see above). The tribunal subsequently confirmed its jurisdiction. On 30 April 2004, it dismissed the investor's claims on the ground that there was nothing that could be properly described as an expropriation by Mexico and the conduct of Mexico did not otherwise violate NAFTA.</td>
<td>Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: James R Crawford (President), Benjamin R Civiletti (appointed by claimant), Eduardo Magallón Gómez (appointed by respondent), Guillermo Aguilar-Alvarez (appointed by respondent)(replaced)</td>
</tr>
<tr>
<td>Trammel Crow Co v. Canada Notice of Intent submitted on 7 September 2001</td>
<td>US property management company alleged that Canada Post treated it unfairly in the outsourcing of certain real estate services. Damages sought: US$32 million.</td>
<td>Claims were withdrawn by investor in April 2002 after it reached an undisclosed settlement with Canada Post.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<td>Lomas de Santa Fe v. Mexico Notice of Intent submitted on 28 August 2001</td>
<td>US investor alleged that it was treated unfairly and inadequately compensated in a dispute over the expropriation of land by Mexican authorities. Investor sought US$210 million in damages.</td>
<td>Claim is inactive.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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| Canfor Corporation v. US           | Notice of Intent submitted on 5 November 2001                        | Canadian lumber company challenged US anti-dumping regulation and countervailing duties imposed on Canadian softwood lumber exports as well as relating to the Byrd Amendment. DAMAGES Sought: US$250 million. Notice of Arbitration submitted on 9 July 2002. On 7 September 2005, at the request of the US government, the Canfor, Terminal and Tembec claims were consolidated into a single arbitration. On 6 June 2006, the tribunal determined that it had no jurisdiction over claims relating to US dumping and countervailing duty law, but that it did have jurisdiction to decide claims regarding the Byrd Amendment. Canfor withdrew its claim as a condition of the October 2006 Softwood Lumber Agreement between the US and Canadian governments. | Arbitration rules: UNCITRAL
Administering institution: N/A
Arbitral tribunal (before consolidation): Emmanuel Galland (President), Joseph Weiler, Conrad Harper (arbitrators)
Arbitral tribunal (after consolidation): Albert Jan Van Den Berg (President), Armand LC de Mestral, Davis R Robinson (both appointed by the Secretary-General of ICSID) |
| Gami Investments Inc v. Mexico, ad hoc (UNCITRAL) Notice of Intent submitted on 1 October 2001 | US shareholders in a Mexican sugar company claimed that their interests were harmed by Mexican government regulatory measures related to processing and export of raw and refined sugar, as well as the nationalisation of falling sugar refineries. DAMAGES Sought: US$55 million. On 15 November 2004, the tribunal ruled that it had no jurisdiction and dismissed the investor's claim. | Arbitration rules: UNCITRAL
Administering institution: N/A
Arbitral tribunal: Jan Paulsson (President), W Michael Reisman (appointed by claimant), Julio Lacarte Muñoz (appointed by respondent) |
| Chemtura Corp v. Canada, PCA Case No. 2008-01 (UNCITRAL) Notice of Intent submitted on 6 November 2001 | Challenge to the Canadian government's ban on the sale and use of lindane, an agricultural pesticide. DAMAGES Sought: US$100 million. On 2 August 2010, the tribunal dismissed the investor's claims. It ordered the investor to pay the costs of the arbitration (US$688,000) and to pay 50 per cent of the government of Canada's costs in defending the claim (C$5,778 million). | Arbitration rules: UNCITRAL
Administering institution: PCA
Arbitral tribunal: Gabrielle Kaufmann-Kohler (President), James R Crawford, Charles N Brower (arbitrators) |
| Francis Kenneth Haas v. Mexico Notice of Intent submitted on December 12, 2001 | US investor in manufacturing company in Mexico alleged unfair treatment by Mexican courts and authorities in the investor's dispute with local partners in the company. DAMAGES Sought: approximately US$35 million. CLAIM is inactive. | Arbitration rules: N/A
Administering institution: N/A
Arbitral tribunal: Not constituted |
| Calmark Commercial Development Inc v. Mexico Notice of Intent submitted on 11 January 2002 | US property development company challenged decision of Mexican courts in a property dispute. DAMAGES Sought: US$400,000. CLAIM is inactive. | Arbitration rules: N/A
Administering institution: N/A
Arbitral tribunal: Not constituted |
Administering institution: N/A
Arbitral tribunal: Not constituted |
Administering institution: N/A
Arbitral tribunal: Not constituted |
**NAFTA and USMCA: The Next Stage of the Saga**

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</table>
| **James Russell Baird v. US**  
Administering institution: N/A  
Arbitral tribunal: Not constituted |
| **International Thunderbird Gaming Corp v. Mexico, Ad hoc (UNCITRAL)**  
Notice of Intent submitted on 22 March 2002 | Canadian gambling company challenged the regulation and closure of its gambling facilities by the Mexican government. Damages sought: US$100 million. | On 26 January 2005 the tribunal dismissed the investor’s claim. Thunderbird Gaming was ordered to pay Mexico’s legal costs of approximately US$1.2 million and three-quarters of the cost of the arbitration. On 14 February 2007, a US court rejected Thunderbird Gaming’s petition to vacate the NAFTA tribunal’s ruling. | Arbitration rules: UNCITRAL  
Administering institution: N/A  
Arbitral tribunal: Albert Jan Van Den Berg (President), Thomas W Wälde (appointed by claimant), Agustin Portal Ariosa (appointed by respondent) |
| **Doman Inc v. US**  
Notice of Intent submitted on 1 May 2002 | Challenge to US anti-dumping regulation and countervailing duties imposed on Canadian softwood lumber exports as well as relating to the Byrd Amendment. Damages claimed: US$513 million. | Claim is inactive. | Arbitration rules: N/A  
Administering institution: N/A  
Arbitral tribunal: Not constituted |
| **Tembec Inc et al v. US**  
Notice of Intent submitted on 3 May 2002 | Challenge to US anti-dumping regulation and countervailing duties imposed on Canadian softwood lumber exports as well as relating to the Byrd Amendment. Damages claimed: US$200 million. | Notice of Arbitration and Statement of Claim submitted on 3 December 2004. On 7 September 2005, the Canfor, Terminal and Tembec claims were consolidated into a single arbitration. In December 2005, Tembec withdrew its claim. It then unsuccessfully challenged the consolidation order in US courts. In July 2007, the tribunal ordered Tembec to pay part of the arbitration costs as well as part of the legal costs of the US. | Arbitration rules: UNCITRAL  
Administering institution: N/A  
Arbitral tribunal: Albert Jan Van Den Berg (President), Armand LC de Mestral, Davis R Robinson (both appointed by the Secretary-General of ICSID) |
| **Page et al v. 800438 Ontario Limited v. US**  
Notice of Intent submitted on 9 September 2002 | Property of three Florida subsidiaries of an Ontario company was seized following allegations of racketeering, corrupt practices and tax violations. Ontario Ltd claimed that the US improperly refused to return its property and destroyed its financial records. Damages claimed: US$38 million. | Claim is inactive. | Arbitration rules: N/A  
Administering institution: N/A  
Arbitral tribunal: Not constituted |
| **Corn Products International v. Mexico, ICSID Case No. ARB(AF)/04/1**  
Notice of Intent was submitted on 28 January 2003 | Challenge to a range of Mexican government measures that allegedly discouraged the import, production and sale of high-fructose corn syrup (HFCS), including a tax on soft drinks sweetened with HFCS. Mexico argued that it applied the 20 per cent tax to protect its sugar cane industry, which is losing domestic market share to imported HFCS, while facing barriers in selling sugar in US. Damages sought: US$325 million. | Mexico sought to consolidate the claims with those of Archer Daniels. The Archer tribunal denied the request on 20 May 2005. In January 2008, the tribunal ruled that Mexico had violated NAFTA’s national treatment obligation. It dismissed the investor’s claims that the tax was a prohibited performance requirement and tantamount to expropriation. After a July 2008 hearing on quantum, in August 2009, Mexico was ordered to pay the investor US$58.4 million. On 1 October 2009, the claimant filed a request for correction and interpretation of the award. On 23 March 2010, the tribunal issued a decision denying the claimants’ request for correction and interpretation. | Arbitration rules: ICSID Additional Facility Rules  
Administering institution: ICSID  
Arbitral tribunal: Christopher Greenwood (President), Andreas F Lowenfeld (appointed by claimant), Jesus Serrano De La Vega (appointed by respondent), Manuel E Tren (appointed by respondent) (replaced) |
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<td><strong>Terminal Forest Products Ltd v. US</strong>  Notice of Intent submitted on 12 June 2003</td>
<td>Challenge to US anti-dumping regulation and countervailing duties imposed on Canadian softwood lumber exports as well as relating to the Byrd Amendment. Damages claimed: US$90 million.</td>
<td>Notice of Arbitration submitted on 31 March 2004. On 7 September 2005, the Canfor, Terminal and Tembec claims were consolidated into a single arbitration. On 6 June 2006, the tribunal determined that it had no jurisdiction over claims relating to US dumping and countervailing duty law, but that it did have jurisdiction to decide claims regarding the Byrd Amendment. Terminal withdrew its claim as a condition of the October 2006 Softwood Lumber Agreement between the US and Canadian governments.</td>
<td>Arbitration rules: ICSID  Administering institution: N/A  Arbitral tribunal: (after consolidation): Albert Jan Van Den Berg (President), Armand L. de Meul, Davis R Robinson (both appointed by the Secretary-General of ICSID)</td>
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<td><strong>Glamis Gold Ltd v. US</strong>  Notice of Intent submitted on 21 July 2003</td>
<td>Allegations that regulations intended to limit environmental impact of open-pit mining and to protect indigenous peoples’ religious sites made proposed gold mine in California unprofitable, thereby expatriating investment and denying fair and equitable treatment. Damages claimed: over US$50 million.</td>
<td>Notice of Arbitration submitted on 9 December 2003. On 8 June 2009, the tribunal dismissed the investor’s claims, finding that the environmental regulations were not sufficiently severe to constitute an expropriation or minimum standards or treatment. It ordered the company to pay two-thirds of the costs of the proceeding.</td>
<td>Arbitration rules: UNCITRAL  Administering institution: N/A  Arbitral tribunal: Michael K Young (President), Kenneth D Hubbard (appointed by claimant), Donald L Morgan (appointed by claimant) (resigned), David Caron (appointed by respondent)</td>
</tr>
<tr>
<td><strong>Grand River Enterprises Six Nations Ltd et al v. US, ad hoc (UNCITRAL)</strong>  Notice of Intent was submitted on 15 September 2003</td>
<td>Allegations that business was harmed by the treatment of ‘non-participating manufacturers’ under the terms of a settlement agreement between 46 US states and the major tobacco companies to recoup public monies spent to treat smoking-related illnesses. Damages sought: more than US$340 million.</td>
<td>In January 2011, after protracted proceedings, the tribunal dismissed the manufacturer’s claim on jurisdictional grounds and dismissed the wholesaler’s claim on its merits. It ruled that the costs of arbitration be split equally between the parties.</td>
<td>Arbitration rules: UNCITRAL  Administering institution: N/A  Arbitral tribunal: Fali S Nariman (President), James Anaya (appointed by claimant), John R Crook (appointed by respondent)</td>
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<td><strong>Archer Daniels Midland v. Mexico, ICSID Case No. ARB(AF)/04/5</strong>  Notice of Intent was submitted on 14 October 2003</td>
<td>Challenge to a range of Mexican government measures that allegedly discouraged the import, production and sale of HFCS, including a tax on soft drinks sweetened with HFCS. Damages sought: US$100 million.</td>
<td>Mexico sought to consolidate the claims with those of Corn Products International. The tribunal denied the request on 20 May 2005. In November 2007, the tribunal ruled that Mexico had violated NAFTA’s national treatment obligation, and that the tax on HFCS constituted a prohibited performance requirement. Mexico was ordered to pay the investors US$33.5 million.</td>
<td>Arbitration rules: ICSID Additional Facility Rules  Administering institution: ICSID  Arbitral tribunal: Bernardo M Cremades (President), Arthur W Rovine, Eduardo Siqueiros (arbitrators)</td>
</tr>
<tr>
<td><strong>Albert J Connolly (Brownfield Holding, Inc) v. Canada</strong>  Notice of Intent submitted on 19 February 2004</td>
<td>US investor claimed actions of Ontario mining agency resulted in forfeiture of investor’s interest in a quarry site. Amount in dispute not available.</td>
<td>Claim is inactive.</td>
<td>Arbitration rules: N/A  Administering institution: N/A  Arbitral tribunal: Not constituted</td>
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<td><strong>Canadian Cattlemen for Fair Trade v. US</strong> &lt;br&gt;Notice of Intent submitted on 12 August 2004</td>
<td>Over 100 Canadian cattle farmers challenged US ban on imports of Canadian live cattle following discovery in 2003 of a cow infected with bovine spongiform encephalopathy from a herd in Alberta. Damages claimed: over US$25 million.</td>
<td>The first Notices of Arbitration were submitted on 16 March 2005; with subsequent Notices of Arbitration by each of the claimants submitted between 16 March 2005 and 2 June 2005. Over 100 claims were consolidated into a single arbitration. In January 2008, the tribunal dismissed the claims on jurisdictional grounds because they determined the claimants did not make or have an investment in the US, but only in Canada.</td>
<td>Arbitration rules: UNCITRAL &lt;br&gt;Administering institution: N/A &lt;br&gt;Arbitral tribunal: Karl-Heinz Böckstiegel (President), James Bacchus (appointed by claimant), Lucinda Low (appointed by respondent)</td>
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<td><strong>Bayview Irrigation District et al v. Mexico, ICSID Case No. ARB(AF)/05/1</strong> &lt;br&gt;Notice of Intent was submitted on 27 August 2004</td>
<td>Seventeen Texas irrigation districts claimed that the diversion of water from Mexican tributaries of the Rio Grande watershed discriminated against downstream US water users, breached Mexico’s commitments under bilateral water-sharing treaties and expropriated water ‘owned’ by US interests. Damages sought: more than US$100 million.</td>
<td>On 21 June 2007, the tribunal dismissed the claims and ruled that the claimants, who were US nationals whose investments were located within the territory of the US, did not qualify as foreign investors entitled to protection under NAFTA.</td>
<td>Arbitration rules: ICSID Additional Facility Rules &lt;br&gt;Administering institution: ICSID &lt;br&gt;Arbitral tribunal: Vaughan Lowe (President), Edwin Meese III (appointed by claimant), Ignacio Gómez Palacio (appointed by respondent)</td>
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<td><strong>Cargill Inc v. Mexico, ICSID Case No. ARB(AF)/05/2</strong> &lt;br&gt;Notice of Intent submitted on 30 September 2004</td>
<td>A large US agri-business challenged a range of Mexican government measures that allegedly discouraged the import, production and sale of HFCS, including a tax on soft drinks sweetened with HFCS. Damages sought: more than US$100 million.</td>
<td>The tribunal found against Mexico in an award rendered on 18 September 2009. Mexico was ordered to pay the investor US$77.3 million plus US$13.4 million in interest for a total award of US$90.7 million. The decision was upheld by the Supreme Court of Canada.</td>
<td>Arbitration rules: ICSID Additional Facility Rules &lt;br&gt;Administering institution: ICSID &lt;br&gt;Arbitral tribunal: Michael C Pyles (President), David D Caron (appointed by claimant), Donald M McRae (appointed by respondent)</td>
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<td><strong>Peter Peric v. Canada</strong> &lt;br&gt;Notice of Intent submitted on 26 July 2005</td>
<td>US investor claimed that Canadian government decision not to extend his temporary work visa impaired his investments in Canada.</td>
<td>Notice of intent to submit claim to arbitration was withdrawn by the investor.</td>
<td>Arbitration rules: N/A &lt;br&gt;Administering institution: N/A &lt;br&gt;Arbitral tribunal: Not constituted</td>
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<td><strong>Merrill &amp; Ring Forestry LP v. Canada, ICSID Case No. UNCITRT/07/1</strong> &lt;br&gt;Notice of Intent submitted on 25 September 2006</td>
<td>US forestry company alleged that Canadian federal and provincial regulations and policies restricting export of forestry products represent discriminatory treatment, expropriation and violate minimum standards of treatment. Damages claimed: US$25 million.</td>
<td>Award on 31 March 2010. Tribunal dismissed the investor’s claims and ordered the costs of the proceedings be split between the two parties. It determined the investor had not demonstrated that minimum standards of treatment had been violated.</td>
<td>Arbitration rules: ICSID &lt;br&gt;Administering institution: ICSID &lt;br&gt;Arbitral tribunal: Francisco Orrego Vieúña (President, appointed by Secretary-General), Kenneth Dam (appointed by claimant), J William Rowley (appointed by respondent)</td>
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### NAFTA and USMCA: The Next Stage of the Saga

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<td>Vito G Gallo v. Canada</td>
<td>Notice of Intent submitted on 12 October 2006</td>
<td>Claim filed following transfer of control of a project asserting legislation was 'tantamount to expropriation' and depriving the minimum standard of treatment. Damages sought: C$105 million.</td>
<td>Statement of Claim submitted on 23 June 2008. Jurisdictional hearing in February 2011. Award issued on 15 September 2011 dismissing the claims on jurisdictional grounds. The tribunal concluded that Mr Gallo could not prove that he acquired ownership and control prior to enactment of the legislation. He was ordered to pay Canada US$450,000 towards its legal costs.</td>
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<td>Mobil Investments Canada Inc &amp; Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4</td>
<td>Notice of Intent for Mobil Investments submitted on 2 August 2007; Notice of Intent for Murphy Oil submitted on 5 August 2007</td>
<td>The investors alleged that Canadian guidelines stipulating that energy companies active in the offshore invest in research and development within Newfoundland and Labrador were NAFTA-inconsistent performance requirements. The claimants previously challenged these guidelines in the Canadian courts and lost. Damages sought: C$60 million.</td>
<td>On 22 May 2012, the tribunal ruled that the local R&amp;D requirements constituted a 'prohibited performance requirement' under Article 1106. It rejected Canada's arguments that the guidelines fell within the scope of the Canadian reservation with respect to Article 1106. It also dismissed the investors’ claim that the R&amp;D guidelines breached Article 1105. The tribunal majority found Canada has been violating NAFTA Article 1106 since 2004, meaning that as long as the R&amp;D guidelines remain in effect, damages will accrue. The award was issued in February 2015. Damages were set at US$132 million. A set-aside application by Canada in the Federal Court was dismissed.</td>
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<td>Apotex Inc v. US (I), ICSID Case No. UNCT/10/2</td>
<td>Notice of Intent submitted on 21 September 2007</td>
<td>In 2003, Apotex sought US Food and Drug Administration (FDA) approval to develop a generic version of Pfizer’s anti-depressant medication, Zoloft (sertraline hydrochloride once Pfizer's patent expired in 2006). Apotex later went to court to dispel uncertainty regarding the status of the Pfizer patents. US courts dismissed Apotex's suit for a declaratory judgment clarifying the patent situation. Apotex alleged that the US court judgments discriminated against it, denied it minimum standard of treatment and expropriated its investment in sertraline. Damages sought: US$8 million.</td>
<td>On 14 June 2013, the tribunal dismissed the claim on jurisdictional grounds, ruling that Apotex did not have investments in the US that qualified for protection under NAFTA Chapter 11. Apotex was ordered to pay all costs of the proceedings.</td>
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### NAFTA and USMCA: The Next Stage of the Saga

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<td>Apotex Inc v. US (II), ICSID Case No. UNCT/1002 Notice of Intent submitted on 2 March 2009</td>
<td>Apotex sought FDA approval to develop a generic version of heart medication pravastatin sodium tablets marketed by Bristol Myers Squibb (BSM) (under the brand name Pravachol once BSM’s patent expired in 2006). Apotex alleged that certain US court judgments and FDA decisions discriminated against it, denied it minimum standard of treatment and expropriated its investment in pravastatin. Damages sought: US$84 million.</td>
<td>By agreement of the parties, the jurisdiction phase in this arbitration (the pravastatin claim) and the above arbitration (the sertaline claim) were held concurrently, even though they were not consolidated. Determinations on preliminary issues in both arbitrations were set out in a single award. Both claims were dismissed on jurisdictional grounds. The tribunal held that Apotex did not have investments in the US that qualified for protection under NAFTA Chapter 11. Apotex was ordered to pay all costs of the proceedings.</td>
<td>Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Toby Landau (President), Clifford M Davidson (appointed by claimant), Fern M Smith (appointed by respondent)</td>
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<tr>
<td>Gottlieb Investors Group v. Canada Notice of Intent submitted on 22 April 2008</td>
<td>US-based private investor group alleged that changes in tax treatment of energy income tax trusts discriminated against US entities and were equivalent to expropriation, and violated minimum standards of treatment. Damages sought: US$6.5 million.</td>
<td>The investor was barred from bringing the expropriation claim. It could have proceeded on its other claims (Articles 1102, 1103 and 1105) but no Notice of Arbitration has been submitted to date. The claim has been inactive since the determination made by US and Canadian tax authorities.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<td>Clayton/Bilcon Inc v. Canada, PCA Case No. 2009-04 (UNCITRAL) Notice of Intent submitted on 5 February 2008</td>
<td>The investor alleged that the administration of an environmental assessment review, along with various provincial and federal government measures, were discriminatory or violated minimum standards of treatment, or both. Damages sought: US$101 million.</td>
<td>The tribunal found in favour of Bilcon, noting that the regulatory process was unfair in that it introduced new concepts and principles without notice. Canada attempted to have the award set aside by the Federal Court in an application filed on 16 June 2015, but it was dismissed by the Court on 2 May 2018. A hearing on damages was held between 19–27 February 2018. Bilcon claimed over US$440 million. On 10 January 2019, the tribunal issued an award granting claimants only US$7 million, a bit more than their sunk costs. The tribunal appears to have reached this conclusion because it was not convinced that the quarry project would have been approved absent Canada’s NAFTA breaches.</td>
<td>Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Bruno Simma (President), Bryan Schwartz (appointed by claimant), Donald M McRae (appointed by respondent)</td>
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<td>Georgia Basin Holdings LP v. Canada Notice of Intent submitted on 5 February 2008</td>
<td>Allegations that Canadian federal and provincial regulations and policies restricting export of forestry products represent discriminatory treatment, expropriation and violate minimum standards of treatment. Damages sought: US$5 million.</td>
<td>This claim is inactive. In late 2007, counsel for Merrill &amp; Ring requested Georgia Basin Holdings be added as a party to the Merrill &amp; Ring arbitration. On 31 January 2008, the tribunal decided not to allow Georgia Basin to participate in the arbitration. Claimant has not brought separate claims against Canada to date.</td>
<td>Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Francisco Orrego Vicuña (President), Kenneth W’Dam (appointed by claimant), J William Rowley (appointed by respondent)</td>
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<td>Melvin J Howard, Centurion Health Corporation v. Canada, PCA No. 2009-21 Notice of Intent submitted on 11 July 2008</td>
<td>US investor alleged plans for private, fee-for-service health clinics in British Columbia and Alberta were frustrated by local, provincial and federal regulatory measures. Damages sought: US$160 million.</td>
<td>Notice of Arbitration submitted on 5 January 2009. Revised Statement of Claim submitted on 2 February 2009. In August 2010, the tribunal terminated the claim because the investor failed to make the required deposits to continue the claim. The claimant was ordered to pay Canada’s share of the arbitration costs.</td>
<td>Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Peter Tomka (President), Marjorie Florestall (appointed by claimant), Henri C Álvarez (appointed by respondent)</td>
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<td><strong>Dow Agro Sciences LLC v. Canada</strong>&lt;br&gt;Notice of Intent submitted on 25 August 2008</td>
<td>Dow Agro Sciences manufactures 2,4-D, an active ingredient in many commercial herbicides. In 2006, the Province of Quebec banned the use of these pesticides. Dow Agro Sciences alleged that the ban is without scientific basis and was imposed without providing a meaningful opportunity for the company to demonstrate that its product is safe. Dow further alleged that the ban is tantamount to expropriation. Damages sought: more than US$12 million.</td>
<td>On 25 May 2011, the parties reached a settlement under which Dow withdrew its claim. In return, the government of Quebec formally acknowledged that 2,4-D does not pose an 'unacceptable risk' to human health. The disputed regulatory measures related to pesticides are maintained and no compensation has been paid to the claimant.</td>
<td>Arbitration rules: UNCITRAL&lt;br&gt;Administering institution: Data not available&lt;br&gt;Arbitral tribunal: Not constituted</td>
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<td><strong>William Jay Greiner and Malbaie River Outfitters Inc v. Canada</strong>&lt;br&gt;Notice of Intent submitted 10 September 2008</td>
<td>Allegations that conservation measures taken by Quebec provincial government to reduce the number of salmon fishing licenses and efforts to restrict access to certain salmon fishing areas, amounted to expropriation and discriminated against investor in favour of Canadian-owned fishing lodges in violation of minimum standards of treatment. Damages sought: US$7.5 million.</td>
<td>Notice of Arbitration was submitted on 2 November 2010. Amended Notice of Arbitration was submitted on 2 December 2010. Claim was withdrawn by investor on 10 June 2011.</td>
<td>Arbitration rules: N/A&lt;br&gt;Administering institution: N/A&lt;br&gt;Arbitral tribunal: Not constituted</td>
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<td><strong>David Bishop v. Canada</strong>&lt;br&gt;Notice of Intent submitted on 8 October 2008</td>
<td>Allegations that conservation measures taken by Quebec provincial government to reduce the number of salmon fishing licenses and efforts to restrict access to certain salmon fishing areas, amounted to expropriation and discriminated against investor in favour of Canadian-owned fishing lodges in violation of minimum standards of treatment. Damages sought: US$1 million.</td>
<td>No Notice of Arbitration has been filed to date. Claim is inactive.</td>
<td>Arbitration rules: N/A&lt;br&gt;Administering institution: N/A&lt;br&gt;Arbitral tribunal: Not constituted</td>
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<td><strong>Christopher and Nancy Lacich v. Canada</strong>&lt;br&gt;Notice of Intent submitted on 2 April 2009</td>
<td>US investors alleged changes in tax treatment of energy income tax trusts were discriminatory, equivalent to expropriation of their investment and violated minimum standards of treatment. Damages sought: approximately US$1.2 million.</td>
<td>Notice of Intent was quickly withdrawn by investor.</td>
<td>Arbitration rules: N/A&lt;br&gt;Administering institution: N/A&lt;br&gt;Arbitral tribunal: Not constituted</td>
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## NAFTA and USMCA: The Next Stage of the Saga

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<td>AbitibiBowater Inc v. Canada, ICSID Case No. UNCT/10/1</td>
<td>In December 2008, the provincial government enacted legislation to return AbitibiBowater’s water use and timber rights to the Crown and to expropriate certain AbitibiBowater lands and assets associated with the water and hydroelectricity rights. Damages sought: C$467.5 million.</td>
<td>In August 2010, the Canadian federal government announced that it had agreed to pay AbitibiBowater C$130 million to settle the claim.</td>
<td>Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Andreas Bucher (President), Doak Bishop (appointed by claimant), Gavan Griffith (appointed by respondent)</td>
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<td>CANACAR v. US</td>
<td>Trackers asserted that the US failed to permit Mexican truckers into the US to provide cross-border trucking services, barred them from investing in US companies providing cross-border trucking services and violated minimum standards of treatment by refusing to comply with a NAFTA government-to-government panel ruling. Damages sought: approximately US$2 billion a year.</td>
<td>Notice of Arbitration filed on 2 April 2009. In 2011, US and Mexico agreed to a three-year memorandum that allowed Mexican trucks to enter the US under certain conditions. In exchange, Mexico eliminated US$2.3 billion tariffs on US goods. There is no information that this case was withdrawn or otherwise terminated, although there has been no activity for many years.</td>
<td>Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Thomas Heather Rodríguez (appointed by claimant)</td>
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<td>Cemex v. US</td>
<td>Cemex is embroiled in a dispute with the state government of Texas over royalty fees on quarrying. The NAFTA claim is an attempt by Cemex to protect itself against potential losses in Texan courts.</td>
<td>Unavailable.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<td>Detroit International Bridge Company v. Canada, PCA Case No. 2012-25 (UNCITRAL)</td>
<td>Detroit International Bridge Company (DIBC) objected to Canadian government plans to build a second bridge across the Detroit River. Canada contended that the arbitration should be ‘time-barred’ because the investor filed the claim more than three years after learning about the alleged breaches. Damages sought: US$3.5 billion.</td>
<td>DIBC alleged that Canada had reneged on a commitment to build a direct connection between the Ontario 401 highway to the Ambassador bridge owned by DIBC and instead connected to the new proposed Gordie Howe bridge. On 2 April 2015, the NAFTA tribunal issued its award on jurisdiction dismissing the DIBC claim against Canada. The majority determined that the ongoing lawsuits by DIBC against Canada in the US District Court for the District of Columbia with respect to the same measures as those alleged in NAFTA meant that DIBC had failed to comply with the waiver requirements in Article 1121, which deprived the tribunal of jurisdiction of the entire dispute. The tribunal ordered DIBC to pay Canada C$2 million in costs.</td>
<td>Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Yves Derains (President), Michael Chertoff, Vaughan Lowe (arbitrators)</td>
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<td>John R Andre v. Canada</td>
<td>Allegations that conservation measures taken to decrease the number of caribou that can be hunted expropriated investment. Damages sought: over US$4 million.</td>
<td>No Notice of Arbitration has been submitted to date. Claim is inactive.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<td><strong>St Mary's VCNA LLC v. Canada, PCA</strong>&lt;br&gt;Notice of Intent was submitted on 13 May 2011</td>
<td>St Mary's VCNA, alleged that its Canadian subsidiary, St Mary's Cement Inc, was the victim of political interference in its attempt to open a quarry. The Ontario Ministry for Municipal Affairs and Housing issued a zoning order that prevented the site from being converted from agricultural to extractive industrial use. St Mary's claimed the 2010 zoning order was unfair, arbitrary, discriminatory and expropriatory. Damages sought: US$275 million.</td>
<td>Canada attempted to have the claim dismissed pursuant to NAFTA Article 1113 on the grounds that St Mary's VCNA was a Brazilian-owned company without substantial US business activities and therefore did not qualify as a US investor. The parties reached a settlement on 28 February 2013, which saw St Mary's withdraw the claim in exchange for US$15 million in compensation from the Ontario government.</td>
<td>Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Michael C Pryles (President), Richard Stewart (appointed by claimant), Brigite Stern (appointed by respondent)</td>
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<td><strong>Mesa Power Group LLC v. Canada, PCA</strong>&lt;br&gt;Notice of Intent submitted on 6 July 2011</td>
<td>The Ontario feed-in tariff (FIT) programme provides incentives for renewable energy producers. Under this programme, projects are ranked to determine priority for government power purchase agreements and access to the transmission grid. The claimant alleged that 2011 changes to the FIT programme discriminated against Mesa by favouring other local and international investors. Damages sought: C$775 million.</td>
<td>In May 2016, the tribunal, with one dissent, dismissed all of Mesa's complaints and awarded Canada 30 per cent of its legal costs of C$3 million. Mesa appealed this decision to the District Court in Washington, DC. The court denied Mesa's petition to vacate and granted Canada's counter-petition to enforce the award issued on 15 June 2017. The case is concluded.</td>
<td>Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Gabrielle Kaufmann-Kohler (President), Charles N Bower (appointed by claimant), Toby Landau (appointed by respondent)</td>
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<td><strong>Apotex Holdings Inc and Apotex Inc v. US, ICSID Case No. ARB(AF)/12/1</strong>&lt;br&gt;Notice of Intent submitted on 23 November 2011</td>
<td>Following an inspection of Apotex in 2009, Canadian manufacturing facilities and the FDA discovered deficiencies and issued an import alert on drugs produced in Apotex's facilities. Apotex claimed that the import alert resulted in substantial lost sales and claimed that similar measures were not taken by the FDA against Apotex's competitors. Therefore, the measures were discriminatory and violated minimum standards of treatment. Damages sought: US$520 million (reported).</td>
<td>On 25 August 2014, the tribunal dismissed all claims. By a 2:1 majority, the tribunal ruled that it lacked jurisdiction over certain claims that the tribunal found to be res judicata. The tribunal concluded that the import alert was a 'lawful and appropriate' exercise of the FDA's regulatory authority. The tribunal ordered Apotex to pay the US government's legal costs and three-quarters of the costs of the arbitration.</td>
<td>Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: V V Veeder (President), J William Rowley (appointed by claimant), John R Crook (appointed by respondent)</td>
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<td><strong>Mercer International, Inc. v. Canada, ICSID Case No. ARB(AF)/12/3</strong>&lt;br&gt;Notice of Intent submitted on 26 January 2012</td>
<td>Allegations that US investor was disadvantaged regarding other mills in the province with self-generating capabilities because of subsidies, preferential treatment and other measures by the provincial government towards its competitors. Damages sought: C$232 million.</td>
<td>Notice of Arbitration submitted on 30 April 2012. Registered at ICSID on 16 May 2012. Tribunal was constituted on 9 October 2012. It rendered an award on 6 March 2018, dismissing the claimant's claims and ordering it to pay C$9 million toward Canada's legal costs. The parties were ordered to split the arbitration costs. Claimant registered a request for a supplementary decision on 20 April 2018. The tribunal issued a decision on that request on 10 December 2018.</td>
<td>Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: V V Veeder (President), Francisco Orrego Vicuña (appointed by claimant), Zachary Douglas (appointed by respondent)</td>
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<td>Windstream Energy LLC v. Canada, PCA Case No. 2013-22 (UNCITRAL) Notice of Intent submitted on 17 October 2012</td>
<td>In 2009, Windstream signed a 20-year FIT contract with the Ontario Power Authority for the purchase of renewable energy. In February 2011, the government of Ontario announced a moratorium on offshore wind development on the grounds that further scientific research was needed into the impacts. Windstream claimed that the moratorium was discriminatory and tantamount to expropriation. Damages sought: $47.5 million.</td>
<td>In December 2016, the tribunal ruled that it would dismiss the Windstream indirect expropriation claim but grant the claim that the offshore moratorium was unfair and inequitable, awarding Windstream damages of C$25 million and C$5 million in legal costs.</td>
<td>Arbitration rules: UNCITRAL, Administering institution: PCA, Arbital tribunal: Veijo Heiskanen (President), R Doak Bishop (appointed by claimant), Bernardo Cremades (appointed by respondent)</td>
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<td>Eli Lilly and Company v. Canada, ICSID Case No. UNCT/14/2 Notice of Intent submitted on 7 November 2012</td>
<td>Zyprexa was first patented in Canada in 1980. Eli Lilly received a patent extension in 1991 on the ground that it had found new uses for the drug. In 2009, the Canadian Federal Court invalidated the patent extension based on a finding that the drug allegedly had not delivered the promised utility. Eli Lilly contested the invalidation of its patents in the Canadian courts. When it lost there, Eli Lilly filed under NAFTA claiming the new test was discriminatory. Damages sought: $500 million.</td>
<td>On 17 March 2017, the tribunal dismissed Eli Lilly's claims and concluded that Canada was in full compliance with its NAFTA obligations. The tribunal ordered Eli Lilly to bear 75 per cent of Canada's legal costs, in addition to Canada's arbitration costs. Those costs were approximately C$5.2 million.</td>
<td>Arbitration rules: UNCITRAL, Administering institution: ICSID, Arbitral tribunal: Albert Jan Van Den Berg (President), Daniel Bethlehem (appointed by claimant), Gary B Born (appointed by respondent)</td>
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<td>Lone Pine Resources Inc v. Canada, ICSID Case No. UNCT/14/1 Notice of Intent submitted on 8 November 2012</td>
<td>US oil and gas exploration company challenged the government of Canada's revocation of exploration licenses located in the St Lawrence River, claiming that it was not meaningfully consulted or compensated for the revoked permit and loss of potential revenue. Damages sought: $119 million.</td>
<td>This case is pending. Notice of Arbitration was submitted on 27 February 2015. A hearing on the merits was held in Toronto in October 2017. The President of the tribunal died unexpectedly in March 2020. He has not yet been replaced.</td>
<td>Arbitration rules: UNCITRAL, Administering institution: ICSID, Arbitral tribunal: V V Veeder (President), David R Haigh (appointed by claimant), Brigitte Stern (appointed by respondent)</td>
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<td>Kellogg, Brown and Root (KBR) v. Mexico, ICSID Case No. UNCT/14/1 Notice of Intent submitted on 19 February 2013</td>
<td>A US energy services company sought damages against the government of Mexico related to a 2011 decision by the Mexican courts to annul a US$320 million arbitration award issued by the International Chamber of Commerce in December 2009. The original arbitration related to a contract dispute between Pemex, the Mexican state energy company, and COMMISSA, a KBR subsidiary. Damages sought: more than US$400 million.</td>
<td>On 30 April 2015, in an unpublished award the arbitrators dismissed the claim. KBR was using the NAFTA claim to collect a large commercial arbitration award KBR had obtained against the Mexican state oil company. That award was set aside by the Mexican court and was subject to enforcement proceedings in the US and Luxembourg. The dispute between Pemex and COMMISSA was settled.</td>
<td>Arbitration rules: UNCITRAL, Administering institution: ICSID, Arbitral tribunal: Andrés Rigo Sureda (President), Gabrielle Kaufmann-Kohler (appointed by claimant), Gerardo Lozano Alarcón (appointed by respondent)</td>
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<td>JM Langyears, LLC v. Canada Notice of Intent submitted on 14 February 2014</td>
<td>Assertion that companies were improperly denied tax incentives for sustainable forestry management. Damages sought: $12 million.</td>
<td>Notice of Arbitration was submitted on 20 May 2014. Investor formally withdrew the claim on 26 June 2015.</td>
<td>Arbitration rules: UNCITRAL, Administering institution: N/A, Arbitral tribunal: Not constituted</td>
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<td>B-Mex, et al v. Mexico, ICSID Case No. ARB(AF)/16/3 Notice of Intent submitted on 23 May 2014</td>
<td>US gaming investors allege that after parting ways with their Mexican business partner, their five Mexican casinos were targeted and harassed by Mexican authorities. Damages sought: US$100 million.</td>
<td>This case is pending. Notice of Arbitration submitted on 15 June 2016. Respondent's memorial on jurisdictional objections submitted on 30 May 2017. A hearing on jurisdiction was held from 21–25 May 2018. In August 2018, both claimants and respondent submitted post-hearing submissions. The US and Canada both filed a written submission as non-disputing state parties on 28 February and 17 August 2018. On 23 November 2018, the tribunal invited the parties and non-disputing state parties to submit additional written submissions on a jurisdictional issue by 7 December 2018. On 21 December 2018, both parties provided written submissions in response to the tribunal’s procedural order. On that same date, the US also filed an additional written submission as a non-disputing state party. On 19 July 2018, the tribunal rendered a partial award finding it has jurisdiction and award claimant half of its costs. On 2 October 2019, the tribunal issued Procedural Order No. 8 establishing a timetable for the merits phase.</td>
<td>Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Gaëtan Verhoosel (President), Gary B Born (appointed by claimant), Raúl E Vinuesa (appointed by respondent)</td>
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<td>Mobil Investments Canada, Inc v. Canada (II), ICSID Case No. ARB/15/6 Notice of Intent submitted on 16 October 2014</td>
<td>In 2012, a NAFTA tribunal (see above) ruled that Canadian guidelines stipulating that energy companies active offshore invest a certain percentage of their revenue in R&amp;D within Newfoundland and Labrador are NAFTA-inconsistent performance requirements. Since the R&amp;D guidelines remain in effect, Mobil is seeking ongoing damages for the period 2012 to 2014. Damages sought: C$20 million.</td>
<td>This case has been settled. The Notice of Arbitration was submitted on 16 January 2015. A hearing on jurisdiction, merits and quantum was held from 24–28 July 2017. On 13 July 2018, the tribunal issued a decision on jurisdiction and admissibility, holding that the tribunal has jurisdiction and the claims are admissible. A decision on scope of damages phase was issued on 11 December 2018. On 5 March 2019, the tribunal issued Procedural Order No. 10 concerning the schedule for the next phase of the proceeding. On 17 September 2019, the proceeding was suspended until 15 November 2019 pursuant to the parties’ agreement. The parties reached an agreement to settle the dispute on 7 January 2020 and on 4 February 2020 the tribunal rendered its award embodying the settlement agreement.</td>
<td>Arbitration rules: ICSID Convention Arbitration Rules Administering institution: ICSID Arbitral tribunal: Christopher Greenwood (President), J William Rowley (appointed by claimant), Gavan Griffith (appointed by respondent)</td>
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<td>Murphy Oil Corporation v. Canada (II) Notice of Intent submitted on 16 October 2014</td>
<td>In 2012, a NAFTA tribunal ruled that Canadian guidelines stipulating that energy companies active offshore invest a certain percentage of their revenue in research and development within Newfoundland and Labrador are NAFTA-inconsistent performance requirements. Since the R&amp;D guidelines remain in effect, Murphy is seeking ongoing damages for the period 2012 to 2014. Damages sought: C$5 million.</td>
<td>This case is pending. The Notice of Arbitration was submitted on 16 January 2015.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<td><strong>Lion Mexico Consolidated (LMC) v. Mexico, ICSID Case No. ARB(AF)/15/2</strong> Notice of Intent submitted on 6 August 2015</td>
<td>Canadian real estate investment firm disputes the cancellation by Mexican courts of mortgages on three properties that secured loans provided by LMC to Mexican nationals. LMC alleges that its Mexican counterparties forged key legal documents and the Mexican courts have not provided their firm a fair opportunity to dispute this fraud and recover its investments. Damages sought: US$200 million.</td>
<td>This case is pending. The Notice of Arbitration submitted on 11 December 2015. On 24 August 2016, Mexico filed a preliminary objection on jurisdiction. It was dismissed on 12 December 2016. A hearing on jurisdiction was held from 22–23 March 2018. A decision on jurisdiction was issued on 30 July 2018. The respondent filed a counter-memorial on the merits on 26 October 2018 and the tribunal issued a procedural order concerning production of documents on 3 January 2019. The tribunal held a hearing on the merits from 22 to 24 July 2019. On 1 October 2019, each party filed post-hearing briefs and on 22 October 2019, each party filed a statement of costs.</td>
<td>Arbitration rules: ICSID Additional Facility Rules. Administering institution: ICSID Arbitral tribunal: Juan Fernández-Armesto (President), David J A Cairns (appointed by claimant), Laurence Boisson De Chazournes (appointed by respondent) (replaced)</td>
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<td><strong>CEN Biotech Inc v. Canada</strong> Notice of Intent submitted on 1 September 2015</td>
<td>Allegations that Canada breached NAFTA’s non-discrimination and minimum standard of treatment provisions when Health Canada denied CEN Biotech Inc a license. The company has been the object of numerous allegations of public misrepresentation and insider trading. Damages sought: US$4.5 billion.</td>
<td>This case is pending, but the Notice of Arbitration has not yet been submitted.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<td><strong>Resolute Forest Products Inc v. Canada, PCA Case No. 2016-13 (UNCITRAL)</strong> Notice of Intent submitted on 30 September 2015</td>
<td>The US supercalendered paper producer alleged that provincial government financial assistance to a competing mill in Nova Scotia discriminated against Resolute, resulted in unfair competition and provoked US trade remedy action, which ultimately led to the closure of one of Resolute’s Quebec mills. Damages sought: US$70 million.</td>
<td>Notice of Arbitration submitted on 30 December 2015. Statement of Defence submitted on 1 September 2016. The tribunal held jurisdictional hearings in August 2017. A decision on jurisdiction and admissibility was made on 30 January 2018, holding that the tribunal has jurisdiction and claims are admissible, although certain claims dating prior to September 2012 were dismissed by the tribunal. Damages claimed are between US$163–201 million. Claimants submitted a memorial on 28 December 2018. Revised procedural timetables were adopted in February and November 2019. Canada submitted a Rejoinder Memorial on 4 March 2020. On 9 July 2019, the tribunal issued its decision on document production. On 1 April 2020, the tribunal extended the date for amici curiae and non-disputing party submissions to 24 April 2020. This case is pending. Canada filed related proceedings at the WTO to contest trade measures brought by the US. The US alleged the bailout of the mill breached international trade law. The WTO found partially in favour of Canada, which Canada appealed.</td>
<td>Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: James R Crawford (President), Ronald A Cass (appointed by claimant), Céline Lévesque (appointed by respondent)</td>
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<td>TransCanada Corp &amp; TransCanada Pipelines Ltd v. US, ICSID Case No. ARB/16/21 Notice of Intent submitted on 6 January 2016</td>
<td>Canadian energy company alleged that the delay and eventual rejection by the Obama administration of the Keystone XL pipeline discriminated against the company, denied it fair and equitable treatment and expropriated its investment. After the Trump administration approved the controversial project, the investor and the US government agreed to discontinue the NAFTA claim. Damages sought: US$15 billion.</td>
<td>This case is discontinued by request of the parties. Notice of Arbitration submitted on 24 June 2016. On 24 March 2017, at the request of the parties, the ICSID Secretary-General formally discontinued the arbitral proceeding. On 8 November 2018, in response to a lawsuit brought by environmental and Native American tribes and groups against the US Department of State and TransCanada, a federal court in Montana ordered a pause in the construction of the Keystone XL pipeline. That lawsuit is ongoing with pending motions for summary judgment filed by both sides. Construction is scheduled to begin in April 2020, and the Native American tribes and groups filed a request for preliminary injunction, which also is pending.</td>
<td>Arbitration rules: ICSID Convention Arbitration Rules Administering institution: ICSID Arbitral tribunal: David R Haigh (appointed by claimant), Sean D Murphy (appointed by respondent)</td>
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<td>Mr Joshua Dean Nelson and Mr Jorge Blanco v. Mexico, ICSID Case No. UNCITRAL/17/1 Notice of Intent submitted on 21 April 2016</td>
<td>Allegations that Mexican Federal Institute of Telecommunications’ acts of failing to enforce Resolution 381, issuing subsequent Decree 77 and Resolution 127, which illegally reversed Resolution 381, irreplaceably harmed the investors’ interests in Mexico and violated Mexico’s obligation under NAFTA Articles 1101 1105 and 1102. Damages sought: approximately US$500 million.</td>
<td>Notice of Arbitration submitted on 26 September 2016. The tribunal was constituted on 1 May 2017. Claimants filed a Statement of Claim on 7 November 2017. Respondent submitted a Statement of Defence on 13 March 2018. Claimants submitted a reply on the merits on 5 June 2018 and respondent submitted a rejoinder on merits issues on 10 September 2018. The tribunal issued Procedural Order No. 11 on procedural matters on 22 October 2018. Procedural Order No. 13 dated 17 April 2019 the tribunal notes that Mr Blanco stated his intention to withdraw from the arbitration, but will continue to participate as a witness on behalf of Mr Nelson. Parties submitted their memorials regarding jurisdiction during 2019 and each party filed their statement of cost on 15 January 2020. This case is pending.</td>
<td>Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Eduardo Zuleta (President), V V Veeder (appointed by claimant), Mariano Gomezperalta (appointed by respondent)</td>
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<td>Primero Mining Corp v. Mexico Notice of Intent submitted on 2 June 2016</td>
<td>The investor alleged that actions taken by Mexican tax authority, which were intended to revoke investor’s previously granted legal rights, were unfair, inequitable and discriminatory, and therefore violated Mexico’s NAFTA obligations. The amount of damages in dispute has not been quantified.</td>
<td>Notice of Arbitration has not been submitted to date. Claim is inactive.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<td>Vento Motorcycles, Inc v. Mexico, ICSID Case No. ARB(AF)/17/3 Notice of Intent submitted on 20 February 2017</td>
<td>Vento assembles motorcycles in the US for export to Mexico. Its vehicles are now subject to a 30 per cent import duty. The company asserted its Mexican-owned competitors, whose assembly practices are allegedly similar, do not pay such a duty, resulting in discrimination against Vento. The amount of damages claimed by the investor is unavailable.</td>
<td>This case is pending. Notice of Arbitration submitted on 7 August 2017 (partially published). The respondent filed a counter-memorial on the merits and a memorial on jurisdiction on 12 November 2018. The tribunal issued a procedural order on document production issues on 25 January 2019. On 9 October 2019, the tribunal issued a procedural order concerning the organisation of the hearing. In November 2019, the tribunal held a hearing on jurisdiction and merits.</td>
<td>Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Andréis Rigo Sureda (President), David A Gantz (appointed by claimant), Hugo Perezcanto Díaz (appointed by respondent)</td>
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| **Tennant Energy, LLC v. Canada, PCA Case No. 2018-54**  
Notice of Intent submitted on 2 March 2017 | US-owned energy company alleged that it was treated unfairly by Ontario authorities administering the province’s FIT programme. Damages sought: C$116 million. | The case is pending. Notice of Arbitration was submitted on 1 June 2017. The tribunal was established on 9 November 2018. Canada filed its Statement of Defense on 2 July 2019. The tribunal held a hearing on bifurcation, third-party funding, interim measures and security for costs on 14 and 15 January 2020. On 27 February 2020, the tribunal issued Procedural Order No. 4, rejecting Tennant’s request for interim measures. The tribunal also declared Canada’s bifurcation request ‘premature’, leaving open the option for Canada to renew its request. The tribunal also ordered Tennant to make certain disclosures regarding any third-party funding it may have received, but denied Canada’s request for security for costs. | Arbitration rules: UNCITRAL  
Administering institution: PCA  
Arbitral tribunal: Mr Cavinder Bull SC (Presiding Arbitrator) Mr Doak Bishop Sir Daniel Bethlehem QC |
| **Omnitrax Enterprises Inc v. Canada**  
Notice of Intent submitted on 14 November 2017 | Allegations that the Manitoba government’s decision not to approve the company’s proposals to transport oil by rail for export from Churchill further undermined its investment. Damages sought: C$150 million. | This case is pending. But the Notice of Arbitration has not yet been submitted. | Arbitration rules: N/A  
Administering institution: N/A  
Arbitral tribunal: Not constituted |
| **Dal Tile Corporation (DTC) and Dal Tile Internacional (DTI) v. Mexico**  
Notice of Intent submitted on 1 February 2018 | DTC and DTI are US companies that own 49.99% of Recubrimientos Interceramic, S.A. de C.V. These US companies started a private arbitration in 2016 and allege that Mexico took steps to stop the private arbitration, affecting their rights under NAFTA. | This case is pending. The Notice of Arbitration has not yet been submitted. | N/A |
| **Alicia Grace and others v. Mexico, ICSID Case No. UNCT/18/4**  
Registered at ICSID on 19 June 2018 | Twenty-seven US investors in a petroleum services venture brought claims relating to oil exploration and production equipment against Mexico. | Tribunal was constituted on 25 January 2019. Request for Arbitration submitted on 19 June 2018. Claimant filed a Statement of Claim on 7 October 2019 and Mexico filed a response to Claimants’ request for provisional measures 7 days later. On 19 December 2019, the tribunal issued Procedural Order No. 6 concerning provisional measures. This case is pending. | Arbitration rules: UNCITRAL  
Administering institution: ICSID  
Arbitral tribunal: Diego P Fernández Arroyo (President), Andrés Jana Linetzky (appointed by claimant), Gabriel Botini (appointed by respondent) |
| **Westmoreland Coal Company v. Canada**  
Notice of Intent submitted on 20 August 2018 | A US entity purchased mine-mouth coal operations adjacent to a coal-fired power station. In 2015, Canada changed its regulations, deciding to phase out coal-fired power by 2030. The investor alleged that Canadian companies were compensated for this change in an amount of over US$1.4 billion, but Westmoreland was excluded from the compensation, which it claims is tantamount to expropriation and violation of the minimum standard of treatment. Damages sought: US$338 million. | Notice of Arbitration and statement of claim were submitted on 19 November 2018. An updated version was submitted in August 2019 by Westmoreland’s successor entity. Westmoreland entered Chapter 11 bankruptcy proceedings in 2018, shortly before it commenced the arbitration. This case is pending. | Arbitration rules: UNCITRAL  
Administering institution: N/A  
Arbitral tribunal: Juliet Blanch (President), James Hosking (appointed by claimant), Zachary Douglass QC (appointed by respondent) |
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<td>Legacy Vulcan, LLC v. Mexico, ICSID Case No. ARB/19/1 Notice of Intent submitted on 3 September 2018</td>
<td>US investor brought claims against Mexico relating to limestone extraction and exportation.</td>
<td>This claim was registered in ICSID on 3 January 2019. On 20 September 2019, the tribunal was constituted in accordance with Article 37(2) of the ICSID Convention and issued Procedural Order No. 1 on 26 November 2019 concerning procedural matters. This case is pending.</td>
<td>Arbitration rules: ICSID Convention Arbitration Rules Administering institution: ICSID Arbitral tribunal: Albert Jan Van Den Berg (President), Guido Santiago Tawil (appointed by claimant), Sergio Puig (appointed by respondent)</td>
</tr>
<tr>
<td>Odyssey Marine Exploration v. Mexico Notice of Intent submitted on 4 January 2019</td>
<td>US marine and development company alleged Mexico breached its NAFTA obligations and minimum standard of treatment, and national treatment by refusing to grant environmental permits for the exploration of large phosphate deposit located off the coast of Baja, California. Damages sought: more than US$3.5 billion.</td>
<td>Notice of arbitration filed on 5 April 2019. This case is pending</td>
<td>Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<tr>
<td>Renaud Jacquet et al v. Mexico Notice of Intent submitted on 17 January 2019</td>
<td>Investors from France, Canada and Portugal filed claims regarding several beachfront parcels in Tulum, Mexico on which they have hotels. Claimants allege, among other things, expropriation and breach of fair and equitable treatment standards under NAFTA, the France–Mexico BIT and the Mexico–Portugal BIT. Damages sought: US$70 million.</td>
<td>This case is pending.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<td>Jonathan Levy v. Canada Notice of Intent submitted on 16 February 2019</td>
<td>US investor claimed that the Alberta Securities Commission ignored his rights as a cross-border legal service provider and treated him as a layperson to allegedly circumvent the attorney–client privilege. He also alleged discriminatory treatment. Damages sought: at least US$2 million in alleged lost investments and billings.</td>
<td>This case is pending.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<td>LIBERO Partners LP and Other v. Mexico Notice of Intent submitted on 29 March 2019</td>
<td>Llbero Partners LP (Canadian company), Espiritu Santo Technologies LLC (US company) and LIBRE Holding LLC (US company) claim that the Mexican government unilaterally modified the terms of a 10-year concession for the replacement, installation and maintenance of taximeters in Mexico City.</td>
<td>This case is pending.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<td>Geophysical Service, Inc et al. v. Canada Notice of Intent submitted on 18 April 2019</td>
<td>Three US nationals who invested in a Canadian company specialising in collecting marine seismic data for offshore oil and gas operations claim Canada unlawfully confiscated their proprietary information. Damages sought: US$2.5 billion, plus interest and costs.</td>
<td>This case is pending.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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<td>Espíritu Santo Holdings, LP (ES Holdings) v. Mexico Notice of Intent submitted on 30 May 2019</td>
<td>Canadian investor claims a de facto termination of a 10-year concession for the replacement, installation and maintenance of taximeters in Mexico City. The investor further claims the expropriation of its investment and a fraudulent attempt to change the concession provisions.</td>
<td>This case is pending.</td>
<td>Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted</td>
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Chapter 31

THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP

Lars Markert and Shimpei Ishido

I INTRODUCTION

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) evolved out of the long-negotiated Trans-Pacific Partnership Agreement (TPP). Entered into force on 30 December 2018, the CPTPP constitutes one of the world’s largest regional free trade and investment agreements, encompassing a combined GDP of US$10 trillion – almost 13.5 per cent of global GDP – 495 million people and over 15 per cent of global trade.¹

The CPTPP’s investment chapter contains a number of interesting provisions that clarify the scope of substantive investment protections and address some of the concerns about the current investor–state dispute settlement (ISDS) regime. This commentary will focus on the most relevant provisions of the CPTPP’s investment chapter and explain why it qualifies as a modern investment agreement.

II NEGOTIATION HISTORY

i Trans-Pacific Partnership Agreement

The TPP was negotiated to reduce tariff and non-tariff barriers to international trade in the Asia-Pacific region, and addresses matters such as intellectual property, investment, and dispute settlement, among others. Negotiations for the TPP began in January 2008 between the United States and members of the Trans-Pacific Strategic Economic Partnership Agreement – Brunei, Chile, Singapore and New Zealand. In November 2008, Australia, Vietnam and Peru joined the negotiations, followed by Mexico and Canada in October 2012, and finally by Japan in July 2013. Because of the involvement of the United States, the TPP initially encompassed nearly 40 per cent of global GDP, over 800 million people and around one-third of global trade.²

The TPP was shaped in 19 official negotiation rounds spanning from March 2010 to August 2013. The end of official negotiations coincided with the late addition of Japan in July 2013, after which unofficial negotiations in the form of chief negotiator meetings

¹ Lars Markert is a foreign law partner and Shimpei Ishido is a senior associate at Nishimura & Asahi. The authors gratefully acknowledge the assistance of their colleagues, Masaki Kawasaki, associate, and Michael Martinez, foreign associate, in preparing this chapter.
and ministerial meetings took place. The terms of the TPP were finally agreed upon on 4 October 2015. On 4 February 2016, 12 Pacific Rim states – Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam – signed the TPP.

The TPP was to enter into force when at least six parties accounting for 85 per cent of the combined GDP of the 12 Member States ratified the agreement. Thus, essentially both Japan and the United States (representing 60 per cent of the combined GDP of the TPP Member States) had to ratify the TPP for it to enter into force. On 23 January 2017, on his fourth day in office, President Donald J Trump withdrew the United States from the TPP by Executive Order, effectively preventing the TPP from ever taking effect.

### II The Comprehensive and Progressive Agreement for Trans-Pacific Partnership

With the TPP unable to enter into force after the withdrawal of the United States, the remaining Member States, led by Japan and intent on executing a binding agreement, agreed in May 2017 to revive and revise the TPP (the newly dubbed ‘CPTPP’). In doing so, 22 provisions from the original TPP that had primarily been pushed by the United States were suspended or modified, as they were not widely supported by the remaining members. After less than a year of negotiations, the CPTPP was signed by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam on 8 March 2018.

The CPTPP was ratified by Mexico, Japan, Singapore, New Zealand, Canada, Australia and Vietnam in late 2018. The CPTPP entered into force, as of 30 December 2018, between Australia, Canada, Japan, Mexico, New Zealand and Singapore, and as of 14 January 2019 for Vietnam. As of March 2020, Brunei, Chile, Malaysia and Peru had yet to ratify the CPTPP. The CPTPP is open for subsequent accession by other, mainly Asia-Pacific Economic Cooperation member states, and Thailand, Indonesia, Colombia, South Korea and Taiwan seem to have expressed interest in joining.

### III CONTENT OF THE CPTPP INVESTMENT CHAPTER

The CPTPP largely incorporates the terms of the TPP by reference and makes them part of the CPTPP *mutatis mutandis* (CPTPP, Article 1.1). This also applies to the TPP Chapter 9 on ‘Investment’ (the CPTPP Investment Chapter).

The CPTPP leaves the substantive investment protections in Section A of Chapter 9 unchanged. With respect to ISDS matters contained in Section B of Chapter 9, however, the CPTPP suspends the application of provisions on claims arising out of investment

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4 Although Japan had expressed interest in joining the TPP as early as October 2010, domestic resistance, particularly from the agriculture industry, hindered Japan’s attempts to join the free trade agreement. (See JETRO Newsletter, ‘Japan Looks to Trans-Pacific Partnership to Transform its Economy’, February 2011, www.jetro.go.jp/ext_images/en/reports/survey/pdf/2011_01.epa.pdf.) Furthermore, the shift from official negotiation ‘rounds’ to unofficial meetings seemingly correlates to the addition of Japan to the negotiations, in light of the 2013 deadline to conclude the negotiations. (See Office of the United States Trade Representative, ‘Joint Press Statement TPP Ministerial Meeting Bandar Seri Begawan, Brunei Darussalam’, 23 August 2013, https://ustr.gov/Joint-Press-Statement-TPP-Ministerial-Brunei.)


authorisations and investment agreements originally foreseen by the TPP (CPTPP, Article 2 and Annex, Article 2). This means that, under the CPTPP, only claims that relate to a breach of the substantive investment protections contained in Section A of the CPTPP Investment Chapter can be submitted to ISDS.

i Scope of investment protection

Article 9.2 regulates the scope of the CPTPP Investment Chapter. To benefit from its protections, the threshold definitions of investor and covered investment must be satisfied, as well as the threshold for the CPTPP Investment Chapter's application ratiocinatio temporis. When it comes to the imposition of performance requirements (Article 9.10) or regulation in the public interest (Article 9.16), the CPTPP Investment Chapter applies to all investments inside member states, including non-CPTPP investments (e.g., those made by investors from non-parties) because in certain circumstances, partial or non-application of such measures could create competitive disadvantages for CPTPP investments.7

**Investor**

Defined as broadly as under the 2012 US Model Bilateral Investment Treaty (BIT), an investor of a CPTPP Member State refers to a CPTPP Member State itself, or a national or an enterprise of a CPTPP Member State, that attempts to make, is making or has made an investment in the territory of another Member State (Article 9.1).8 Thus, not only nationals and enterprises, but also CPTPP Member States and even separate customs territories for which the CPTPP is in force, fall under the definition of an investor (Article 9.1).

The rather broad notion of ‘investor’ is counterbalanced by CPTPP Member States reserving the right to deny the benefits of the CPTPP Investment Chapter to certain investors and their investments in either of the following two situations (‘denial of benefits’):

a First, if the investor is an enterprise of another CPTPP Member State owned or controlled by a person of a non-CPTPP Member State or the host state, that has no substantial business activities in the territory of any CPTPP Member State other than in the host state (Article 9.15.1).9

b Second, if the investor is an enterprise of another CPTPP Member State owned or controlled by a person of a non-CPTPP Member State, and the host state adopts or maintains measures with respect to the non-CPTPP member state or a person thereof, that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of the CPTPP Investment Chapter were accorded to the enterprise or its investments (Article 9.15.2).

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8 Sub-definitions are as follows: ‘Party means any State or separate customs territory for which the Agreement is in force’ (Article 1.3); ‘National means a “natural person who has the nationality of a Party” according to Annex I-A (Party-Specific Definitions) or a permanent resident of a Party’ (Article 1.3); and ‘Enterprise means an enterprise constituted or organized under the law of a Party, or a branch located in the territory of a Party and carrying out business activities there’ (Article 9.1).

9 Similar provisions can also be found in other investment agreements. See NAFTA, Article 1113; Argentina–United States BIT, Article 1(2); 2012 US Model BIT, Article 17; Austria–Jordan BIT, Article 10.

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Where a respondent state successfully establishes either of the above situations in an ISDS proceeding, a claim will likely be rejected.10

Investment

The definition of ‘investment’ is correspondingly broad. Similar to the 2012 US Model BIT, the CPTPP Investment Chapter utilises the term ‘characteristics of an investment’, which includes the commitment of resources, expectation of profit or assumption of risk (Article 9.1).11 Unlike some other investment agreements,12 the CPTPP Investment Chapter contains no ‘in accordance with host state law’ requirement. Further, as in many other investment agreements, a non-exhaustive list of forms of investments is set out; however, expressly excluding an order or judgment entered in a judicial or administrative action (Article 9.1). Whether an arbitral award may constitute an investment remains unclear but, in light of the wording, cannot be ruled out.13

Application ratione temporis

The CPTPP Investment Chapter defines covered investments as those investments in existence as of the date of entry into force of the CPTPP, or established, acquired or expanded thereafter (Article 9.1). In other words, the CPTPP Investment Chapter applies to all investments, whether made before or after its entry into force.14 However, the CPTPP Investment Chapter will not bind a CPTPP Member State in relation to an act or fact occurring before the CPTPP’s entry into force for that Member State (Article 9.2.3).

Limitations of scope for certain areas

Investments into financial services are governed by the Financial Services Chapter (Chapter 11), which incorporates only some of the provisions of the CPTPP Investment Chapter by reference.15 Accordingly, investors can only invoke these provisions in ISDS proceedings (Article 11.2.2(a) and (b)).

10 See, e.g., 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, para. 4.30.

11 Some authors have pointed out that it is somewhat circular to define the term ‘investment’ by invoking the ‘characteristics of an investment’. See, e.g., Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2nd ed. (2012), pages 63, 64.

12 See, e.g., Lithuania–Ukraine BIT, Article 1.1; ASEAN Comprehensive Investment Agreement, Article 4(a); and India–Brunei Darussalam BIT, Article 1(b).

13 See Maximilian Clasmeier, ‘Arbitral Awards as Investments: Treaty Interpretation and the Dynamics of International Investment Law’, International Arbitration Law Library, Vol. 39 (2016), page 70: ‘From a mere textual approach, it is difficult to see how an arbitral award could be previously invested before it is rendered. Nevertheless, it is a matter of interpretation to allocate its function in a broader context and the object and purpose of the respective BIT. It must in any case be taken into consideration.’

14 Annex 9-K, however, contains a carve-out with respect to certain claims under government procurement contracts with Malaysia for a period of three years after the date of entry into force of the CPTPP for Malaysia.

15 See Article 11.2.2(a), making reference, e.g., to Article 9.6 (Minimum Standard of Treatment) and Article 9.8 (Expropriation). See also the express limitation in Article 9.3.3.
With respect to taxation measures, the scope of substantive protections is narrowed (Article 29.4). 16

ii Substantive standards of investment protection
The most frequently invoked substantive standards of investment protection seem to have been somewhat curtailed in the CPTPP Investment Chapter (when compared to other investment agreements), presumably to ensure greater regulatory freedom of the member states. This ‘right to regulate’ is emphasised throughout.

In a similar vein, the member states retain interpretative control over the scope of the substantive standards. Chapter 27 provides for the forming of a Trans-Pacific Partnership Commission (the Commission), which can issue interpretations of the CPTPP Investment Chapter that are binding on tribunals (Article 9.25.3).

National treatment and most favoured nation (MFN) treatment
Like practically all investment agreements, the CPTPP Investment Chapter prohibits nationality-based discrimination by the host state. The CPTPP Investment Chapter’s national treatment clause requires CPTPP Member States to guarantee investors of another CPTPP Member State and covered investments treatment no less favourable than treatment they accord, in like circumstances, to their own investors and their investments in their territories (Articles 9.4.1, 9.4.2). It also requires CPTPP Member States to guarantee investors of another CPTPP Member State and covered investments treatment no less favourable treatment than they accord, in like circumstances, to investors of any other state and their investments (Articles 9.5.1, 9.5.2).

It is widely accepted that differentiations are justifiable if rational grounds can be shown. The CPTPP Investment Chapter clarifies in a footnote that whether treatment is accorded in ‘like circumstances’ depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives (Article 9.4, footnote 14). 17

Article 9.5.3 of the CPTPP Investment Chapter speaks to the long-standing controversy of whether MFN clauses can apply to dispute settlement provisions by clarifying that the treatment referred to in the MFN clause does not encompass international dispute resolution procedures or mechanisms, such as ISDS covered in Section B of the CPTPP Investment Chapter.

Another limitation of the MFN clause arises out of all of the CPTPP Member States appearing to have expressed in some form that the MFN clause shall not extend to legal

16 Only Article 9.4 (National Treatment), Article 9.5 (Most Favoured Nation Treatment), Article 9.8 (Expropriation) and Article 9.10.2 (Performance Requirements) apply.

17 See also the Drafters’ Note on Interpretation of ‘In Like Circumstances’ Under Article 9.4 (National Treatment) and Article 9.5 (Most Favoured Nation Treatment).
The Comprehensive and Progressive Agreement for Trans-Pacific Partnership

protections in their investment agreements already in force, but only to such protections in investment agreements a Member State is to sign in the future. This will require the CPTPP Member States to adopt consistent practices when they conclude future investment treaties.

**Customary international law minimum standard of treatment of aliens (minimum standard of treatment)**

Similar to the North American Free Trade Agreement (NAFTA) – soon to be superseded by the United States–Mexico–Canada Agreement (USMCA), the CPTPP Investment Chapter equates the fair and equitable treatment (FET) standard (and full protection and security) with the minimum standard of treatment under customary international law (Article 9.6.1). Moreover, the CPTPP Investment Chapter incorporates a NAFTA Free Trade Commission’s Note, and provides that the concepts of FET and full protection and security do not require measures in addition to or beyond that which is required by the minimum standard of treatment of aliens, and do not create additional substantive rights (Article 9.6.2). This is echoed in a significant and growing number of recent international investment agreements involving CPTPP Member States.

By limiting the FET standard to customary international law, the CPTPP Investment Chapter seeks to rein in the discretion of tribunals when considering the standard’s content. In reality, however, the minimum standard itself is quite indeterminate and requires interpretation. The process of establishing the content of customary international law (determining state practice and opinio juris) is methodologically difficult and puts an onerous burden on the claimants. This may become an issue under the CPTPP Investment Chapter according to which an investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration (Article

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18 See, e.g., Japan’s Annex II to the Investment Chapter, page 18, concerning MFN treatment (Articles 9.5 and 10.4) states ‘Japan reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral agreement in force on, or signed prior to, the date of entry into force of this Agreement’. See also Canada’s Annex II to the Investment Chapter, page 13; Australia’s Annex II to the Investment Chapter, page 19; and New Zealand’s Annex II to the Investment Chapter, page 9.


20 NAFTA, Article 1105.


22 See, e.g., the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (2009), the Japan–Philippines EPA (2006), the China–Peru FTA (2009), the Malaysia–New Zealand FTA (2009).

23 UNCTAD Series on Issues in International Investment Agreements II, ‘Fair and Equitable Treatment’ (2012), pages 28, 29. See, e.g., *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, paras. 9.47–9.65, where the tribunal set a ‘high threshold of severity and gravity before finding that a state has breached any elements of [NAFTA] Article 1105’, and dismissed claimants’ claim because they had failed to pass such a threshold.
In arbitral practice, the linkage to the minimum standard of treatment has hardly led to differing interpretations and applications of the FET standard, irrespective of which governing standard is ultimately assumed.25

There are also other novel attempts to articulate the FET standard in the context of certain controversial issues; for example, clarification that breach of the FET standard is not constituted by a party merely (1) taking or failing to take an action that may be inconsistent with an investor’s expectations, or (2) modifying or reducing (or alternatively not issuing, renewing or maintaining) a subsidy or grant, even if either scenario results in loss or damage to the covered investment (Articles 9.6.4, 9.6.5).

**Expropriation**

CPTPP Member States agree not to expropriate or nationalise covered investments, either directly or indirectly, except (1) for a public purpose; (2) in a non-discriminatory manner; (3) on payment of prompt, adequate and effective compensation; and (4) in accordance with due process of law (Article 9.8.1). These elements are generally in line with many other international investment agreements.

An annex to the CPTPP Investment Chapter elaborates on the meaning of expropriation and requires, in determining an indirect expropriation, a case-by-case, fact-based inquiry that considers the economic impact, legitimate expectations and character of the government action, among other factors. Non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriation (Annex 9-B(3)).26

The CPTPP Investment Chapter clarifies the concept of expropriation in the context of subsidies and grants. A CPTPP Member State’s decision not to issue, renew or maintain a subsidy or grant, or a decision to modify or reduce a subsidy or grant, in the absence of a legal or contractual commitment to do so, or in accordance with terms of the subsidy or grant, standing alone, does not constitute expropriation (Article 9.8(6)).

**Performance requirements**

The CPTPP Investment Chapter prohibits Member States from imposing performance requirements such as export requirements, local content requirements and technology transfer requirements on investors (Articles 9.10.1 and 2). This aims to ensure that investors’ business activities are undisturbed by host states’ demands made in the interest of developing their economies.
Most of the requirements stipulated in the CPTPP Investment Chapter are similar to those in past investment agreements, such as NAFTA. However, the CPTPP Investment Chapter sets forth novel performance requirements in relation to the use of technology. One is the requirement to use or accord preference to a technology of the host state or a person of the host state (Article 9.10.1(h)), and the other is the requirement to adopt certain terms as required by the host state in the technology licensing agreement freely entered into between the investor and a person of the host state (Article 9.10.1(i)). These provisions are expected to help investors investing in manufacturing and high-tech industries to freely make use of the technologies they develop.

These new provisions are subject to an exception that allows the host state to adopt or maintain measures to protect legitimate public welfare objectives (Article 9.10.3(h)).

Right to regulate and corporate social responsibility

Apart from emphasising the right to regulate with respect to various substantive standards of protection as indicated above, the CPTPP Investment Chapter expressly, but somewhat declaratorily, acknowledges that CPTPP Member States can implement measures otherwise consistent with the CPTPP Investment Chapter to ensure that investment activity is undertaken in a manner sensitive to environmental, health or other regulatory objectives (Article 9.16).

In a similar declaratory fashion, CPTPP Member States reaffirm the importance of encouraging enterprises operating in their territory to voluntarily comply with corporate social responsibility standards (Article 9.17).

iii Investor State Dispute Settlement

The CPTPP Investment Chapter contains a modernised form of investment arbitration to address ISDS. This distinguishes it from NAFTA's successor, the USMCA, which has largely abolished ISDS, or the investment agreements negotiated by the European Union, which aim to establish an investment court system.

ISDS mechanism

A claimant may submit a claim under one of the following alternatives: the ICSID Convention and the ICSID Rules; the ICSID Additional Facility Rules; the UNCITRAL Rules; or, if the claimant and respondent agree, any other arbitral institution or any other arbitration rules (Article 9.19.4).

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27 The provision was just adopted in the US Model BIT (2012); see Caplan and Sharpe, footnote 7 herein, page 799.
28 A similar provision can be found in Japan's recent treaty practice, see, Japan–Mongolia EPA, Article 10.7.1(k).
30 Provided that both the respondent and the claimant are parties to the ICSID Convention.
31 Provided that either the respondent or the claimant is a party to the ICSID Convention.
When doing so, the claimant must be aware of:

- the mandatory six-month prior consultation and negotiation period (Articles 9.18, 9.19);\(^{32}\)
- the three-year-and-six-month time limitation from the date on which the claimant first acquired, or should have first acquired, knowledge of breach or damage (Article 9.21.1);
- the requirement of a mandatory written waiver of any right to initiate or pursue the same claims before any court or administrative tribunal, or through any other dispute settlement procedures (Article 9.21.2(b)); and
- a fork-in-the-road clause in the case of Chile, Mexico, Peru or Vietnam, which provides that an investor must elect between litigation before these state’s domestic courts or administrative tribunals, on the one hand, or an investment arbitration claim, on the other hand. The election is definitive and exclusive, and choosing the former will prevent the investor from submitting the claim to arbitration (Annex 9-J).

### Selection of arbitrators

In contrast to proposals by the European Union to replace investment arbitration with a standing investment court, parties under the CPTPP Investment Chapter continue to be able to select their arbitrators. However, the Chapter addresses perceived legitimacy concerns that arise when a system of adjudication permits adjudicators to act as arbitrator in one case and legal counsel in another (double hatting).\(^{33}\)

On 19 January 2019, the Commission established the Code of Conduct for Investor–State Dispute Settlement Proceedings (the Code of Conduct),\(^{34}\) which is required under Article 9.22.6. As a countermeasure against double hatting, the general principles of the Code of Conduct require that an arbitrator, upon selection, shall refrain for the duration of the proceedings from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under the CPTPP Investment Chapter or any other international agreement (Code of Conduct, 3(d)). In the event of an alleged breach of the Code of Conduct, the rules governing the arbitration shall apply to any challenge, disqualification or replacement of an arbitrator (Code of Conduct, 3(f)).

### Conduct of the arbitration

The CPTPP Investment Chapter offers procedural provisions to improve the efficiency of arbitral proceedings.

A tribunal shall address and decide as a preliminary question any objections by the respondent that, as a matter of law, a claim submitted is not a claim for which an award

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32 As explained above, the claimant cannot avoid this requirement by invoking a more favourable dispute settlement clause of another treaty that does not contain such a requirement because the treatment under the CPTPP MFN clause does not encompass the dispute resolution mechanism.

33 Neither the various arbitration rules (i.e., ICSID, SCC, ICC and UNCITRAL) nor the IBA Guidelines on Conflicts of Interest in International Arbitration explicitly prohibit this practice, although the latter list ‘double hatting’ in the Orange List. For an empirical analysis of ‘double hatting’, see, e.g., Malcolm Langford, Daniel Behn, Runar Hilleren Lie, ‘The Revolving Door in International Investment Arbitration’, *Journal of International Economic Law*, Volume 20, Issue 2, 1 June 2017, pages 321–324.

in favour of the claimant may be made under Article 9.29 (Awards) or that a claim is manifestly without legal merit (Article 9.23.4). A similar provision can be found in ICSID Arbitration Rule 41.5, but the CPTPP Investment Chapter allows a respondent to submit the above-referenced objections even in arbitral proceedings under other arbitration rules. Further, if the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis such an objection (or any objection pertaining to the dispute not being within the tribunal’s competence), including an objection that the dispute is not within the tribunal’s jurisdiction. The tribunal shall suspend any proceedings on the merits, and issue a decision or award on the objection, stating the grounds therefore, no later than 150 days after the date of the request (Article 9.23.5).

Most notable, a tribunal shall, before issuing a decision or award on liability, share its proposed decision or award with the disputing parties for their comments. They may submit written comments on the proposed award on liability, which the tribunal shall consider for its decision or award (Article 9.23.10). It remains to be seen whether the party review effectively addresses tribunal oversights, or whether it will be used by the disputing parties to reargue their case.

 Probably with a nod to reform efforts regarding the ISDS system currently undertaken within the UNCITRAL Working Group III, the CPTPP Investment Chapter provides that if an appellate mechanism for reviewing awards rendered by ISDS tribunals is developed in the future under other institutional arrangements, the CPTPP Member States shall consider whether awards rendered under Article 9.29 should be subject to such an appellate mechanism (Article 9.23.11).

**Side letter to the CPTPP**

On 8 March 2018, alongside signing the CPTPP, New Zealand also signed side letters with five other signatories – Brunei, Malaysia, Peru, Vietnam and Australia – to exclude compulsory ISDS through the following two approaches.

The first approach is to fully exclude an investor’s right to ISDS. This can be seen in the side letters exchanged with Peru and Australia. Investors of Australia and New Zealand may nevertheless be able to draw on the ASEAN–Australia–New Zealand free trade agreement (AANZFTA) to get around this exclusion. By contrast, as of March 2020, New Zealand has no overlapping investment agreement with Peru, meaning that the exclusion of ISDS between those two states is effective.

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35 However, the same article also provides that if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days. In addition, when the tribunal makes a determination on such objections, it may, if warranted, award to the prevailing disputing party reasonable costs and attorney’s fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant’s claim or the respondent’s objection was frivolous and shall provide the disputing parties a reasonable opportunity to comment (Article 9.23.6).

36 New Zealand–Peru Side Letter, paras. 1–2, and New Zealand–Australia Side Letter, paras. 3–4, both stating that no investor of a party shall have recourse to dispute settlement against the government of another party under Chapter 9, Section B (ISDS) of the CPTPP.
The second approach, taken in the remaining three side letters,37 is more complex and provides for dispute resolution on a staged basis. In the case of a dispute, an investor should make a written request for consultations and negotiations, briefly describing the facts regarding the measures at issue. The state and the investor will then try to resolve the dispute amicably within six months by using non-binding third-party procedures, including good offices, conciliation and mediation, failing which the dispute may be submitted to arbitration in accordance with the CPTPP Investment Chapter, provided that the states concerned consent (and, in case of the Vietnam side letter, ‘specifically’ consent) to its application. However, despite the new requirement for specific host state consent, investors from those four states may be able to draw on the general consent to arbitration in a prior treaty such as AANZFTA to pursue ISDS against one of the states, even without the respondent state’s specific consent to arbitrate that dispute.

**Joint declaration on ISDS**

In addition to signing side letters, New Zealand, together with Chile and Canada, made a joint declaration on ISDS. While reaffirming the right of each state to regulate within its territory to achieve legitimate policy objectives, this declaration recognises the strong procedural and substantive safeguards that are included in the CPTPP Investment Chapter, and ‘the important role of civil society and other interested groups on public policy matters relating to ISDS’, and intends ‘to consider evolving international practice and the evolution of ISDS including through the work carried out by multilateral international fora’.38

**IV CONCLUSION**

As the above shows, the CPTPP Investment Chapter is calibrating, but not abandoning, familiar substantive and procedural investment protections.39 The contracting states have addressed current concerns about the investment protection system in an ‘evolutionary’ rather than a ‘revolutionary’ manner. This stands in stark contrast to the USMCA or the European Union’s efforts to replace the tried and tested ISDS investment arbitration with an investment court system.

It would therefore not be surprising if the CPTPP Investment Chapter became an inspiration for other states seeking to modernise their investment agreements, in Asia and beyond.

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37 New Zealand–Brunei Side Letter, paras. 1–2; New Zealand–Malaysia Side Letter, paras. 1–2; and New Zealand–Vietnam Side Letter, paras. 1–2.

38 Joint Declaration on Investor State Dispute Settlement among New Zealand, Canada and Chile.

ABOUT THE AUTHORS

KAMEL AITELAJ
Milbank LLP
Kamel Aitelaj is a senior associate in the Washington, DC office of Milbank LLP. His practice focuses on complex international dispute resolution and matters of public international law. He has represented sovereign states and companies in a wide range of proceedings, including arbitrations conducted under ICC, ICDR, ICSID, LCIA, SCC and UNCITRAL rules, as well as court proceedings involving sovereign immunity and award enforcement. Kamel is licensed to practice at the New York and District of Columbia bars, the Barreau de Paris and was called to the Bar of England and Wales.

HIROKI AOKI
Nagashima Ohno & Tsunematsu
Hiroki Aoki is a partner at Nagashima Ohno & Tsunematsu Singapore LLP. He specialises in dispute resolution and has a wide range of experience in international arbitration under various arbitration rules, including ICC, SIAC, JCAA and UNCITRAL, and litigation in various jurisdictions. He graduated from the University of Tokyo (LLB) in 2000 and the University of Michigan (LLM) in 2004, and has work experience at the Ministry of Land, Infrastructure, Transport and Tourism of Japan (2000–2006). He was admitted to practise law in Japan and joined Nagashima Ohno & Tsunematsu in 2007. He has been working in Singapore since 2013.

ULYANA BARDYN
Eversheds Sutherland
Ulyana Bardyn is an associate based in the Eversheds Sutherland New York office. Ms Bardyn is a member of the firm's international dispute resolution practice group. Her practice is focused on complex cross-border disputes, including international commercial arbitration, investment treaty arbitration and commercial litigation. Ms Bardyn previously worked with the Secretariat of the ICC International Court of Arbitration, where she oversaw hundreds of arbitration matters.

Ms Bardyn is a fellow of the Chartered Institute of Arbitrators and she sits as an arbitrator. Ms Bardyn also serves as an adjunct professor at Brooklyn Law School teaching a class on investment law and she serves as Chair of the International Law Committee of the New York City Bar Association.
Ms Bardyn holds an LLM focused on international dispute resolution from Georgetown University Law Center and a postgraduate diploma in international commercial arbitration from Queen Mary, University of London, as well as a JD-equivalent from the University of Lviv in Ukraine.

RONNIE BARNES
Cornerstone Research

Dr Ronnie Barnes, a principal at Cornerstone Research, has played a key role in establishing and developing the firm’s European international arbitration practice. An expert in accounting, damages and valuation, Dr Barnes specialises in complex valuation methodologies. He has provided written and oral testimony in multiple matters, including on the tax treatment of hire purchase contracts; the assessment of damages resulting from the breach of a joint venture agreement; the economic equivalence of various types of financial derivative; and the use of such derivatives in alleged share price manipulation.

In addition to serving as a testifying expert, Dr Barnes also leads teams that support Cornerstone Research’s affiliated experts. In this role, he has consulted on numerous matters requiring sophisticated accounting, financial and economic analysis.

Dr Barnes co-authored ‘The Use of Econometric and Statistical Analysis and Tools’, a chapter in *The Guide to Damages in International Arbitration*, and *The Role of Economic Analysis in U.K. Shareholder Actions*, a Cornerstone Research report. He has also published articles on valuation methods and damages analyses. A UK-qualified chartered accountant, Dr Barnes previously held positions in accounting and investment banking firms, as well as a consulting firm and in academia. Who’s Who Legal has named Dr Barnes as a leading international arbitration economist. He was educated at London Business School, PhD; London Business School, MSc; University of Cambridge, master of advanced study in mathematics; and University of Oxford, BA (with honours).

MARINN CARLSON
Sidley Austin LLP

Marinn Carlson, co-leader of the firm’s global arbitration, trade and advocacy practice, focuses on international investment disputes, with an emphasis on investor–state arbitration. She represents both cross-border investors as well as respondent governments in ICSID and UNCITRAL arbitrations under bilateral investment treaties and free trade agreements, including NAFTA. She counsels clients in sectors ranging from financial services to energy to infrastructure development on the implications of international trade and investment rules for their global operations.

Marinn is consistently recognised for her work and experience. A recent academic analysis of the investment treaty arbitration community placed her in the top 25 most experienced investor–state dispute settlement counsel in the world, among the ‘core of lawyers who dominate the caseload’ (*Journal of International Economic Law* 2017). She is named as one of the Top 250 Women in Litigation by Benchmark, and as one of Latin America’s Top 100 Female Lawyers in Arbitration and Litigation by Latinwex.

Marinn is an adjunct professor at George Washington University Law School and American University’s Washington College of Law, a vice president of the American Society of International Law and serves on the Executive Committee of the Foundation for International Arbitration Advocacy.
CHLOE J CARSWELL
Reed Smith LLP

Chloe J Carswell's practice is almost entirely focused on international arbitration, in particular investment treaty arbitration and public international law. Chloe has been involved with both ad hoc arbitrations and arbitrations under the rules of major international arbitration institutions, including the ICC, ICSID, and ad hoc arbitration under the UNCITRAL Rules. She acts for claimant investors and respondent states, and has handled cases in the mining, energy, hotel, construction, banking and telecommunications sectors. She has a wealth of experience dealing with disputes arising out of bilateral investment treaties and the Energy Charter Treaty, dealing with such issues as jurisdiction, unlawful expropriation, unfair and inequitable treatment, and denial of justice. She also advises clients on pre-contract structuring and the restructuring of investments. Her recent experience includes disputes over the transfer of licences, the alleged nationalisation of strategic assets, the interpretation of provisions in production sharing agreements, the effect and enforceability of stabilisation provisions, and breaches of other commercial agreements. Chloe also has significant experience of rail-related disputes, having acted for train operating companies against the national infrastructure provider and the regulator in arbitration, adjudication, expert determination, industry-specific dispute resolution procedures, mediation and judicial review.

KONSTANTIN CHRISTIE
Peter & Kim Ltd

Konstantin Christie is a partner at Peter & Kim in Geneva. For the past 12 years, his practice has focused on international commercial and investment arbitration, as well as disputes under public international law. A native Russian speaker, he regularly handles cases from eastern Europe, Russia and the former CIS. Konstantin was admitted to the Bars of New York and Massachusetts 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.

RUXANDRA CIUPAGEA
Compass Lexecon

Ruxandra Ciupagea is a senior vice president with Compass Lexecon, based in Madrid and London. Ms Ciupagea has over 10 years of experience in economic consulting and has provided expert evidence in litigation and international arbitration matters focused on pricing, valuation and damages assessments in energy and infrastructure markets. She has extensive experience in the fields of natural gas and LNG, electric power, renewable energy and regulated infrastructure. Ms Ciupagea is a recognised expert in the *Who's Who Legal Energy* 2020 publication.

Ms Ciupagea also has particular expertise in electricity market modeling, including valuation of transmission assets and storage technologies, as well as in the environmental arena, where she has consulted on issues related to air quality impacts, carbon leakage risk and carbon credits. She has participated in designing models related to the UK Renewable Heat Incentive and renewable energy support (RES) policies in Europe.

Ruxandra holds an MPhil in Economics and Finance from the Centro de Estudios Monetarios y Financieros (CEMFI, Madrid), where she specialised in microeconomics, with
a special focus on industrial organisation and regulation and competition policy. She holds a BA in Economics from Universidad Carlos III de Madrid. Previous to joining Compass Lexecon, Ms Ciupagea worked for the energy and environment practices of another major economic consulting company.

RAËD FATHALLAH

Bredin Prat

Raëd Fathallah is a partner in Bredin Prat’s International Arbitration team. Raëd acts as counsel in large-scale commercial and investment arbitrations for corporate and private clients as well as sovereign states and state entities acting in a variety of sectors and spanning different regions. Raëd is also ranked amongst the most sought-after international arbitrators, having served in more than 60 cases under all major institutional rules (ICSID, ICC, LCIA, DIAC, CRCICA) and involving claims often exceeding US$1 billion. He is currently serving as a Court member of the LCIA, a member the ICSID Panel of Arbitrators and Conciliators and of the ICC Commission on Arbitration.

Praised for his experience as counsel and arbitrator in both commercial and investment arbitration, Raëd is recognised in all major listings and has won the prestigious Swiss Arbitration Association (ASA) Prize for Advocacy in International Commercial Arbitration (2014).

Raëd is admitted to the Quebec Bar (1997) and the Paris Bar (2007), in addition to being qualified as a Solicitor of the Supreme Court of England and Wales (2005). Raëd is a graduate of the University of Ottawa (LLL, 1994) and the New York University School of Law (MCJ, 1996). He also obtained a Doctorate in Law (DPhil, 2007) from the University of Oxford, Lincoln College.

DANIELE FAVALLI

VISCHER

Daniele Favalli is a partner in the dispute resolution team of VISCHER in Zurich. For more than 20 years he has been representing clients in commercial disputes before Swiss and international courts and arbitral tribunals (Swiss Rules, ICC, LCIA, AAA/ICDR, etc.); he also serves as arbitrator. Daniele has experience of working with clients from the United States and Latin America, having worked for about seven years as a practitioner in these regions. In addition to German and English, Daniele’s working languages are Italian, Spanish and French. A founding member and a member of the Academic Council of the Swiss Arbitration Academy, Daniele has also a teaching assignment as head coach of the VIS Moot Team of the University of Lucerne. He is a graduate of the University of St Gallen, Switzerland and has obtained an LLM from the University of Texas at Austin, and is rated in The Legal 500 and Chambers and Partners.

BEATA GESSEL-KALINOWSKA VEL KALISZ

Gessel, Koziorowski spk

As of 1995, arbitration has been an important element in Beata’ Gessel-Kalinowska VEL Kalisz’s professional practice. She has built up comprehensive experience in ADR, participating – whether as arbitrator, counsel or expert – in approximately 100 arbitration cases, domestic as well as international (conducted according to rules, including those of the
ICC, UNCITRAL, FCC, IAA, SCAI, Lewiatan, Polish National Chamber of Commerce and the National Depository for Securities). The majority of the arbitral proceedings she has been involved in have concerned, but were not limited to, M&A transactions and construction law (including FIDIC regulations).

Between 2011 and 2017, she served as president of the Lewiatan Arbitration Court; upon leaving this position, she was appointed honorary president. She is an alternate member of the ICC International Arbitration Court (2015).

Beata Gessel is also an adjunct professor in commercial arbitration and M&A transactions at the Cardinal Stefan Wyszynski University.

In 2015–2016 she ran comparative law research on breach of M&A transactions as a visiting academic at Oxford University’s law department, and in 2016–2017 continued her research at the Cambridge University law department within the Herbert Smith Freehills visiting professor scheme.

A member of the Polish Arbitration Association, she also chairs the audit committee of the Polish Private Equity Association, an organisation assembling all the private equity funds active in Poland.

CATHARINE GILFEDDER

_Dentons UK and Middle East LLP_

Catherine Gilfedder is a senior associate in the international arbitration group of the Dentons UK and Middle East LLP London office. She specialises in investment treaty arbitration, public international law, and commercial arbitration and litigation. Catherine holds a first-class honours degree in law from the University of Cambridge and an LLM in international law (distinction) from University College London. Catherine is admitted as a solicitor in England and Wales and the Republic of Ireland, and has Higher Rights of Audience before the English courts.

LEVON GOLENDUKHIN

_Eversheds Sutherland_

Levon Golendukhin is an associate based in the Eversheds Sutherland New York office. Mr Golendukhin has successfully counselled clients through all stages of the dispute resolution process, from pleadings to appeals to enforcement, and has appeared in both federal and state courts, and before arbitration tribunals. Clients for whom he has acted range from sovereign states to private companies in mining, agricultural and transportation sectors.

Mr Golendukhin has authored publications on topics in international investment law and investor–state arbitration and has spoken at international arbitration events and conferences. He holds an LLM in international business law from the London School of Economics and Political Science, and a JD from Columbia Law School, where he was a Harlan Fiske Stone scholar, international programme chair for the Columbia Society of International Law and a staff editor on the _Columbia Journal of Transnational Law_.

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DORA GRUNWALD

Osborne Partners

Dora Grunwald is a partner at Osborne Partners. Previously, she was a managing director at FTI Consulting’s Economic and Financial Consulting segment. Before joining FTI Consulting, Dora worked for the economic and strategy teams of PriceWaterhouseCoopers.

Dora has a PhD in Economics from the University of Siena (Italy) and is an economist by training and profession. Dora has 15 years of experience in providing economic advice on policy, regulatory and commercial issues in a range of industries in both contentious and non-contentious matters.

More recently, Dora has provided expert opinion and given oral evidence on nine occasions on regulatory issues in a series of investor–state arbitrations related to photovoltaic solar power disputes in Spain and in Italy. Related to this, she has given advice on the state aid aspects of the Spanish renewables support scheme. Her regulatory experience includes assessment of incentives of menu regulation and economic and econometric analyses related to cost efficiency, cost of capital and financeability of regulated utilities.

MÉLIDA HODGSON

Jenner & Block LLP

Mélida Hodgson is head of the firm’s New York International Arbitration Practice. She focuses her practice on investor-state and commercial arbitrations, counselling governments and state-owned entities, as well as corporate entities, with respect to international investment protection provisions, business disputes and World Trade Organization (WTO) dispute resolution and international trade policy issues. Recognized by Latinvex as one of top 100 lawyers whose practice focuses on Latin America, Ms Hodgson is noted for her key role in successfully defending countries in investment arbitration, including Venezuela in several International Centre for Settlement of Investment Disputes (ICSID) arbitrations. She currently represents the Republics of Panama, Peru and Sierra Leone in ICSID and United Nations Commission on International Trade Law (UNCITRAL) matters. Ms. Hodgson is an arbitrator of international trade and commercial disputes including those initiated under the American Arbitration Association’s International Centre for Dispute Resolution rules (ICDR), and Chapter 19 of the North American Free Trade Agreement (NAFTA).

NAOKI IGUCHI

Nagashima Ohno & Tsunematsu

Naoki Iguchi is a partner of the international projects and arbitration practice team of Nagashima Ohno & Tsunematsu. Mr Iguchi has been advising construction companies, investment companies and infrastructure management companies in construction, transportation, crude oil pipeline and other infrastructure projects in various jurisdictions, including Asia, the Middle East, Africa and the American continent. Mr Iguchi also provides advice to national and foreign construction and investment companies with projects in Japan, including advising on the construction of a famous entertainment facilities project.

Mr Iguchi has represented many companies in international arbitration in Asian regions. Mr Iguchi was the country representative of Japan for the Dispute Resolution Board Foundation and a regular workshop lecturer of the Overseas Construction Association of Japan, Inc. Mr Iguchi also taught international project law at Keio Law School. Mr Iguchi
studied at the University of Tokyo (LLB; LLM), Stanford Law School (LLM) and Beijing Language University (Mandarin training), and worked at law firms in Japan, China, Taiwan and the United States. Mr Iguchi is a member of the Japan ICC Arbitration Committee and was a member of ICC Workforce on Costs. Mr Iguchi is fluent in Japanese, English and Mandarin, and he also understands Spanish.

SHIMPEI ISHIDO
_Nishimura & Asahi_

Shimpei Ishido has been active in the field of international trade matters and international investment disputes for many years. He advises governments and major corporations with regard to anti-dumping and countervailing duties proceedings and WTO dispute settlements, as well as international arbitrations under UNCITRAL Arbitration Rules and ICSID Arbitration Rules. He currently serves as a member of the Japanese delegation to the UNCITRAL Working Group III (Investor–State Dispute Settlement Reform). Before joining Nishimura & Asahi, he led, as legal counsel to the Ministry of Foreign Affairs of Japan, the negotiations of Japan’s international investment agreements, including the investment chapters of the Trans-Pacific Partnership, the Japan–EU EPA, the ASEAN–Japan Comprehensive Economic Partnership, the Japan–Australia and the Japan–Mongolia EPAs, and the Japan–Mozambique BIT.

CEYDA KNOEBEL
_Gibson, Dunn & Crutcher LLP_

Ceyda Knoebel is an English and Turkish-qualified solicitor advocate in the London office of Gibson, Dunn & Crutcher. She is a member of the firm’s dispute resolution and international arbitration groups.

Ms Knoebel advises on a wide range of disputes involving public international law and general commercial matters in common and civil law jurisdictions. She has experience in both commercial and investment treaty arbitration proceedings under the UNCITRAL, ICSID, ICC, VIAC and LCIA Rules. She teaches international investment arbitration at King’s College London. Ms Knoebel represents and advises clients across a broad spectrum of industries, including energy, oil and gas, financial services, banking and construction. Ms Knoebel continues to write on legal issues for a wide range of publications and is currently a senior editor of _The Turkish Commercial Law Review_, an independent English-language print journal of legal scholarship aimed at those in the international business, legal and academic communities with an interest in Turkey.

Ms Knoebel was admitted to the Bar in Turkey in 2007.

MATTHEW KOH
_Rajah & Tann Singapore LLP_

Matthew Koh (LLB (Hons) NUS, LLM (international legal studies) NYU) is a senior associate with Rajah & Tann Singapore LLP. His practice focuses on international arbitration, construction disputes and commercial litigation, as well as representing clients to enforce or set aside arbitral awards in Singapore.
RYCE LEE

*Rajah & Tann Singapore LLP*

Ryce Lee (LLB (Hons) NUS) is an associate with Rajah & Tann Singapore LLP. Her practice focuses on international arbitration and commercial litigation. Prior to joining Rajah & Tann Singapore LLP, she served as a Judicial Fellow to Judge Christopher J Greenwood and Judge Nawaf Salam at the International Court of Justice.

BARTON LEGUM

*Dentons Europe LLP*

Bart Legum is a partner in the Paris office of Dentons and head of the firm’s investment treaty arbitration practice. Bart has over 30 years’ experience in litigating complex cases and has argued before numerous international arbitration tribunals, the International Court of Justice, and a range of trial and appeals courts in the United States. His practice focuses on international arbitration and litigation in general, and arbitration under investment treaties in particular.

From 2000 to 2004, Bart served as chief of the NAFTA Arbitration Division in the Office of the Legal Adviser, United States Department of State. In that capacity, he acted as lead counsel for the United States government defending over US$2 billion in claims submitted to arbitration under the investment chapter of the North American Free Trade Agreement. The United States won every case decided under his tenure.

Bart is a past chair of the Section of International Law of the American Bar Association, an international bar organisation with over 24,000 members from over 90 countries around the world. In 2012–2013, he served as chair of the Section and chaired its Executive Committee, Council and Administration Committee.

In addition to being the editor of *The Investment Treaty Arbitration Review*, Bart is the editor of *International Litigation Strategies and Practice* (2nd edn 2014; 1st edn 2005), a book published by the American Bar Association. Bart publishes often on international dispute resolution topics, and frequently speaks at conferences on international arbitration and litigation.

ARTHUR MA

*DaHui Lawyers*

Arthur Ma is a partner in DaHui Lawyers’ litigation and arbitration team. Over the years, by focusing on complex commercial disputes resolution, Arthur has accumulated extensive experience in international arbitration and litigation involving foreign interests, and is especially adept at cross-border disputes and enforcement of foreign arbitration awards. He also honed his expertise in international arbitration. Prior to joining DaHui, Arthur worked with major international and PRC law firms in their Shanghai, London, Washington, DC, Hong Kong and Beijing offices for more than 12 years. During this period, he represented clients in both domestic and foreign litigation and arbitration proceedings under different jurisdictions and different laws and rules, including disputes arising out of large-scale engineering and construction, joint ventures, equity transfers, private equity investments, international sales of goods, etc. He has attended nearly 20 international arbitration hearings in different cities around the world and has obtained rich experience in hearing advocacy. He also has experience in compliance and FCPA investigations. Arthur is a native Mandarin speaker and is fluent in English.
GERVASE MACGREGOR

BDO LLP

Gervase MacGregor is the head of international advisory, risk and quality at BDO LLP. Gervase is one of the most experienced accounting expert witnesses in the United Kingdom and has extensive experience of international arbitrations. He has worked on cases in London (LCIA and ICC), Stockholm (SCC), Geneva (ICC), Paris (ICC, ICSID), Zurich (ICC, ad hoc cantonal) and Rotterdam (NAI). He has also worked on cases before the Court of First Instance of the European Communities, the High Court in London, the Copyright Tribunal and the Restrictive Practices Court.

He is the author of various books, including *Expert Accounting Evidence, Solicitors Accounts* and *Surveyors, Architects and Estate Agents*. He has also written numerous articles for Accountancy and other technical publications. His main areas of expertise are in the fields of natural resources, particularly oil and gas claims; state/operator disputes; takeover disputes; regulatory matters; and valuing companies and damages.

Prior to joining BDO, he worked as a petroleum geologist in the North Sea, Australia and West Africa. He has investigated and reported on the affairs of the MG Rover Group and Phoenix Venture Holdings on behalf of the Secretary of State and DTI.

JEFF D MAKHOLM

NERA Economic Consulting

Jeff D Makholm concentrates on the issues surrounding the privatisation, regulation and operation of resource and infrastructure industries, including those that operate networks (such as oil and gas pipelines, electricity transmission and gas distribution systems, telecommunications and water utility systems) and those operating at specific sites, such as oil refineries, electricity generation plants, oil and gas storage facilities, gas treatment plants, mines, sewage treatment plants and airports. Disputes for such industries include the broad categories of valuation, pricing, market definition (including assessments of market power and mergers), and the components of reasonable regulatory and business practices.

On these issues, among others, Dr Makholm has prepared expert testimony, reports and statements, and has appeared as an expert witness on more than 250 occasions in LCIA, AAA, International Chamber of Commerce and ICSID cases, high courts in a number of countries (including US district courts), regulatory commissions and parliamentary panels.

In *Who's Who Legal: Arbitration*, the ‘superb’ Dr Makholm was singled out for his work as an expert witness. *Who's Who Legal: Consulting Experts* (Quantum of Damages) reported that Dr Makholm ‘is extremely knowledgeable and well thought of as an expert witness’.

DAVID MANNERS-WEBER

Jenner & Block LLP

David Manners-Weber is an associate at Jenner & Block. Prior to joining the firm, Mr Manners-Weber clerked for the Hon Guido Calabresi of the United States Court of Appeals for the Second Circuit; he received his JD from the Yale Law School in 2017.
LARS MARKERT
Nishimura & Asahi
Lars Markert is a foreign law partner at Nishimura & Asahi, Tokyo office. He is admitted to the German and New York Bars, a registered foreign lawyer in Japan, and advises clients in both investor–state and international commercial arbitrations. Lars has experience in representing investors and states in proceedings under the ICSID Convention and the UNCITRAL Arbitration Rules, and in advising on potential claims under bilateral investment treaties and related negotiation strategies. He holds a PhD in investment arbitration from the University of Cologne on the topic of dispute settlement clauses in investment agreements. He is on the advisory council of the International Investment Law Centre Cologne, teaches investment law and procedure at the University of Cologne, and regularly speaks and publishes on issues of commercial and investment arbitration. Lars is recommended for his arbitration expertise by various legal directories (Who’s Who Legal Arbitration 2020: Global Elite Thought Leader).

ERIN B MCHUGH
NERA Economic Consulting
Erin McHugh is an associate director in NERA’s London and New York offices, and is a member of the firm’s European finance, litigation and dispute resolution group. She leads projects in the areas of financial economics and valuation. She has consulted on litigation and arbitration matters in various venues (e.g., ICC, ICSID), as well as on internal and regulatory investigations. She has also provided testimony as an expert witness.

Ms McHugh has extensive experience in estimating quantum in matters involving an alleged breach of a contract or investment treaty. She also has considerable valuation experience, including the valuation of financial products (including various derivatives) and business assets (including those in emerging markets). She has worked on a number of disputes between brokerage firms and customers over investments in equities, derivatives, fixed-income and structured finance securities. Ms McHugh is listed in Who’s Who Legal: Arbitration.

Ms McHugh holds an MBA from the MIT Sloan School of Management and a BA, magna cum laude, in economics and French from Amherst College. She is also a CFA charterholder. Ms McHugh has presented at industry conferences and law firms on various topics, including damages estimation and valuation techniques. She is a co-author of ‘Floating-Rate Mortgage Securities’ in The Handbook of Mortgage-Backed Securities.

IAIN C MCKENNY
Profile Investment
Iain C McKenny is a director and co-founder of Profile Investment (PI), and heads its legal analysis division. Iain spent his formative years as a disputes lawyer with Freshfields Bruckhaus Deringer and subsequently Latham & Watkins in London and Paris. Prior to founding PI in 2018 with Alain Grec, he was general counsel of disputes and managing director at Vannin Capital. Iain specialises in international commercial and investment treaty arbitration across various sectors, including construction, technology, finance and general commercial.

In addition to being a qualified UK solicitor, registered foreign lawyer at the Paris Bar and co-founder of PI, Iain is a co-founder of the 2018 legal innovations GAR award winner – Delos Arbitration. Delos is an international arbitration institution specifically designed for small and medium-sized businesses.
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 areas of expertise include:

- Oil and gas: economic analysis relating to the price of gas and LNG in long-term contracts, valuation of gas supply businesses, and the estimation of damages from the breach of supply contracts; valuation of oil and gas assets.
- Other energy sources: valuation of conventional, nuclear and renewable power generation assets; estimation of damages in relation to alleged breaches of obligations under bilateral and multilateral investment treaties, and alleged breaches of contractual obligations.
- Regulated infrastructure: economic analysis of appropriate pricing and related issues for regulated infrastructure.
- Competition and antitrust issues in the energy industry: including the economic analysis of mergers, abuse of dominance cases and anticompetitive agreements.

He has provided expert witness testimony in approximately 50 international arbitrations, in both commercial and investment treaty disputes. Who’s Who Legal notes that ‘Boaz Moselle draws praise for his “exceptional genius” and prowess in gas-pricing disputes’, and 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.

PATRICIA NACIMIENTO

Herbert Smith Freehills LLP

Dr Patricia Nacimiento is the co-head of the German dispute resolution practice. 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. The German government appointed her in 2007 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 120 arbitration proceedings under the rules of numerous arbitration institutions – including ICC, ICSID, SCC, CIETAC, DIS, LCIA, ICDR, 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 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 Berlin, Heidelberg, Frankfurt and Saarbrücken. A native German speaker, Patricia is also fluent in English, Spanish, Italian and French.

MICHAEL NOLAN  
Milbank LLP  
Michael Nolan is a partner in the Washington, DC office of Milbank LLP. He has served as counsel or arbitrator in cases under AAA, ICC, ICSID, HKIAC, SIAC, UNCITRAL and other rules. Michael represents companies and states in court proceedings involving sovereign immunity, acts of state, and recognition and enforcement of foreign judicial and non-judicial awards. He is consistently recognised as a leading international practitioner by Chambers USA, Euromoney and Super Lawyers. He writes frequently on transnational disputes, including as the co-author of the law school textbooks Experiencing Arbitration (2019) and Experiencing International Arbitration: Resolving Cross-Border Disputes (2020) (West Academic). He also co-edited a collection of determinations in political risk insurance disputes (Oxford University Press). Michael has been an adjunct professor of law at Georgetown University for nearly 20 years and is a former general counsel of the Intellectual Property Owners Association. He is a member of the international advisory committee of the American Arbitration Association, the Users Council of SIAC and the ICSID panel of arbitrators and is a fellow of the Chartered Institute of Arbitrators.

OBIOMA OFOEGO  
Dentons Europe LLP  
Obioma Ofoego is an associate in the Dentons Paris office. He specialises in public international law, investment treaty arbitration and international commercial arbitration. Prior to joining Dentons, he practised as a barrister in London, and served as an assistant legal adviser in the Foreign and Commonwealth Office.

CHUDOZIE OKONGWU  
NERA Economic Consulting  
Chudozie Okongwu is a managing director in NERA’s London and New York offices, and heads NERA’s European finance, litigation and dispute resolution group. He specialises in the areas of financial economics and valuation.

Dr Okongwu has provided expert witness testimony in multiple international arbitration venues, including ICSID, the ICC International Court of Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce, and in ad hoc arbitration forums. He has also submitted expert evidence and testified in various national court systems as well as in US domestic arbitration forums. Dr Okongwu is listed in Who’s Who Legal: Arbitration and Who’s Who Legal: Consulting Experts. He is also a member of the P.R.I.M.E. Finance panel of finance experts.

Prior to joining NERA, Dr Okongwu was a member of Banque Paribas’ fixed income emerging markets team in London and New York. He holds a PhD and an MA in economics from the University of California, Berkeley, and an SB in economics from the Massachusetts Institute of Technology. He is the lead author of ‘Credit Derivatives and Mortgage-Backed

LAURA T W OLIVE
NERA Economic Consulting

Laura T W Olive works with energy companies to navigate complex questions arising from the economics of energy and transport industries. Dr Olive concentrates on issues arising from contract disputes, litigation and regulation. She has extensive experience with valuing oil and gas assets for damages claims before courts and international arbitration tribunals. Dr Olive supports firms with developing answers to the most pressing questions of market value, competition, costs and prices, and related economic questions for energy and transport firms.

Dr Olive has testified on such matters before state commissions and federal regulators. Her work includes many sectors such as electricity, gas, liquefied natural gas, crude oil, petroleum products, rail, road and marine transport.

COLIN ONG QC
Dr Colin Ong Legal Services (Brunei)

Dr Colin Ong QC is senior partner at Dr Colin Ong Legal Services (Brunei); Queen’s Counsel at 36 Stone (London); and chartered arbitrator and counsel at Eldan Law LLP (Singapore). He is regularly instructed as counsel or appointed as arbitrator, and has been involved in over 350 arbitrations conducted under many rules, including AAA/BANI/CIETAC/HKIAC/ICC/LCIA/LMAA/KCAB/KLRCA/SCMA/SIAC/TAI/UNCITRAL and WIPO. He is a visiting professor in civil law as well as common law jurisdictions. He has much experience in working in many applicable laws, including Chinese, English, Indian, Indonesian, Japanese, Malaysian, New York, Hong Kong, Philippine, Singaporean, Thai and Vietnamese law. Generally appointed in complex high-value international disputes, many of his arbitrations involve values up to some billions of US dollars. Cases range from investor–state disputes to commercial areas encompassing banking and finance infrastructure projects, insurance, mining and minerals disputes, energy disputes, information technology, intellectual property, M&A disputes, shipping, telecoms, technology transfer, urban development and wind farms.

In 2010, he became the first non-senior judge from ASEAN to be elected as a Master of the Bench of the Inner Temple. He was the first ASEAN national lawyer to be appointed Queen’s Counsel. He is a Chartered Arbitrator (FCIArb, FMIArb, FSIArb) and holds a PhD, LLM, DiplCArb and LLB (Hons).

Dr Colin Ong is president of the Arbitration Association Brunei Darussalam; Chairman, International Advisory Board of the Thailand Arbitration Center (THAC); a member of the advisory council of the Indonesian National Board of Arbitration; an adviser for China-ASEAN Legal Research Center; a member of the Task Force of the International Chamber of Commerce Commission; a member of the ICCA-Queen Mary Task Force (Costs); president of the Regional Arbitral Institutes Forum (RAIF); vice chair (arbitration) of the Inter-Pacific Bar Association; vice president of the Asia-Pacific Regional Arbitral Group; a visiting professor in several civil law jurisdictions; and the author of leading advocacy, arbitration and law publications, with two books listed as endnote reference books in two CIArb Practice Guidelines.

**CHRIS OSBORNE**

*Osborne Partners*

Chris Osborne is the founder of Osborne Partners. Previously, he was the global head of FTI Consulting’s Economic Consulting segment. Before joining FTI Consulting, Chris was the European Managing Director of LECG LLP and before that the global head of Arthur Andersen’s Economic and Financial Consulting Group. Chris has more than 35 years’ experience in bringing economic and financial analysis to complex commercial and regulatory disputes.

Chris has been named as one of 10 ‘Thought Leaders’ in Europe in *Who’s Who Legal’s ‘Arbitration: Expert Witness Analysis’* in both the 2018 and 2019 editions; and consistently been identified as a leading expert witness in *Who’s Who Legal’s* listings since their inception in 2011. He has testified multiple times in commercial and investor/state arbitrations around the world, across multiple industry sectors.

During the course of his career, Chris has been involved in more than 200 cases of litigation and arbitration, across multiple industry sectors. He has given oral evidence on over 30 occasions – in the UK’s domestic courts, as well as in London, Paris, Stockholm, Geneva, Singapore and Melbourne in ICC, UNCITRAL and ICSID arbitrations. He has also given evidence in the US tax courts, in the US-Iran Tribunal, before the Competition Appeals Tribunal, in the then Restrictive Trades Practices Court and in front of the then Monopolies and Mergers Commission.

**MIKAËL OUANICHE**

*OCA*

Mikaël Ouaniche is chair of the OCA in his chapter, where he specialises in damage valuation, business valuation, bankruptcy and forensic matters. He is a judicial expert at the Court of Appeal of Paris, the Administrative Courts of Paris and Versailles, and at the International Criminal Court.

He has testified on valuations of equity, businesses and litigation settlements. Mikaël Ouaniche regularly appears as an expert in arbitration proceedings under the authority of international arbitration centres such as the ICC International Court of Arbitration and the World Bank International Centre for Settlement of Investment Disputes.

He has been retained as an expert to address issues relating to valuations, contract disputes, commercial damages litigations and shareholder disputes, as well as investment arbitration (expropriation cases).

He intervened at the request of states, investors and corporate clients in disputes in many sectors, including mining and port concessions, railway projects, nuclear power plant, shipbuilding and infrastructure construction.

Mikaël Ouaniche is often appointed by French courts in the context of civil, commercial and criminal matters.

Mikaël Ouaniche is a chartered accountant, French-certified legal auditor and graduate of EMLYON Business School. He is responsible for training at the Sciences Po Law School and the French National School of Judges.
Mikaël Ouaniche is the author of a reference book on corporate fraud and has published numerous articles in peer-reviewed French journals.

He is the secretary general of the French Association of Economic and Financial Litigation Practitioners (www.apcef.com).

He speaks French, English and Spanish.

ELITZA POPOVA-TALTY

EKPT Law

Elitza Popova-Talty is the founder of EKPT Law. She represents multinational corporations and governments in arbitrations and court proceedings relating to foreign investments, high-stake contracts, concessions, intellectual property and others. She appeared before ICSID, ICC, AAA and ad hoc arbitral tribunals. She advises clients on litigation and arbitration strategy, as well as on FCPA compliance matters and document retention. Elitza is licensed to practice at the New York, District of Columbia and Bulgaria bars.

PHILLIP-GEORGE PRYCE

Cornerstone Research

Phillip-George Pryce is a senior analyst at Cornerstone Research, based in the firm's London office. He has experience in financial institutions litigation, securities litigation, and Rule 10b-5 and Section 11 securities class actions. Prior to joining Cornerstone Research, Mr Pryce worked as an investment analyst for Stocks and Securities Ltd in Kingston, Jamaica, where he analysed the financial statements of large-cap US and Jamaican companies to identify candidates for long-term investments. He holds an MSc in financial economics from the University of Oxford.

LISA M RICHMAN

McDermott Will & Emery LLP

Lisa M Richman is a litigation partner at McDermott Will & Emery, where she is the Managing Partner of the Washington, DC office and the co-chair of the firm's International Arbitration & Dispute Resolution practice group. For nearly 20 years, Lisa has focused her career on international dispute resolution, with a particular emphasis on international commercial arbitration and public international law. She has handled disputes in a wide variety of industries, including disputes relating to energy, oil and gas, intellectual property, pharmaceuticals, infrastructure, licensing, securities, telecommunications, transportation, joint ventures and construction.

Lisa's clients have included investors, governments, corporations, corporate officers and directors, and individuals in disputes seated in common law and civil law jurisdictions worldwide. Her work has included disputes conducted under ICC, ICSID, ICSID AF, AAA/ICDR, SIAC, HKIAC, JAMS, DIS, LCIA, CPR, Swiss Rules and UNCITRAL Rules as well as pure ad hoc arbitrations.

Lisa also has represented clients in international and domestic arbitrations, litigation, and mediations in the United States and around the world. Complementing her dispute resolution expertise, Lisa has managed internal investigations and has helped a variety of companies to resolve government investigations, including World Bank Sanctions.
proceedings. Lisa has been recognised by clients, peers and others in the industry as one of the ‘most highly regarded’ international arbitration specialists in the United States. She is a native German speaker, and also speaks Spanish and French.

ANTHONY SINCLAIR
Quinn Emanuel Urquhart & Sullivan, LLP

Dr Anthony Sinclair specialises in international commercial arbitration, investment treaty arbitration and public international law. His work spans a broad range of industry sectors, with particular focus on the oil and gas, energy and mining, telecommunications, infrastructure and utilities sectors, especially in emerging markets, as counsel and arbitrator. Anthony is co-author of the second edition of The ICSID Convention: A Commentary (Cambridge University Press, 2009), and is widely published in the field of international investment law and international arbitration. He is the joint winner of the 2017 International Arbitration Club of New York annual Smit-Lowenfeld Prize for an outstanding article published in the field of international arbitration. He has a PhD in law from the University of Cambridge on international arbitration and public international law. In 2011, he was named one of Global Arbitration Review’s ‘45 under 45’ leading arbitration practitioners. In 2018, he was named a Thought Leader in Arbitration by Who's Who Legal and was selected by his peers for inclusion in Best Lawyers in the UK 2018 for International Arbitration: London. Law360 named him a 2018 MVP for International Arbitration.

MLADEN STOJILJKOVIC
VISCHER

Mladen Stojiljkovic is a counsel in the dispute resolution team of VISCHER in Zurich. He focuses his practice on complex litigation and international commercial and investment arbitration. He also serves as arbitrator. Mladen’s experience in litigation and arbitration spans a wide range of industries and issues – including M&A-related disputes, engineering and construction, patent licensing and foreign investment. He has also handled litigation matters involving foreign governments and foreign officials. He holds degrees from the University of Zurich (lic. iur., PhD) and Columbia Law School (LLM). He has worked in New York; Washington, DC; and Zurich. Mladen was named a Future Leader in International Arbitration by Who’s Who Legal (2018, 2019 and 2020). He speaks English, German, French, Bosnian/Croatian/Serbian and Russian fluently.

HUAWEI SUN
Zhong Lun Law Firm

Huawei Sun specialises in international commercial and investment treaty arbitration, and has represented Chinese and foreign clients in cases conducted under the UNCITRAL, LCIA, ICC, SIAC, LME, HKIAC, CIETAC and ICSID arbitration rules. Her work, as counsel and arbitrator, spans a broad range of areas, including cross-border M&A, energy and resources projects, financial products, private equity investment, intellectual property, construction projects and international sale of goods. With an acute understanding of both common law and civil law issues, Huawei has a strong track record in handling complex and multi-jurisdictional proceedings. She has advised MOFCOM on various investment treaty issues and recently achieved victory for China in Ansung Housing Co, Ltd. v. People's Republic
About the Authors

of China (ICSID Case No. ARB/14/25). Who’s Who Legal Arbitration 2020 says she is ‘absolutely first-rate’ and an ‘incredibly astute strategic thinker’ when it comes to commercial and investment treaty arbitrations.

Prior to Zhong Lun, Huawei worked for more than seven years at the Beijing and Hong Kong offices of Allen & Overy.

DAVID ISIDORE TAN
Rajah & Tann Singapore LLP

David Isidore Tan (LLB (Hons) NUS, LLM (international business regulation, litigation and arbitration) NYU) is an associate with Rajah & Tann Singapore LLP. He has been and continues to be involved in a variety of litigation and arbitration matters, which have included investor–state arbitration proceedings and the setting aside of an investor–state arbitration award in Singapore.

PAUL TAN
Rajah & Tann Singapore LLP

Paul Tan (LLB (first class hons) NUS, BCL (dist) Oxon) is a partner of Rajah & Tann Singapore LLP. He is a Band 1 arbitration practitioner, and has an active commercial and investor–state arbitration practice. His cases often involve complex issues of private and public international law.

RODICA TURTOI
Peter & Kim Ltd

Rodica Turtoi is an associate at Peter & Kim. She works both as arbitration counsel and as an arbitrator’s assistant in commercial and investment disputes. Rodica graduated with a dual degree from Paris 1 Panthéon-Sorbonne and Bucharest Universities. She also obtained a master 2 in international trade law from Paris 1 Panthéon-Sorbonne University and a master of laws (LLM) from Cornell Law School. Rodica is admitted to practise in New York State and passed the Paris Bar.

XINGYU WAN
Zhong Lun Law Firm

Xingyu Wan is an associate at the Beijing office of Zhong Lun and specialises in international commercial and investment treaty arbitration. She has experience working on cases involving international sale of goods, private equity investment and general commercial contracts. She has passed the PRC bar and the New York State bar.

Xingyu received the master of law degree from Georgetown University with a certificate in international arbitration and dispute resolution. She was also awarded Thomas Bradbury Chetwood, SJ Prize for the most distinguished academic performance.
MARINA WEISS
*Bredin Prat*

Marina Weiss is a counsel in Bredin Prat’s International Arbitration team. She has appeared as advocate in numerous complex commercial and investment arbitrations under the main institutional rules (ICSD, UNCITRAL, ICC, LCIA), the UNCITRAL Rules and ad hoc, in a variety of disputes spanning different industrial sectors and geographic regions, including Central and Eastern Europe, Northern and Sub-Saharan Africa and the Middle East. Marina advises individual and corporate clients as well as sovereign states and state entities. Marina also serves as secretary to arbitral tribunals and acts as arbitrator under various major institutional rules (ICC, DIAC). She also represents clients in arbitration-related litigations in domestic courts and advises on matters of sovereign immunity and investment structuring. Marina holds law degrees from Columbia Law School (LLM, 2010), Université de Paris I Panthéon-Sorbonne (2007) and Sciences Po Paris (2007). She is admitted to the Paris Bar (2010).

MARTIN WIEBECKE
*Anwaltsbüro Wiebecke*

Martin Wiebecke is admitted to practise in Switzerland, Germany and New York. He has acted as counsel, sole arbitrator, party-appointed arbitrator or chair in more than 190 international commercial arbitrations under the rules of the ICC, LCIA, Swiss Chambers, DIS, VIAC (Vienna), Stockholm Institute, AAA, SIAC, MKAS (Moscow), CAS and other institutions, UNCITRAL and in ad hoc arbitrations.

His arbitration experience includes mergers and acquisitions, shareholders’ agreements, joint ventures, privatisations, foreign investments, construction and engineering, infrastructure and development projects, natural resources, oil and gas, pharmaceuticals, life sciences, biotechnology, insurance and reinsurance, telecommunications, technology transfer, licence agreements, patents, defence contracts, disputes involving states and public entities and enterprises, agency, distribution, and sale and purchase agreements.

He is on the panel of arbitrators of several leading arbitral institutions and a member of various professional associations. He is a past chair of the International Sale of Goods Commission of the International Association of Lawyers.

Martin Wiebecke was educated at the Universities of Freiburg im Breisgau (BA economics, 1979), Geneva, Göttingen (JD, 1983) and Basel (lic iur, 1986), and at Columbia Law School (LLM, 1984). He is fluent in German, English and French, and has a basic knowledge of Spanish and Portuguese.

LUCY WINNINGTON-INGRAM
*Reed Smith LLP*

Lucy Winnington-Ingram is an associate in the commercial disputes group advising on international arbitration, in particular cases relating to investment treaty arbitration and public international law. Since joining the team, Lucy has been involved in cases in the mining, energy, construction and telecommunications sectors. She has experience of acting on arbitration cases for both the claimant and the respondent under UNCITRAL and ICSID rules, particularly on disputes arising out of bilateral and multilateral investment treaties. Lucy’s recent experience includes disputes over the transfer of licences, the alleged nationalisation
of strategic assets, the alleged state expropriation of mineral and petroleum assets, the effect and enforceability of stabilisation provisions, and breaches of other commercial agreements and international law.

ANDRE YEAP SC
Rajah & Tann Singapore LLP

Andre Yeap SC (LLB (Hons) NUS) is the senior partner of dispute resolution and head of international arbitration at Rajah & Tann Singapore LLP. In addition to arbitration, Andre has a broad-based corporate, commercial and insolvency-related litigation practice.

CAN YEĞINSU
4 New Square Chambers

Can Yeğinsu is a barrister at 4 New Square Chambers in London, practising in commercial and investment treaty arbitration, commercial litigation, and private and public international law.

In the field of international arbitration, Mr Yeğinsu has been described as ‘fiercely clever but also a true team player; he knows arbitration inside out and is a very elegant and effective advocate’ (Chambers UK), possessing ‘serious legal brainpower, accompanied with a deft touch with clients’ (The Legal 500) and ‘in a class of his own’ (Chambers Global), with experience of advising on and appearing in commercial and investment arbitrations, including under the ICSID, UNCITRAL, LCIA, ICC, LMAA and CIArb Rules. Mr Yeğinsu also accepts appointments and is recognised by Who’s Who Legal as ‘very thorough and decisive as arbitrator’. In 2019, he was shortlisted for Barrister of the Year in International Arbitration by The Legal 500. He is a Member of the IBA’s Investment Treaty Arbitration Subcommittee.

Frequently appearing in the English Commercial Court, Administrative Court and the Chancery Division, Mr Yeğinsu has acted in over 35 cases in the English Court of Appeal, UK Supreme Court and the European Court of Human Rights.

Mr Yeğinsu is adjunct professor of law at Georgetown University Law Center in Washington, DC and Koç University Law School in Istanbul, where he teaches investment law and arbitration. Mr Yeğinsu is also a lecturer in law (teaching public international law) at Columbia Law School in New York and partner fellow at the Lauterpacht Centre for International Law, University of Cambridge.

KOH SWEE YEN
WongPartnership LLP

Ms Koh Swee Yen is a partner in the commercial and corporate disputes, and international arbitration practices at WongPartnership LLP.

Ms Koh is the vice chair of the IBA Arbitration Committee. She is also the vice-chair of the IPBA Dispute Resolution and Arbitration Committee, and a member of the editorial board of the ICC Dispute Resolution Bulletin and the ICCA-ASIL Task Force on Damages.

Ms Koh is recommended as a leading practitioner in various legal publications, including The Legal 500, Chambers Global and Benchmark Litigation Asia-Pacific. Most recently, she has been listed as one of the world’s leading arbitration practitioners in Who’s Who Legal: Arbitration 2020 and as a recognised expert in Commercial Arbitration in Experts Guides 2019: The World’s Finest Lawyers Chosen By Their Peers. Described as being ‘in a
league of her own’, ‘extremely talented’ and ‘incredibly hard-working and persistent’ with a ‘very deep understanding of the law’ by Chambers Global, sources also praise her for a ‘keen sense of strategy’ and ‘great ability to quickly grasp her clients’ perspective and understand their commercial issues’. The Legal 500 says that Swee Yen is the ‘go-to disputes lawyer in Singapore’, with an ‘ability to zone right in on the issues with precision and confidence’, and is ‘brilliant, decisive and fearless’.

ALVIN YEO
WongPartnership LLP

Mr Alvin Yeo, Senior Counsel, is the Chairman & Senior Partner of WongPartnership LLP. He was appointed Senior Counsel of the Supreme Court of Singapore in 2000 at the age of 37, the youngest ever to be so appointed. His main areas of practice are litigation and arbitration in banking, corporate/commercial and infrastructure disputes.

Chambers Global describes Mr Yeo as ‘the most impressive, as an advocate, out of all the Singapore firms’ and ‘simply outstanding as an international counsel’. Chambers Asia-Pacific lauds Alvin for providing ‘leadership on SIAC and ICC proceedings’ and is ‘an excellent strategist as well as a first-rate litigator’ who is ‘deeply impressive and [an] extremely capable individual’. The Legal 500 affirms that his ‘wisdom and powers of persuasion are phenomenal’ and that he is ‘one of the best in a court room’. Who’s Who Legal: Arbitration recognises Mr Yeo as ‘a leading light in the market who possesses strong arbitration credentials and experience’.

Mr Yeo is a member of the Court of the SIAC, the ICC Commission and a fellow of the AIADR, the Singapore Institute of Arbitrators and the Singapore Institute of Directors, and a former member of the LCIA Court and the IBA Arbitration Committee. He is also on the panel of arbitrators in the HKIAC, ICDR, KCAB, SCIETAC and the Singapore Institute of Arbitrators’ Panel for Sports in Singapore.

HAFSA ZAYYAN
Quinn Emanuel Urquhart & Sullivan, LLP

Hafsa Zayyan is an associate in Quinn Emanuel’s London office. Her practice focuses on international arbitration and litigation, including arbitrations under the LCIA, ICC, ICSID and UNCITRAL Rules. Hafsa has had significant exposure to investor–state disputes and other public international law matters. Prior to joining the firm, Hafsa trained at a large international law firm in London, spending six months in Singapore. Hafsa read law at the University of Cambridge and graduated with a first-class degree in 2012. She went on to pursue a masters at the University of Oxford, completing the BCL in 2013, where she specialised in international dispute resolution and conflicts of laws. She was recognised as a key lawyer in The Legal 500 UK 2020 edition for her work in the ‘Crime, Fraud and Licensing – Fraud: Civil’ practice area.

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Appendix 2

CONTRIBUTORS’ CONTACT DETAILS

4 NEW SQUARE CHAMBERS
4 New Square
Lincoln’s Inn
London, WC2A 3RJ
United Kingdom
Tel: +44 20 7822 2000
c.yeginsu@4newsquare.com
www.4newsquare.com

BDO LLP
55 Baker Street
London, W1U 7EU
United Kingdom
Tel: +44 20 7893 2570 / 3487
gervase.macgregor@bdo.co.uk
www.bdo.co.uk

ANWALTSBÜRO WIEBECHE
Kohlrainstrasse 10
8700 Küsnacht
Zurich
Switzerland
Tel: +41 44 914 20 00
Fax: +41 44 914 20 01
info@wiebecke.com
www.wiebecke.com

BREDIN PRAT
53 Quai d’Orsay
75007 Paris
France
Tel: +33 1 44 35 35 35
Fax: +33 1 42 89 10 73
marinaweiss@bredinprat.com
raedfathallah@bredinprat.com
www.bredinprat.fr

ASIAN INTERNATIONAL ARBITRATION CENTRE
Bangunan Sulaiman
Jalan Sultan Hishamuddin
50000 Kuala Lumpur
Malaysia
Tel: +603 2271 1000
Fax: +603 2271 1010
enquiry@aiac.world
www.aiac.world

COMPASS LEXECON
5 Aldermanbury Square, 14th Floor
London, EC2V 7HR
United Kingdom
Tel: +44 203 932 9600
bmoselle@compasslexecon.com

Paseo de Castellana 7
9th Floor
Madrid 28046
Spain
Tel: +34 91 586 10 00
rciupagea@compasslexecon.com
www.compasslexecon.com

© 2020 Law Business Research Ltd
Contributors' Contact Details

CORNERSTONE RESEARCH
4 More London Riverside
5th Floor
London, SE1 2AU
United Kingdom
Tel: +44 20 3655 0900
Fax: +44 20 3655 0999
rbarnes@cornerstone.com
ppyce@cornerstone.com
www.cornerstone.com

DAHUI LAWYERS
Suite 3720 China World Tower A
1 Jianguomenwai Avenue
Beijing 100004
China
Tel: +86 10 6535 5888
Fax: +86 10 6535 5899
arthur.ma@dahuilawyers.com
www.dahuilawyers.com

DENTONS
Dentons Europe LLP
5 Boulevard Malesherbes
75008 Paris
France
Tel: +33 1 4268 4870 / 4470
Fax: +33 1 4268 7155 / 1545
barton.legum@dentons.com

Dentons UK and Middle East LLP
One Fleet Place
London, EC4M 7WS
United Kingdom
Tel: +44 20 7246 7232
Fax: +44 20 7246 7777
catherine.gilfedder@dentons.com

www.dentons.com

DR COLIN ONG LEGAL SERVICES
Suites 2-2 to 2-8
Gadong Properties Centre
Km 3-5, Jalan Gadong
Bandar Seri Begawan BE4119
Brunei
Tel: +673 2 420 913
Fax: +673 2 420 911
contacts@onglegal.com

EKPT LAW
1629 K Street, NW
Suite 300
Washington, DC 20006
United States
Tel: +1 240 423 5932
etalty@ekptlaw.com
www.ekptlaw.com

EVERSHEDS SUTHERLAND
Eversheds Sutherland (US) LLP
Grace Building
1114 Avenue of the Americas
New York, NY 10036
United States
Tel: +1 212 287 6926 / 6928
ulyanabardyn@eversheds-sutherland.com
levongolendukhin@eversheds-sutherland.com
www.eversheds-sutherland.com

GESSEL, KOZIOROWSKI SPK
ul Sienna 39
00-121 Warsaw
Poland
Tel: +48 22 318 69 01
Fax: +48 22 318 69 31
b.gessel@gessel.pl
www.gessel.pl
GIBSON, DUNN & CRUTCHER LLP
Telephone House
2-4 Temple Avenue
London, EC4Y 0HB
United Kingdom
Tel: +44 20 7071 4000
Fax: +44 20 7071 4244
cknoebel@gibsondunn.com
www.gibsondunn.com

HERBERT SMITH FREEHILLS LLP
Neue Mainzer Strasse 75
60311 Frankfurt
Germany
Tel: +49 69 2222 82530
Fax: +49 69 2222 82499
patricia.nacimiento@hsf.com
www.herbertsmithfreehills.com

JENNER & BLOCK LLP
353 N Clark Street
Chicago, IL 60654-3456
United States
Tel: +1 312 222 9350
Fax: +1 312 527 0484
mhodgson@jenner.com
dmanners-weber@jenner.com
www.jenner.com

MCDERMOTT WILL & EMERY LLP
500 North Capitol Street
NW, Washington, DC
20001-1531
United States
Tel: +1 202 756 8090
Fax: +1 202 756 8087
lrichman@mwe.com
www.mwe.com

MILBANK LLP
1850 K Street, NW
Suite 1100
Washington, DC 20006
United States
Tel: +1 202 835 7500
Fax: +1 202 263 7586
mnolan@milbank.com
kaitelaj@milbank.com
www.milbank.com

NAGASHIMA OHNO & TSUNEMATSU
JP Tower, 2-7-2 Marunouchi
Chiyoda-ku
Tokyo 100-7036
Japan
Tel: +81 3 6889 7000
Fax: +81 3 6889 8000
naoki_iguchi@noandt.com

© 2020 Law Business Research Ltd
NERA ECONOMIC CONSULTING

99 High Street
16th Floor
Boston, MA 02110
United States
Tel: +1 617 927 4500
jeff.makholm@nera.com
laura.olive@nera.com

Marble Arch House
66 Seymour Street
London, W1H 5BT
United Kingdom
Tel: +44 20 7659 8568 / 8736
Fax: +44 20 7659 8501
chudozie.okongwu@nera.com
erin.mchugh@nera.com

www.nera.com

OSBORNE PARTNERS

29 Throgmorton Street
London, EC2N 2AT
United Kingdom
Tel: +44 207 947 4297
chris@osbornes.com
dora@osbornes.com
www.osbornes.com

PETER & KIM LTD

Avenue de Champel 8C
PO Box 71
1211 Geneva 12
Switzerland
Tel: +41 58 317 70 70
Fax: +41 58 317 70 75
kchristie@peterandkim.com
rturtoi@peterandkim.com
www.peterandkim.com

NISHIMURA & ASAHI

Otemon Tower
1-1-2 Otemachi
Chiyoda-ku
Tokyo, 100-8124
Japan
Tel: +81 3 6250 6200
Fax: +81 3 6250 7200
l_markert@jurists.co.jp
s_ishido@jurists.co.jp
www.jurists.co.jp

PROFILE INVESTMENT

58 bis, rue La Boétie
75008 Paris
France
Tel: +33 1 53 76 99 99
imckenny@profile-investment.com
www.profile-investment.com

QUINN EMANUEL URQUHART & SULLIVAN, LLP

90 High Holborn
London, WC1V 6LJ
United Kingdom
Tel: +44 20 7653 2000
Fax: +44 20 7653 2100
anthony.sinclair@quinnemanuel.com
hafsazayyan@quinnemanuel.com
www.quinnemanuel.com

OCA

63, avenue de Villiers
75017 Paris
France
Tel: +33 1 40 54 98 80
Fax: +33 1 47 63 92 75
mo@oca-audit.com
www.oca-audit.com
Contributors' Contact Details

RAJAH & TANN SINGAPORE LLP
9 Straits View #06-07
Marina One West Tower
Singapore 018937
Tel: +65 6535 3600
info@rajahtannasia.com
sg.rajahtannasia.com

REED SMITH LLP
Broadgate Tower
20 Primrose Street
London, EC2A 2RS
United Kingdom
Tel: +44 20 3116 3000
Fax: +44 20 3116 3999
ccarswell@reedsmith.com
lwinnington-ingram@reedsmith.com
www.reedsmith.com

SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
United States
Tel: +1 202 736 8000
Fax: +1 202 736 8711
mcarlson@sidley.com
www.sidley.com

VISCHER
Schuetzengasse 1
PO Box CH-8021
Zurich
Switzerland
Tel: +41 58 211 34 00
dfavalli@vischer.com
mstojiljkovic@vischer.com
www.vischer.com

WONGPARTNERSHIP LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
Tel: +65 6416 8000
Fax: +65 6532 5711 / 5722
alvin.yeo@wongpartnership.com
sweeyen.koh@wongpartnership.com
www.wongpartnership.com

ZHONG LUN LAW FIRM
Levels 28, 31, 33, 36 and 37, SK Tower
6A Jianguomenwai Avenue
Chaoyang District
Beijing 100022
China
Tel: +86 10 5957 2288
Fax: +86 10 6568 1022
sunh@zhonglun.com
wanxingyu@zhonglun.com
www.zhonglun.com

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