ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALJAZY & CO
ALLEN & OVERY LLP
CMS CAMERON MCKENNA LLC
CORRS CHAMBERS WESTGARTH
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
DENTONS
DR COLIN ONG LEGAL SERVICES
GIBSON, DUNN & CRUTCHER LLP
HERBERT SMITH FREEHILLS GERMANY LLP
JAMS
KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION (KLRCA)
LAZAREFF LE BARS
MILBANK, TWEED, HADLEY & MCCLOY
NISHIMURA & ASAHI
REDCIFFE PARTNERS LLC
SANDART & PARTNERS ADVOKATBYRÅ KB
THREE CROWNS LLP
WOLF THEISS RECHTSANWÄLTE GMBH & CO KG
WONGPARTNERSHIP LLP
YULCHON LLC
ZHONG LUN LAW FIRM
CONTENTS

PREFACE......................................................................................................................................................... vii

Barton Legum

Part I Jurisdiction

Chapter 1 COVERED INVESTMENT .................................................................................................................. 1
Cyrus Benson, Penny Madden and Ceyda Knoebel

Chapter 2 COVERED INVESTORS................................................................................................................. 15
Yutaro Kawabata and Kojiro Fujii

Chapter 3 RATIONE TEMPORIS OR TEMPORAL SCOPE ............................................................................ 24
Barton Legum, Michelle Bradfield, Niccolò Castagno and Catherine Gilfedder

Part II Admissibility and Procedural Issues

Chapter 4 ADMISSIBILITY ............................................................................................................................... 37
Michael D Nolan and Elitza Popova-Talty

Chapter 5 THE REQUIREMENTS RATIONE PERSONAE.................................................................................. 46
Ayham N M Al-Mashni

Chapter 6 THE BIFURCATION OF JURISDICTION FROM MERITS, AND MERITS FROM DAMAGES ............... 52
Colin Y C Ong QC

Chapter 7 OBJECTIONS OF MANIFEST LACK OF LEGAL MERIT OF CLAIMS: THE SUCCESS OF ARBITRATION RULE 41(5) .......................................................... 64
Alvin Yeo and Koh Swee Yen

Chapter 8 INVESTMENT ARBITRATION AND PARALLEL PROCEEDINGS ................................................... 78
Sae Youn Kim and Taejoon Ahn
Chapter 9  INTERIM MEASURES IN INTERNATIONAL INVESTMENT ARBITRATION  90
        Benoit Le Bars and Athina Fouchard Papaefstratiou

Chapter 10  THIRD-PARTY FUNDING: SECURITY FOR COSTS AND OTHER KEY ISSUES ................................................................. 103
        Miriam K Harwood, Simon N Batifort and Christina Trahanas

Chapter 11  MULTIPARTY PROCEEDINGS AND MASS CLAIMS .............................................. 122
        Jeffrey Sullivan, Marie Stoyanov and Lucia Raimanova

Chapter 12  CORRUPTION, FRAUD AND ABUSE OF PROCESS IN INVESTMENT TREATY ARBITRATION ................................................................. 144
        Carmen Martinez Lopez and Lucy Martinez

Part III  Substantive Protections

Chapter 13  EXPROPRIATION ........................................................................................................... 167
        Olexander Martinenko and Sergiy Gryshko

Chapter 14  OBSERVANCE OF OBLIGATIONS ............................................................................. 178
        Ceyda Akbal Schwimann

Chapter 15  POLITICAL RISK INSURANCE ................................................................................... 188
        Huawei Sun, Danni Wang and Chang Liu

Part IV  Damages

Chapter 16  CONTRIBUTORY FAULT, MITIGATION AND OTHER DEFENCES TO DAMAGES CLAIMS ........................................................................................................ 201
        Eric M Runeson and Rasmus Josefson

Part V  Post-Award Remedies

Chapter 17  ANNULMENT OF INVESTMENT ARBITRATION AWARDS ........................................ 211
        Sundra Rajoo

Chapter 18  ENFORCEMENT OF AWARDS ................................................................................... 222
        Ivan W Bilaniuk and Ulyana Bardyn
## Contents

**Part VI**  
**Multilateral Treaties**

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Author(s)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>19</td>
<td>THE ENERGY CHARTER TREATY</td>
<td>Patricia Nacimiento</td>
<td>243</td>
</tr>
<tr>
<td>20</td>
<td>NAFTA: PAST, PRESENT AND FUTURE</td>
<td>Gordon E Kaiser</td>
<td>254</td>
</tr>
<tr>
<td>21</td>
<td>EUROPEAN LAW AND INVESTMENT TREATIES</td>
<td>Virginia Allan and David Ingle</td>
<td>288</td>
</tr>
<tr>
<td>22</td>
<td>THE TRANS-PACIFIC PARTNERSHIP: LESSONS LEARNED FOR ISDS</td>
<td>Andrew Stephenson and Lee Carroll</td>
<td>301</td>
</tr>
<tr>
<td></td>
<td><strong>Appendix 1</strong> ABOUT THE AUTHORS</td>
<td></td>
<td>315</td>
</tr>
<tr>
<td></td>
<td><strong>Appendix 2</strong> CONTRIBUTING LAW FIRMS’ CONTACT DETAILS</td>
<td></td>
<td>333</td>
</tr>
</tbody>
</table>
The past year confirmed the usefulness of *The Investment Treaty Arbitration Review*’s contribution to its field. The biggest challenge for practitioners and clients over the past year has been to keep up with the flow of new developments and jurisprudence in the field. There was a significant increase in the number of investment treaty arbitrations registered in the first years of this decade. These cases have come or are now coming to conclusion. The result today is more and more awards and decisions being published, making it hard for practitioners to keep up.

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, therefore, *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 for, those developments.

This second 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.

**Barton Legum**
Dentons
Paris
April 2017
Part I

JURISDICTION
Chapter 1

COVERED INVESTMENT

Cyrus Benson, Penny Madden and Ceyda Knoebel

I INTRODUCTION

The definition of a covered ‘investment’ is a key element in determining the applicability of protections under an international investment treaty to a covered investor. It delineates a state’s consent to arbitrate expressed in the dispute settlement provisions of the international instrument containing that consent, be it a bilateral or multilateral investment treaty, or an investment agreement. Accordingly, it represents a critical element in determining the jurisdiction of an arbitral tribunal to resolve investment disputes between the state and the investor.

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 still 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 property and contractual rights, including, most commonly:

- moveable and immovable property, and property rights such as mortgages, liens and pledges;
- equity and debt participation in a company including shares, debentures and debt instruments;
- intellectual property rights, goodwill, know-how;
- claims to money and performance under a contract having an economic value; and
- 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 further below. In addition, 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 also subject to a determination of an autonomous notion of

---

1 Cyrus Benson and Penny Madden are partners and Ceyda Knoebel is a senior associate at Gibson, Dunn & Crutcher LLP.
‘investment’ under the ICSID Convention, and must meet the requirements for a covered investment within the meaning of the ICSID Convention. These requirements are in addition to the requirements of the investment treaty or agreement at issue containing a state’s consent to arbitrate, and this is often referred to as the ‘double-barrel’ test, which 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 investment to be covered by the definition. For example, the Energy Charter Treaty (ECT), which is a sectoral multilateral treaty borne 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 1994 North American Free Trade Agreement between the United States, Canada and Mexico (NAFTA) 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 used to import a broader definition from other treaties that the defendant state is a party to. 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.

---

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.
of ‘investment’ from other treaties, on the basis that the definition of ‘investment’ is a crucial element of a state’s consent to arbitrate a particular dispute, which goes to the *ratio materiæ* jurisdiction of an arbitral tribunal.\(^8\)

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 investment chapter of the EU–Vietnam Free Trade Agreement (FTA) agreed in January 2016\(^9\) and the investment chapter of the EU–Canada Comprehensive Economic and Trade Agreement (CETA), which was released in March 2016,\(^10\) both refer to ‘every kind of asset . . . that has the characteristics of an investment’ including ‘the commitment of capital or other resources, the expectation of gain or profit’, or ‘the assumption of risk’, and ‘a certain duration’. The investment chapter of the Trans-Pacific Partnership trade agreement (TPP) signed between 12 Pacific Rim states in February 2016 adopts a similar construction, save for the reference to ‘a certain duration’.\(^11\) Before the political developments of 2016,\(^12\) it was expected that the investment chapter of the EU–US Transatlantic Trade and Investment Partnership agreement (TTIP) under negotiation would follow this trend. However, the negotiations are on ice at present, given the new US administration’s voiced scepticism towards multilateral trading blocs.\(^13\) Regardless, we know the United States prefers

\(^8\) See *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, paragraphs 145–163; *Rafat Ali Rizvi v. Republic of Indonesia*, ICSID Case No. ARB/11/13, Award on Jurisdiction, 16 July 2013, paragraph 220; *Vannessa Ventures Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, paragraph 133.


\(^11\) See TPP, Chapter 9 – Investment, Section A, Article 9.1 available at https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (accessed on 22 February 2017). Note that since the publication of the first edition, the US has formally withdrawn from the agreement per guidance from the new President of the United States in January 2017. To come into effect, the treaty requires ratification by at least six states which together have a GDP of more than 85 per cent of the GDP of all signatories. The US withdrawal, however, means that the 85 per cent threshold is currently unachievable by the remaining 11 signatories, effectively killing the Pacific trade deal. However, it is still momentous in reflecting the current approach of its signatory states (US, Canada, Japan, Mexico, Vietnam, Brunei, Australia, New Zealand, Chile, Malaysia, Peru and Singapore) towards what should qualify as protected investments.


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 to the broad, open-ended definitions found in earlier treaties encompassing ‘every kind of asset’. This recent trend may be explained by states’ desire to expressly exclude one-off commercial transactions for the sale of goods or services, or purely contractual claims from the scope of investments afforded treaty protections. For the reason that 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 formulation ‘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’, since otherwise ‘any sales or procurement contract involving a State agency would qualify as an investment’. The tribunal in *Nova Scotia 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 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, *Deutsche Bank v. Sri Lanka*, the arbitral 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

---

14 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.


16 *Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)11/1, Award, 30 April 2014, paragraphs 75–78.

17 Id., paragraph 82.

18 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, paragraphs 284–286. Note that Sri Lanka has since applied for the annulment of the award, which is currently pending before the ICSID annulment committee.
governments 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’.19

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 and CETA categorically exclude sale of goods claims, clarifying that such transactions would not constitute a ‘claim to money’ referred to in the ‘investment’ definition.20 The 2012 US Model BIT and the TPP 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]’21 without completely disqualifying them. By way of contrast, there are still recent treaties such as the 2015 Australia–China and 2008 New Zealand–China FTAs which adopt the wider ECT formula that merely requires any ‘claims to money or claims to any contractual performance’ to be ‘associated with an investment’.22

III COVERED INVESTMENT IN ICSID JURISPRUDENCE

While consent of the parties to resolve their investment disputes before an ICSID tribunal ‘is an essential prerequisite for the jurisdiction of the Centre’,23 Article 25 of the ICSID Convention determines the jurisdiction of any tribunal that would be constituted under the Convention. It provides that:

*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.* [emphasis added]

---

19 Malaysian Historical Salvors v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, paragraphs 61 and 73–74.

20 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’; and 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, or (ii) the domestic financing of such contracts; or (iii) any order, judgment, or arbitral award related to sub-subparagraph (i) or (ii).’

21 TPP, Chapter 9 – Investment, Section A, Article 9.1, note 2.


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)).

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. 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 a complex one.

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 proposed by the Fedax v. Venezuela tribunal. This approach was embraced by the Salini v. Morocco tribunal, which devised the following criteria as 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 adopted them fully and applied the test rigidly as a jurisdictional requirement, while others took a more flexible approach and preferred to apply only some elements of the test. To these tribunals, requirements on duration and contribution to economic development of...
the host state are too subjective to be consistently endorsed. Some other tribunals saw these criteria as mere guidelines rather than strict jurisdictional requirements that would deprive a tribunal of its jurisdiction were they not to be fully satisfied. A number of 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 the spectrum, one tribunal 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.

It should be noted that 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 UNCITRAL tribunals 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 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

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

30 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, paragraphs 479 and 481; MCI Power Group LC and New Turbine Inc v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, 31 July 2007, paragraph 165.

31 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, paragraphs 73–79; Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, paragraph 129; Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, 8 November 2010, paragraphs 311–312; Philip Morris Brand Sarl (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, paragraphs 204–206; Hasan Audi, Enterprise Business Consultants Inc and Alfa El Corporation v. Romania, ICSID Case No. ARB/10/13, Award, 2 March 2015, paragraphs 197–199; SGS Société Générale de Surveillance SA v. Republic of Paraguay, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, paragraph 93.

32 Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009, paragraph 114.

33 Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, 14 July 2010, paragraph 112.


35 See Guaracachi America Inc and Rurelec PLC v. Plurinational State of Bolivia, PCA Case No. 2011-17, Award, 31 January 2014, paragraph 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, paragraph 7.4.9.
to determine the existence of a protected investment.36 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,37 hedging agreements38 and sovereign bonds39), contracts for provision of services40 and arbitral awards crystallising a party’s rights and obligations.41 Some tribunals have preferred to look at the totality of the investment

---

36 Romak SA (Switzerland) v. The Republic of Uzbekistan, PCA Case No. AA280 (UNCITRAL Rules), Award, 26 November 2009, paragraphs 182 and 185; Alps Finance and Trade AG v. The Slovak Republic, UNCITRAL, Award, 5 March 2011, paragraph 230.

37 Fedax NV v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997.


39 See the trio of Argentine government bond cases: 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; 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; Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014. But note the recent Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Award, 9 April 2015 decision at paragraphs 318–324, concerning the Greek sovereign bonds in which the tribunal 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 that 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.

40 See, e.g., 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 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.

41 In ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 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’.
activity rather than individual elements of it to decide whether the entire operation constitutes an ‘investment’. To date, most tribunals have been reluctant to consider pre-investment activities and expenditures that do not ultimately come to fruition as covered investments.

V IRRELEVANCE OF ORIGIN OF CAPITAL

Unlike some treaties – such as the 1987 Association of Southeast Asian Nations (ASEAN) 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 uniform that 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.

42 See, e.g., *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, paragraph 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 *White Industries Australia Limited v. The Republic of India*, Final Award, paragraph 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 *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, paragraphs 4.35–4.36; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme SA v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, paragraphs 285–288.

43 See *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, paragraphs 48–51, where after extensive negotiations the parties never signed a contract for the construction and operation of a power plant. In *PSEG Global Inc and Konya Iğın Elektrik Üretim 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.

44 See *Yang Chi On Trading Pte Ltd v. Government of the Union of Myanmar*, ASEAN ID 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.’

Arguments based on Professor Prosper Weil’s infamous dissenting opinion in *Tokios Tokelés*, focusing on the object and purpose of the ICSID Convention, have not been favoured by later tribunals. Professor Weil differed sharply from his co-arbitrators in that case, 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’ and he disagreed with the majority view in *Tokios Tokelés* that 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 have 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 Party’ within the context of the substantive obligations and protections. 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.

Two examples from NAFTA cases illustrate the relevance of territorial connection. *Bayview v. Mexico* 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 since 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.

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 has been consistently confirmed that, with regard to investments of a purely financial nature, the territorial determination should focus on where,

---

48 *Bayview Irrigation District et al v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, paragraphs 93–108.
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.50

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
turned on this question involving bondholders who purchased Argentinian sovereign bonds
in the secondary market. 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 could not be protected as a covered investment. The dissenting
opinion by Professor Georges Abi-Saab in Abaclat v. Argentina certainly sided with this
objection 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’
lacked the necessary territorial link to the host state.51 However, most tribunals considering
financial investments (such as the Argentinian sovereign bonds or hedging agreements as in
Deutsche Bank v. Sri Lanka)52 have disagreed with Professor Abi-Saab’s dissenting opinion.
These tribunals were 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 directly53.

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.54 For treaties that include a form of conformity with

50 Fedex NV and The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on
Objections to Jurisdiction, 11 July 1997, paragraphs 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, paragraph 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, paragraphs 498–499, 508–510; British Caribbean Bank Ltd v. Government
of Belize, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, paragraphs 206–207.

51 Dissenting Opinion of Abi-Saab in 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, paragraphs 56–57, 78, 105. Note that Argentina’s appointee in the sister case Ambiente v.
Argentina, Professor Santiago Torres Bernardes, held a similar opinion to Professor Abi-Saab; see Dissenting
Opinion of Bernardes 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, paragraphs 262–263.

52 Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/02, Award,
31 October 2012, paragraphs 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.

53 Contrast with Poštová banka a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8,
Award, 9 April 2015.

54 Some treaties have a specific provision clarifying that the host state shall admit investments made in
accordance with its laws from which tribunals also inferred the same requirement. See, e.g., Saluka
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 barrier for a tribunal to consider the dispute.55 When 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 thePhoenix tribunal, have suggested that conformity with host state law is an implied requirement for an investment to be a protected investment under a treaty and Article 25 of the ICSID Convention, even if the definition of investment in the treaty is silent on this issue.56 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 their own law.57

Other tribunals have, however, disagreed with this rationale, suggesting that states are at liberty to (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’ depriving the tribunal of its jurisdiction. It may give rise to an admissibility defence or a defence on the merits since 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. But that does not mean that these elements are part of the definition of ‘investment’. An illegal or bad-faith investment remains an investment.58

It should also be noted that 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.59 Other tribunals have interpreted non-conformity to condemn a wider illegality or iniquity in the investor’s

55 See, e.g., Inceysa Vallisletana SL v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, 2 August 2006, paragraph 335; Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case No. ARB/03/25, Award, 16 August 2007, paragraph 398; Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, paragraphs 46, 55, 57–58.

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


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

59 See, e.g., Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award, 16 August 2007, paragraph 398; Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, paragraph 55; Rusoro Mining Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, paragraphs 289–344.
behaviour; some have even extended the analysis of non-conformity beyond domestic laws to encompass breaches of general principles of international law and international public policy.  

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. That 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.

This is a difficult issue and one that is potentially open to abuse by states that have been complicit in the wrongdoing when they subsequently rely upon the non-conformity 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.


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

62 See, e.g., Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008, paragraphs 141, 143–144; Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010, paragraphs 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 12/40, Award, 6 December 2016, paragraphs 488–508. See also World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award 4 October 2006, paragraphs 137–157, where the question arose under an investment agreement governed by English law as opposed to a treaty under international law.

63 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, paragraph 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 paragraphs 92–94, the tribunal characterised non-compliance with exchange control legislation by 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.
VIII CONCLUSION

The definition of a covered investment remains one of the most controversial topics in international investment law and it is impossible to identify one agreed definition; the wording of the international treaties is inconsistent and the arbitral jurisprudence is contradictory. The preponderance of generic definitions of investment within international 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 easier. Opponents 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* test to the definition of investment within the ICSID framework (let alone in general) is cited as one of the prime reasons for questioning the legitimacy of the system and its players.

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 will be interesting to see how arbitral jurisprudence interpreting these instruments will develop and contribute to the current debate.64 Certainly, if states choose to make the *Salini* test 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.

---

64 For example, a recent 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: 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 22 February 2017).
Chapter 2

COVERED INVESTORS

Yutaro Kawabata and Kojiro Fujii

I  INTRODUCTION

In this chapter, the authors briefly explain the issues regarding covered investors in relation to investment treaty arbitrations.\(^1\) Given the purpose and the target readers of this publication, we will focus on juridical persons, rather than natural persons.\(^2\) In addition, where reference to international investment agreements (IIAs) is made, such as for the definition of investors, we will refer to the investment treaties to which Japan is a party. As of February 2016, Japan has concluded 24 free trade agreements (FTAs), and nine economic partnership agreements (EPAs) that contain investor–state dispute settlement (ISDS) clauses.\(^3\) Japan is also a signatory to the Energy Charter Treaty, and signed the Trans-Pacific Partnership (TPP) on 4 February 2016. Recently, we have seen a significant rise in interest regarding investment treaty arbitration in Japan.

---

1 Yutaro Kawabata and Kojiro Fujii are partners at Nishimura & Asahi.
2 While the definition of ‘investment’ is vitally important for an investor to rely on an investment treaty to bring an arbitration against the host state, the issue is outside the scope of this chapter. With respect to restructuring investments to seek investment treaty protection, see, for example, Stephen Jagusch, Anthony Sinclair and Manthi Wickramasooriya, ‘Restructuring Investments to Achieve Investment Treaty Protection’, in Kinnear, Fischer, et al. (ed.), Building International Investment Law: The First 50 Years of ICSID, Kluwer Law International (2016), pages 175–190.
4 With respect to the difference between FTAs and EPAs, ‘basically FTAs are part of EPAs. EPAs are not necessarily limited to trade and investment, but also include other economic activities such as tourism, the standardization of regulations and intellectual property among other things. So it covers a wider range of economic relations’ (www.mofa.go.jp/region/asia-paci/asean/year2003/summit/press1211-2.html#3). ‘Japan tends to conclude such mixed agreements with a slightly broader scope which are then called economic partnership agreements’, Lars Markert, ‘Key Issues to Consider for (Japanese) Investors Before Commencing an Investment Arbitration’, in ‘The Pacific Rim and International Economic Law: Opportunities and Risks of the Pacific Century’, Transnational Dispute Management (2015) page 4. The Japan–Philippines Economic Partnership Agreement (which entered into force on 11 December 2008) and the Japan–Australia Economic Partnership Agreement (which entered into force on 15 January 2015) do not contain ISDS clauses. It is also worth noting the limitations on the scope of investment disputes in certain IIAs to which Japan is a party, for example, the Japan–China BIT (1989).
II INVESTORS ELIGIBLE TO BRING INVESTMENT TREATY ARBITRATIONS

i Investor–state dispute settlement clauses in IIAs

Investment arbitration is a form of arbitration, which means that there must be an agreement between the investor and the host state to submit their dispute to arbitration: without such consent (i.e., an arbitration agreement), the arbitral tribunal in an investment arbitration would not have jurisdiction.

In investment treaty arbitrations, the consent to investor–state arbitration is based on the ISDS clause of an IIA, such as a bilateral investment treaty (BIT), multinational investment treaty or FTA with investment chapters. When the ISDS clause of an IIA contains a unilateral offer by the host state party to the IIA to conclude an arbitration agreement with an investor from the other contracting state to the IIA, the investor concludes the arbitration agreement by accepting this unilateral offer from the host state. An example of an ISDS clause can be found in Article 96 in the Investment Chapter of the Japan–India Economic Partnership Agreement (2011) (the Japan–India EPA).5 Article 96.1 states:

> For the purposes of this Chapter, an ‘investment dispute’ is a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation under this Chapter and other provisions of this Agreement as applicable with respect to the investor and its investments.

Article 96.4 of the Japan–India EPA sets forth that:

> If the investment dispute cannot be settled through such consultation or negotiation within six months from the date on which the disputing investor requested the consultation or negotiation in writing, the disputing investor may submit the investment dispute to one of the following international conciliations or arbitrations.

Article 96.4 provides that the ‘disputing investor’ (as defined in Article 96.2 as ‘an investor who is a party to an investment dispute’) may submit the investment dispute to arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), under the Additional Facility Rules of the ICSID Convention, under the UNCITRAL Arbitration Rules, or to arbitration in accordance with any other arbitration rules if agreed by the parties.6

In addition, Article 96.8 of the Japan–India EPA recognises the cornerstone principle that investor–state arbitrations require the consent of the disputing parties:

(a) Each Party hereby consents to the submission of investment disputes by a disputing investor to conciliation or arbitration set forth in paragraph 4 chosen by the disputing investor.

(b) The consent given under subparagraph (a) and the submission by a disputing investor of an investment dispute to conciliation or arbitration shall satisfy the requirements of:

---


6 In ICSID claims, the jurisdictional requirements provided under Article 25 of the ICSID Convention must also be satisfied.
(i) Chapter II of the ICSID Convention or the Additional Facility Rules of the International Centre for Settlement of Investment Disputes, for written consent of the parties to a dispute; and

(ii) Article II of the New York Convention for an agreement in writing.

ii Definition of ‘investors’ (or ‘nationals’) in IIAs

A necessary condition of eligibility for bringing an investment treaty arbitration is to be an investor of a state party to the treaty. But who can be an investor potentially eligible for protection under the applicable investment treaty? This question is addressed by the IIA provisions that define the investors (or nationals) potentially eligible to bring an investment arbitration claim against the host state.

With respect to legal persons, ‘it is the general practice in investment agreements to specifically define the objective criteria which make a legal person a national, or investor, of a Party, for the purposes of the IIA’. ‘There is no single test used by all investment treaties to define the link required between a legal person seeking protection under the treaty and the contracting state under whose treaty the investor asks for protection’, but in ‘investment treaties the nationality of corporations is typically defined by [their] place of incorporation, [their] siège social, the nationality of a controlling shareholder, or a combination of the three’.

With respect to IIAs to which Japan is a party, commentators summarise the definition of ‘enterprises and companies’ in ‘Japan’s “new generation” BITs/FTAs’ (i.e., BITs and

---


8 ‘IIAs typically include also a provision specifying the requirements of nationality, location, place of incorporation, etc. for a person or entity making an investment to be protected by, and thus, to be able to rely on, the IIA. Together with the definition of “investor”, this is usually found in the initial article of the treaty which, *inter alia*, defines who are the “investors” or “nationals” benefiting from treaty protections,’ Andrew Newcombe and Lluís Paradell, Chapter 1, ‘The Historical Development of Investment Treaty Law’, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, 2009, page 68.


12 ‘Some treaties add other requirements, such as the need actually to carry out business in the home state . . . where no such additional requirements have been stipulated, tribunals generally conduct a review limited to determining whether the legal entity satisfies the formal definition of investor under the treaty and refuse to incorporate additional requirements that the treaty drafters did not include.’ Nigel Blackaby, Constantine Partasides, et al, *Redfern and Hunter on International Arbitration* (6th Edition, Kluwer Law International, 2015), pages 441–500.
FTAs entered into after 2002) as generally being “any legal person or any other entity duly constituted or organized”, combined with illustrative examples. The nationality of enterprises is determined by the applicable law under which they are constituted or organised.\textsuperscript{13}

For example, the Japan–India EPA defines the terms ‘investor of a Party’ and ‘enterprise’ as follows:

\begin{align*}
\text{[T]he term ‘investor of a Party’ means a natural person or an enterprise of a Party, that seeks to make, is making, or has made, investments.}\textsuperscript{14} \\
\text{[T]he term ‘enterprise’ means any legal person or any other entity duly formed, constituted or organised under applicable law, whether for profit or otherwise, and whether privately-owned or controlled or governmentally-owned or controlled, including any corporation, trust, partnership, joint venture, sole proprietorship, association, organisation or company.}\textsuperscript{15}
\end{align*}

The TPP ratified by Japan in December 2016 covers broader types of entities as entitled to its protection of investments, compared to the traditional investment treaties of Japan. An ‘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’ (Article 9.1). As an ‘investor of a Party’ includes that party itself, investments made by governmental organisations are covered by the TPP Investment Chapter. In addition, an ‘enterprise of a Party’ includes ‘an enterprise constituted or organised under the law of a Party, or a branch [of a foreign enterprise] located in the territory of a Party and carrying out business activities there’ (Article 9.1). Though such definitions of investors have been adopted by NAFTA and the US Model BIT, there have been very few examples, so far, of investment treaties concluded by Japan that have such broad definitions of investors.

\textbf{iii Denial of benefits clause}\textsuperscript{16}

In relation to investors covered under investment treaties, to create ‘safeguards against the problem of treaty shopping through the creation of “sham” enterprises’,\textsuperscript{17} ‘[s]ome treaties seek to limit the scope of protection to protected investors by means of treaty clauses allowing the state parties to deny treaty benefits to investors that do not have substantial business activities in their home state and which are controlled by entities or persons of a third state’ (denial


\textsuperscript{14} Compare with the definition of ‘investor of a Party’ under the TPP (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.’

\textsuperscript{15} Compare with the definition of ‘enterprise’ under the TPP (Article 1.3): ‘enterprise means any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association or similar organisation.’


\textsuperscript{17} Lee M Caplan and Jeremy K Sharpe, ‘United States’, in Chester Brown and Devashish Krishan, eds., Commentaries on Selected Model Investment Treaties (OUP, 2013), page 812.
of benefits clauses), and ‘[w]hether or not an investor will be successful in bringing a claim before a tribunal under the treaty will . . . turn on whether the host state has recourse to a denial of benefits clause, conferring it with the right to refuse treaty protections to a given investor or group of investors on the basis of certain agreed criteria’. As an example of a denial of benefits clause, Article 11.7 of the Japan–India EPA states:

> if the investment is structured in a way to avail itself of the substantive protection of an investment treaty, it has to be ensured that the investment does not run afoul of so-called ‘denial of benefits’ clauses which deny pure ‘mailbox companies’ the recognition as an investment or an investor.


> Most BITs, however, do not contain a denial-of-benefits clause. This could allow investors from third countries to benefit from the agreement. This effect may not necessarily be against the interests of the contracting parties. For instance, small economies such as Singapore and Mauritius have used the ‘platform concept’ under which they have been the base for third party foreign investment to be channelled into China or India, with which they have BITs. On the other hand, investors of non-parties might merely establish a shell company under the laws of a contracting party to benefit from treaty protection, unless the BIT requires that the assets be first located in the platform country.

Not all IIAs to which Japan is a party contain a denial of benefits clause, but ‘All of Japan’s “new generation” BITs/FTAs except the Japan–Switzerland FTA (2009) include denial of benefits clauses.’ Shotaro Hamamoto and Luke Nottage, ‘Japan’, in Chester Brown and Devashish Krishan, eds., Commentaries on Selected Model Investment Treaties (OUP, 2013), pages 355–356. As for the Japan–Switzerland FTA, enterprises that have no substantial business activities in the host state are excluded from the definition of investors.

Compare with the denial of benefits clause in the TPP signed by Japan on 4 February 2016 under Article 9.15:

> 1. 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.
>
> 2. 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 persons of a non-Party own or control the enterprise and the
subject to prior notification to and consultation with the other Party, a Party may also deny the benefits of the Chapter to an investor of the other Party that is an enterprise of the other Party and to its investments, where the denying Party establishes that:

(a) the enterprise has no substantial business activities in the Area of the other Party; and
(b) the enterprise is owned or controlled by an investor of a non-Party or of the denying Party.

The phrase ‘owned or controlled by an investor’ is further clarified in Article 3(d) of the same instrument:

an enterprise is: (i) ‘owned’ by an investor if more than 50 percent of the equity interests in it is beneficially owned by the investor; and (ii) ‘controlled’ by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions.

Thus, according to the provisions of the Japan–India EPA, (1) a Japanese corporation formed under the Japanese Companies Act (for example, a kabushiki kaisha) would fall under the definition of ‘investor of a Party’, which may be eligible to bring an investment arbitration against the Indian government if it has made ‘investments’ (as defined in the Japan–India EPA) in India; however, (2) the Japanese corporation may be denied protection under the Japan–India EPA if the requirements for the Indian government to deny benefit in accordance with Article 11.7 are met because more than 50 per cent of the stock of the Japanese corporation is owned by an Indian company.

iv Locally incorporated but foreign-controlled companies and Article 25(2)(b) of the ICSID Convention

In relation to parties to investment arbitrations, there is also an issue concerning whether legal entities established in the host state (having the nationality of that state) may become a party to investment arbitrations. In this regard, it is relevant to refer to Article 25 of the ICSID Convention on the jurisdiction of the International Centre for Settlement of Investment Disputes (the Centre) concerning juridical persons:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State . . .

(2) ‘National of another Contracting State’ means:

(a) [omitted]

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

The second part of Article 25(2)(b) of the ICSID Convention, which extends the jurisdiction of the Centre, was set forth because ‘[i]t is quite usual for host States to require that foreign
investors carry on their business within their territories through a company organized under the laws of the host country’, and ‘[i]f no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside of the scope of the Convention’.23 According to Schreuer, ‘[a] number of bilateral investment treaties provide that companies constituted in one State but controlled by nationals of the other State shall be treated as nationals of the other States for purposes of Art. 25(2)(b).’24 For example, one of the IIAs to which Japan is a party, the Japan–Egypt BIT (1977), provides:

Each Contracting Party shall consent to submit any legal dispute that may arise out of investment made by a national or company of the other Contracting Party to conciliation or arbitration, in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on March 18, 1965, at the request of such national or company. Any company of the former Contracting Party which was or is controlled by nationals and companies of the other Contracting Party prior to or on the date on which the parties to such a dispute consent to submit the dispute to conciliation or arbitration shall in accordance with the provisions of Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of such other Contracting Party.

While similar provisions are found in IIAs to which Japan is a party, such as the Japan–Sri-Lanka BIT (1982), Japan–Bangladesh BIT (1998) and Japan–Mongolia BIT (2001), the ‘new generation’ BITs and FTAs (other than the BIT with Vietnam), ‘omit this provision completely’.25

As shown above, there are investment treaties that address the issue of locally incorporated companies that are controlled by foreign investors by expanding jurisdiction so that the local entities may bring a claim against the host state.

On the other hand, there are also investment treaties that take a different approach by providing that ‘an investor may submit to arbitration a claim against the host State on behalf of an enterprise constituted or organized under the host State’s law, which the investor owns or controls directly or indirectly’.26, 27 The TPP signed by Japan on 4 February 2016, adopts this approach under Article 9.19.1.(b): ‘the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit [a claim] to arbitration’.

III RECENT CASES CONCERNING COVERED INVESTORS

Investment treaty arbitration cases where jurisdiction (rationae personae) is an issue are introduced and discussed in great length and depth in treatises and commentaries. Thus, we will not discuss these cases in this chapter, as we consider such an exercise to be outside the scope of this book. Having said that, we will briefly introduce a recent case concerning covered investors in connection with investment treaty arbitrations: National Gas SAE, ICSID Case No. ARB/11/17, wherein an arbitral award was rendered on 3 April 2014 (National Gas), and the arbitral tribunal addressed the issue of the test to determine ‘foreign control’ under the second part of Article 25(2)(b) of the ICSID Convention, which was a ‘relatively novel point’.

The claimant in National Gas was a corporation established under the laws of Egypt (the Claimant). Ninety per cent of the Claimant’s shares were owned by CTIP Oil & Gas International (CTIP), a company incorporated under the laws of the Jebel Ali free zone in the United Arab Emirates (UAE), which was wholly owned by a company called REGI, incorporated under the same law. The arbitral tribunal in National Gas found that CTIP was a shell company 100 per cent owned by REGI, and REGI was also a shell company 100 per cent owned by Mr Reda Ginena (a dual national of Egypt and Canada), and in ‘commercial reality’ Mr Ginena controlled the Claimant.

Faced with an ICSID claim by the Claimant based on the treaty between Egypt and the UAE on the Encouragement, Protection and Guarantee of Investments signed on 11 May 1997 and the ICSID Convention, Egypt asserted that there was a lack of jurisdiction, including jurisdiction rationae personae because the Claimant was not under ‘foreign control’, which is an objective requirement for the finding of jurisdiction under Article 25(2)(b) of the ICSID Convention.

The arbitral tribunal in National Gas found that ‘from the text of the ICSID Convention, it is clear that the parties’ consent, even if otherwise established, may not suffice to establish jurisdiction before an ICSID tribunal’ and, adopting the arbitral tribunal’s approach in Autopista, stated that Article 25(2)(b) of the ICSID Convention ‘separately establishes a subjective test and an objective test’: (1) ‘[t]he parties have agreed to treat the said company as a national of another Contracting State for the purposes of this Convention’ and (2) ‘the said company is subject to foreign control’.

28 For further reading on jurisdiction (rationae personae) and related ICSID cases, see relevant sections of C H Schreuer, The ICSID Convention: A Commentary (2nd Edn, Cambridge University Press, 2012). With regard to the famous Tokios Tokeleis v. Ukraine, ICSID Case No. ARB/02/18 (Tokios Tokeleis), see, for example, Pierre Terrier and Nhu-Hoang Tran Thang, ‘Criteria to Determine Investor Nationality (Juridical Persons)’, in Kinnear, Fischer, et al (ed.), Building International Investment Law: The First 50 Years of ICSID, Kluwer Law International (2016), page 141. One interesting issue that will not be addressed in this chapter is the difference in various arbitral tribunals’ approach depending on whether the claimant is an investor falling under the first part of Article 25(2)(b) of the ICSID Convention or the second part of the said article (compare Tokios Tokeleis with TSA Spectrum de Argentina SA v. Argentina Republic, ICSID Case No. ARB/05/5, and National Gas introduced in this chapter).

29 Paragraph 155 of the National Gas arbitral award.

30 Paragraph 144.

31 Paragraphs 75–99.

32 Paragraph 120.

33 Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5.

34 Paragraphs 130–131.
Citing the *Vacuum Salt* award, the arbitral tribunal in *National Gas* decided that the 'objective test is not satisfied by mere agreement by the Parties’ and “foreign control” must be established objectively’. The arbitral tribunal in *National Gas* stated that the objective test concerning 'foreign control' in Article 25(2)(b) of the ICSID Convention ‘may take into account the express agreement of both disputing parties and the Contracting Parties to the ICSID Convention’ and, by further reference to the *Vacuum Salt* and *Autopista* decisions, stated that ‘such agreement may operate as “a rebuttable presumption”’, and that an ‘agreement based on “reasonable criteria” without formalities would ordinarily suffice’.

The arbitral tribunal’s views in *National Gas* on the ‘significant difference’ between the first and second part of Article 25(2)(b) provide an important perspective in understanding Article 25(2)(b):

_In the Tribunal’s view, there is a significant difference under Article 25(2)(b) between (i) control exercised by a national of the Contracting State against which the Claimant asserts its claim and (ii) control by a national of another Contracting State. The latter situation violates no principle of international law and is consistent with the text of the ICSID Convention. On the other hand, the former situation violates the general limitation in Article 25(1) and the first part of Article 25(2)(b) of the ICSID Convention in regard to both Contracting States and nationals (including dual nationals). In other words, the latter is consistent with the object and purpose of the ICSID Convention; but the former is inconsistent: it would permit the use of the ICSID Convention for a purpose for which it was clearly not intended and it would breach its outer limits. As already noted above, Article 25(2)(b) operates only as a qualified exception to the general limitation to ICSID jurisdiction in Article 25: a sardine cannot swallow a whale._ [Emphasis added]

In conclusion, the arbitral tribunal in *National Gas* decided that it had no jurisdiction over the claimant’s claim because the claimant had not satisfied the objective test in the second part of Article 25(2)(b) of the ICSID Convention.

It is also worth noting that the arbitral tribunal in *National Gas* expressly mentioned that its:

_factual findings imply no criticism of Mr Ginena: the Tribunal recognises that his choice of corporate structure was made in good faith for legitimate fiscal reasons; it was not designed as an exercise in forum shopping under the Treaty; and whilst CTIP and REGI are both shell companies, neither are shell entities._

---

35 *Vacuum Salt Products Ltd v. Republic of Ghana*, ICSID Case No. ARB/92/1.
36 Paragraph 133.
37 Paragraph 134.
38 Paragraph 136.
39 Paragraph 149.
40 Paragraph 146.
Chapter 3

RATIONE TEMPORIS OR TEMPORAL SCOPE

Barton Legum, Michelle Bradfield, Niccolò Castagno and Catherine Gilfedder

I INTRODUCTION

The expression *ratione temporis* denotes the effects that the passage of time has 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 of the law has received relatively little attention in decisions or commentary. Additionally, tribunal decisions frequently disagree on the basic principles, or inconsistently apply the same principle.

The starting point in a specific case is the express terminology of the treaty at issue. The treaty terms can determine the temporal scope of the treaty. In the absence of express treaty text, temporal issues are decided by reference to principles stated by the Vienna Convention on the Law of Treaties (VCLT), the International Law Commission’s Draft Articles on State Responsibility (the ILC Articles) and decisions of international courts and investment treaty tribunals.

This chapter deals with relevant issues frequently arising as to temporal jurisdiction. Section II addresses issues relating to the timing of an ‘investment’. The third section outlines the principle of non-retroactivity, and the qualification of this principle. Section IV examines issues relating to the timing of a ‘dispute’. Section V outlines temporal issues relating to termination of the treaties, and the final section addresses extinctive prescription.

II TIMING OF AN ‘INVESTMENT’

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

This topic does not feature significantly in cases. This is likely due in large part to the fact that many investment treaties clearly express their coverage of investments that are made prior to the treaty coming into force.

---

1 Barton Legum is a partner at Dentons Europe LLP, Michelle Bradfield is a partner at Dentons UKMEA LLP, Niccolò Castagno is an associate at Dentons Europe LLP and Catherine Gilfedder is an associate at Dentons UKMEA LLP.
2 This chapter will only examine investment treaties, even though temporal issues arise in relation to any consent document, whether an investment contract, a specific compromise or domestic statute.
4 See, for example, the Canadian, Chinese, German, Malaysian and Turkish model bilateral investment treaties (BITs). For more examples, see Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) page 340.
If a treaty is silent on the matter, one scholar has suggested that investments made before the entry into force of the treaty are included within its scope.5

ii What happens if the investment occurred after the alleged breach?

It is an uncontested principle that a tribunal has no jurisdiction ratiōne 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 ratiōne temporis extends only to an investment that existed ‘at the time the challenged measure was adopted’.6 The same point was made in *Philip Morris v. Australia*.7 While the tribunal found that the claimant had made its investment before the contested measure, it ultimately held that the initiation of the arbitration constituted an abuse of rights, which it said was a different principle to that of ratiōne temporis.8

III NON-RETROACTIVITY OF TREATIES

Tribunals have repeatedly found that treaties, in the absence of any clear contrary language, will not apply retroactively to acts or facts that occur before they enter into force.9 Article 28 of the VCLT10 and Article 13 of the ILC Articles11 have been relied on to support this proposition. 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
Some tribunals have found that it is necessary to ‘distinguish between (1) the jurisdiction \textit{ratione tempori}s and (2) the applicability \textit{ratione tempori}s of the substantive obligations contained in a BIT’.\textsuperscript{13} Recently, 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 certain qualifications: (1) where there are continuous and composite acts; and (2) where a treaty is not yet in force, but a state intends to be bound by it.

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

The principle of non-retroactivity may not apply to state action that is deemed to be a continuous or composite act, in which case, 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 the weight given to such acts so as to avoid an overreaching retroactive application of the substantive provisions of a treaty. Some tribunals have stated continuous or composite acts prior to 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} VCLT Article 28 supports the relevance of continuous acts despite the principle of non-retroactivity.\textsuperscript{20} Article 14(2) of the ILC Articles also does

\footnotesize

14 Philip Morris v. Australia (n 7) [528].

15 Douglas (n 4) pages 341–342; Société Générale (n 9) [94]; Walter Bau v. Thailand (n 9) [9.84]; \textit{ABCI Investments NV v. Republic of Tunisia}, ICSID Case No. ARB/04/12, Decision on Jurisdiction (18 February 2011) [178]; Paushok v. Mongolia (n 13) [491].

16 Société Générale (n 9) [92]; MCI Power Group LC and New Turbine Inc v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award (31 July 2007) [93] [MCI v. Ecuador]; 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) [2.105] [Pac Rim v. El Salvador].

17 Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v. The Republic of Ecuador [I], PCA Case No. 34877, Interim Award (1 December 2008) [282–284] [Chevron v. Ecuador]; Walter Bau v. Thailand (n 9) [12.26, 12.36–12.37, 13.1(f)].


19 James Crawford, \textit{State Responsibility: The General Part} (Cambridge University Press 2013) page 259; see also ILC Article 14(2) in Crawford (n 3) page 135 (‘The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.’)

20 See commentary to this Article, which clearly specifies this point; International Law Commission, ‘Draft Articles on the law of Treaties with commentaries’ (1996) \textit{YBILC} Volume II, pages 187 and 212.
so. A number of tribunals have taken a similar approach. Examples of continuing acts 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 as an act that is composed of a series of actions or omissions defined in aggregate as wrongful. The composite act does not ‘occur’ until the completion of the series. Tribunals have found it to be sufficient that the point of completion take place after the effective date of the treaty. Tribunals have, however, been reluctant to accept claims of a composite breach to avoid 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 intends to be bound by it?

Arguments that a state is bound by a treaty before it enters into force have been made in two contexts. First, where the treaty is provisionally applicable and second, on the basis that states should refrain from committing acts that defeat the object and purpose of the signed treaty.

First, as specified in the VCLT, the contracting parties may agree to grant a treaty provisional application before it enters into force. In those cases, the treaty becomes binding upon signature.

21 Crawford (n 19) page 259; see also ILC Article 14(2) in Crawford (n 3) page 135 (“The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”)
22 Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (6 December 2002) [62]; Mondev v. United States (n 9) [69–70]; Tecmed v. Mexico (n 12) [66]; SGS Société Générale de Surveillance SA v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 January 2004) [166] [SGS v. Philippines].
23 SGS v. Philippines (n 22) [43, 167].
24 Pac Rim v. El Salvador (n 16) [3.43].
25 Chevron v. Ecuador (n 17) [298]; see also Rubins and Love (n 13) page 484.
26 ILC Article 15, in Crawford (n 3) 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 (n 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 Rusoro 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].
This has been addressed by cases considering Article 45 of the Energy Charter Treaty (ECT), which provides for provisional application.11 Tribunals have repeatedly retained jurisdiction on the basis of Article 45, most recently in the Yukos cases, where the tribunal found the ECT was provisionally applicable to Russia, even though it never finally ratified the treaty.12 Ultimately, Russia was held to be liable for breach of the expropriation provision.13 The tribunals in Petrobart v. Kyrgyzstan14 and Kardassopoulos v. Georgia took a similar approach.15

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.16 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 the signature and the entry into force of the relevant treaty.17 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.38

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

Given that many treaties refer to a ‘dispute’, especially in the consent to arbitrate provision, there are a number of cases that address this point. Cases in this area have largely fallen into two categories, which are dealt with in turn.

The first category concerns cases where the treaty makes provision, explicitly39 or implicitly,40 for the exclusion of disputes that arose prior to the treaty coming into force.

The second category relates to cases where the treaty provides no guidance and tribunals have applied general international law principles to determine whether the treaty covers disputes arising before the treaty comes into force. The findings in cases of this category are inconsistent. *Ping An v. Belgium* highlighted the divergent views by pointing to tribunals that have applied a presumption of non-retroactivity (with or without reference to VCLT Article 28) to deny jurisdiction in cases where the dispute arose before the BIT came into force,41

---


39 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.’ This provision was applied in *Empresas Lucchetti SA and Lucchetti Peru SA v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award (7 February 2005) [59] *[Lucchetti v. Peru]*. See also *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) [67-68], applying Article II(2) of the Argentina–Spain BIT *[Maffezini v. Spain]*; *Sociedad Anonima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award (21 August 2007) [105, 151-163].

40 In *Salini v. Jordan* (n 9), 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’; see also *Impregilo v. Pakistan* (n 13) [299–300], considering Article 9(1) of the Italy–Pakistan BIT.

41 *Ping An v. Belgium* (n 9) [189–191], referring to *MCI v. Ecuador* (n 15) and *Impregilo v. Pakistan* (n 13) [300].
while other tribunals had rejected any such presumption. The tribunal expressed doubt as to whether Mavrommatis stood for ‘a principle that there is a presumption that the jurisdiction of a tribunal extends to disputes which arose prior to its establishment’.

Common to all of the above cases is a determination of when the dispute ‘arises’. This needs to be differentiated from an analysis of when the facts or acts that gave rise to the dispute arose, as these may have taken place some time before the dispute itself is said to have arisen. 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’. The identification of when this occurs can give rise to opposing results in apparently similar circumstances; for example, in Lucchetti v. Peru and in Jan de Nul v. Egypt. In Lucchetti, the tribunal outlined what has been coined the ‘subject matter’ test, which asked if ‘the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute’ or if the disputes had the same ‘origin or source’. The tribunal found that the subject matter of the earlier dispute did not differ from the alleged dispute that post-dated the treaty and that the two disputes had the same origin or source. However, in Jan de Nul v. Egypt, 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, even though the respondent had argued that this dispute was not new and was in fact already in existence before the treaty came into force.

This question has also featured in recent decisions. Tribunals have stated that a breach or violation of a BIT does not crystallise into a dispute until the breach is identified and objected to by the injured party. A relevant factor in determining when a dispute arises has

---

42 Ping An v. Belgium (n 9) [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.

43 In Mavrommatis Palestine Concessions, the PCIJ stated: ‘in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. . . . The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above.’ 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 (n 42) page 139; Rubins and Love (n 13) page 490.

44 Ping An v. Belgium (n 9) [174 et seq].

45 Mavrommatis Palestine Concessions (n 43) [19]. This formulation has been adopted by investment treaty tribunals; see, for example, Maffezini v. Spain (n 39) [96].

46 Lucchetti v. Peru (n 39).

47 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) [Jan de Nul v. Egypt].

48 Lucchetti v. Peru (n 39) [50].

49 Ibid. [53].

50 Ibid.

51 Jan de Nul v. Egypt (n 47) [59,128].

52 See, for example, Renée Rose Levy and Gremcitel SA v. Republic of Peru, ICSID Case No. ARB/11/17, Award (9 January 2015) [167]. This part of the award addressed the question of whether the second claimant was under foreign control, and therefore had investor status, at the time the dispute arose.
been when the investor considers its claim to be ‘positively opposed’ by the respondent, although other tribunals have noted the test for determining when a dispute has arisen is objective.

V IMPACT OF THE TERMINATION OF TREATIES

i Can a claim be initiated after the treaty has been terminated?

Of increasing prominence are the temporal issues around termination of treaties. Termination of investment treaties has been rare. According to one study, as at September 2014, only 19 treaties had been terminated unilaterally, and two consensually. However, all but three of those 19 unilateral terminations had been declared since 2012. Indeed, since that study there have been further reports of states’ termination of BITs. The general position on the termination of a treaty is outlined in Articles 42(2), 56 and 70 of the VCLT.

BITs tend to contain provisions regulating how they are terminated. Many BITs specify an initial duration period, within which they cannot be terminated save in exceptional circumstances. Following this, state parties are often permitted to terminate with a fixed period of written notice. In most BITs, a specific clause (known as a ‘survival clause’ or a ‘tail’) will provide for treaty protections to continue in respect of investments made when the treaty is still in force, usually for a fixed period of between 10 and 15 years. There are examples of these clauses not being applied in cases of termination by mutual consent. Moreover, in the context of the termination of intra-EU BITs, several EU Member States have indicated their intention to terminate BITs immediately (without the application of the ‘survival clause’) – which is the approach preferred by the European Commission.

53 Ibid. [168]; Philip Morris v. Australia (n 6) [532].
54 Lao Holdings NV v. The Lao People’s Democratic Republic, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (21 February 2014) [124].
56 See, for example, research indicating that since 2014, Indonesia has notified over 20 treaty partners that it will unilaterally terminate BITs, having previously announced it would terminate its more than 60 BITs: Luke Eric Peterson ‘Indonesia ramps up termination of BITs – and kills survival clause in one such treaty – but faces new $600 mil. claim from Indian mining investor’ (20 November 2015).
57 Gordon and Pohl (n 55) page 19.
58 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 (n 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.
59 The Czech Republic agreed with several former BIT partners upon termination that the ‘survival clause’ would not apply: Luke Eric Peterson, ‘Czech Republic terminates investment treaties in such a way as to cast doubt on residual legal protection for existing investments’ (1 February 2011). Termination of the Indonesia-Argentina BIT in this way is also reported to have been agreed (Peterson, n 56).
60 See, for example, ‘Intra-EU Investment Treaties: Non-paper from Austria, Finland, France, Germany and the Netherlands’, Council of the European Union, Trade Policy Committee (Services and Investment) (7 April 2016) [3 and seq].
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 a lively debate around the effects of withdrawal on consent to jurisdiction made while the treaty was still in force. Commentators disagree on the effect of Articles 71 and 72, and more specifically, the meaning of consent in Article 72.

In the recent case of *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. However, the *Venoklim* tribunal did not address the broader issue of whether consent that is accepted by the investor after the six-month period may still be effective to establish ICSID jurisdiction.

EXTINCTIVE PRESCRIPTION

Will a claim be dismissed if the state's breach of a treaty occurred a long time before the initiation of a claim?

The principle of extinctive prescription (or laches) is that a right can be lost, or a claim can be barred, when it is not exercised within a certain amount of time. While 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 explicitly provide time limitations on claims. For example, the North American Free Trade Agreement 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'. This provision was recently applied by the tribunal in *Clayton v. Canada* to refuse jurisdiction over events that occurred more than three years before the date of the notice of arbitration.

---

63 *Venoklim Holding BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award (3 April 2015), [63]. See also *Tenaris SA y Talca-Trading Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award (12 December 2016), [144].
64 This question has been answered in the affirmative by some commentators: see, for example, Emmanuel Gaillard and Yas Banifatemi, ‘The Denunciation of the ICSID Convention’ (2007) (122) *New York Law Journal*, page 237, who argue that where a BIT contains an unqualified consent, rights and obligations attached to that consent should not be affected by denunciation of the Convention.
Where a treaty does not provide specific time bars, tribunals have generally allowed claims, although they have not rejected the possibility of time-barring a claim. Instead, the cases have typically justified not time-barring the case. In *Wena Hotels v. Egypt* a lapse of seven years after the expropriation was not sufficient to time-bar the claim because the claimant had diligently pursued its claim and provided sufficient notice of the dispute.\(^{69}\) Similarly, in *Kardassapopulos v. Georgia*, a delay of 10 years did not prevent the claim as the claimant had reasonably believed an amicable settlement was possible and Georgia had timely notice of the dispute.\(^{70}\)

---

\(^{69}\) See *Wena Hotels LTD v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (8 December 2000) [104–105], the tribunal also refused to apply the domestic statute of limitations, holding that, even under Article 42 of the ICSID Convention, international law takes precedence. See also *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Award (3 March 2010) [104–106, 261, 264–268].

\(^{70}\) Ibid. [261].
Part II

ADMISSIBILITY AND PROCEDURAL ISSUES
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, 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.

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. Second, the

---

1 Michael D Nolan is a partner and Elitza Popova-Talty is an associate at Milbank, Tweed, Hadley & McCloy. The information contained in this chapter is accurate as of April 2016.
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:

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

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 ICJ9 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

---

7 Id. (quoting 1970 ICJ 3, 33 paragraph 35 (5 February 1970) (Judgment)).
9 Under the United Nations system, the ICJ is the ‘principal judicial organ’ charged with two main functions: to assist in the resolution of disputes between states, and to provide advisory opinions to specified international organisations. See UN Charter Articles 92–96.
Admissibility

objections 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

III ADMISSION 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

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 Id.
Admissibility

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.\(^\text{16}\)

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’.\(^\text{17}\) Under this approach, the tribunal should first determine if it has jurisdiction over the dispute and, once that jurisdiction has been confirmed, address the admissibility of the claims. But 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’.\(^\text{18}\) 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.\(^\text{19}\) In *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic* the tribunal held: ‘there is no need to go into the possible – and somewhat controversial – distinction between jurisdiction and admissibility. Whatever the labeling, the parties have presented their case on the basis of the six objections raised by the Respondent.’\(^\text{20}\)

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 (Dr Brinner and Professor van den Berg) applied the following criteria in distinguishing the two kinds of objections:

\(^{16}\) 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).


\(^{18}\) ICSID Case No. ARB/03/08, Award, paragraph 2 (10 January 2005).

\(^{19}\) 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.’)

\(^{20}\) ICSID Case No. ARB/03/13, Decision on Preliminary Objections, paragraph 54 (7 July 2006).
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.\(^{21}\)

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’.\(^{22}\) 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’.\(^{23}\)

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.\(^{24}\)

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 bilateral investment treaty 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*

\(^{21}\) *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.

\(^{22}\) *Abaclat v. Argentine Rep*, ICSID Case No. ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility, paragraph 126 (4 August 2011).

\(^{23}\) Id. at paragraphs 150–51 (quoting 130 S Ct 1758, 1774 (2010)).

\(^{24}\) 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).
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.\textsuperscript{25}

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’.\textsuperscript{26} 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.’\textsuperscript{27}

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 \textit{Plama v. Bulgaria},\textsuperscript{28} 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’.\textsuperscript{29} The respondent had argued that the claimant had obtained the investment through unlawful means rendering the claim inadmissible.\textsuperscript{30} 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.\textsuperscript{31} The analysis section of the \textit{Plama} award on the merits did not use the term ‘admissibility’. But 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’.\textsuperscript{32} In its reasons, the tribunal stated that granting the protection of the ECT would be contrary to the principle of \textit{nemo auditur propriam turpitudinem allegans} – no one is heard when alleging one’s own wrong.\textsuperscript{33}

The tribunal referred to the decisions in \textit{Inceysa v. El Salvador} and \textit{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

\begin{footnotesize}
\textsuperscript{25} ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, paragraph 154 (29 January 2004).
\textsuperscript{26} Id. at paragraph 155.
\textsuperscript{27} Id. at paragraph 154 (citing Brownlie, Principles of Public International Law 681 (6th edition 2003)).
\textsuperscript{28} \textit{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).
\textsuperscript{29} Id. at paragraph 135.
\textsuperscript{30} Id. at paragraph 96.
\textsuperscript{31} Id. at paragraph 97.
\textsuperscript{32} Id. at paragraph 139.
\textsuperscript{33} Id. at paragraph 141.
\end{footnotesize}
Admissibility

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 ‘there may be a residue of instances in which questions of inadmissibility and “substantive” issues are difficult to distinguish. This is the case of the so-called “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 Commission’s previous work on state responsibility. Citing Salmon, the Report notes that the doctrine has been applied in 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 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

---

35 Id. at 701.
36 Id. at 701 n. 66.
37 Second Rep on State Responsibility, UN Doc A/CN.4/498 and Add 1-4 (1999) (James Crawford, Special Rapporteur). The scope of the report is to ‘continue the task, begun in 1998, of systematically considering the draft articles in the light of the comments of Governments and developments in State practice, judicial decisions and in the literature’. Id. at 9.
38 Id. at paragraph 332.
39 Id. at paragraph 333.
40 Id. at paragraph 334 (citing Jean Salmon, ‘Des “mains propres” comme condition de recevabilité des réclamations internationales’, 10 Annuaire français de droit international, 259 (1964)) (emphasis in original).
41 Id. at paragraph 336.
42 Id.
to partial, or even total, exoneration of the defendant.\footnote{See Wáter van Gerven, Pierre Larouche and Jeremy Lever, Cases, Materials and Text on National, Supranational and International Tort Law section 7.3.1 (2000), available at www.casebooks.eu/documents/tortLaw/heading7.3.1.pdf.} Whether the doctrine of clean hands should be considered as 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 ADMISSIBILITY 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’.\footnote{Fed R Evid 404(a)–(b).}

In the context of ICSID proceedings, parties also have objected to use of documents in evidentiary hearings on the basis of their admissibility although is not always clear if the parties refer to inadmissible documents as documents that are otherwise relevant or have used the term ‘admissibility’ as synonymous with ‘relevancy’. In \textit{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’.\footnote{\textit{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 \textit{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.\footnote{\textit{Abaclat v. Argentine Rep}, ICSID Case No. ARB/07/5, Procedural Order No. 4, paragraphs 37–39 (19 March 2000).} 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.’\footnote{Id. at paragraph 50.} Claimants had also objected to the use of a DVD and its transcript of an Italian TV show broadcast discussing
Italian court decisions concerning proceedings initiated by the claimants and intended to be used for cross-examination by respondent of the claimants’ expert because of (1) the fact that the statements made in this TV show are not witness testimony, (2) the alleged unreliability of the source and (3) the late filing of this material. 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 reserving the right to interrupt the examination of [claimants’ expert] in case it deems that Respondent’s examination is beyond the scope of what is necessary and appropriate’. 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, 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.’

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.

48 Abaclat v. Argentine Rep, ICSID Case No. ARB/07/5, Procedural Order No. 5, paragraph 18 (2 April 2010).
49 Id. at paragraph 20(ii).
50 ICSID Case No. ARB/05/20, Decision on Annulment (26 February 2016).
51 Id. at paragraph 79.
Chapter 5

THE REQUIREMENTS RATIONE PERSONAE

Ayham N M Al-Mashni

I INTRODUCTION

The International Centre for the Settlement of Investment Disputes (the Centre) has seen an all-time high in the registration of new arbitrations in 2015. The past year saw the registration of 52 new cases, representing an increase of 36.8 per cent from 2014. This increase can be attributed to the proliferation of new BITs citing ICSID as their venue of choice for the settlement of investor–state disputes, and to the looming public-debt crisis facing emerging and developed economies.1 Notwithstanding the new caseload, the Centre reached decisions in 64 per cent of cases concluded in 2015; interestingly, declining jurisdiction in 20 per cent of those concluded cases.2

The Centre has seen an increase in decisions to decline jurisdiction in concluded cases. Between 2005 through 2014, 15 per cent of cases administered by the Centre were declined on jurisdictional basis. The abrupt increase in 2015 indicates that the coming years will see jurisdictional challenges come to light that have not been previously dealt with by the Centre.3

The increase in demand for investor–state dispute-resolution tools is giving rise to new cross-border legal challenges paralleling the rise of new jurisdictional challenges. The transnational and international characteristics of investors and the changing attitudes of states are testing what were previously considered settled and established principles in investment treaty arbitration.

Traditional attitudes to nationality and cross-border investment have seen dramatic change in the past years. International and regional corporations are dissolving their national identities and embracing multiculturalism, globalisation and cross-border investment. The settled notions of nationality are also being tested, as the notion of the nation state changes and citizens from around the world embrace dual citizenship and multiple nationalities. Those changes in international attitudes among the citizenry of the world coupled with the changing attitudes of host states are giving rise to new contentious jurisdictional issues relating to the nationality of investors under BITs. The aim of this chapter is to provide a general narrative on the requirements ratione personae embodied in the vast majority of BITs, which proliferate predominantly in the requirement for nationality.

---

1 Ayham N M Al-Mashni is an arbitration practitioner at Aljazy & Co. The information contained in this chapter is accurate as of April 2016.
3 Ibid.
4 Ibid.
This chapter does not intend to provide a study on the legal aspects of nationality, nor will it attempt to distinguish between issues of admissibility and jurisdiction; a subject already extensively examined in legal literature. Neither is it the objective of this chapter to provide an extensive narrative on the differentiation between the requirements ratione personae in contrast with the requirements ratione materiae, or ‘substantive jurisdiction’. In a nutshell, this chapter will attempt to shed light on the question ‘who exactly can bring claims under the Convention on the Settlement of Investment Disputes between States and Nationals of other States?’

II THE REQUIREMENTS RATIONE PERSONAE IN INVESTMENT TREATY ARBITRATION

The basic principle on jurisdiction under the ICSID Convention (the Convention) stipulates that any investor wishing to bring a claim before the Centre must be a ‘national of another Contracting State’ to the Convention. Article 25(2) of the Convention sets out the basic requirements ratione personae as follows:

(2) ‘National of another Contracting State’ means:

(a) any natural person who had the nationality of a Contracting state other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

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

Accordingly, Article 25(2) of the Convention sets out the basic criterion for the requirements ratione personae by differentiating between a natural person and a juridical person. Furthermore, an investor must pass a positive and negative nationality test; for an investor to bring a claim before the Centre it must prove, positively, that it is a national of a contracting state and negatively prove that it is not a national of a host state.

A natural person ought to pass both the positive and negative nationality requirement on two dates; on the date when the investor and the contracting state registers consent to submit the dispute to the Centre and on the date of the submission of its request for arbitration to the Centre. It is important to note that an agreement between the parties

---


clarifying the nationality of the investor does not itself evidence compliance with the requirement of Article 25(2)(a), notwithstanding the presumption to the contrary, generally reported by the Centre's users. The Convention has not provided for a clear or express definition on the nationality of a juridical person. It is assumed that the Centre follows the prevalent criteria for nationality of corporations under international and local laws. The nationality of juridical persons is decided based on place of incorporation of said juridical person or its place of administrative domicile – siège social. Interestingly, and unlike natural persons, a juridical person may possess the host state’s nationality and still qualify as a national of another contracting state pursuant to the exception contained in Article 25(2).

A juridical person must, therefore, be a national of a contracting state to fulfil the requirements ratione persona. And unlike the case with natural persons, an agreement between the parties on the nationality of an investment creates a strong and reliable presumption for the requirements ratione personae. Furthermore, even if the juridical person is a national of a non-contracting state, a qualification that said person is controlled by a national of a contracting state by way of agreement between the parties will suffice for the fulfilment of the requirements ratione personae.8

i MINE v. Guinea9

The position above was consolidated in MINE v. Guinea. The parties were in agreement on the nationality of the investor, MINE; an agreement between MINE and the government of Guinea contained an express and clear indication of the nationality of the investor and the parties consent to settle any disputes through the Centre. The agreement stipulated that MINE held Swiss nationality. Nonetheless, it was evident that MINE was indeed incorporated in Liechtenstein, which had not ratified the Convention.

The investor contended, however, that MINE did indeed comply with the requirements ratione personae based on the fact that the real interest in the corporate was actually Swiss and that MINE was controlled by a Swiss national; and Guinea did not object to the Centre’s jurisdiction.

The tribunal did not explicitly indicate the investor’s nationality, which reasonably indicates that the tribunal assumed jurisdiction by implicitly accepting that MINE’s nationality was Swiss. In this instance, the tribunal’s decision was substantiated by two facts: (1) the agreement between the parties did stipulate the investor’s nationality as Swiss and (2) the government of Guinea had been made aware of the particulars concerning the investor’s nationality and still proceeded with agreeing to submit to the Centre’s jurisdiction.

III FOREIGN INVESTMENT AND LOCALLY INCORPORATED JURIDICAL PERSONS

Principles relating to the requirements ratione personae are not clearly established for locally incorporated juridical persons who are controlled by foreign investors. It is the norm for foreign investments to be allocated through locally incorporated companies in the host state.

8 Interestingly, a state-owned enterprise can be qualified as an investor if it acts commercially without carrying a governmental function – a similar test to the ‘commercial exception’ adapted in enforcement proceedings applies.

9 MINE v. Guinea, Award, 6 January 1988, 4 ICSID Reports 61.
When exactly such locally incorporated entities can fulfil the requirements *ratione personae* is yet to be fully established. Generally, such entities may register claims before the Centre if there is clear evidence that the host state has agreed to, or did, treat the entities as foreign nationals because of foreign interest or control. The nationality of a locally incorporated (yet foreign-controlled) entity may be evidenced by direct agreement between the parties or it may be contained in the definitions set out in the host state’s legislation. An agreement between the host state and the locally incorporated entity conferring jurisdiction on the Centre may be inferred as an agreement to treat the locally incorporated entity as a foreign national. However, this position cannot be achieved through a general consent to jurisdiction prescribed under a BIT. The current tendency stipulates that the locally incorporated entity must prove that a foreign national of a contracting state exercises direct control over the locally incorporated entity.

The test for proving said control is an objective test – foreign control cannot be inferred from an agreement and its existence must be proven; factors such as control of shareholders, management boards and voting rights are all examined to ascertain the same. This position has been reinforced time and again by a string of consistent ICSID precedents.

i  **Amco v. Indonesia**

Amco was incorporated in Indonesia but controlled by a foreign company, Amco Asia. Amco’s agreement with the Indonesian government stipulated that Amco would be the potential party in ICSID proceedings. The Indonesian government contested jurisdiction arguing that it has not at any point treated Amco as a foreign entity.

However, the tribunal observed that the Indonesian government and Amco have previously acknowledged that Amco is a locally incorporated but foreign-controlled entity, which allowed the tribunal to infer the consent and acknowledgment of the Indonesian government to submit the claim to the Centre.

The tribunal ruled that Amco was a national of another contracting state, therefore fulfilling the requirements *ratione personae* under the Convention.

ii  **Klöckner v. Cameroon**

The particulars of this case relate to a foreign investor who has contracted with a local entity for the creation of a local joint venture company (SOCAME) in Cameroon. SOCAME contracted with the government of Cameroon, citing ICSID as the venue for the settlement of any dispute. SOCAME was, pursuant to local legislation, a Cameroonian entity with its *siège social* based in Cameroon.

The tribunal ruled that the mere existence of an ICSID clause indicates that the government of Cameroon considered SOCAME to be an entity under foreign control. The fact that SOCAME itself is a joint venture consisting, in one part, of a foreign company indicates that actual foreign control over the joint venture existed.

---


iii Vacuum Salt Products v. Ghana\textsuperscript{12}

Perhaps the most important precedent on this issue remains the case of Vacuum Salt Products \textit{v. the Government of Ghana}. The parties agreement cited ICSID as its dispute resolution venue. Vacuum Salt itself was incorporated under the laws and regulations of Ghana; notwithstanding this fact, Vacuum Salt was directly controlled by a foreign investor who is a national of a contracting state.

When proceedings were initiated, the government of Ghana submitted a jurisdictional challenge contesting the jurisdiction of the Centre to hear the claim by arguing that Vacuum Salt was a Ghana national and that no agreement was executed between the parties indicating the contrary.

The tribunal decided not to infer jurisdiction simply based on the existence of consent to submit any dispute to the jurisdiction of the Centre; the tribunal adopted a further test to try to ascertain whether or not foreign control over Vacuum Salt did exist. The tribunal stated:

\begin{quote}
the parties' agreement to treat Claimant as a foreign national 'because of foreign control' does not ipso jure confer jurisdiction. The reference in Article 25(2)(b) to 'foreign control' necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so.
\end{quote}

The tribunal noted that foreign interest in Vacuum Salt constituted only 20 per cent of the shares of the locally incorporated entity. Around 80 per cent of its shares were actually held and controlled by Ghanaian investors. The tribunal therefore decided that Vacuum Salt was a local company and did not objectively fulfil the requirement of foreign control under the Convention. However, other elements of control – including the foreign investor’s superior management role – indicated that certain aspects of the Ghanaian company do fulfil the requirement of foreign control and ruled that it had jurisdiction to hear the claim.

A more recent decision has once again shown that Vacuum Salt Products \textit{v. Ghana} has been able to set a versatile test on foreign control. National Gas SAE \textit{v. Arab Republic of Egypt} has expanded on the established principles set out in Vacuum Salt Products in relation to the objective test for ascertaining foreign control. The tribunal stated in part:\textsuperscript{13}

\begin{quote}
there is a significant difference under Article 25(2)(b) between (i) control exercised by a national of the Contracting State against which the Claimant asserts its claim and (ii) control by a national of another Contracting State. The latter situation violates no principle of international law and is consistent with the text of the ICSID Convention. On the other hand, the former situation violates the general limitation in Article 25(1) and the first part of Article 25(2)(b) of the ICSID Convention in regard to both Contracting States and nationals (including dual nationals). In other words, the latter is consistent with the object and purpose of the ICSID Convention; but the former is inconsistent: it would permit the use of the ICSID Convention for a purpose for which it was clearly
\end{quote}

\textsuperscript{12} Vacuum Salt \textit{v. Ghana}, Award, 16 February 1994, \textit{4 ICSID Reports} 329.

not intended and it would breach its outer limits. As already noted above, Article 25(2)(b) operates only as a qualified exception to the general limitation to ICSID jurisdiction in Article 25: a sardine cannot swallow a whale.\textsuperscript{14}

\section*{IV CONCLUSION}

It is evident from the Centre case law discussed above that the jurisdictional requirements \textit{ratione personae} prescribed in Article 25(2) of the Convention has allowed tribunals a high tolerance level for accepting jurisdiction over disputes. It can be concluded that the tribunals have actually applied in excess the principle \textit{in favorem jurisdictionis}, leading to a number of awards on jurisdiction that clearly favour investors over host states.

It can be argued, nonetheless, that the ruling in \textit{National Gas SAE v. Arab Republic of Egypt} has put an end to the pattern of tribunals seldom declining jurisdiction over challenges on a \textit{ratione personae} basis, and put an end to the one-sided manner and imbalanced approach to accepting jurisdiction previously taken by tribunals.

The notion of nationality is being applied in a manner consistent with the principle objectives of the Convention. Globalisation has dramatically changed the nature of international investment and therefore the concepts of nationality in investment law must be reviewed.

\textsuperscript{14} Ibid.
Chapter 6

THE BIFURCATION OF JURISDICTION FROM MERITS, AND MERITS FROM DAMAGES

Colin Y C Ong QC

I INTRODUCTION

Bifurcation of an arbitration procedure generally means that the arbitral proceedings are split into at least two different parts. Bifurcation is practised in both international commercial arbitration and investment arbitration, and is often promoted as a means to manage costs in international arbitration. It is generally taken on early in the arbitration process as a preliminary issue and essentially signals that a tribunal will need to decide various particular discrete issues at an early stage of the hearing. The basic idea is to try to assist in narrowing the differences and scope of the parties’ disputes and therefore contribute towards saving significant valuable time and considerable costs for the parties.

The term bifurcation was traditionally used to describe the division of the arbitration hearing process into two distinct phases: (1) a determination of liability; and (2) a determination of quantum. Over time, it has become common practice in both international commercial arbitration and investment treaty arbitration for there to be another level of division of the arbitration process into a preliminary determination as to the jurisdiction of the tribunal.²

A tribunal has to look carefully at the arbitration agreement as it is the main source of the discretion of the tribunal in deciding how to proceed to establish the factual background of the case and how to set up the ground rules between the parties in settling the dispute. Arbitral tribunals also have to follow the rules of arbitration that have been agreed by the parties and look carefully at the arbitration statute in the law of the seat. For example, a tribunal sitting in ICSID arbitration is given express discretion to bifurcate jurisdictional issues. Article 41(2) of the ICSID Convention provides 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.

Parties who seek bifurcation of the proceedings take the position that parties can avoid or limit spending time and resources on certain issues that might be rendered moot, should the tribunal dismiss the claim. While parties do sometimes agree to deal with the jurisdictional

---

1 Colin Y C Ong QC is the senior partner at Dr Colin Ong Legal Services.
The Bifurcation of Jurisdiction from Merits, and Merits from Damages

objection\(^3\) or application to bifurcate sensibly,\(^4\) more often than not, this is not the case. It is also significant to note that, in many cases, the parties settle their dispute after a tribunal has rendered an award holding that the respondent is liable. What is clear is that resolving issues at different times in the proceedings is generally inadvisable if it is very clear that the potential issues and the evidence necessary to address those issues are inextricably linked to one another. Rather than deal with the topic on a purely academic basis, it would be more beneficial to the end reader who is not well acquainted with this subject to approach the topic on a more practical basis, combining both an explanation of the various reasons for tribunals having bifurcated jurisdiction from merits and quantum from merits, and then setting out what countermeasures such tribunals had put into place to fairly balance the competing interests of the applicant and those of the party that opposed the applications for bifurcation.

Most, if not all of the time, a decision as to whether to bifurcate or not has to be made by a tribunal by looking carefully at the actual facts of the case and considering the background circumstances of the case.\(^5\) Many arbitrators take the position that it is otherwise not possible for a tribunal to truly act fairly and reach a conclusion as to whether the balance of procedural fairness bears less heavily on the applicant (usually the respondent) without bifurcation than on the opposing party (usually the claimant) with bifurcation.

II SITUATIONS WHERE BIFURCATION IS APPROPRIATE

For bifurcation to be appropriate, it is important that the parties and tribunal carefully consider whether the issues to be bifurcated are clear and whether the facts can be easily separated out. Generally, it is easier to deal with legal issues separately, as such issues are easier to separate and be heard as preliminary issues. In addition, if it is clear that the legal issues can significantly narrow the scope of the parties’ disputes, then those matters should be bifurcated.\(^6\) Tribunals tend to be more easily persuaded to bifurcate jurisdiction from merits and merits from quantum in such clear-cut situations, as this can then avoid or significantly limit the costs that are to be incurred in preparing expert witnesses to address the issue of quantum of loss and damages. The costs of expert witnesses and production of evidence for liability and for quantum are generally higher than or of equal costs to that of jurisdiction and may well be unnecessarily incurred if a tribunal finds that it has no jurisdiction to hear the arbitration. In addition, practitioners are also quite aware of the fact that once liability has been established, the disputing parties tend to be more inclined to try to agree to reach a settlement on quantum without the need to expend further resources and time on additional hearings.

\(^3\) E.g., The parties in *Ickale Insaat Limited Sirketi v. Turkmenistan* (ICSID Case No. ARB/10/24 March 2016) agreed that jurisdictional objections and liability would be heard first and quantum would be heard at a later hearing.

\(^4\) E.g., Decision taken by the parties in *Abaclat v. The Argentine Republic* (ICSID Case No. ARB/07/5 (December 2016).

\(^5\) In *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 27 Oct 2014) (P.O. No. 12 paragraph 50), in the face of forgery allegations, the tribunal decided *pro proprio motu* to bifurcate the proceedings between liability and quantum in order to try to save time and costs by narrowing the scope of the parties’ dispute. If the allegations of forgery were to succeed, that would put an end to the claim.

\(^6\) For example, a quick determination of the proper governing law, which could decide whether the substantive rights in the claims exist or not.
The relevant provision of the ICSID Convention in relation to jurisdiction of a tribunal is Article 25(1), which provides as follows:

*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.*

Arbitral tribunals are often faced with several challenges to jurisdiction. In such situations, tribunals are entitled to exercise their discretion to consider the objections to its jurisdiction in any particular order. In the case of *Pac Rim Cayman LLC v. El Salvador*, the tribunal decided to deal first with the objection based on alleged abuse of the international investment treaty system by the claimant, which had allegedly attempted to create an artificial international jurisdiction over a pre-existing domestic dispute. Tribunals tend to choose to deal with such objections first, because the question of the existence of abuse of process is a threshold issue that would bar the exercise of the tribunal's jurisdiction even if jurisdiction existed.

**III CASE EXAMPLE OF ICSID DECISION ON BIFURCATION**

In the case of *Tulip Real Estate v. Republic of Turkey* (*Tulip*), the Republic of Turkey had in its application submitted that the claimant’s claims had to be dismissed for lack of jurisdiction or were inadmissible as being premature. It submitted that ‘efficiency of these proceedings requires that these objections be bifurcated from the rest of the case as they can be heard as a separate matter, avoiding pleading the complex contractual dispute that underlies the present one’.

After setting out the general position that the parties had both agreed that the arbitral tribunal had the discretion under Article 41(2) of the ICSID Convention to bifurcate proceedings, the tribunal then went on to set out at paragraph 30 the considerations that were applicable to the discretion:

*The Parties agree that the Tribunal has the power to bifurcate these proceedings in its discretion [Application para. 8, C Reply para. 8]. Three considerations have been identified as relevant to the exercise of the Tribunal’s discretion. These are: (i) whether it is desirable to bifurcate for reasons of procedural economy; and (ii) whether the preliminary objection is intimately linked to the merits; and (iii) whether a determination of the preliminary objection is capable of resulting either in the dismissal of the entire case or reducing significantly its scope and complexity.*

---


8 The tribunal in *Transglobal Green Energy LLC and Transglobal Green Panama SA v. Republic of Panama* (ICSID Case No. ARB/13/28) (31 May 2016) adopted the same test that was applied in *Pac Rim v. El Salvador*.

The tribunal approached its task by setting out that its initial considerations were to focus on the question as to whether to grant the respondent’s application for bifurcation of this jurisdictional objection, and not to decide the objection to jurisdiction itself. The tribunal in Tulip referred to decisions of previous ICSID tribunals that have been reluctant to launch into the merits to decide a jurisdictional question and cited the decision in Generation Ukraine Inc v. Ukraine\(^\text{10}\) (Generation Ukraine) as an example of its concerns. The tribunal in the Generation Ukraine case had earlier taken the position that it had ‘elected to join issues of jurisdiction and admissibility to the merits because of the close relationship between the Respondent’s primary jurisdictional objection, based on the alleged absence of any relevant investment by the Claimant, and the factual evidence pertaining to the complete history of the Claimant’s activities in Ukraine’.

The Tulip tribunal came to a conclusion that, based on the evidence before it, without prejudging the merits, there appeared to be a close relationship between the respondent’s jurisdictional objection and the factual evidence presented by claimant pertaining to the alleged representations and conduct of the respondent. Based on that fact, the tribunal decided that it was unlikely that a determination of the respondent’s jurisdictional objection was capable of significantly reducing the scope and complexity of the case, and it dismissed the respondent’s application to bifurcate jurisdiction from merits.

The Tulip decision can be contrasted with the decision of the tribunal in Emmis v. Hungary,\(^\text{11}\) where the tribunal took the position that to defer the determination of a question to the merits phase might lead to confusion and lack of clarity on a fundamental question.

IV CASE EXAMPLES OF ICSID DECISIONS DISALLOWING BIFURCATION

Some of the common reasons given by both ICSID and non-ICSID tribunals in not allowing bifurcation of jurisdiction from merits have also been couched in terms of overall procedural fairness. These reasons include the explanation that proceedings could better proceed without bifurcation between jurisdiction and merits, because there would be less risk of substantial delay if the tribunal or counsel cannot hold a second hearing date for the merits hearing within a reasonable period. Quite often, it is very difficult for a tribunal to balance the factors and look at the facts and background circumstances so as to reach a decision with confidence at an early stage of the arbitral proceedings. Arbitrators who are less inclined to reach such decisions to bifurcate jurisdiction also tend to take the position that, even if such a fair balancing exercise were possible at an early stage of arbitration proceedings, it would be inappropriate and could be potentially prejudicial to one or both sides.

There is then also a reasoning that there would be less risk of wasted expense for the parties, as there are often many overlapping jurisdictional and liability issues that would need not be addressed twice, in the event that jurisdictional objections should fail.\(^\text{12}\) In the Apotex decision, the tribunal was persuaded by the claimant’s submission that there was a substantial overlap between jurisdictional issues and liability issues. The tribunal there came to the view that procedural fairness and efficiency required all the intertwined issues to be

\(\text{10}\) Generation Ukraine Inc v. Ukraine.

\(\text{11}\) Emmis International Holding BV and others v. Hungary (ICSID Case No. ARB/12/2).

\(\text{12}\) Apotex Holdings Inc and Apotex Inc v. United States of America (ICSID Case No. ARB(AF)/12/1).
addressed together. The tribunal also came to the conclusion that it was safer to hear all of
the intertwined issues and decide those issues at the same time, so as to lessen the risk of a
decision on jurisdiction compromising any later decision on merits.

The *Apotex* tribunal was clearly persuaded by the factual issues put before it and was
concerned of the real risk of reaching inconsistent decisions in the event that there were future
inconsistent submissions made by the parties. The *Apotex* tribunal dealt with the respondent’s
concern regarding additional costs borne by the respondent in addressing liability issues (if
it succeeded on the jurisdictional issues) by making an order that the tribunal would apply
the 'loser pays' principle in allocating legal and arbitration costs to reflect such an event.
The tribunal made it clear that it would not leave costs where they lay under Article 58 of
the ICSID Arbitration (Additional Facility) Rules and also made an assumption that the
claimants would honour such an award for costs in favour of the respondent pursuant to
Article 52(4) of the ICSID Arbitration (Additional Facility) Rules.

V INTERPRETATION OF BILATERAL INVESTMENT TREATIES AND
APPROACH IN DEALING WITH BIFURCATION APPLICATIONS

There has been a fair division in the positions taken by different ICSID tribunals as to how
to interpret a BIT when dealing with applications to bifurcate. It is not generally in dispute
that the relevant enquiry remains for the tribunal to interpret and apply the terms of the BIT
itself.13 This would appear to be the general approach to take, as at the end of the day, the
wording of BITs do differ from one another, and this would be a matter of fact and a finding
of fact should always be an issue that only a tribunal can decide. As in the *Tulip*
case, there
is sometime a challenge made to jurisdiction on the basis that a tribunal has no jurisdiction
because the mandatory negotiation period as set out in a BIT was not respected and, as such,
this breach would take the dispute outside the jurisdiction of a tribunal.

It is accepted practice for ICSID tribunals that are challenged on their jurisdiction on
the premise of a lack of powers accorded under a BIT to go straight to, and focus on, the exact
text of the BIT under which the claim is brought. As the tribunal in *Daimler v. Argentina*
explained:

*B**it*s constitute an exercise of sovereignty by which States strike a delicate balance among their
various internal policy considerations. For this reason, the Tribunal must take care not to allow any
presuppositions concerning the types of international law mechanisms (including dispute resolution
clauses) that may best protect and promote investment to carry it beyond the bounds of the framework
agreed upon by the contracting state parties. It is for States to decide how best to protect and promote
investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen
to do so.*14

While it is an issue of a finding of fact, it is important that arbitrators are familiar with, and
do apply, the principles under the Vienna Convention on the Law of Treaties (the Vienna
Convention), particularly Articles 31 and 32, when interpreting relevant provisions of both
the ICSID Convention and the BIT in question. Article 31.1 of the Vienna Convention

13 *Tulip Real Estate Investment and Development Netherlands BV v. Republic of Turkey* (ICSID Case
No. ARB/11/28) at [47].
14 *Daimler Financial Services AG v. Argentine Republic* (2012 ICSID Case No. ARB/05/1) at [164].
provides that the BIT should also 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 the light of its object and purpose’. It is also a rule that supplementary means of interpretation are to be resorted to only as permitted by Article 32 of the Vienna Convention.

Questions that concern the issue of ‘the consent of the parties to jurisdiction, in the context of a BIT arbitration, are generally governed by international law’.15

It is an established principle in international law that a state cannot be forced to submit its disputes to arbitration without its consent. There have, however, been diametrically different approaches taken by different tribunals. Some arbitration tribunals have followed \textit{Plama v. Bulgaria},16 in which the tribunal decided as follows:

196. \textit{In the view of the Tribunal, the following consideration is equally, if not more, important. With the advent of bilateral and multilateral investment treaties since the 1980s (today estimated to be more than 1,500), the traditional diplomatic protection mechanism by home states for their nationals investing abroad has been largely replaced by direct access by investors to arbitration against host states. Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.}\textsuperscript{17}

Other tribunals have taken a completely opposite approach and have held as follows:

\textit{The Plama tribunal also stated, in its reasons, that an arbitration agreement must be clear and unambiguous, especially where it is incorporated by reference to another text. This Tribunal does not share this statement. As stated above, it believes that dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor more liberal.}\textsuperscript{18}

The tribunal in \textit{Teinver v. Argentine Republic} came to the conclusion that investment arbitration jurisprudence on the ordinary meaning of ‘most favoured nation’ (MFN) provisions has not been entirely consistent, even when the same BIT is concerned.19 It adopted the position taken by earlier tribunals. In \textit{Maffezini v. Spain},20 the tribunal held that:

\begin{itemize}
  \item \textit{Plama Consortium Limited v. Republic of Bulgaria (2005 ICSID Case No. ARB/03/24).}
  \item \textit{See also Teilen Mobile Communications AS v. Republic of Hungary (2006 ICSID Case No. ARB/04/15) at [90], which held: ‘This Tribunal wholeheartedly endorses the analysis and statement of principle furnished by the Plama tribunal.’}
  \item \textit{Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales del Agua SA v. Argentine Republic (2006 ICSID Case No. ARB/03/17) at [64]. See also Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic (ICSID Case No. ARB/03/19) at [65].}
  \item \textit{Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. The Argentine Republic (ICSID Case No. ARB/09/1) at [165].}
  \item \textit{Emilio Agustin Maffezini v. The Kingdom of Spain (ICSID Case No. ARB/97/7), Decision on Jurisdiction at [64].}
\end{itemize}
The Tribunal is satisfied that the Claimant has convincingly demonstrated that the most favored nation clause included in the Argentine–Spain BIT embraces the dispute settlement provisions of this treaty. Therefore, relying on the more favorable arrangements contained in the Chile–Spain BIT and the legal policy adopted by Spain with regard to the treatment of its own investors abroad, the Tribunal concludes that Claimant had the right to submit the instant dispute to arbitration without first accessing the Spanish courts.

Similar decisions were taken by other ICSID tribunals in *Gas Natural v. Argentina* and *Suez InterAgüas v. Argentina,* where the majority of arbitrators determined that the broad ‘all matters’ language of the MFN clause in the Italy–Argentina BIT extended to dispute settlement provisions.

### VI MOST FAVOURED NATION CLAUSES IN BILATERAL INVESTMENT TREATIES AND BIFURCATION APPLICATIONS

The tribunal in *Garanti v. Turkmenistan* summed up very nicely the position of tribunals’ consideration of whether the MFN clause of a BIT may be used to vary the terms of the investor–state arbitration article of the same BIT when they stated that one was ‘venturing into a fiercely contested no man’s land in international law’, and stated that:

41. By this Tribunal’s count, there is a fairly even split between the number of tribunals that have applied the MFN clause of a BIT to vary its dispute resolution provisions, and the number that have declined to do so. We recognize that decisions of other arbitral tribunals, interpreting other BITs, have no binding authority on this Tribunal. But we have found the analysis in many of these awards helpful in framing the question before us, and indeed both parties have relied on these decisions in making their arguments. And the fact that so many arbitrators with such a collective wealth of experience in international law and investment arbitration have been unable to reach a consensus on the subject certainly counsels caution in approaching it.

### VII CASE EXAMPLE OF UNCITRAL DECISIONS ALLOWING BIFURCATION

Article 21(4) of the 1976 UNCITRAL Arbitration Rules is couched in the following words: ‘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.’

Some parties have taken the view that in effect Article 21(4) of the 1976 UNCITRAL Rules creates ‘a presumption in favour of bifurcating jurisdictional questions that should be declined only if, in the circumstances of the particular case, the Tribunal determines that it would be inefficient or would cause prejudice to a disputing party’. The tribunal in *Resolute Forest Products Inc v. Government of Canada* PCA Case No. 2016-13

---

21 *Gas Natural SDG SA v. The Argentine Republic* (ICSID Case No. ARB/03/10) Decision of the Tribunal on Preliminary Questions on Jurisdiction at [30]–[31].
22 *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. The Argentine Republic* (ICSID Case No. ARB/03/19) at [54]–[55].
Forest v. Canada agreed that the language of Article 21(4) of the 1976 UNCITRAL Rules did create a presumption in favour of bifurcation, subject to the tribunal exercising discretion to deal with jurisdictional pleas together with the merits in appropriate circumstances. However, the tribunal cautioned that while in some cases bifurcation can serve purposes of fairness, efficiency and economy, ‘bifurcation is not appropriate in every case.’

The tribunal in this case went on to apply the three-part test applied in Philip Morris v. Australia, which posed the following questions:

a. Is the jurisdictional objection prima facie serious and substantial?
b. Can the objection be examined without prejudging or entering the merits?
c. Could the objection, if successful, dispose of all or an essential part of the claims raised?

It is important to note that the determination of the first part of the test, namely whether an objection is ‘prima facie serious and substantial’ does not entail a preview of the actual jurisdictional arguments themselves. The usual test at this initial first stage is for a tribunal to only satisfy itself that the objections to bifurcation are not frivolous or vexatious. It is important to note that such initial assessments should not in any way be interpreted to prejudice how any tribunal will eventually resolve the substantive dispute surrounding the preliminary objections themselves, or any issues on the merits.

VIII BIFURCATING QUANTUM FROM MERITS LIABILITY

It is not uncommon, especially in complex cases, for arbitral tribunals to bifurcate the proceedings, and afford the parties an opportunity to express their views on damages issues after the tribunal has rendered its ruling on liability. Parties need to make it clear to a tribunal why there should be a need to bifurcate quantum from merits. They need to carefully explain why proposed methodologies may not be practical so that a tribunal can subject its analysis to the careful scrutiny of the positions taken by parties and their experts. As an example, in the case of Apotex Holdings Inc and Apotex Inc v. United States of America, the United States took the position that it would be prejudicial for it to be expected to ‘file an expert report on valuation and brief quantum issues a mere nine weeks after receiving Apotex’s “supplemental” damages report and evidence. The United States should not be penalized for Apotex’s own failure to submit a complete damages claim and complete evidence.’

The United States then concluded by submitting at paragraph 51 of its submissions that:

(1976 UNCITRAL Rules).

25 See, three-pronged test laid down in Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure (14 April 2014) and Bifurcation Hearing Transcript 7:18-23.
27 Apotex Holdings Inc and Apotex Inc v. United States of America (2013 ICSID Case No. ARB(AF)/12/1).
28 Apotex Holdings v. United States of America (2013 ICSID Case No. ARB(AF)/12/1). Reply of Respondent United States of America on Bifurcation at [3].
It is the Claimants that bear the burden of proving that their claims fall within the Tribunal's jurisdiction. The United States simply asks for a decision on its legitimate, good-faith objections to jurisdiction before it is required to incur the substantial expense of further pleading the merits of claims that, in its view, clearly fall outside the Tribunal's jurisdiction.

In its Procedural Order Deciding Bifurcation and Non-Bifurcation decided 10 days after the submissions of the United States, the tribunal decided (at Paragraph 14) to dismiss the respondent's application for bifurcation and fixed jurisdictional and liability issues to be heard together. However, it did bifurcate issues as to damages.29

Similarly, while the tribunal in Burumi v. Albania30 did not allow a bifurcation of jurisdiction from merits, it allowed bifurcation of quantum from merits. The tribunal believed that issues on jurisdiction were tied to merits and refused the respondent's application to bifurcate on that basis:

[13.2] Regarding the Respondent's request for bifurcation, the Tribunal believes that substantial questions on jurisdiction were raised, but that they are inextricably tied to issues of the merits (liability) and are best appreciated in that context. Therefore, after deliberation among its Members, the Tribunal has decided to join the issue of jurisdiction to that of the merits (liability). However, given the significance of the jurisdictional questions, the Tribunal will defer consideration of damages until after it has reached a decision (or award) on jurisdiction and merits.31

There continues to be great division among arbitrators and practitioners alike as to how they deal with the issue of bifurcation of quantum from merits, it cannot be in dispute that tribunals have to consider and make a decision on recurring themes whenever they are faced with an application to bifurcate the quantum stage from the merits stage. These perennial factors include the following issues that have to be considered carefully:

a) Is the request to bifurcate a real issue or is it a frivolous application?
b) In the event that the tribunal agrees to bifurcation, would this assist and lead to a significant reduction of the proceedings?
c) Will there be any significant overlap in the evidence?
d) Are there any causation issues that require the matter to be considered in its entirety?
e) Are the main issues that are to be decided intertwined matters or can they be dealt with separately and discretely?
f) Would it be convenient, practical, efficient and cost effective to bifurcate the quantum stage from the merits stage?
g) Are there any issues of natural justice and due process that require the consideration of both merits and quantum together or does the balance favour bifurcation?

IX COSTS CONSIDERATIONS

One of the important strategic considerations for parties who are embroiled in international arbitration is whether or not a decision to bifurcate will significantly increase or decrease the

29 Apotex Holdings v. United States of America (2013 ICSID Case No. ARB(AF)/12/1). Procedural Order Deciding Bifurcation and Non-Bifurcation at [14].
31 A similar decision was reached in Austrian Airlines AG v. Slovak Republic (2009 UNCITRAL).
overall costs of the proceedings. It forms part of the responsibility of counsel and tribunals to carefully consider the issue of time and cost in international arbitration. As is often submitted by parties resisting bifurcation, jurisdictional phases themselves may take years and cost a lot of money and time. However, it is also important to maintain a watchful balance that, while offering some degree of protection against frivolous claims, there should not be an abuse of ICSID’s additional jurisdictional requirements that could be used by some to gain a strategic advantage in wearing down a proper claim.

There has been much new literature on the subject of costs in international arbitration. Article 39 of the ICC’s Techniques for Controlling Time and Costs in Arbitration provides that ‘The arbitral tribunal should consider, or the parties could agree on, bifurcating the proceedings or rendering a partial award when doing so may genuinely be expected to result in a more efficient resolution of the case.’

The costs decision made by the ICSID tribunal in *Iberdrola v. Guatemala* provides a practical example of the way in which tribunals deal with the issue of costs in bifurcated proceedings. It decided as follows:

> [516] For purposes of determining the costs of the proceeding and their distribution between the Parties, the Tribunal has considered the following factors:
> a. The objection to jurisdiction filed by the Respondent against the main claims of the Claimant was successful;
> b. The Claimant insisted that the proceeding should not be bifurcated, thus opposing the Tribunal resolving the objection to jurisdiction of the Respondent at a preliminary stage;
> c. The only substantive claim that the Tribunal could find was dismissed;
> d. The Claimant reformulated the petition submitted in the Memorial in the Reply and in its Post-Hearing Brief;
> e. Neither of the Parties objected to the amount of the costs claimed by the other Party and the Tribunal considers that those costs are reasonable.

There is also a division of views as to whether or not tribunals should award costs against unsuccessful claimants where the state as respondent has prevailed in its jurisdictional challenges. This divided view has been set out by the authors of *Costs in International Arbitration*.

> It may be noted that costs-shifting in investment cases generates differences not only between tribunals, but between members of a tribunal. In *EDF (Services) Limited v. Romania* the tribunal unanimously dismissed the claimant’s case but agreed that there were complex legal issues and that both parties had acted in good faith. A majority considered that the respondent should have its reasonable costs, quantified at US$6 million. One arbitrator dissented, holding to what he contended was the correct starting point: ‘Each side bearing its own costs has been an ICSID tradition’. The majority did not accept that this was the correct starting point: ‘the investment arbitration tradition of dividing the costs evenly may be changing, although it is a bit early to know whether a different approach is evolving’. In the instant case, and generally, the Tribunal’s preferred approach to costs is

---

33 *Iberdrola Energía SA v. Republic of Guatemala* (ICSID Case No. ARB/09/5).
34 Colin Ong and Michael O’Reilly, *Costs in International Arbitration* (LexisNexis, 2013), page 212.
As a result of an investigation into a sample of 30 awards decided in the three-year period 2010–2012, the authors discovered that ‘any tradition that central costs should be borne by the parties in equal shares and that parties should bear their own party costs no longer reflects majority practice. There appears to be a continuing trend towards costs being awarded to reflect outcome and other relevant factors. In 12 of the cases (40%) at least some party costs were awarded to the prevailing party.’

The conclusion that one can arrive at is that, with tribunals now adopting the ‘loser pays’ approach, the stakes have increased significantly for claimants in ICSID and investment treaty arbitrations. Long gone are the days where claimants could expect to bring a frivolous case and then just walk away without the need to pay costs if its claim was dismissed in a jurisdictional challenge. This, therefore, means that parties and their advising counsel have to be very careful in ensuring that any claims that are to be made should have substance and cannot be a claim that does not have much hope for success if challenged on a bifurcation application. However, tribunals should also be very wary of any untoward attempts by states to stifle genuine claims brought by claimants. The balancing exercise is therefore going to be extremely delicate and important.

X PRACTICAL ISSUES THAT PARTIES AND THEIR COUNSEL SHOULD BEAR IN MIND

As a matter of practice, it would be useful for a party seeking bifurcation to make its formal application at the earliest possible opportunity; to request that the tribunal does afford the parties a separate opportunity to express their views on damage issues, but only after the tribunal has decided liability based on the merits of the case. An applying party will need to show that the bifurcation of liability and damages as proposed by the party would provide an efficient procedure for obtaining the parties’ views on damages based on the tribunal’s specific liability findings, including its findings regarding the date on which damages should be assessed and the heads of damages, if any, to be awarded to claimants.

An applicant should in its application explain the grounds on which it relies upon to request that the tribunal bifurcate its consideration of liability and damage issues before such time as the tribunal is to fix the schedule for the filing of memorials and evidence on the merits. The opposing party will no doubt to ask the tribunal to defer its decision on bifurcation until after the first round of merits submissions. In the event that a tribunal does decide to take this course of action, it would be prudent for the applicant to renew its application, when any new facts or procedural issues arise that would present an opportunity.

A tribunal should not attempt to try to fill any evidentiary or technical gaps in any damages methodology by developing its own novel damages methodology that has been made without the participation of the parties and their experts. A sensible bifurcation of liability and damages methodology would provide an efficient procedure that would allow for the smooth collection of the view of the parties, their counsel, and their experts as to issues on liability and damage that have to be settled first. It is crucial for counsel to develop practical strategies to manage costs in international arbitration. In the right cases, this approach can save unnecessary costs of lawyers and expert witnesses. Counsel may wish to advise their clients...
The Bifurcation of Jurisdiction from Merits, and Merits from Damages

on the availability of any expedited procedures. Parties can at the outset in their commercial agreements also negotiate arbitration clauses to have arbitration under institutional rules that provide for expedited arbitrations, or have a fast-track arbitration procedure. In the right situations where investments are small, parties can also consider savings in time and cost by nominating one arbitrator rather than three.

It is important for a claimant’s counsel to make appropriate applications to arbitral tribunals to ensure that the party challenging jurisdiction should lay all its cards on the table in any jurisdictional challenge. In Canfor Corp v. United States (Canfor),35 the respondent objected to the tribunal’s jurisdiction to address the case based on the investor’s notice of arbitration and statement of claim. The respondent requested the tribunal to deal with the objection to jurisdiction as a preliminary matter, before requiring the respondent to file a statement of defence. The tribunal agreed that under the UNCITRAL Arbitration Rules, a tribunal had a discretion to decide when a statement of defence should be filed and to bifurcate proceedings prior to filing of a defence. The tribunal in Canfor ordered the respondent to file its defence limited to its jurisdictional objections, but insisted that the respondent raise all of its jurisdictional or preliminary objections at that early stage rather than reserving the right to raise other jurisdictional objections at a later stage in the proceedings.

As lawyers and expert witnesses who are involved in arbitral proceedings tend to charge their fees on an hourly basis or according to the time they have spent on the proceedings, parties who wish to control costs may strive to reduce the size of their legal teams and have more senior counsel involved who are able to conduct work quickly and efficiently without need for a large team of juniors. In-house legal counsel may also wish to encourage their counsel to bifurcate issues that have little or no document disclosure but interpretation of governing law. They may try to limit the number of rounds of memorials in the proceedings, and limit the number of factual and expert witnesses that will appear in the arbitration.

35 Canfor Corp (Canada) v. United States of America (2004 UNCITRAL) (Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings) (23 January 2004) at paragraphs [38]–[54].
Chapter 7

OBJECTIONS OF MANIFEST LACK OF LEGAL MERIT OF CLAIMS: THE SUCCESS OF 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.

1 Alvin Yeo is a senior counsel and Koh Swee Yen is a partner at WongPartnership LLP. The authors are grateful to their colleague Monica WY Chong 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).

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 . . . dr[e]w 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.
By contrast, the governing rules of most arbitral institutions do not stipulate in express terms the arbitral tribunal’s authority to dismiss claims in an expedited fashion, other than to make a general 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’. Although some commentators have suggested that it is possible for such authority to be read into the general provision, tribunals doubt take different views on this. One would 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.

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, 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
Objections of Manifest Lack of Legal Merit of Claims: The Success of Arbitration Rule 41(5)

party might make, if the request were denied.\textsuperscript{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.\textsuperscript{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:

\textit{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.}\textsuperscript{13}

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.\textsuperscript{14} 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, infra).

\textsuperscript{11} ICSID Discussion Paper-2004 at [10].

\textsuperscript{12} The exercise of the Article 36(3) screening power is confined to cases where the request discloses a manifest lack of jurisdiction, and does not extend to the merits of the dispute or to cases where jurisdiction is merely doubtful but not manifestly lacking. 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.


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\(^{15}\) (in *Trans-Global Petroleum Inc v. Jordan*\(^{16}\) (*Trans-Global*) in February 2008, and *Brandes Investment v. Venezuela*\(^{17}\) (*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]’.\(^{18}\) 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’.\(^{19}\)

It was not until December 2010 that Rule 41(5) came to life.\(^{20}\) Within a span of 10 days, two separate tribunals in *Global Trading Resource Corp and anor v. Ukraine*\(^{21}\) (*Global Trading*) and *RSM Production Corp v. Grenada*\(^{22}\) (*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’),\(^{23}\) while the


\(^{17}\) *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].


\(^{21}\) *Global Trading Resource Corp and Globex International Inc v. Ukraine*, ICSID Case No. ARB/09/11 (Award, 1 December 2010).

\(^{22}\) *RSM Production Corporation and ors v. Grenada*, ICSID Case No. ARB/10/6 (Award, 10 December 2010).

\(^{23}\) *Global Trading* at [57].
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, Rule 41(5) has been invoked (albeit mostly unsuccessfully) a further 20 times (thrice in annulment proceedings), bringing the total number of Rule 41(5) applications filed to date to 24. 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, infra).

**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.

24 *RSM Production* at [9.1].
25 *RSM Production* at [7.3.6].
26 Although, most recently, the PRC in *Ansung Housing Co Ltd v. People’s Republic of China*, ICSID Case No. ARB/14/25 (Award, 9 March 2017) (*Ansung Housing*) (the second-ever ICSID claim to be brought against the PRC, and the first such claim to proceed past the stage of tribunal constitution) succeeded in its Rule 41(5) application (filed on 15 September 2016), on the grounds that the claim was time-barred under Article 9(7) of the 2007 PRC–Korea BIT and thus ‘manifestly without legal merit’ ([*Ansung Housing* at [105]–[122]), and that the MFN clause in Article 3(3) of the 2007 PRC–Korea BIT could not be invoked to sidestep the temporal limitation prescribed in Article 9(7) ([*Ansung Housing* at [136]–[141]). The tribunal issued an oral ruling in the PRC’s favour at the close of the Rule 41(5) hearing (conducted during the First Session in Singapore) on 14 December 2016, declared the proceedings closed on 15 February 2017 (following the submission of costs statements and observations on costs) ([*Ansung Housing* at [4], [24]–[27]), before issuing its Award on 9 March 2017.
27 *Elsamex SA v. Honduras*, ICSID Case No. ARB/09/4 (Decision on Elsamex SA’s Preliminary Objections, 7 January 2014) (*Elsamex*); Ioan Micula and ors v. Romania, ICSID Case No. ARB/05/20 (Decision on the applicable arbitration rules and on the preliminary objections filed by the Respondents on Annulment, 25 June 2014) (*Ioan Micula*) (where the tribunal dismissed the application following Romania’s successful argument that the 2003 ICSID Arbitration Rules (which did not contain Rule 41(5)), rather than the 2006 ICSID Arbitration Rules (containing Rule 41(5)), applied to the annulment proceedings: see the Decision on Annulment (26 February 2016) at [7]-[20]); *Venoklim Holding BV v. Venezuela*, ICSID Case No. ARB/12/22. See Potestà-2017, pages 267–271 for a discussion of the use of Rule 41(5) in annulment proceedings.
28 Based on information obtained from ICSID website https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Manifest-Lack-of-Legal-Merit.aspx (last visited on 19 February 2017) and the recent decision of *Ansung Housing*. Two of these cases were filed under Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules: *Mobile TeleSystems OJSC v. Republic of Uzbekistan*, ICSID Case No. ARB(AF)/12/7 (Decision on the Respondent's Objection pursuant to the ICSID AF Rules, 14 November 2013) (*Mobile TeleSystems*); *Lion Mexico*.
Objections of Manifest Lack of Legal Merit of Claims: The Success of Arbitration Rule 41(5)

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 10.20.5 of CAFTA, and not that under Rule 41(5), that was applicable. That submission was not materially disputed by the claimant and was accepted by the ICSID tribunal as correct.

ii Scope – merits, jurisdiction and procedure

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

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'. . . . [But] [s]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.

---

30 E.g., Article 9.23(4) of the TPP, which permits the raising of preliminary objections on the ground ‘that a claim is manifestly without legal merit’; Articles 28(4) and 28(5) of the 2012 US Model BIT, which provides that ‘a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made’; Articles 10.19(4) and 10.19(5) of the 2003 Chile–US FTA; 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).
31 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.
32 *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).
33 *Pac Rim* at [81].
34 *Pac Rim* at [85].
35 While ‘a party may’ in Rule 41(5) would seem to encompass both the claimant and respondent, the procedure is hardly likely to hold much interest for a claimant (save for the case where a claimant is seeking the dismissal of a respondent’s unmeritorious counterclaim): Potestà-2017, page 254.
37 *Brandes* at [50], [52], [55].
38 See, further, Diop-2010, pages 322–323.
This position accords with the drafting history of Rule 41(5) and discussions at the ICSID Secretariat during the 2006 amendment process, and has been consistently endorsed by subsequent ICSID tribunals confronted with Rule 41(5) applications raising objections based on jurisdiction.

In *RSM Production*, Rule 41(5) was further extended to cover objections premised on ‘equitable considerations and procedural impediments’. 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. . . . the 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.

---

39 Diop-2010, page 322.
40 See *Global Trading* at [30]; *PNG Sustainable Development Program Ltd v. Papua New Guinea*, ICSID Case No. ARB/13/33 (Decision on the Respondent’s Objections under Rule 41(5) of the ICSID Arbitration Rules, 28 October 2015) at [91]; *Emmis International Holdings BV and or v. Hungary*, ICSID Case No. ARB/12/2 (Decision on Respondent’s Objection under ICSID Arbitration Rule 41(5), 11 March 2013) (*Emmis International*) at [64]–[72]; *Lion Mexico* at [71]–[75] (in the context of an application brought pursuant to Rule 45(6) of the ICSID Arbitration (Additional Facility) Rule).
41 Diop-2010, page 324.
42 *RSM Production* at [4.1.1]–[4.1.2].
43 *RSM Production* at [7.3.6]–[7.3.7].
44 Brabandere-2012, pages 30 and 44.
45 Brabandere-2012, page 44.
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 Arbitration Rule 13(1)) within which the tribunal has to hold its first session, and after which the tribunal must decide ‘promptly’.

While 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 PNGSDP took roughly three weeks following oral arguments to issue their decisions, while 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. While the full rigour of the rules in question would be difficult to apply to a decision upholding an objection under Rule 41(5), it must be the case that, if the circumstances were to arise, a Tribunal ought to draw inspiration from the general sense of those rules so far as they can be applied to the situation in hand . . . On that question, the Tribunal has come to the clear view that, in principle, it would not be right to non-suit a claimant under the ICSID system without having allowed the claimant (and therefore the respondent as well) a proper opportunity to be heard, both in writing and orally. That may raise organizational problems,
Objections of Manifest Lack of Legal Merit of Claims: The Success of Arbitration Rule 41(5)

in the face of the requirement that the Tribunal is to rule on the objection ‘at its first session or shortly thereafter’ . . . but the Tribunal was able to resolve them in the present case, given the delays that had been introduced into the proceedings for extraneous reasons, by allowing two rounds of short and focused written argument, complemented by two rounds of well-focused oral argument completed within one single day at the end of the first formal session . . . The cost has been a slight delay (which the parties accepted was reasonable) between the hearing and the rendering of this Award. But the Tribunal views that as both inevitable and still within the spirit of the Rules. 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.

It appears, indeed, 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,\textsuperscript{51} this has been the typical manner in which Rule 41(5) proceedings have been conducted to date.\textsuperscript{52}

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’\textsuperscript{53} of jurisdictional review of claims with a progressively higher

\begin{footnotes}


\item[53] *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).’
\end{footnotes}
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.\textsuperscript{54}

iv  \textbf{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’.\textsuperscript{55} The threshold is very high, and a respondent must establish its Rule 41(5) objection ‘clearly and obviously, with relative ease and dispatch’.\textsuperscript{56} Put another way, it must be shown that the claim is ‘clearly and unequivocally unmeritorious’\textsuperscript{57} and thus ‘untenable in a way that is evident and easily proved’.\textsuperscript{58} This will not be the case where the claimant has ‘a tenable arguable case’ (since Rule 41(5) was intended to capture cases that are ‘clearly and unequivocally unmeritorious’),\textsuperscript{59} nor where the objections throw up novel, difficult or disputed legal issues (since Rule 41(5) was intended ‘only to apply undisputed or genuinely indisputable rules of law to uncontested facts’).\textsuperscript{60}

Unsurprisingly, the high threshold under Rule 41(5) has rarely been crossed; for example, in \textit{Trans-Global}, where it was ‘obvious’\textsuperscript{61} 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]’\textsuperscript{62} (a conclusion that the tribunal was able to reach with ‘little difficulty of interpretation’),\textsuperscript{63} in \textit{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’,\textsuperscript{64} in \textit{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,\textsuperscript{65} and most recently in \textit{Ansung Housing}, where there were ‘multiple and clear pleadings’\textsuperscript{66} by the claimants confirming that they ‘first knew’ that they incurred loss and damages more than three years before the commencement of proceedings (thus offending the three-year limitation period under Article 9(7) of the 2007 PRC–Korea BIT\textsuperscript{67}), and where it was

\textsuperscript{54} Diop-2010, page 319–321.
\textsuperscript{55} \textit{Trans-Global} at [83]; \textit{PNGSDP} at [88]; \textit{Lion Mexico} [62]-[67] (in the content of an application brought pursuant to Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules).
\textsuperscript{56} \textit{Trans-Global} at [88]; \textit{Global Trading} at [35]; \textit{Brandes} at [63]; \textit{PNGSDP} at [88]; \textit{MOL} at [25], [45]; \textit{Ansung Housing} at [70], [142].
\textsuperscript{57} \textit{Lion Mexico} at [66].
\textsuperscript{58} Diop-2010, page 336.
\textsuperscript{59} \textit{PNGSDP} at [88].
\textsuperscript{60} \textit{PNGSDP} at [89]. In \textit{Ansung Housing} (see [32], [71]), the tribunal ‘assume[d] the truth of the facts alleged by Claimant’ for purposes of ruling on the PRC’s Rule 41(5) application.
\textsuperscript{61} \textit{Trans-Global} at [118].
\textsuperscript{62} \textit{Trans-Global} at [95].
\textsuperscript{63} \textit{Trans-Global} at [95].
\textsuperscript{64} \textit{Global Trading} at [56].
\textsuperscript{65} \textit{Emmis International} at [70].
\textsuperscript{66} \textit{Ansung Housing} at [107]–[108].
\textsuperscript{67} Article 9(7) of the 2007 PRC–Korea BIT provided: ‘… an investor may not make a claim pursuant to paragraph 3 of this Article if more than 3 years have elapsed from the date on which the investor first acquired, or should have first acquired, the knowledge that the investor had incurred loss or damage’.
'clear' from a 'plain reading' of the MFN clause in Article 3(3) of the 2007 PRC–Korea BIT that MFN treatment did not extend to the temporal limitation period for investor–state arbitration in Article 9(7).68

More often than not, the threshold is fallen short of. In a relatively recent decision in PNG Sustainable Development Program Ltd v. Papua New Guinea69 (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),70 and the claimant was not a ‘foreign investor’ with a ‘private foreign investment’, because it existed to fulfil the sole public purposes 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 most favoured nation clause (the MFN clause) in Section 37(1) of the IPA71 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’72 facts:73

[T]he interpretation of the IPA and IDCA 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

68 Ansung Housing at [136]–[141].
69 ICSID Case No. ARB/13/33 (Decision on the Respondent’s Objections under Rule 41(5) of the ICSID Arbitration Rules, 28 October 2015).
70 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, in light of which the proceedings were closed (PNG Sustainable Development Program Ltd v. Papua New Guinea, ICSID Case No. ARB/13/33 (Award, 5 May 2015)).
71 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.’
72 PNGSDP at [94].
73 PNGSDP at [95]–[98].

74
Objections of Manifest Lack of Legal Merit of Claims: The Success of Arbitration Rule 41(5)

Further, the Tribunal notes that the IPA and the 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.

. . . [T]he 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:74

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 pagares [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.

. . . [T]he question whether the pagares and hipotecas constitutes 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.

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:75

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.

74 Lion Mexico at [79]-[81].
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.76 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:77

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’.

Indeed, 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,78 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).79 Tribunals would therefore refuse to entertain factual evidence80 or weigh the credibility or plausibility of a disputed factual allegation at the Rule 41(5) stage;81 ‘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.’82

Notwithstanding this, tribunals (e.g., those in Trans-Global and RSM Production) seem prepared to make a ‘plausibility exception’83 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.84

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

78 Antonietti-2007, page 440; Diop-2010, pages 325–326; Lion Mexico at [68]-[70].
79 Trans-Global at [97]; Brandes at [59]; PNGSDP at [90].
80 Schreuer, page 543; Trans-Global at [91].
81 Trans-Global at [105].
82 Brandes at [61].
83 Markert-2011, page 147.
84 Trans-Global at [105]; RSM Production at [6.1.2]; Emmis International at [26].
proceedings and increase costs by invoking without basis an ‘additional procedural layer’,\(^{85}\) have not eventuated. To date, only 24 Rule 41(5) applications have been filed, representing a fraction of ICSID’s caseload.\(^{86}\) The high threshold set and consistent approach to such applications, as well as potential costs consequences for unmeritorious invocations of Rule 41(5)\(^{87}\) has likely served as an important deterrent against trigger-happy behaviour 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. Indeed, the success of Rule 41(5) is evident from the move by the SIAC to include a similar explicit provision in their rules\(^{88}\) and it will be interesting to see whether other arbitral institutions follow suit.

\(^{85}\) Schreuer, page 544.


\(^{87}\) The authors noted in a previous edition of this chapter that, while 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 forwards 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 (the PRC), *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.

Chapter 8

INVESTMENT ARBITRATION
AND PARALLEL PROCEEDINGS

Sae Youn Kim and Taejoon Ahn

I INTRODUCTION

The rapid increase in cross-border transactions in recent decades has naturally given rise to a spike in various types of international disputes involving numerous subjects and parties of different nationalities all over the world. Consequently, when facing such international disputes, the concerned parties are no longer limited to seeking to resolve them via a traditional litigation at a domestic court. Rather, now disputing parties usually have the luxury of choosing one of several options at their disposal. The rise in prominence of international arbitration, both commercial and investment, as well as international organisations such as the WTO, have certainly contributed to this development. Complications arise, however, where the parties have a disagreement over where to take the dispute to begin with.

For instance, in an investment arbitration case under a bilateral investment treaty (BIT), one party might opt to go ahead and initiate a litigation in front of a national court, even though an arbitration case is already in progress. This would be a classic example of a parallel proceeding in international arbitration. In this example, it is entirely possible that the national court hearing the second proceeding might decline to exercise jurisdiction based on the specific wording of the arbitration clause between the parties. That may not always happen, however, and if so, the end result would be that the parties would suddenly be facing parallel proceedings. To further complicate matters, a domestic court is not the only forum with which an arbitral tribunal might find overlapping jurisdiction. Instead, a tribunal could easily find overlapping jurisdiction with another arbitral tribunal or even international courts.

While it always has been and remains quite common to see issues arising from overlapping jurisdiction in domestic settings, in international law this is an emerging and new issue. Nevertheless, it seems obvious that its importance will only increase and, indeed, parallel proceedings are becoming more and more common in practice. Parallel proceedings are naturally problematic as well as burdensome to the concerned parties for a number of reasons. Even besides the fact that they require additional costs and time, the existence of

---

1 Sae Youn Kim is a partner and Taejoon Ahn is counsel at Yulchon LLC.
2 David W Rivkin, 'The Impact of Parallel and Successive Proceedings on the Enforcement of Arbitral Awards' in Julian D M Lew and Bernardo M Cremades Roman (eds), Parallel State and Arbitral Procedures in International Arbitration (International Chamber of Commerce 2005) page 269 (‘supranational institutions, treaty-based tribunals, arbitral institutions and commissions, and ad hoc tribunals’).
4 Rivkin (n 1) page 269.
conflicting awards could cause serious issues at the enforcement stage and encourage forum shopping. For that reason, as we will see, critics and arbitrators have crafted a number of sophisticated—albeit insufficient—mechanisms to deal with them.

In the following, we will delve into some of the basics surrounding parallel proceedings in international arbitration such as the concept, some of the problems they pose and solutions that arbitral tribunals have adopted to address such problems.

II WHAT ARE PARALLEL PROCEEDINGS?

i Definition and types of parallel proceedings

Before delving any further, it would first be necessary to define the term ‘parallel proceedings’. There is no general definition of parallel proceedings, but as a guideline, the International Law Association defines the term ‘concurrent proceedings’ as ‘proceedings pending before a domestic court or another arbitral tribunal, in which the parties and one or more of the issues are the same or substantially the same as the ones before the arbitral tribunal in the Current Arbitration’. This is a noticeably broad definition and to somewhat narrow it down, the proceedings must ‘address the same claims, demand or cause of action between the same parties’. Needless to say, two proceedings are not deemed parallel or concurrent just because the involved parties are identical or they originate from the same transaction. In contrast, the proceedings must be essentially identical but simply filed in front of two separate courts, tribunals, or some other institutions with adjudicative authority.

Parallel proceedings are most common between an arbitral tribunal and a domestic court, as one might expect. However, they can easily take other forms as well. For example, an investor might file a claim under a relevant BIT or in front of a domestic court while simultaneously encouraging the state of its nationality to file a WTO claim against the respondent state. While this example does not technically fit into the definition stated above, since the involved parties are not identical, there is no denying that international court proceedings such as WTO proceedings can also be pursued in parallel with arbitral proceedings. In this context, parallel proceedings can arise between courts and arbitral tribunals, regardless of whether the courts are international or domestic.

As the number of channels that parties may take in resolving international disputes has risen, it is only logical that potential areas where different forums might clash over their respective jurisdiction have increased as well. For the purposes of this paper, however, we...
will briefly touch upon and discuss issues arising from the following two types of parallel proceedings: (1) those between a domestic court and an arbitral tribunal, and (2) those between two different arbitral tribunals.

ii What are some of the causes of parallel proceedings?

One of the causes of parallel proceedings in international arbitration is the doctrine of competence-competence, as it empowers the arbitral tribunal with the authority to decide its own jurisdiction. In that sense, while an arbitral tribunal’s decision on jurisdiction is not final and may be reviewed by domestic courts, the arbitral tribunal nonetheless has priority over other adjudicative bodies on whether or not it has the requisite jurisdiction over a claim. This, in particular, creates room for conflict with local courts, as the scope of the competence-competence rule and the involvement of domestic courts can vary depending on the jurisdiction. Under the competence-competence doctrine, both domestic courts and arbitral tribunals could independently decide to exercise jurisdiction over the same case without being affected by one another in any way. This problem is further exacerbated by the fact that arbitrators are more likely to find jurisdiction than local court judges since they receive monetary compensation for hearing a dispute. Given that tendency, it seems perfectly reasonable that, whereas a judge might decline to exercise jurisdiction over a certain case because of potentially overlapping jurisdictions, an arbitrator might very likely find otherwise.

Specifically for investment arbitrations, another possible cause of parallel proceedings is the inclusion of an umbrella clause in the relevant BIT. Umbrella clauses can be phrased in a number of ways in a BIT, but regardless of the specific wording, they attempt to extend the scope of the BIT beyond disputes under the BIT itself. Thus by utilising an umbrella clause, an investor might initiate an investment arbitration while simultaneously carrying out a contractual claim in a different forum. To put it differently, where applicable, an investor could bring an investment treaty claim against the state as well as a breach of contract claim in front of a domestic court at the same time. Consequently, there would be two proceedings involving the same parties and the same set of facts pending at two different forums. Umbrella clauses are expectedly controversial and the source of much confusion and uncertainty. For their part, ICSID tribunals have rendered inconsistent rulings on the line dividing contract and treaty claims.

13 Forsten (n 8) page 36.
15 Ibid. 218–230.
16 Erk-Kubat (n 4) page 2 (‘competence-competence may, by authorising the arbitral tribunal to decide on its own jurisdiction, lead to jurisdictional conflicts of competence where national courts and arbitral tribunals both declare themselves competent to hear a case’).
18 Yannaca-Small (n 7) page 1032.
Finally, parallel proceedings can be intentionally initiated by the actual parties to the dispute themselves.21 For example, a party might commence a parallel proceeding as a tactical decision to delay the proceedings, or a party might do so as a precautionary measure.22 This is because, depending on the applicable national legislations, ‘there is room for playing with parallel proceedings that can really make a difference on the outcome of the case.’23 In the worst case, parties can take advantage of parallel proceedings to take the fight to a forum more favourable to it or even just to cause annoyance and worsen the burden on the opposing party.24 Whether such behaviour is ethical is an entirely different issue, but at the very least, most would agree that it cannot be encouraged.

III ISSUES WITH PARALLEL PROCEEDINGS

i General issues

Parallel proceedings are the source of a number of complications in international arbitration. For instance, they may cause delays, increase costs, encourage forum shopping, or lead to conflicting results.25 Among these, the biggest concern might very well be the last one.26 On first thought, it is natural that parties would prefer to avoid parallel proceedings since they would be forced to spend additional time and effort over the same dispute and set of facts. Having to litigate the same cause of action twice would undermine some of the notable advantages of international arbitration, such as the speed of the proceedings and relatively lower expenses, after all. Interestingly, another potential issue is that an ongoing domestic proceeding, as court proceedings are generally open and public, could result in the loss of confidentiality, thereby stripping the arbitration of another one of its principal advantages.27

These particular problems are complications that arise from the existence of a parallel proceeding in a different forum. This means that they are unnecessary and should be avoided if possible. As we will see below, however, these issues are at most a procedural inconvenience compared with the grave implications and potential impact of forum shopping and conflicting results.

ii Conflicting results and forum shopping

Conflicting results and forum shopping are undoubtedly two of the most significant drawbacks to parallel proceedings that strike at the heart of both commercial and investment international arbitrations. Starting with the former, for one thing, the mere existence of a conflicting arbitration award can raise questions about its enforceability under the New York Convention.28 This is especially the case since domestic courts and arbitral tribunals may very
well apply different substantive laws.\textsuperscript{29} Even worse, where there are two conflicting decisions, the enforcement of one might result in a violation of the other,\textsuperscript{30} which would put the party seeking enforcement in a difficult position. Most importantly, however, inconsistent rulings might leave the dispute unresolved while simultaneously threatening the stability and legitimacy of the system of the tribunal itself.\textsuperscript{31}

One notable set of proceedings in which this became an issue was the conflicting results between \textit{Lauder v. Czech Republic} and \textit{CME v. Czech Republic}.\textsuperscript{32} A total of four principal proceedings ensued from a series of events, including the above-mentioned two investment arbitrations under the US–Czech Republic BIT and the Netherlands–Czech Republic BIT, respectively. The tribunals in these two investment arbitration cases rendered conflicting decisions,\textsuperscript{33} and needless to say, the reaction to these conflicting awards was largely negative.\textsuperscript{34} For example, some have even gone as far as labelling the outcome of these parallel proceedings a ‘debacle’.\textsuperscript{35}

Furthermore, the fact that different tribunals or courts could render conflicting results creates an incentive for parties to entertain the idea of forum shopping, which is a new phenomenon among international tribunals.\textsuperscript{36} Even though there may be no clear answer as to whether forum shopping in international arbitration is clearly negative,\textsuperscript{37} there can be little doubt that greater stability and predictability would be beneficial for the investment arbitration system in general. Forum shopping hurts the investment arbitration system in that respect, since it is based on the premise that different forums could very well lead to different outcomes regarding the same dispute. There are a number of other reasons why parties might use parallel proceedings for forum shopping among tribunals or courts, much like how they might do so under domestic law. Among other things, they might do so to take advantage of favourable procedural issues, such as interim measures or different discovery rules, or because of practical considerations such as geographical convenience.\textsuperscript{38} In essence, parties seek ‘home advantage’ by engaging in forum shopping.\textsuperscript{39} Ultimately, their intent would be to take their claim to the forum that would be most favourable for their interests.\textsuperscript{40}

\begin{enumerate}
\item Forsten (n 8) page 38.
\item Ibid. page 40.
\item Pauwelyn and Salles (n 2) page 83.
\item \textit{CME v. The Czech Republic}, UNCITRAL Case, Final Award, 14 March 2003; \textit{Ronald S Lauder v. The Czech Republic}, UNCITRAL Case, Final Award, 3 September 2001.
\item For additional details on these cases, see Rivkin (n 1).
\item Pauwelyn and Salles (n 2) page 78.
\item Erk-Kubat (n 4) pages 13–14.
\item Kreindler (n 36) page 138.
\end{enumerate}
Conclusion
Given such adverse effects and negative implications of parallel proceedings, it seems obvious that judges and arbitrators have to be well versed in possible means of dealing with them. Despite the obvious need to develop mechanisms designed to prevent parallel proceedings, as we will see in the subsequent section, they have rather limited measures in terms of effectiveness at their disposal.

Now that we have identified the problems caused by parallel proceedings, logically the next step will be discussing ways for arbitral tribunals to rectify them. The American Law Institute and the European Court of Justice have each attempted to address parallel proceedings,41 but it is apparent that there is no clear-cut answer available at this point. Still, arbitral tribunals can and have sought to resolve issues arising from parallel proceedings by adopting certain legal principles from domestic law and local courts. In the following, we will discuss some of the possible means through which arbitral tribunals could limit or prevent parallel proceedings from taking place or proceeding any further.

IV POSSIBLE SOLUTIONS
i Res judicata and lis pendens
First of all, arbitral tribunals can utilise the principles of _res judicata_ and _lis pendens_, both of which are, of course, borrowed concepts from domestic law principles. Needless to say, _res judicata_ and _lis pendens_ are hardly the only means or legal principles applicable for addressing the matter of parallel proceedings.43 For example, as a general principle of international law, courts and tribunals may decline jurisdiction as a matter of comity.44 Nevertheless, _res judicata_ and _lis pendens_ are effective as ‘preclusion doctrines’ in that they ‘bar either the jurisdiction of a court or the plaintiff’s right to have her substantive claims examined’.45 In other words, where applicable, _res judicata_ and _lis pendens_ would require the court or tribunal in the second proceeding to decline jurisdiction.

Starting first with the principle of _res judicata_, it is applicable where another court or tribunal has already rendered a decision on the dispute, whereas _lis pendens_ is applicable if the dispute is still pending.46 Widely known as ‘claim preclusion’, _res judicata_ blocks a party from seeking to relitigate a claim that has already been resolved in a final and conclusive manner. While not perfectly interchangeable with its domestic law counterpart, _res judicata_ is a principle of international commercial arbitration.47 In the context of international arbitration, _res judicata_ can be applied in a similar manner as in domestic law.

However, the utilisation of _res judicata_ in parallel proceedings is bound to be limited, as it only applies to proceedings where the parties, the object or subject matter, and the cause

---

41 T eitz (n 23) page 4.
42 Rivkin (n 1) pages 292–295.
43 Forsten (n 8) page 43 (‘[o]ther measures include, _inter alia_, anti-suit injunctions, consolidation of proceedings, and the application of the doctrine of _forum non conveniens_’).
44 Rivkin (n 1) page 291.
45 Pauwelyn and Salles (n 2) page 86.
46 Ibid.
of action are identical. More importantly, *res judicata* necessarily presupposes a final and conclusive judgment. Thus it would apply to subsequent proceedings but not to the situation where two or more proceedings are currently in progress. Even if there is a final judgment, it must be binding on the subsequent proceeding. Where a final judgment is deemed to be non-binding, tribunals have merely ‘acknowledged the “persuasiveness” of non-binding awards’. To make matters even more challenging, *res judicata* is only applicable to two proceedings in the same legal system. As such, it follows that *res judicata* cannot be applied to proceedings between different international tribunals. Logically, it cannot be applied to an international tribunal and a domestic court either for the same reason.

As for *lis pendens*, which is the method adopted by signatories to the Brussels I Regulation, in domestic law this particular doctrine bars a court from hearing a case that is ‘already pending before another court in the same legal system’. In an investment arbitration setting, however, there is no indication that *lis pendens* must be limited to proceedings within the same legal system as well. Instead, it could be applied so that ‘the subject matter of the dispute may not be negotiated simultaneously before more than one tribunal.’ Unlike *res judicata, lis pendens* is built to deal with proceedings that are occurring concurrently. Nevertheless, much like the case with *res judicata*, there is an ongoing debate over whether *lis pendens* is a principle of international law.

In addition, *lis pendens* is only applicable under extremely limited circumstances. Since it requires parallel proceedings to be taking place in the same legal system, it would not be applicable to overlapping jurisdictions between a domestic court and an arbitral tribunal.

Given the uncertainty over the role that *res judicata* and *lis pendens* might have in the domain of international law, it becomes clear that they are not fit or sufficient for dealing with the problems accompanying parallel provisions on their own. At most they could be expected to play a supplementary role where applicable.

### ii Consolidation of arbitrations/claims

Another possible solution to parallel proceedings is consolidating the arbitrations/claims, as a domestic court might do. By doing so, parallel proceedings can be consolidated into a single proceeding. In fact, consolidation of claims have been used in commercial arbitrations to deal with parallel proceedings. The International Chamber of Commerce (ICC), for example, prescribes in Article 10 of its Rules of Arbitration that that International Court of Arbitration of the ICC may consolidate two or more arbitrations in instances such as ‘where the claims

---

48 Ibid. page 103.
49 Ibid. page 90.
50 Pauwelyn and Salles (n 2) page 104.
52 Yannaca-Small (n 7) page 1022.
53 Dimsey (n 46) page 87.
54 Pauwelyn and Salles (n 2) page 106.
55 Ibid.
56 Ibid. page 110.
in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.58 For parallel proceedings, the prerequisite that the parties must be the same would be immediately satisfied, but one problem with this approach, at least in the case of the ICC, is that the concerned parallel proceedings must be taking place in the same legal system,59 which seems to be a recurring issue for mechanisms to deal with parallel proceedings. Thus, generally, there are no means for a domestic court to consolidate claims made in an arbitral proceeding, and vice versa.

Moreover, whereas domestic courts generally have broad jurisdiction, arbitral tribunals can only hear a claim upon agreement by the parties. As obvious as it may seem, a court must have the jurisdiction to do so in the first place to consolidate two or more proceedings into one.60 That being the case, since the boundaries of the jurisdiction of an arbitral tribunal are in contrast entirely set by the scope of the consent of the involved parties, the power of the tribunal to consolidate claims is naturally far more limited than that of a domestic court. It follows that consolidating claims between two or more parallel proceedings would be a viable option for arbitral tribunals only in limited circumstances.

### iii Waiver provisions

Perhaps a more effective solution would be preventing parallel proceedings from arising in the first place. There are two simple ways of preventing parallel proceedings from arising at all, one of which is via a waiver provision. In fact, the simplest way of dealing with parallel proceedings might be including a waiver provision as part of a BIT. In order to comply with a waiver provision, the investor would have to submit a written waiver foregoing any other dispute settlement procedure prior to filing an arbitration. That way, the investor is precluded from seeking an alternative dispute settlement procedure for the same claim under the BIT. Indeed, investment treaties can explicitly include provisions requiring claimants to refrain from initiating parallel proceedings, and many recent investment treaties in fact do include such provisions.61 For example, Article 8(6) of the Mexico–Korea BIT provides as follows:

*A disputing investor may submit a claim to arbitration only if he consents to arbitration in accordance with the procedures set out in the Agreement and waives his right to initiate before any administrative*

---

58 International Chamber of Commerce, Rules of Arbitration, Article 10(c); The Korean Commercial Arbitration Board also has a similar provision, Korean Commercial Arbitration Board, International Arbitration Rules, Article 23.

59 Article 10 specifies that the arbitrations must be pending under the ICC Rules of Arbitration, International Chamber of Commerce, Rules of Arbitration Article 10. As only the International Court of Arbitration may administer arbitrations under the ICC Rules of Arbitration as per Article 1, this means that the International Court of Arbitration can consolidate only ICC arbitrations, International Chamber of Commerce, Rules of Arbitration, Article 1.

60 Pauwelyn and Salles (n 2) page 87 (’[b]oth consolidation and joinder presume that the court deciding the case has jurisdiction to do so in respect to all aspects and parties to the dispute’).

tribunal or court under the law of the Contracting Party, or other dispute settlement procedures, and any proceedings with respect to the measure of the disputing Contracting Party that is alleged to be a breach of this Agreement.

A waiver can be explicit or implicit, and by submitting a written waiver the investor relinquishes its right, claim or privilege.62 When there is a waiver clause, by choosing to arbitrate, the investor foregoes its right to take the dispute to another forum. It seeks to directly prevent the negative effects of parallel proceedings, such as the respondent state being forced to litigate multiple proceedings, as well as the risk of double recovery and inconsistent findings of fact and law.63 Any attempt to initiate a parallel proceeding in spite of a valid waiver provision would by definition violate it and lead to the relevant arbitral tribunal declining jurisdiction.

However, there are shortcomings with this approach as well. Most notably, in order to be effective, the waiver provision must be worded carefully and precisely. Thus the drafters of a BIT must exercise caution to increase the likelihood that an arbitral tribunal would find a waiver provision valid. This is more difficult than it may seem because a waiver provision has a formal as well as a material component.64 The formal requirement is that the investor must submit a written waiver that complies with the terms of the treaty.65 As for the material component, however, the investor must refrain from ‘initiating or continuing proceedings in a domestic court’.66 Even if the investor satisfies the formal component, a tribunal will decline to exercise jurisdiction if the second prong is not met. This can be seen in the first proceeding of Waste Management Inc v. United Mexican States and the Partial Award on Jurisdiction in Renco Group v. Peru.67

Starting with Waste Management, the claimant submitted a written waiver as required by Article 1121, but simultaneously pursued two domestic proceedings against a Mexican state bank along with another arbitration against a municipal government.68 Based on these facts, the arbitral tribunal held that as the claimant was not planning to terminate the domestic proceedings, its actions contradicted the intent behind Article 1121.69 For that reason, the arbitral tribunal could not exercise jurisdiction. This was even though the Claimant’s waiver had satisfied the formal requirement.70

Turning to Renco Group v. Peru, which was an ICSID case under the Peru–United States Trade Promotion Agreement (the Treaty), the tribunal had to determine whether it had jurisdiction in light of the claimant’s Notice of Arbitration that was accompanied by a waiver. Article 10.18(2)(b) of the Treaty required an investor to first submit a written waiver prior to initiating a claim under the Treaty before an administrative tribunal, court, or some other

---

63 The Renco Group Inc v. The Republic of Peru, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, paragraph 84.
64 Ibid. paragraph 73.
65 Ibid. paragraph 60.
66 Ibid. paragraph 142.
67 ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, 236–238; Renco (n 62).
69 Waste Management (n 66) 236-238; Renco (n 62).
70 Dodge (n 67) page 63.
dispute settlement body. However, in its waiver the claimant had stated that it reserved the right to bring claims in another forum if the tribunal declined to hear it on jurisdictional and admissibility ground.71 In the partial award decision on jurisdiction, a split tribunal held that the reservation of rights was in breach of Article 10.18(2)(b) of the Treaty.72

As a second line of defence, the claimant in this case argued that it would still be able to ‘cure’ the defective waiver. The tribunal disagreed, however, by holding that ‘[c]ompliance with both elements is a precondition to Peru’s consent to arbitrate and to the existence of a valid arbitration agreement.’73 Since there was no arbitration agreement in the first place, the tribunal could not exercise jurisdiction to hear the claim.

Therefore, it is evident that a waiver provision does not invariably prevent parallel proceedings from arising. As discussed above, there are several hurdles one party must overcome in order to prevent parallel proceedings through the use of a waiver provision.

iv Fork-in-the-road clauses

A similar but perhaps more effective recourse for dealing with parallel proceedings is by inserting a fork-in-the-road clause in BITs or commercial contracts. Generally, a fork-in-the-road clause requires the investor to ‘choose between the litigation of its claims in the host State’s domestic courts or international arbitration and that, once made, the choice is final’.74 That is, once an investor has made its choice, it is irrevocable.75 The choice does not necessarily only have to be between two options, as a fork-in-the-road clause may offer the investor several different options instead.76 Although they may seem eerily similar at first thought, a fork-in-the-road clause can be distinguished from a waiver provision in that the latter requires the investor to refrain from turning to a domestic court prior to filing an arbitration by submitting a written waiver, whereas the former allows the investor to choose between a domestic proceeding and an investment arbitration.77

To reiterate, the difference is that a waiver requirement in a BIT, on one hand, forces the investor to choose arbitration as the only dispute settlement procedure. A fork-in-the-road clause, on the other hand, allows the investor to choose arbitration among two or more options. In that sense, it offers greater freedom and flexibility to the investor. Some have also suggested that a waiver provision, unlike a fork in the road clause, encourages the investor to consider the option of utilising domestic remedies before filing an arbitration claim.78 Ideally, however, the end result would be identical in that either method would lead to the preclusion of parallel proceedings. Moreover, regarding the investor’s choice between a domestic court or international arbitration, the tribunal in *OEPC v. Republic of Ecuador*,79 which was an investment arbitration under the US–Ecuador BIT, has held that the choice must have been

71 Renco (n 62) paragraph 58.
72 Ibid. paragraph 119.
73 Ibid. paragraph 135.
74 Schreuer (n 18) page 239.
76 Kreindler (n 36) page 148.
77 Rivkin (n 1) page 286.
79 *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, 1 July 2004.
free and not under any duress.\textsuperscript{80} Another caveat to this approach is that the tribunal must still determine whether the claimant’s appearance in front of a domestic court suffices as its choice under the fork-in-the-road clause.\textsuperscript{81}

Overall, a tribunal relies on the following three-prong test to determine whether an investor has exercised its right under the fork in the road clause: (1) whether the domestic proceeding was instituted before the arbitration was chosen; (2) whether the dispute between the parties is identical in both proceedings; and (3) whether the parties are also identical.\textsuperscript{82} Despite this general framework, ultimately a tribunal evaluates each fork-in-the-road clause on a case-by-case basis.\textsuperscript{83} As a result, there is no consistent jurisprudence on how to interpret a fork-in-the-road clause.

Therefore, much like the situation with waiver provisions, the mere inclusion of a fork-in-the-road clause does not automatically give effect to it. Rather, the parties must exercise in drafting it and also in their attempts to utilise it.

\textbf{v Conclusion}

As a whole, the analysis above proves that each of the techniques currently available has its own drawbacks and, if invoked alone, is not sufficient to address the problems caused by parallel proceedings. Instead, arbitral tribunals must have regard to some or a combination of these options where applicable. What is more, with regard to waiver or fork-in-the-road clauses in BITs, parties should elaborate on drafting treaty language and structure to preclude parallel proceedings, which is expected to result in predictability for parties and clarity for arbitral tribunals.

\textbf{V CONCLUSION}

Cross-border transactions and investments have become an essential and inevitable component of today’s world economy. For example, the number of arbitration cases administered by the world’s major commercial arbitration institutions continues to increase each year.\textsuperscript{84} At the same time, investment arbitrations are becoming more and more common as well.\textsuperscript{85} Invariably, this means that the potential room for conflict resulting from parallel proceedings in the realm of international arbitration is growing too. Therefore, any actor in the world of international arbitration – both commercial and investment – must keep an eye out on the issue of parallel proceedings. While there are a number ways to alleviate some of the problems arising from parallel proceedings, as discussed above, there are still inherent limitations and

\begin{itemize}
\item \textsuperscript{80} Rivkin (n 1) page 289.
\item \textsuperscript{81} Schreuer (n 18) page 241.
\item \textsuperscript{82} Ibid. page 248.
\item \textsuperscript{83} Rivkin (n 1) page 288.
\item \textsuperscript{85} ‘Record Number of Investor-State Arbitrations Filed in 2015’ (UNCTAD Division on Investment and Enterprise, 2 February 2016); see: http://investmentpolicyhub.unctad.org/News/Hub/Home/458; accessed 14 February 2017.
\end{itemize}
glaring weaknesses with each of those methods. Furthermore, despite the danger they pose, discussions regarding parallel proceedings in international arbitration are somewhat scarce and inadequate.

Ultimately, given the magnitude of the problems they pose and the lack of clear solutions or in-depth discussions, there can be little doubt that the issue of parallel proceedings warrants greater attention by the international arbitration community in the future. Left alone, parallel proceedings can eventually lead to ‘fragmentation and unpredictability’.86 After all, by increasing the burden on the parties and frustrating their attempts to enforce arbitral awards, parallel proceedings are bound to have a negative impact on the role of international arbitration as a dispute settlement mechanism. While our recommendation is that careful drafting of waivers and fork-in-the-road clauses are relatively superior to the other solutions, in order to appropriately remedy such problems caused by parallel proceedings, a consistent jurisprudence will be necessary.87 To achieve this objective, as a start, arbitral tribunals will have to accept the gravity of the issues originating from parallel proceedings.

---

86 Erk-Kubat (n 4) page 1.
87 Teitz (n 23) page 70.
Interim measures can be of immense importance to parties involved in investment arbitration proceedings. The time between the commencement of investment arbitration and the rendering of the final award can span a few years, and events occurring during this time could threaten the conduct of the proceedings and render the final award hollow. Interim measures may prove critical to preserving a party’s rights pending the final award. Securing interim measures in investment arbitration presents several particularities that arbitration practitioners have to familiarise themselves with.

Four key aspects of interim measures, which will be considered below, are: (1) jurisdiction to order such measures; (2) preconditions to their granting; (3) types of measures available; and (4) their effectiveness.

All the major institutional rules provide for the granting of interim relief. The rules surveyed here include rules commonly used in investment arbitration – ICSID, ICSID Additional Facility (ICSID AF), UNCITRAL (both 1976 and 2010) and SCC – as well as the ICC Arbitration Rules and the recently released SIAC Investment Rules.

I JURISDICTION TO ORDER INTERIM MEASURES

All of the UNCITRAL 1976, UNCITRAL 2010, ICC, SCC rules and the SIAC Investment Rules expressly condition the grant of interim relief on there being a request made by a party. Exceptionally, the ICSID and ICSID AF Rules allow a tribunal to recommend interim measures of its own initiative. The ICSID AF Rules additionally specify that the tribunal may recommend measures other than those requested.

---

1 Benoit Le Bars is managing partner and Athina Fouchard Papaefstratiou is counsel at Lazareff Le Bars.
2 ICSID Rule 39(1); ICSID AF Rules, Article 46(1); 1976 UNCITRAL Rules, Article 26(1); 2010 UNCITRAL Rules, Article 26(1); SCC Rules, Article 37(1); ICC Rules, Article 28(1); SIAC Investment Rules, Article 27.1.
3 1976 UNCITRAL Rules, Article 26(1).
4 2010 UNCITRAL Rules, Article 26(1).
5 Article 28(1).
6 Article 37(1).
7 SIAC Investment Rules, Article 27.1.
8 ICSID Convention, Article 47 and ICSID Rule 39(3); ICSID AF Rules, Article 46(2).
9 ICSID AF Rules, Article 46(2). See also Christoph H Schreuer, The ICSID Convention: A Commentary (Cambridge University Press, 2nd Ed, 2009), page 763 for examples of cases in which ICSID tribunals departed from the requests in recommending provisional measures.
All sets of rules examined also provide that parties may apply to national courts for interim relief. However, the ICSID Rules additionally require that the parties must consent to recourse to national courts in order to be able to do so. This requirement of party consent was introduced in the 1984 amendments to the ICSID Rules to engineer compatibility between the interim measures regime and the exclusive jurisdiction that an ICSID tribunal enjoys over a dispute submitted to ICSID arbitration.

More generally, the parties’ freedom to have recourse to domestic interim relief after the arbitration tribunal is constituted is often limited. The ICC Rules stipulate that this may only be done in ‘appropriate circumstances’, while the as yet untested SIAC Investment Rules require ‘exceptional circumstances’. Such circumstances would exist when the tribunal is not in a position to provide effective relief, for example, against third parties over which the tribunal has no jurisdiction.

Of all the arbitration rules examined, only the ICSID and ICSID AF Rules expressly require that the tribunal give each party an opportunity to be heard. The remaining rules surveyed are silent on the issue. However, ex parte relief is probably not available in investment arbitration as this could amount to a fundamental breach of procedural fairness (the requirement of audi alteram partem), leaving the award vulnerable to being set aside.

A different issue is whether tribunals have the power to issue orders maintaining the status quo pending a response from the party against whom the request for interim measures is submitted. The UNCITRAL Model Law expressly provides for such a possibility, which is not uncommon in investment arbitration practice, irrespective of the set of arbitration rules applicable. In the Von Pezold v. Zimbabwe case, the state ordered the claimants to allow an inspection of share registers of all companies linked to the ICSID proceedings, which was to take place two days later, and threatened criminal prosecution if the claimants refused to comply. Immediately upon receiving the state’s letter, the claimants filed a request for an order preventing such research. The president of the tribunal ordered, one day later and without inviting the state’s comments, the requested relief, highlighting that he would ‘confer with [the other arbitrators] as soon as possible regarding the final determination of the Application, including the need, if any, for reconsideration of these instructions’.

Another difference between the various sets of rules is the availability of emergency relief, or relief before the tribunal is constituted. Given the time-sensitive circumstances

---

10 ICSID Rule 39(6); ICSID AF Rules, Article 46(4); 1976 UNCITRAL Rules, Article 26(3); 2010 UNCITRAL Rules, Article 26(9); ICC Rules, Article 28(2); SCC Rules, Article 37(5); SIAC Investment Rules, Article 27.2.
11 ICSID Rule 39(6).
13 ICSID Convention, Article 26.
14 ICC Rules, Article 28(2); SIAC Investment Rules, Article 27.2.
16 UNCITRAL Model Law, Article 17B(2).
18 Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Directions Concerning Claimants’ Application for Provisional Measures, 12 June 2012.
19 Ibid., paragraph 2.
under which most interim relief is commonly requested, parties may require relief prior to
the relatively lengthy process of constituting the tribunal. Only the ICC, SCC and SIAC
Investment Rules allow for emergency relief.

As a matter of fact, there is some uncertainty as to whether emergency relief is available
in treaty-based investment arbitration conducted under the ICC Rules. While the SIAC
Investment Rules require the parties’ express consent before the emergency provisions
apply,\textsuperscript{20} and the SCC rules do not impose any separate requirement of party consent, the
ICC emergency arbitrator provisions require both parties to be signatories to the arbitration
agreement.\textsuperscript{21} Certain commentators consider that this excludes treaty-based investment
arbitration;\textsuperscript{22} given that the state’s offer to arbitrate is contained in the treaty and is accepted
by the investor’s request for arbitration, there is no orthodox arbitration agreement. The issue
has not yet arisen in practice.

Under the SCC and SIAC Investment Rules (but not the ICC Rules), emergency
orders granted cease to be binding if the dispute is not referred to a tribunal within 90 days
of their granting. This safeguards against abuse of the emergency process by a party that has
no intention of commencing arbitral proceedings.

Only the SCC provisions on emergency proceedings have been tested in investment
arbitration, with emergency relief granted in three reported cases.\textsuperscript{23} Two questions of note
were answered by the emergency arbitrators in these proceedings: (1) emergency relief could
be granted even if the investment treaty had been concluded before the introduction of the
SCC emergency provisions;\textsuperscript{24} and (2) emergency relief could be granted notwithstanding the
requirement of a cooling-off period in an investment treaty.\textsuperscript{25}

II PRECONDITIONS FOR THE GRANTING OF INTERIM MEASURES

The preconditions for the granting of interim measures are generally not expressly set out in
the applicable arbitration rules. Indeed, the ICC and SCC Rules contain no further indication
than requiring that the arbitral tribunal grant only the measures it ‘deems appropriate’.\textsuperscript{26}
For its part, Article 47 of the ICSID Convention merely states that ‘the Tribunal may, if it
considers that the circumstances so require, recommend any provisional measures which

\textsuperscript{20} SIAC Investment Rules, Article 27.4.
\textsuperscript{21} ICC Rules, Article 29(5).
\textsuperscript{22} Chiara Giorgetti ed, Litigating International Investment Disputes: A Practitioner’s Guide (Koninklijke Brill,
2014), pages 203–205.
\textsuperscript{23} Koh Swee Yen, ‘The Use of Emergency Arbitrators in Investment Treaty Arbitration’ (2016) 31(3) ICSID
Rev 534, page 536; according to the latest available official statistics, 14 emergency proceedings have been
commenced under the SCC Rules. See Arbitration Institute of the Stockholm Chamber of Commerce,
\textsuperscript{24} Griffin Group v. Poland, see Koh Swee Yen, ‘The Use of Emergency Arbitrators in Investment Treaty
Emerge About Use of Emergency Arbitrators in Investment Treaty Cases’, IA Reporter (8 October 2015);
\textsuperscript{25} TSIKinvest LLC v. The Republic of Moldova, SCC Emergency Arbitration No. EA(2014/053), Emergency
Decision on Interim Measures, 29 April 2014, paragraph 66.
\textsuperscript{26} ICC Rules, Article 28; SCC Rules, Article 37.
should be taken to preserve the respective rights of either party,' and Article 39 of the ICSID Rules does not provide more details on the requirements that a request for interim measures must meet: 'the request shall specify the rights to be preserved, the measures the recommendation of which is requested and the circumstances that require such measures.'

Only the UNCITRAL Rules 2010 expressly set out the preconditions for the granting of interim measures, namely (1) the threat of a 'harm not adequately reparable by an award of damages' (necessity), (2) that 'substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted' (proportionality), and (3) a 'reasonable possibility that the requesting party will succeed on the merits of the claim' (prima facie claim on the merits). These preconditions are also included in Article 17 of the UNCITRAL Model Law.

Commentators and investment arbitration jurisprudence refer to most (or all) of the following criteria for the granting of interim measures:

- **Prima facie jurisdiction**
- A prima facie claim on the merits;
- Necessity;
- Urgency; and
- Proportionality.

Even though none of the rules examined provide for this precondition, tribunals often assess their prima facie jurisdiction before granting interim measures. The assessment is prima facie only, as requests for interim measures must be dealt with as a matter of priority. Arbitrators are required to simply satisfy themselves that they do not manifestly lack jurisdiction over

---

27 ICSID Convention, Article 47.
28 ICSID Rule 39(1).
29 2010 UNCITRAL Rules, Article 26.3.
30 UNCITRAL Model Law, Article 17.

the underlying claim.\textsuperscript{33} ICSID tribunals can rely on the Secretary General’s registration of a request for arbitration as a token of such \textit{prima facie} jurisdiction, as he or she would not do so where the dispute falls manifestly outside ICSID jurisdiction.\textsuperscript{34}

Accordingly, the granting of interim measures does not prejudice the tribunal’s ultimate jurisdiction over the dispute, or preclude a jurisdictional challenge.

\textbf{ii} \textbf{Prima facie claim on the merits}

Only the UNCITRAL Rules 2010 specifically require this precondition. However, it has also been applied in arbitrations under other sets of rules.\textsuperscript{35} It is not a stringent requirement, and the tribunal here needs only to assess a \textit{prima facie} review of the merits\textsuperscript{36} to satisfy itself that the claims made are ‘not, on their face, frivolously or obviously outside the competence of the [t]ribunal’.\textsuperscript{37} We are not aware of any case in which the tribunal refused to award interim measures based on a lack of a \textit{prima facie} claim on the merits.

\textbf{iii} \textbf{Necessity}

One of the main criteria that arbitrators have to assess before ordering interim measures is whether these measures are necessary to preserve the rights of one of the parties to the arbitration.\textsuperscript{38}

Two standards on the requisite level of necessity have emerged in international arbitration practice. The higher standard is inspired by the International Court of Justice, which in \textit{LaGrand} interpreted necessity as the prospect of irreparable harm.\textsuperscript{39} This standard was applied by the ICSID tribunal in \textit{Occidental v. Ecuador}, which considered that a provisional measure is necessary where the actions of a party are ‘capable of causing or of threatening irreparable prejudice to the rights invoked’.\textsuperscript{40} The claimant in \textit{Occidental v. Ecuador} requested provisional measures to compel Ecuador to fund and preserve a particular oil field. The tribunal refused to grant the requested provisional measures on the grounds that the relief sought was merely aimed at reducing the amount of damages incurred by the claimant. Since the alleged harm


\textsuperscript{38} As formulated in ICSID Rule 39.

\textsuperscript{39} \textit{La Grand (Germany v. United States of America)}, Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, paragraph 23.

\textsuperscript{40} \textit{Occidental Petroleum Corporation v. the Republic of Ecuador}, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, paragraph 59. See also \textit{Tokios Tokelés v. Ukraine}, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, paragraph 8.
was compensable by monetary damages, provisional measures could not be granted. The tribunal in *Quiborax v. Bolivia* acknowledged the ICJ jurisprudence, and, by referring to Article 17A of the UNCITRAL Model Law (reproduced in the UNCITRAL Rules 2010), explained that irreparable harm is harm that cannot be repaid by the award of damages. This view was shared by the ICSID tribunal in *Plama v. Bulgaria*. The dispute involved the decision by a Bulgarian district court that had ordered that the company constituting the claimant’s investment in Bulgaria be declared bankrupt, and that its assets be sold and distributed to its creditors. The tribunal refused to order the discontinuance of the insolvency proceedings, as it considered that, regardless of the outcome of the Bulgarian proceedings, the claimant’s right to pursue its claim for damages in the ICSID arbitration and the tribunal’s ability to decide this claim remained unaffected.44

The lower standard requires merely that the applying party risk suffering significant harm should the provisional measures not be granted. In *Perenco v. Ecuador*, the tribunal considered that ‘where action by one party may cause loss to the other which may not be capable of being made good by an eventual award of damages, the test in [Article 47 of the ICSID Convention] is likely to be met. But the Article does not lay down a test of irreparable loss and the authorities do not warrant so narrow a construction.’45 The tribunal ordered that Ecuador refrain from collecting on certain taxes, because this would expose the claimant to imminent seizure of its assets in Ecuador and bring the claimant’s business in the country to an end.46

In *City Oriente v. Ecuador*, the tribunal noted that ‘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 exceeds greatly the damage caused to the party affected thereby.’47 Therefore, the *City Oriente* tribunal replaced the requirement of irreparable harm with a proportionality element.

It is worth noting that the ICJ’s test in *LaGrand* was birthed in extreme circumstances, in which provisional measures were sought to stay the execution of a German national by the United States.48 It is difficult to think of a more acute situation of irreparable harm. Such situations are unlikely in investment arbitration, and it is questionable whether this high threshold is adequate in that specific field.49

41 *Occidental Petroleum Corporation v. the Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, paragraphs 26, 59 and 98.
42 Article 26(3)(a).
43 *Quiborax SA and others v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraph 156.
44 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, paragraphs 3(b) and 46.
45 *Perenco v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, paragraph 43.
46 Ibid., paragraphs 43, 46 and 79.
47 *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petroleos Del Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters, 13 May 2008, paragraph 72.
iv  Urgency

Although not expressly required by the arbitration rules surveyed, urgency has been referred to as ‘the most important (even a sine qua non) consideration for the granting of interim measures’,\(^ {50}\) as provisional measures ‘will only be appropriate where a question cannot await the outcome of the award on the merits’.\(^ {51}\) Thus, tribunals have regularly considered urgency as a requirement for the granting of interim measures.\(^ {52}\)

In practice, urgency appears to be the assessment of necessity in the prevailing circumstances.\(^ {53}\) This was well articulated by the tribunal in *Perenco v. Ecuador*: ‘[p]rovisional measures may only be granted where they are urgent, because they cannot be necessary if, for the time being, there is no demonstrable need for them’.\(^ {54}\)

The degree of urgency required before provisional measures should be granted depends on the circumstances and nature of the measures sought.\(^ {55}\) Typically, urgency is related to the prospect of potential harm being caused to the applying party before the final award is rendered by the tribunal.\(^ {56}\) In any event, the applying party is obliged to demonstrate that the threat to its interests is imminent and likely to occur. Mere possibility or hypothetical harm are insufficient grounds for such measures.\(^ {57}\)

v  Proportionality

It is generally admitted that ‘the risk of harm must be assessed with respect to the rights of either party’.\(^ {58}\) Most of the institutional arbitration rules are silent on this requirement, except for Article 26 of the UNCITRAL Rules 2010, which expressly requires that the harm the applicant is likely to suffer ‘substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted’.\(^ {59}\)


\(^{54}\) *Perenco v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, paragraph 43.

\(^{55}\) *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, paragraph 76.

\(^{56}\) *Azurix Corp v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Provisional Measures, 6 August 2003, paragraph 33.

\(^{57}\) *Occidental Petroleum Corp and Occidental Exploration & Production Co v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, paragraph 89.


\(^{59}\) 2010 UNCITRAL Rules, Article 26.3(a).
This is akin to the common law doctrine of the ‘balance of convenience’, whereby a tribunal must compare the harm that would result to either party if it turned out at the stage of the final award that provisional measures were wrongly granted or withheld. Tribunals may consider proportionality either as a standalone requirement or, more commonly, as part of the requirement of necessity.

Tribunals pay heightened attention to the requirement of proportionality when potential impingement on the sovereign powers of a state is at stake. This is particularly obvious in cases involving applications for the stay of domestic criminal proceedings to protect the arbitral process. As the tribunal in Hydro S.r.l v. Albania considered, ‘criminal law and procedure are a most obvious and undisputed part of a State’s sovereignty’ and, therefore, ‘any obstruction of the investigation or prosecution of conduct that is reasonably suspected to be criminal in nature should only be ordered where that is absolutely necessary’. The tribunal granted the measures sought, reasoning that the state’s threat to incarcerate the claimants would affect their ability to participate in the arbitration, while a stay of the criminal proceedings would merely postpone the state’s ability to bring those proceedings.

III TYPES OF MEASURES GRANTED BY INVESTMENT TRIBUNALS

There is generally no restriction on the types of interim relief available. Measures granted by tribunals are generally measures that:

a) require the parties to cooperate in the proceedings or preserve evidence, or decide on confidentiality;

b) preserve the status quo between the parties and avoid further aggravation of the dispute through unilateral action;

c) prevent the parties from seeking relief through other remedies, for example, by staying parallel proceedings; or

d) secure compliance with an eventual award, for example, by ordering security for costs.


62 City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petroleos Del Ecuador, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters, 13 May 2008, paragraph 72; Burlington Resources Inc v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, paragraphs 81 and 82.

63 Hydro S.r.l. and others v. Republic of Albania, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016, paragraph 3.16.

64 Ibid., paragraphs 3.14, 3.16. See also Quiborax v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraphs 164–165.

This chapter focuses on the latter three categories, and more specifically measures that (1) preserve the status quo and avoid further aggravation of the dispute, (2) order that parallel proceedings be stayed and (3) order security for costs.

### Measures to maintain the status quo and avoid further aggravation of the dispute

The principle that a dispute should not be aggravated is part of general international law. It was the basis upon which Article 47 of the ICSID Convention (which empowers the arbitral tribunal to grant interim relief) was drafted, and has been expressly acknowledged as a general obligation incumbent on disputing parties by several ICSID tribunals.

As a matter of fact, the preservation of the status quo or the non-aggravation of the dispute, rather than being considered as a type of interim measure, may be considered as a criterion for granting interim measures, which applies to several types of measures. In practice, the preservation of the status quo or the non-aggravation of the dispute has been used as a ground for a very wide range of applications for relief, such as ordering the stay of proceedings in domestic courts, preventing the respondent from publicising criminal investigations, or preserving disputed contractual rights.

This large scope of measures that fall under the preservation of the status quo and non-aggravation of the dispute contradicts the application of the high threshold for the necessity criterion. If the arbitral tribunal applies the irreparable harm standard (i.e., if interim measures can only be granted to prevent harm that cannot be repaired with an award for monetary damages), then by definition, interim measures seeking simply to preserve the status quo or to prevent the aggravation of the dispute should be precluded. It has, therefore, been noted that:

> [the irreparable harm] approach reduces the effectiveness of the rule of non-aggravation since one party may actually exacerbate the dispute by increasing the damages inflicted to the other party provided that remedies to compensate such injuries are available in a later stage of the proceedings. To some extent, the rule loses its preventive nature under this criterion.

---


68 It was acknowledged for the first time in Amco Asia Corporation and Others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, 9 December 183, page 412. See also, Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, paragraph 67; Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Order No. 1 Claimant’s Request for Provisional Measures, 1 July 2003, paragraph 7.

69 Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Order No. 1, Claimant's Request for Provisional Measures, 1 July 2003.

70 Teinver SA v. Argentina, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016.

71 Perenco v. The Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009.

ii Measures to stay parallel proceedings

Many international tribunals have granted interim measures directed at the conduct of domestic courts.73 The most controversial variety of such measures consists in injunctions against the state's conduct of criminal proceedings against the claimant.

States’ power to prosecute has regretfully been used against claimants in retaliation for the commencement of arbitral proceedings, resulting in applications to the arbitral tribunal for injunctive relief. On the other hand, tribunals are reluctant to infringe on a core aspect of state sovereign power: the national judge's ability to initiate criminal proceedings.74 Relief will only be granted where there is a clear abuse of the criminal process, for example, where the criminal proceedings were politically motivated, initiated as a ‘defence strategy’ to the arbitration,75 or as a means of compelling the claimant to comply with alleged obligations that are disputed in the arbitration.76

iii Measures ordering security for costs

The SCC Arbitration Rules explicitly provide for the possibility for tribunals to order security for costs.77 Security for costs can also be considered as provided for under Article 26(2)(c) of the UNCITRAL Rules 2010, which refers to measures that ‘provide a means of preserving assets out of which a subsequent award may be satisfied’.78

Although investment arbitration tribunals have generally acknowledged their power to grant security for costs, even under other sets of rules,79 they are very reluctant to grant such measures. Tribunals have referred to various reasons for their refusals, including that it would be improper to prejudge the claimant’s case,80 or because there is no imminent harm at stake.81

74 The issue was raised in Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Order No. 1 Claimant’s Request for Provisional Measures, 1 July 2003. See also Quiborax v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraphs 120 and 123; Caratube International Oil Company LLP v. The Republic of Kazakhstan, ICSID Case No. ARB/08/12, Decision Regarding Claimant’s Application for Provisional Measures, 31 July 2009, paragraph 137.
75 Quiborax v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraph 122; Teiwer SA v. Argentina, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016, paragraph 190.
76 City Oriente Ltd v. Republic of Ecuador and Petroecuador, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, paragraph 62.
77 SCC Rules, Article 38.
80 Emilio Agustin Maffezini v. The Kingdom of Spain, ICSID Case No. 97/7, Decision on Provisional Measures (Procedural Order No. 2), 28 October 1999, paragraphs 20–21.
81 Burimi SRL and Eagle Games SHA v. Republic of Albania, ICSID Case No. ARB/11/18, Procedural Order No. 2 on Provisional Measures Concerning Security for Costs, 3 May 2012, paragraph 35; Guaracachi
Tribunals have stated that security for costs might be ordered in the most extreme cases, such as where essential interests of either party stand in danger of irreparable damage,\(^\text{82}\) or where abuse or serious misconduct is apparent.\(^\text{83}\) Financial difficulties and third-party funding do not constitute in themselves exceptional circumstances justifying the granting of security for costs.\(^\text{84}\) Neither would the fact that the claimant investor is a ‘shell company’ without assets of its own, as special purpose or joint venture vehicles are common in investment making.\(^\text{85}\)

The tribunal in *RSM Production Corporation v. Santa Lucia* ordered the claimant to provide security for the respondent’s costs, as it was satisfied that such exceptional circumstances were met, highlighting that ‘the difference between the present proceeding and previous ICSID arbitrations in which the request for security for costs was in every case denied, is that in this case the circumstances which were brought forward in other proceedings occur cumulatively.’\(^\text{86}\) According to the tribunal, there was a material risk of non-compliance with a cost award given the claimant’s non-compliance with cost awards in previous proceedings that it had initiated,\(^\text{87}\) combined with a serious lack of financial assets given that the claimant’s claim was financed by a third party.

### IV THE EFFECTIVENESS AND ENFORCEMENT OF INTERIM MEASURES

The ICSID Rules state that a tribunal may ‘recommend’ interim measures.\(^\text{88}\) The ICC and SIAC Investment Rules use the more imperative term ‘order’,\(^\text{89}\) while the remaining rules surveyed use more neutral terms such as ‘grant’ or ‘take’.\(^\text{90}\) Notwithstanding the difference in terminology, interim measures ordered in investment arbitration are considered as binding on the parties.\(^\text{91}\)

---

\(^{82}\) *Libananco Holdings Co Limited v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, paragraph 57.


\(^{84}\) *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, paragraph 123.


\(^{86}\) *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, paragraph 86.

\(^{87}\) See *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 April 2011; *Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010.

\(^{88}\) ICSID Rule 47.

\(^{89}\) ICC Rules, Article 28(1); SIAC Investment Rules, Article 27.1.

\(^{90}\) 1976 UNCITRAL Rules, Article 26(1); 2010 UNCITRAL Rules, Article 26(1); SCC Rules, Article 37(1).

\(^{91}\) *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Provisional Measures (Procedural Order No. 2), 28 October 1999, paragraph 9; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures,
On the other hand, tribunals lack the coercive power of state courts, and have limited ability to compel enforcement of the interim relief granted. The tribunal’s own coercive powers extend only to costs sanctions, and the drawing of adverse inferences against a party on matters of evidence. For example, the claimant in *MINE v. Guinea* was slow to withdraw parallel proceedings in Belgium and Switzerland that conflicted with the ICSID tribunal’s exclusive jurisdiction, and was ordered to pay the respondent’s costs for those proceedings. Another example is the adverse inference drawn by the tribunal in *AGIP v. Congo* against the respondent for failing to cooperate with orders to preserve evidence.

There are examples of respondent states pre-empting orders for provisional measures, by voluntarily undertaking to preserve certain rights for the claimant. For example, the government in *Vacuum Salt v. Ghana* undertook that it would not deny the claimant access to certain records requested. The tribunal considered that this satisfied the claimant’s concerns expressed in its request for provisional measures, and did not see the need to order relief. Another example is found in *Italba v. Uruguay*, where the claimant sought to restrain Uruguay’s criminal investigations against two of the claimant’s witnesses. The government of Uruguay undertook that these investigations would not impede the witnesses’ ability to participate in the claimant’s case and freely offer their testimony. The tribunal was persuaded by these undertakings, *inter alia*, and declined to restrain the investigations.

On the other hand, and more particularly where anti-enforcement or anti-suit injunctions regarding proceedings against the claiming investor are concerned, there is an understandable difficulty with enforcing the interim measures, given that a state’s sovereign rights are implicated. Reportedly, out of 10 orders granted by ICSID tribunals between 2000 and 2010 for relief suspending domestic litigation, only two were complied with.

If measures of enforcement are required, the requesting party must resign itself to turn to national courts for assistance. This can be a complicated exercise given that international conventions, in particular the New York Convention, and domestic rules typically only provide for the enforcement of awards and not orders.

In this regard, in *Chevron v. Ecuador*, the tribunal re-issued interim measures previously granted in procedural order in the form of an interim award, stating that such an award
was ‘immediately final and binding’ upon the parties. The relevant interim measures sought to preclude the state from enforcing an anticipated judgment issued by an Ecuadorian court against the claimants.

However, naming an interim measures order as an ‘award’ is unlikely to resolve all enforceability issues. A key characteristic of an award is that it finally resolves a substantive issue between the parties and not just a procedural matter. Interim measures are employed precisely to secure the applying party’s rights prior to the final resolution of the dispute on its merits, and are subject to review and reversal.99 There is a practice among certain national jurisdictions to refuse to enforce interim orders as awards under the New York Convention 1958, no matter their title.100

On the other hand, jurisdictions that have adopted Articles 17H and 17I of the UNCITRAL Model Law 1985 with the amendments of 2006, specifically provide that interim measures issued by an arbitral tribunal are binding and shall be enforced by a competent national court subject to specified grounds for refusing such enforcement.101

V CONCLUSION

As was exposed in the paragraphs above, it is generally accepted today that international investment tribunals have the power to take a wide array of interim measures. The jurisdiction of tribunals (or of national courts, pending arbitration proceedings) is not subject to particular controversies. However, there are several issues relating to the legal framework of interim measures in investment arbitration that are not yet crystallised: the conditions for their granting, the meaning of the necessity requirement and their enforcement by the national judge. It is to be hoped that the future will bring the desired harmonisation, limiting guerrilla tactics in arbitration proceedings and enhancing the rule of law.

100 See, e.g., Cour de Cassation, 1st Civil Chamber, 12 October 2011, No. 09-72.439, Groupe Antoine Tablet v. Congo (2012) Rev arb 86, note by François-Xavier Train. On the other hand, there are examples of national courts enforcing interim awards under the New York Convention 1958, e.g., on 24 February 2016, the Supreme Court of Ukraine reportedly admitted the possibility to enforce under the New York Convention 1958 an emergency arbitrator decision ordering the state to provisionally apply a former tax rate to the investor’s company. See Sebastian Perry, ‘Ukrainian Court Told to Reconsider Emergency Award’, GAR (29 April 2016); http://globalarbitrationreview.com/article/1036292/ukrainian-court-told-to-reconsider-emergency-award (last accessed on 28 February 2017).
THIRD-PARTY FUNDING: SECURITY FOR COSTS AND OTHER KEY ISSUES

Miriam K Harwood, Simon N Batifort and Christina Trahanas

I INTRODUCTION

Third-party funding, referring to the financing of lawsuits in exchange for a portion of the proceeds in the event of success, is a relatively recent phenomenon in investment arbitration. Professional funders appear to have realised the potential of a field where multimillion and multibillion-dollar cases are the norm rather than the exception. They may also be attracted by the lack of regulation of third-party funding. While some domestic laws limit or even prohibit third-party funding, investment arbitration was until recently a ‘legal no man’s land’ in that respect.2

But that situation is rapidly changing. As third-party funding is becoming more common, a growing body of arbitral decisions and commentary has highlighted serious concerns. This chapter discusses some of the key issues, including: (1) potential conflicts of interest arising out of the involvement of a third-party funder in an arbitration; (2) whether a party’s reliance on third-party funding constitutes grounds for ordering security for costs; (3) whether the involvement of a third-party funder has implications for the jurisdiction of investment treaty tribunals; and (4) whether and to what extent a party relying on third-party funding should disclose that arrangement.

II CONFLICTS OF INTEREST

The first issue raised by third-party funding concerns the conflicts of interest that may arise. The most obvious scenario is that of a person affiliated with a third-party funder, such as a consultant or member of its board of directors, who also serves as an arbitrator in a case financed by that funder. For example, a well-known third-party funder, Woodsford Litigation

---

1 Miriam K Harwood is a partner and Simon N Batifort and Christina Trahanas are associates at Curtis, Mallet-Prevost, Colt & Mosle LLP. The authors acted as counsel for the respondent in one of the cases discussed in this chapter: Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd Sti v. Turkmenistan, ICSID Case No. ARB/12/6. This chapter revises and updates the chapter on third-party funding prepared by the same authors for the previous edition of this publication. See Miriam K Harwood, Simon N Batifort and Christina Trahanas, 'Third-Party Funding: Security for Costs and Other Key Issues', The Investment Treaty Arbitration Review 119 (2016).

Third-Party Funding: Security for Costs and Other Key Issues

Funding, has an Investment Advisory Panel comprised, *inter alia*, of individuals who also act as arbitrators.3 There would surely be a conflict of interest if a member of that Panel also served as an arbitrator in a case in which Woodsford supplied funding.

The potential for conflicts of interest has been widely recognised. For example, two members of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration have acknowledged that third-party funding raises ‘real and important concerns about potential conflicts’, especially given ‘the increase in the number of cases involving third-party funding, the highly concentrated segment of the funding industry that invests in international arbitration cases, the symbiotic relationship between funders and a small group of law firms, and, relatedly, the often close relations among elite law firms and leading arbitrators’.4

Arbitral tribunals have also cited potential conflicts of interest as a factor warranting disclosure of third-party funding. In *Sehil v. Turkmenistan*, the tribunal ordered disclosure of third-party funding, underscoring the need ‘to avoid a conflict of interest for the arbitrator’ and the importance of ‘transparency’.5 Avoiding conflicts of interest was also cited as a concern justifying disclosure in *South American Silver v. Bolivia*.6 In *Guaracachi v. Bolivia*, after the identity of the third-party funder became known, the arbitrators confirmed that they had no link with the funder and that they were ‘not aware of any circumstance that could give rise to justifiable doubts as to their impartiality and independence on account of the financing of the Claimants’ claims by [the third-party funder]’.7

The IBA Guidelines on Conflicts of Interest as revised in 2014 also acknowledge this issue by providing that a third-party funder is the ‘equivalent of a party’, which has significant implications under those Guidelines.8 For example, the scenario mentioned above, where an

---

4 William W Park and Catherine Rogers, ‘The Arbitration Agreement and Arbitrability, Third-Party Funding in International Arbitration: The ICCA-Queen Mary Task Force’, *Austrian Yearbook on International Arbitration* 113 (2015), page 119. See also Catherine A Rogers, *Ethics in International Arbitration* (Oxford University Press 2014), page 201, paragraph 5.79 (‘In sum, for arbitrators to assess the potential for conflicts and make necessary disclosures, third-party funders’ participation in particular international arbitration cases will necessarily have to be disclosed’); Catherine Kessedjian, ‘Good Governance of Third Party Funding’, *Columbia FDI Perspectives*, No. 130, 15 September 2014 (Kessedjian, ‘Good Governance’), pages 1–2 and n. 7 (‘The involvement of funders bears directly on, *inter alia*, the admissibility of claims and a potential conflict of interest’).
5 Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd Sti v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3 dated 12 June 2015 (*Sehil v. Turkmenistan*), paragraphs 1 and 9.
8 IBA Guidelines on Conflicts of Interest in International Arbitration, adopted on 23 October 2014 (IBA Guidelines), General Standard 6(b), page 13 (‘If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party’); Explanation to General Standard 6(b), pages 14–15 (‘Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party’).
arbitrator serves as an adviser for a third-party funder, would fall under the list of non-waivable conflicts of interests in the IBA Guidelines. This also has important implications in terms of disclosure requirements under the IBA Guidelines, which are discussed in Section V, infra.

At least one arbitrator has been challenged on the basis of his relationship with a third-party funder. In 2013, the respondent in an ICC arbitration challenged an arbitrator on the basis that he ‘failed to disclose that his law firm and the third-party funder were linked in an unrelated investment treaty dispute’ – that is, the funder and the arbitrator’s law firm ‘had an ongoing financial relationship . . . in an unrelated case’. The challenge was rejected because the funder had a limited role in the arbitration, specifically, the funder was only ‘engaged to facilitate settlement negotiations between the parties, which never took place, and the arbitrator’s law firm had a role other than that of counsel in the investment treaty dispute in which the third-party funder was involved’.

III SECURITY FOR COSTS

A claimant usually has recourse to third-party funding because it has no or few assets of its own to finance its case. The respondent may therefore question whether the claimant will have the means to comply with a potential award ordering it to pay the costs of the proceeding. To address the risk of non-compliance with a costs award, the respondent may request the tribunal to order the claimant to post security for costs as a condition for continuing the proceeding.

---

9 See IBA Guidelines, Part II: Practical Application of the General Standards, paragraphs 1.1, 1.2, 1.4 (listing as part of the Non-Waivable Red List the situations where ‘the arbitrator is a legal representative or employee of an entity that is a party in the arbitration’, where ‘[t]he arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration’, and where ‘[t]he arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom’).


11 Id., page 40.

12 An order for security for costs has been defined as a ‘form of provisional relief’ that ‘require[s] one party (or both parties) to post security to cover the likely amounts that would be awarded to the counter-party in the event that it prevails in the arbitration and is entitled to recover its legal costs’. Gary B Born, International Commercial Arbitration (2nd ed., Kluwer Law International 2014) (Born, International Commercial Arbitration), page 2495.
The threshold issue for a tribunal seized of a request for security for costs is whether it has the power to make such an order. Some arbitration rules and statutes expressly provide for that power. But even when there is no such express provision, it is well accepted that the power of arbitral tribunals to order provisional measures encompasses security for costs.

That power has been recognised under the two main sets of rules applied in investment treaty arbitration: ICSID and UNCITRAL. The threshold issue for a tribunal seized of a request for security for costs is whether it has the power to make such an order. Some arbitration rules and statutes expressly provide for that power. But even when there is no such express provision, it is well accepted that the power of arbitral tribunals to order provisional measures encompasses security for costs.

13 See, e.g., Arbitration Rules of the London Court of International Arbitration (2014), Article 25.2; Arbitration Rules of the Singapore International Arbitration Centre (2013), Article 24(k); Arbitration Rules of the Australian Centre for International Commercial Arbitration (2016), Article 33.2(e); English Arbitration Act (1996), Section 38(3). The EU–Vietnam Free Trade Agreement and the draft of the Transatlantic Trade and Investment Partnership proposed by the European Commission provide ‘[f]or greater certainty’ that security for costs can be ordered by the arbitral tribunal ‘if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against’ it. EU–Vietnam Free Trade Agreement, Agreed text as of January 2016, Chapter 8: Trade in Services, Investment and E-Commerce (the EU–Vietnam FTA), Section 3, Article 22.1; European Commission, Draft of Chapter II (Investment) of the Transatlantic Trade and Investment Partnership, released on 12 November 2015 (the EU Draft TTIP), Section 3, Article 21.1. See also Arbitration Rules of the Singapore International Arbitration Centre, Draft for Public Consultation released 18 January 2016, Rule 26.k.

14 See, e.g., Julian D M Lew et al, Comparative International Commercial Arbitration (Kluwer Law International 2003), pages 600–601 (‘The respondent against whom the proceedings were brought has an interest in ensuring that at least part of the fees incurred will be recoverable. To this end several arbitration rules contain provisions empowering the tribunal to grant security for costs. . . . However, even where no such express provisions exist, tribunals can grant such orders under their general power to grant interim relief’); Nicolas Ulmer, ‘The Cost Conundrum’, 26(2) Arbitration International 221 (2010), page 230 (‘It is widely accepted that the ordering of security for costs is within the power of arbitrators to order interim measures’); Ali Yeşilirmak, Provisional Measures in International Commercial Arbitration (Kluwer Law International 2005), paragraph 5-84; Nathalie Voser, ‘New Rules on Domestic Arbitration in Switzerland: Overview of Most Important Changes to the Concordat and Comparison with Chapter 12 PILA’, 28(4) ASA Bulletin 753 (2010), page 762.

15 See, e.g., RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs dated 13 August 2014 (RSM v. St Lucia), paragraph 54; Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg and RSM Production Corporation v. Government of Grenada, ICSID Case No. ARB/10/6, Tribunal’s Decision on Respondent’s Application for Security for Costs dated 14 October 2010 (RSM v. Grenada), paragraph 5.16; Commerce Group Corp & San Sebastian Gold Mines Inc v. Republic of El Salvador, ICSID Case No. ARB/09/17, Decision on El Salvador’s Application for Security for Costs dated 20 September 2012, paragraph 45 (finding that the ad hoc committee’s power to safeguard the integrity of the proceeding included the power to order security for costs); Christoph H Schreuer et al, The ICSID Convention: A Commentary (2nd ed., Cambridge University Press 2009) (Schreuer, The ICSID Convention), page 782, paragraph 90 (stating that a claimant in an ICSID arbitration ‘may be required to provide a financial guarantee as a condition for the tribunal proceeding with the principal claim’).

A related issue that arises specifically in ICSID cases is whether the respondent’s interest in securing compliance with a potential costs award qualifies as a ‘right to be preserved’, which is a requirement for ordering provisional measures under the ICSID Arbitration Rules. At least two tribunals have rejected a request for security for costs on the basis that this requirement had not been satisfied. One tribunal stated that the respondent did not have a ‘right with respect to an eventual award of costs’ but only ‘a mere expectation’. The decision of the other tribunal is not public, but it has been reported that the tribunal considered the request to relate to protection of ‘a right that as of yet does not exist’. However, several other tribunals have found that provisional measures, including security for costs, can protect not only ‘established rights’ but also rights that may arise in the future, such as the potential right to enforce a costs award. That approach seems consistent with one of the main purposes of provisional measures, which is to ‘secure compliance with an eventual award’.

Assuming that the tribunal has the power to order security for costs, does the claimant’s reliance on third-party funding constitute grounds for making such an order? Many commentators respond positively. They point out that, in the absence of security, the respondent will be unable to enforce a potential costs award against the claimant because it has no funds of its own, and will also be unable to enforce it against the third-party funder.
because it is not a party to the arbitration and is outside the jurisdiction of the tribunal.\textsuperscript{22} Moreover, the third-party funder may withdraw from the case at any time, leaving the respondent with no recourse to recover its costs – a situation that has occurred in several investment arbitration proceedings.\textsuperscript{23}

Some argue, however, that ordering security for costs based on the claimant’s reliance on third-party funding may prevent access to justice to meritorious claims. But a third-party funder with confidence in the claims may well decide to finance the security, and some

\textsuperscript{22} See, e.g., Maxi Scherer, ‘Third-Party Funding in Arbitration: Out in the Open?’, \textit{Commercial Dispute Resolution}, May 2012, page 57 (‘The tribunal might order security for cost if the funded party lacks financial means to participate in the arbitration but for the existence of the funding agreement, and thus is likely not to be in a position to satisfy a future adverse costs award’); Jean Kalicki, ‘Security for Costs in International Arbitration’, 3(5) Transnational Dispute Management, December 2006 (‘[S]ecurity is more likely to be awarded . . . where the claimant’s arbitration fees and expenses are being covered by a related entity or individual who stands to gain if the claimant wins, but would not be liable to meet any award of costs that might be made against the claimant if it lost. This scenario has been called “arbitral hit and run”, and described by arbitrators and commentators alike as particularly compelling grounds for security for costs’); Jeffrey Waincymer, \textit{Procedure and Evidence in International Arbitration} (Kluwer Law International 2012), page 644; Otto Sandrock, ‘The Cautio Judicatum Solvi in Arbitration Proceedings or The Duty of an Alien Claimant to Provide Security for the Costs of the Defendant’, 14(2) \textit{Journal of International Arbitration} 17 (Kluwer Law International 1997), page 34.

\textsuperscript{23} See, e.g., Aren Goldsmith and Lorenzo Melchionda, ‘Third Party Funding in International Arbitration: Everything You Ever Wanted To Know (But Were Afraid To Ask): Part 1’, 1 \textit{International Business Law Journal} 53 (2012), page 59 (arguing that provisions on termination of funding in third-party funding agreements ‘expose the opposing party to costs risks (i.e. the risk of being unable to collect costs from a defaulting entity no longer supported by TPF) in the event the funder should decide to withdraw funding because the claim appears to have weakened over time’); Corporate Europe Observatory, ‘Profiting from Injustice’ (2012), page 59 (‘Third-party funding can also drive up legal tabs, burdening cash-strapped sovereign budgets with even heftier arbitration costs. One example is the investment dispute of S&T Oil Equipment and Machinery Ltd. against Romania. The case was eventually discontinued when the oil company stopped paying its legal bills, but only after having been kept alive for an extra two years thanks to a cash injection from Juridica. Romania is stuck with its legal costs, including for the two extra years’); Clovis Téveno, ‘One of Three ICSID Argentine Bond Arbitrations Collapses Due to Lack of Funding’, \textit{Investment Arbitration Reporter}, 2 June 2015 (reporting that the \textit{Ambiente v. Argentina} case was discontinued after the claimants, who were relying on third-party funding, failed to make advance payments to ICSID).
funders even consider this part of their normal commitment. Moreover, the notion that funders finance only meritorious claims seems naïve. As one third-party funder put it: ‘The perception that you need strong merits is wrong – there’s a price for everything.’

How have arbitral tribunals dealt with these concerns? Several tribunals in both investment and commercial arbitration have ordered security for costs based at least in part on the claimant’s reliance on third-party funding. In *RSM v. St Lucia*, an ICSID tribunal found that the existence of third-party funding raised legitimate concerns as to the claimant’s compliance with a potential costs award. Although this was not the sole basis for the

---

24 Maxi Scherer, Aren Goldsmith and Camille Fléchet, ‘Third Party Funding in International Arbitration in Europe: Party 1: Funder’s Perspectives’, 2 *International Business Law Journal* 207 (2012) (Scherer et al, ‘Funder’s Perspectives’), page 215 (‘Regarding security for costs, a majority of the attending funders considers it to be part of the funder’s commitment and it is, as such, provided for in the funding agreement’); Mick Smith, ‘Mechanics of Third-Party Funding Agreements: A Funder’s Perspective’, in Victoria Shannon and Lisa Bench Nieuwveld, *Third-Party Funding in International Arbitration* 19 (Kluwer Law International 2012), n. 16 (‘It is also common for a third-party funder to be asked to provide additional capital either by way of provision for a future adverse cost orders, or for security for costs’); Jasminka Kalajdzic et al, ‘Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding’, 61(1) *The American Journal of Comparative Law* 93 (2013), page 100 (‘The [funding] agreement will often provide that the funder will . . . pay any amount required to be provided by way of security for costs’); Alison Ross, ‘The Dynamics of Third-Party Funding’, *Global Arbitration Review*, 7 March 2012, page 14 (quoting Selvyn Seidel of Fullbrook Management: ‘Personally I like to assume an obligation to pay adverse costs – because, if I believe in the case, I don’t think there are going to be adverse costs’).

25 Corporate Europe Observatory, ‘Profiting From Injustice’ (2012), page 59 (quoting Mick Smith, co-founder of third-party funder Calunius Capital). See also ibid. (‘One particular concern is an increase in frivolous disputes which would go uncontested without external funding. . . . A condition in the funding agreement can always make a weak case worthwhile for the financier. Eventually, frivolous, high-risk claims might inflate the value of funders’ portfolios. As the Burford Group notes: “If we shy away from risk for fear of loss, as some litigation investors do, we will not maximise the potential performance of this portfolio”’); UNCTAD, ‘Recent Developments in Investor–State Dispute Settlement (ISDS)’, May 2013, n. 172 (‘TPF companies, who build a “portfolio” of claims, have an economic incentive to put money even into weak cases that have at least some chance of a high monetary award’); ibid., page 25 (‘[T]here are serious policy reasons against TPF of IIA claims – for example, it may increase the filing of questionable claims. From a respondent State’s perspective, such frivolous claims, even if most of them fail, can take significant resources and may cause reputational damage’); US Chamber Institute for Legal Reform, ‘Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States’, October 2009, pages 2 and 5 (‘Although providing non-recourse loans to fund litigation is inherently risky, it does not follow that litigation-finance companies will only finance claims that are likely to succeed. These companies – like all sophisticated investors – will base their funding decisions on the present value of their expected return, of which the likelihood of a lawsuit’s success is only one component. The other component is the potential amount of recovery. . . . Moreover, third-party funding companies are able to mitigate their downside risk in two ways: they can spread the risk of any particular case over their entire portfolio of cases, and they can spread the risk among their investors’); George Kahale, III, ‘Is Investor–State Arbitration Broken?’, *Transnational Dispute Management* (2012), page 33 (‘Third party funding is a bit like drilling for oil. You know you will be drilling a lot of dry holes, but one discovery can make it all worthwhile’).

26 *RSM v. St Lucia*, paragraph 83 (‘Moreover, the admitted third party funding further supports the Tribunal’s concern that Claimant will not comply with a costs award rendered against it, since in the absence of security or guarantees being offered, it is doubtful whether the third party [funder] will assume responsibility for honoring such an award. Against this background, the Tribunal regards it as unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential costs award in Respondent’s favor’).
tribunal’s order – RSM had also failed to comply with its financial obligations in other cases – the tribunal made it clear that third-party funding was a relevant factor in ordering security.27 One of the arbitrators, Gavan Griffith, went further in his concurring opinion, finding that the integrity of investment arbitration requires that third-party funders ‘remain at the same real risk level for costs as the nominal claimant’ and that a funder’s ‘real exposure to costs orders which may go one way to it on success should flow the other direction on failure’.28 Another of the arbitrators, Edward Nottingham, dissented because he considered that ICSID tribunals do not have the power to order security for costs.29 He nevertheless acknowledged that third-party funding may be a relevant consideration ‘in deciding whether and when security for costs may be appropriate’ and that this concern can and should be addressed by ICSID’s Administrative Council.30 Subsequent to the decision ordering security for costs, the claimant informed the tribunal that it would be unable to pay the security. The tribunal ordered that the proceedings be vacated for six months and, just over a year after this order, the tribunal dismissed the case.31

In another case, an ICC tribunal ordered security for costs on the ground that the agreement between the claimant and their third-party funder provided that the funder had no obligation to pay an eventual costs award and that the funder could ‘walk out at any time’.32 The tribunal explained that, although the existence of third-party funding was not by itself determinative, these ‘specific features’ of the third-party funding agreement warranted security for costs.33 One author commenting on this case observed that provisions excluding

---

27 Id., paragraph 85.
28 RSM v. St Lucia, Assenting Reasons of Gavan Griffith dated 12 August 2014, paragraph 14. Gavan Griffith was the president of the ad hoc committee in the annulment proceeding relating to one of RSM’s cases against Grenada, which was discontinued after RSM failed to make the required advance payments. See RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs dated 28 April 2011.
32 X v. Y and Z, ICC Case, Procedural Order dated 3 August 2012, reproduced in Philippe Pinsolle, ‘Third Party Funding and Security for Costs’, 2 Cahiers de L’Arbitrage 399 (2013) (X v. Y and Z), paragraph 40 (‘The third-party funding mechanism at hand makes it possible for the Funder to secure a comfortable share of the proceeds for itself in case the litigation is successful while (i) taking no risk whatsoever with regard to the costs that may have to be paid to the other party as a consequence of an unsuccessful litigation and (ii) retaining the possibility to walk out at any time by simply [“pulling the plug” on [the Claimant] should it appear . . . that the case is going less well for the Claimant than had been anticipated’). Although the 2012 ICC Rules, which applied in that case, do not specifically provide for the power to order security for costs, the parties agreed that the tribunal possessed that power. See ibid., paragraph 16. On the 2012 ICC Rules, see also Jason Fry, Simon Greenberg, Francesca Mazza, The Secretariat’s Guide to ICC Arbitration (ICC Publications 2012), paragraph 3-1036 (‘Where, for example, there is a substantial risk that a party (usually the claimant) may not be able to cover the opposing side’s arbitration costs (i.e., if ultimately ordered to do so), the arbitral tribunal may be prepared to order that party to place funds into an escrow account that is either controlled by the arbitral tribunal or jointly by the parties’).
33 X v. Y and Z, paragraphs 40–41.
payment of costs awards by the third-party funder are quite common in funding agreements, and argued that the situation in which an impecunious claimant finances a case through such a funder justifies by itself granting security for costs.34

Likewise, the tribunal in another ICC case ordered security for costs on the ground that ‘[i]f a party has become manifestly insolvent and therefore is likely relying on funds from third parties in order to finance its own costs of the arbitration, the right to have access to arbitral justice can only be granted under the condition that those third parties are also ready and willing to secure the other party’s reasonable costs to be incurred’.35 It has also been reported that a separate ICC tribunal granted a request for security for costs filed by Bulgaria on the ground that the claimant relied on third-party funding to finance its case.36

However, requests for security for costs based on the claimant’s reliance on third-party funding have been denied in at least three investment arbitrations. In Eurogas v. Slovakia, an ICSID tribunal held that security for costs may be ordered only in ‘exceptional circumstances’ such as ‘abuse or serious misconduct’, and that ‘financial difficulties and third party-funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances’.37 In Guaracachi v. Bolivia, an UNCITRAL tribunal also rejected the request for security for costs, having found that the existence of third-party funding was insufficient to demonstrate the claimant’s inability to comply with a costs award.38 And in South American

34 Philippe Pinsolle, ‘Third Party Funding and Security for Costs’, 2 Cahiers de L’Arbitrage 399 (2013) (‘The fact that this [third-party funding] agreement may exclude the payment of arbitration costs in case of failure, as it appears to be most often the case, places the respondent against a claimant who, by definition, now has the means to move forward with his arbitration without really taking any risk regarding its outcome precisely because of his insolvency. It seems to us that this asymmetrical situation, when it is clearly established, justifies by itself granting security for costs. Indeed, absent such a guarantee, the claimant will be in a position, in case of failure, to hide behind his impecuniosity to refuse to pay costs, despite the fact that he was able to advance his claim thanks to the funds of the third party. The claimant would thus benefit from the best of both worlds, which does not seem to be a desirable situation’) (authors’ translation).


36 Jarrod Hepburn, ‘ICC Costs Award in Favor of Bulgaria Is Upheld, as Domestic Court Rejects Claimant’s Allegation of Tribunal Bias Against Third-Party-Funded Claimant’, Investment Arbitration Reporter, 19 October 2015. See also Swiss Entity v. Dutch Entity, HKZ Case No. 415, Award dated 20 November 2001, 20(3) ASA Bulletin (2002), pages 467–471 (The respondent had applied for security for costs on the ground that the claimant was ‘not able to pay the costs of the proceedings and that it is therefore forced to obtain funds from external sources’. The tribunal granted the request, stating that ‘it is most likely that if Respondent were to prevail in this arbitration, a future cost award in its favor could not be satisfied by Claimant’).

37 EuroGas Inc and Belmont Resources Inc v. Slovak Republic, ICSID Case No. ARB/14/14, Procedural Order No. 3 dated 23 June 2015, paragraphs 121 and 123. The type of ‘abuse’ or ‘misconduct’ the tribunal had in mind was apparently the situation in RSM v. St Lucia, which it acknowledged was ‘exceptional’, but which it distinguished because the Eurogas claimants, unlike RSM, did not have a ‘proven history of not complying with cost orders’. Id., paragraphs 122–123.

38 Guaracachi v. Bolivia, Procedural Order No. 14 dated 11 March 2013, paragraph 7 (finding that ‘the Respondent has not shown a sufficient causal link such that the Tribunal can infer from the mere existence of third-party funding that the Claimants will not be able to pay an eventual award of costs rendered against them, regardless of whether the funder is liable for costs or not’ and that the respondent’s analysis of the claimants’ financial information did not ‘sufficiently demonstrate’ that the claimants will ‘lack the means to pay a costs award or to obtain (additional) funding for that purpose’).
Silver v. Bolivia, another UNCITRAL tribunal observed that ‘the existence of a third-party funder may be an element to be taken into consideration’, but it rejected the request for security on the grounds that ‘[t]he fact of having financing alone does not imply risk of non-payment’ and that ordering security every time that third-party funding is established would ‘inrease[e] the risk of blocking potentially legitimate claims’.39

A key consideration in these three cases was that third-party funding was not sufficient to establish the claimant’s inability to comply with a costs award, and that the respondent had the burden of supplying additional evidence of impecuniosity. But it could be argued that, once it has been established that the claimant is relying on third-party funding, this constitutes prima facie evidence of the claimant’s impecuniosity, and the claimant should then be required to provide positive evidence of its ability to comply with a costs award. This was the solution suggested by Gavan Griffith in RSM v. St Lucia, where he stated that, once third-party funding is revealed, ‘the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made.’40 As also noted by Gary Born: ‘Where a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third party, then a strong prima facie case for security for costs exists.’41

Another noteworthy decision on this issue is the recent order for disclosure in Sehil v. Turkmenistan, where one of the factors that the tribunal took into account was that ‘the Tribunal is sympathetic to Respondent’s concern that if it is successful in this arbitration and a costs order is made in its favour, Claimants will be unable to meet these costs and the third-party funder will have disappeared as it is not a party to this arbitration’.42

As the foregoing review of commentary and decisions indicates, the ability of respondents to collect on costs awards is a serious concern, in particular for states involved in investment treaty arbitrations. In that respect, ICSID has accepted a request from Panama that the ICSID member states be consulted regarding ‘the subject of improved protection for respondent states against judgment-proof claimants’.43 Panama stated that orders for security for costs were one of the ‘tools’ available to protect respondent states, and it suggested that the ICSID Arbitration Rules be revised to require ‘disclosures concerning the financial condition of a claimant and the use of any third-party funding’.44

IV JURISDICTION

The transfer of an interest in the claim to a third-party funder may also affect the jurisdiction of arbitral tribunals. If the agreement between the claimant and the funder is deemed to

42 Sehil v. Turkmenistan, paragraph 12.
44 Memorandum from Panama’s Ministry of Economy and Finance to ICSID (12 September 2016).
constitute a *de jure* or *de facto* assignment of the claim or a portion thereof, the funder arguably becomes the real party in interest, which may jeopardise the tribunal’s jurisdiction *ratione personae*. This has particular significance in investment arbitration, where jurisdiction is conditioned upon nationality requirements.

The nature of the interest acquired by a third-party funder depends on the terms of the funding agreement. The agreement may expressly provide that the claimant assigns its claim to the third-party funder. This is the practice in Germany, where funding agreements usually contain a provision under which ‘the plaintiff assigns to the financing company his asserted claim against the defendant as well as any later claims arising against the defendant or any other party for compensation for costs, fees and expenses incurred by him as a result of the litigation’. Shannon and Nieuwveld state that the effect of such a provision is that ‘the claimant no longer owns the claim’ and ‘must file the lawsuit in its name only after the funder gives it authorization to do so’.46

Even where the funding agreement does not expressly assign the claim, the funder’s entitlement to receive a portion of any damages paid to the claimant may be deemed to constitute a *de facto* assignment. This is especially the case where the agreement also contains provisions that confer a significant degree of control or influence to the funder, such as the right to approve the filing of a claim, control the selection of the claimant’s counsel, decide on fact and expert witnesses, receive, review and approve counsel’s bills, veto settlement agreements, or buy the claim at some point in the future.47 As recognised by Goldsmith and

---


46 Id.

47 Aren Goldsmith and Lorenzo Melchionda, ‘Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask): Part Two’, 2 *International Business Law Journal* 221 (2012) (Goldsmith and Melchionda, ‘Part Two’), page 228 (‘[W]here sufficient rights have been conferred to the funder under a funding agreement in relation to a claim, it may be possible – depending . . . upon applicable law – to qualify the package of rights conferred as constituting a form of *de facto* assignment’); Philippe Pinsolle, ‘Comment on Third-Party Funding and Nationality Issues in Investment Arbitration’, in *Yearbook on International Investment Law & Policy 2010–2011* (Karl P Sauvant ed., Oxford University Press 2012) (Pinsolle, ‘Third-Party Funding and Nationality’), page 646 (‘Elements to be taken into account for an autonomous analysis would . . . include the following: the characterization of the agreement under its applicable law (if expressly chosen by the parties); the fact that the claimant no longer controls the claim, but that the third party does; the fact that the third party has a veto over any settlement proceedings; the fact that the third party chooses external counsel and/or experts; the fact that the third party may decide to terminate the claim or the funding at any time; and the portion of the proceeds which is to be recovered by the third party. These factors may be taken into account, individually or collectively, by an international arbitral tribunal in order to determine if, and to what extent, the claim has been assigned to a third party’); Anthony J Sebok, ‘The Inauthentic Claim’, 64 *Vanderbilt Law Review* 61 (2011), page 82 (stating that assignment occurs where a party ‘lose[s] all control over the disposition of that cause of action, including whether to settle, for how much to settle, and every aspect of litigation strategy, including the selection and compensation of attorneys’); *Waterhouse v. Contractors Bonding Limited*, New Zealand Supreme Court, NZSC 89, Judgment dated 20 September 2013, paragraph 57 (‘In assessing whether litigation funding arrangements effectively amount to an assignment, the court should have regard to the funding arrangements as a whole, including the level of control able to be exercised by the funder and the profit share of the funder’); Mark Kantor, ‘Third-Party Funding in International Arbitration: An Essay About New Developments’, 24 *ICSID Review – Foreign Investment Law Journal* 65 (2009) (Kantor, ‘Third-Party Funding’), pages 76–77 (‘What voice does the funding provider have in the management and pursuit
Melchionda, ‘where a funder has been granted full control over the conduct of the claim or a disproportionate economic interest in the claim, the funder could . . . be viewed as having replaced the nominal claimant as the real party in interest behind the claim’. 48

Assuming that the third-party funding agreement is deemed to effect an assignment of the claim or a portion thereof, what consequences would it have on the jurisdiction of an investment arbitration tribunal? One principle of international law that may be relevant in this respect is that the beneficial owner, rather than the nominal owner, of a claim is the proper party before an international tribunal. 49 This principle was recently applied by the ad hoc committee in Occidental v. Ecuador when it partially annulled an investment arbitration award. The committee found that the tribunal ‘illicitly expanded the scope of its jurisdiction’ by compensating the claimant for 100 per cent of the investment, even though a third party was the beneficial owner of 40 per cent of the investment. 50 The committee applied the ‘uncontroversial principle of international law’ that ‘when legal title is split between a nominee and a beneficial owner . . . international law only grants standing and relief to the owner of the beneficial interest – not to the nominee’. 51 It explained that this reflected the ‘more general principle of international investment law: claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents of the claim, the arbitral proceeding, collection efforts, settlement negotiations and similar issues? Some providers seek a veto right: “Van Diepen [the funds provider] had to approve the filing of the lawsuit; controlled the selection of the plaintiffs’ attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel’s bills; and had the ability to veto any settlement agreements”).

48 Goldsmith and Melchionda, ‘Part Two’, page 228.
49 David J Bederman, ‘Beneficial Ownership of International Claims’, 38 International and Comparative Law Quarterly 935 (1989), page 936 (‘International law authorities have agreed that the real and equitable owner of an international claim is the proper party before an international adjudication, and not the nominal or record owner’); Oppenheim’s International Law – Volume 1 (Robert Jennings and Arthur Watts eds., 9th ed., 1996, Oxford University Press 2008), page 514 (‘Where a claim is made in respect of property which is beneficially owned by one person, although the nominal title is vested in another, and they are of different nationalities, it will usually be the nationality of the holder of the beneficial interest which will be the determining factor for purposes of an international claim’); James Crawford, Brownlie’s Principles of Public International Law (8th ed., Oxford University Press 2012), page 704; Marjorie Whiteman, ‘Chapter XXIV: State Responsibility for Injuries to Aliens: Diplomatic Protection and International Claims: Nationality of Claimant: Natural Persons’, in 8 Digest of International Law 1233 (1967), pages 1261–1262; Edwin M Borchard, The Diplomatic Protection of Citizens Abroad (Banks Law Publishing Co. 1915), pages 642–643.
50 Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11 (Occidental v. Ecuador), Decision on Annulment of the Award dated 2 November 2015, paragraphs 266 and 268.
51 Ibid., paragraph 268. The ad hoc committee stated that ‘[i]nvestment arbitration case law has acknowledged the principle that under international law legal standing pertains to beneficial owners and not necessarily to nominees, and that unprotected parties cannot receive compensation, even if claimed on their behalf by protected investors’. Ibid., paragraph 273. It referred in that respect to the dissenting opinion of Brigitte Stern in the underlying Occidental v. Ecuador arbitration, as well as Impregilo SpA v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction dated 22 April 2005, paragraphs 131–139, 144–155 (finding that the claimant could not advance claims on behalf of an unincorporated joint venture and on behalf of other joint venture partners), PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award dated 19 January 2007, paragraphs 325 (finding that it would be improper ‘if compensation is awarded in respect of investments or expenses incurred by entities over which there is no jurisdiction, even if this was done on behalf of one of the Claimants’), and Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case
or otherwise) on behalf of third parties not protected by the relevant treaty’. The committee added that ‘tribunals exceed their jurisdiction if they grant compensation to third parties whose investments are not entitled to protection under the relevant instrument’.

The above principles may apply by analogy in the context of third-party funding. If a claimant is deemed to have expressly or de facto assigned its claim or a portion thereof to a funder, the claimant may be seen as the nominal owner and the funder as the beneficial owner, at least as regards the portion of the claim that has been assigned. Under the principle discussed in Occidental, any award of damages would therefore have to exclude the portion that was transferred to the third-party funder.

A second relevant principle in investment treaty arbitration is that tribunals can only adjudicate the claims of investors having the nationality of one of the contracting parties to the treaty. If a claim or portion thereof is deemed to be owned by the third-party funder, and the funder does not have the same nationality as the claimant investor, this raises serious

No. ARB/00/2, Award dated 15 March 2002, paragraphs 24–26 (finding that the claimant was entitled to file a claim in its own name against the respondent, but not for the rights of its partner, a Canadian company).

Occidental v. Ecuador, Decision on Annulment of the Award dated 2 November 2015, paragraph 262.

Ibid. See also Occidental v. Ecuador, Dissenting Opinion of Brigitte Stern dated 20 September 2012, paragraphs 138 and 140 (‘How would it be possible to grant damages pertaining to rights that no longer belong to OEPC [the claimants], without disregarding the basic rules that confer jurisdiction on ICSID tribunals? In case two different investors are claiming an interference with their rights, they must both present a claim and one investor cannot bring a claim for the other, especially when they do not have the same nationality and cannot invoke the same BIT?’). But see Ceskoslovenska Obchodni Banka AS v. Slovak Republic, Decision of the Tribunal on Objections to Jurisdiction dated 25 May 1999, paragraph 32 (in obiter, ‘absence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute should not and has not been deemed to affect the standing of a claimant in an ICSID proceeding, regardless whether or not the beneficial owner is a State Party or a private party’); RosinvestCo UK Ltd v. Russian Federation, Final Award dated 12 September 2010, paragraph 323 (‘Respondent argues that the Participation Agreements with Elliott International preclude the definition [of investor in the treaty] applying to Claimant as Claimant was a mere nominal owner. This analysis is not supported by a plain reading of the definition in the [treaty]’).

See, e.g., Goldsmith and Melchiona, ‘Part Two’, pages 229–231 (‘Whatever the basis for finding an assignment (i.e., whether de facto or de jure), where a funder has acquired rights through assignment, it will arguably be necessary to assess the potential impact of the assignment, both upon jurisdiction and the admissibility. In relation to jurisdiction, where an assignment has been qualified, it would be worthwhile to consider whether a valid jurisdictional basis, ratione personae, exists to support the arbitration of any claim (or fractional interest in a claim) deemed to have been assigned to the funder. . . . Depending upon the terms of the funding employed, TPF may raise issues in respect of the identity of the real party in interest behind the claim, which may in turn have an impact on jurisdiction and admissibility’; Carolyn B Lamm and Eckhard R Hellbeck, ‘Third-Party Funding in Investor–State Arbitration Introduction and Overview’, in Third-Party Funding in International Arbitration 101 (Bernardo M Cremades Román and Antonias Dimolitsa eds., Kluwer Law International 2013) (Lamm and Hellbeck, ‘Third-Party Funding’), page 104 (‘Typically, a litigation funding arrangement will provide that the third-party funder is to receive a portion of the proceeds of the eventual award (assuming a monetary award is rendered in favour of the funded party). Such an arrangement may take the form of an assignment granting the funder a beneficial interest in the claim. The question arises whether this affects the arbitral tribunal’s jurisdiction and/or the funded party’s standing’).

doubts as to whether the claim meets the requisite nationality requirements. However, the tribunal in *Teinver v. Argentina* found that the alleged transfer of the claimants’ interest to a third-party funder that did not meet the nationality requirements could not affect its jurisdiction because it occurred after the case was initiated. The same result may not have followed if the transfer had occurred prior to the initiation of the arbitration. Moreover, the timing may not be relevant where what has been assigned is not just the investment but the claim itself.

56 See, e.g., Goldsmith and Melchionda, ‘Part Two’, page 232 (‘If we assume that the relevant nationality is that of the real party in interest – the real investor – and not that of the party that appears as such, in cases involving a *de jure* or *de facto* assignment of claims to a funder having a different nationality from the investor, it could be argued that neither the funder nor the original investor has standing to bring a claim. The investor, although a national of the contracting State, would no longer be the real party in interest. The funder, as the new owner of the claim, would not fulfil the nationality requirement. Therefore, if a protected investor assigns its treaty claims to a funder that does not have the requisite nationality – leaving aside the issue of the assignability of treaty claims – a risk may exist that the funder could find itself unable to enforce the claim’); Lamm and Hellbeck, ‘Third-Party Funding’, page 104 (‘Thus, if the funded party and the funder do not share the same nationality in particular if a claimant’s funder has the nationality of the host state, it is essential to assess whether the claim would continue to meet the nationality requirement under a bilateral investment treaty or the ICSID Convention to the extent of the funder’s beneficial interest in the claim’); Angelynn Meya, ‘Third-Party Funding in International Investment Arbitration ‘The Elephant in the Room’, in *Third-Party Funding in International Arbitration* 122 (Bernardo M Cremades Román and Antonias Dimolitsa eds., Kluwer Law International 2013), page 123 (‘When funded by a third party, questions could arise as to whether an investor continues to have standing to bring claims. This includes such questions as whether the state’s consent to arbitrate extends to disputes where the party with a real interest in the claims appears to be a third-party funder (as opposed to the investor) and whether such a dynamic is consistent with the object and purpose of the treaty. States have an interest in knowing the identity of the investor (and its funder). They are likely to resist any attempt to broaden the scope of consent or the definition of investor under the relevant treaty, especially where this would permit third parties to benefit from rights that were only intended for qualified investors’). But see Pinsolle, ‘Third-Party Funding and Nationality’, page 646 (‘[I]t would seem that the nationality of the claimant would be unaffected by the fact that the proceeds of the award may go directly to a third party. After all, one would argue that the situation is no different from that where a claimant has received a corporate loan and uses the proceeds of the award to reimburse that loan.’).

57 See, e.g., Pinsolle, ‘Third-Party Funding and Nationality’, page 647 (‘[I]f the assignment has taken place after the initiation of the arbitration, and absent any other circumstances such as fraud, there is in principle no issue of nationality, and no objection can be raised by the respondent on that basis’); von Goeler, *Third-Party Funding*, page 240 (‘[A] third-party funding agreement . . . should not affect the admissibility of the funded claim if the transfer of rights operated by that agreement becomes effective after the date on which the proceedings have been instituted’).

58 See, e.g., El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction dated 27 April 2006, paragraph 135 (stating that a transfer of the investment after commencement of the arbitration does not affect jurisdiction because the claimant continues to own the claim itself, ‘unless, of course, it can be shown that it was sold with the investment’).
V DISCLOSURE OF THIRD-PARTY FUNDING

Given the concerns raised by third-party funding, the issue arises as to whether and to what extent third-party funding arrangements should be disclosed. This issue is discussed here in connection with the three concerns addressed above: conflicts of interest, security for costs and jurisdiction.

i Disclosure and conflicts of interest

A consensus is developing that a claimant should automatically disclose whether it is being funded by a third-party funder and, if so, the identity of its third-party funder, to assess potential conflicts of interest. Commentators refer to the need for disclosure in that context as a ‘vital’ ‘best practice’, without which ‘the independence of an arbitrator cannot be assured’.60

As noted earlier, the revised IBA Guidelines also support this position. The Guidelines provide that a party shall disclose, ‘on its own initiative at the earliest opportunity’, ‘any relationship, direct or indirect, . . . between the arbitrator and any person or entity with a direct economic interest in . . . the award’, and recognise that a third-party funder has a ‘direct economic interest’ in the award.61 Similarly, the EU–Vietnam Free Trade Agreement, the Comprehensive Economic and Trade Agreement between Canada and the European Union and the European Union’s draft proposal for the investment chapter of the Transatlantic

60 See, e.g., Catherine A Rogers, Ethics in International Arbitration (Oxford University Press 2014), page 201 (‘[F]or arbitrators to assess the potential for conflicts and make necessary disclosures, third-party funders’ participation in particular international arbitration cases will necessarily have to be disclosed’); Club des Juristes, ‘Financement du procès par les tiers’ (June 2014), page 59 (‘It is undeniable that the presence of a third-party funder in the arbitral proceeding may generate potential conflicts of interest. In this sense, the current situation that does not require anyone to disclose anything cannot persist’) (authors’ translation); William Stone, ‘Third Party Funding in International Arbitration: A Case for Mandatory Disclosure?’, Asian Dispute Review 62 (April 2015), page 68 (‘Absent disclosure of a funding relationship within the arbitration, the independence of an arbitrator cannot be assured’); Burcu Osmanoglu, ‘Third Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest’, 32(3) Journal of International Arbitration 325 (2015), pages 339–340 (‘[A]n obligation on the parties to disclose the presence of third-party funders in the arbitration proceedings is vital and would closely relate to the obligation of the arbitrators to disclose any relationship that they have with third-party funders that may imperil the arbitral tribunal’s independence and impartiality’); Kessedjian, ‘Good Governance’, pages 1–2 (‘Some of the best practices for arbitral tribunals confronted with third-party financing could include the following: Financing by third parties must be disclosed for arbitration proceedings to be conducted appropriately’).

61 IBA Guidelines, Guidelines 6(b) and 7(a) and Explanations to General Standards 6(b) and 7(a).
Trade and Investment Partnership contain an obligation to disclose ‘the name and address of the third-party funder’. Municipal jurisdictions have also considered initiatives for requiring parties to an arbitration to disclose third-party funding.

Tribunals have also referred to the potential for conflicts of interest between arbitrators and funders as a basis for ordering claimants to disclose whether they are being financed by third-party funders and, if so, to disclose their details.

Apart from the issue of disclosure of third-party funding by the parties, the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration refers to disclosure by the arbitrators themselves, stating that they should consider disclosing ‘relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award’.

---

62 EU–Vietnam FTA, Section 3, Article 11.1 (‘Where there is third-party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal the existence and nature of the funding arrangement, and the name and address of the third-party funder’); Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, signed 30 October 2016, Article 8.26(1) (‘Where there is third-party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder’); EU Draft TTIP, Section 3, Article 8.1 (‘Where there is third-party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal, the name and address of the third-party funder’).

63 See, e.g., Law Reform Commission of Hong Kong, Report: Third Party Funding for Arbitration (October 2016), paragraph 3.47, Annex 1 (Draft Provisions to amend the Arbitration Ordinance, Article 98Q).

64 See, e.g., Sehil v. Turkmenistan, paragraphs 9–12 (ordering that the claimants disclose ‘whether their claims in this arbitration are being funded by a third-party/parties, and, if so, the names and details of the third-party funder(s) and the terms of that funding’. The reasons for the tribunal’s order included ‘the importance of ensuring the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third-party funder’); SAS v. Bolivia, Procedural Order No. 10 dated 11 January 2016, paragraphs 70, 79 (‘Bolivia considers that the identity of the funder should be disclosed to preserve the integrity of the arbitration given that there could be conflicts of interests between the funder and the arbitrators. . . . [T]he 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’); Eurogas Inc and Belmont Resources Inc v. Slovak Republic, ICSID Case No. ARB/14/14, First Session and Hearing on Provisional Measures dated 17 March 2014, page 145 (ordering disclosure of the identity of the third-party funder); Jarrod Hepburn, ‘ICSID Tribunal Orders Identification of Third-Party Funder, But Denies State’s Request for Security for Costs and Claimants’ Request for Provisional Measures’, Investment Arbitration Reporter, 3 August 2015 (‘Although the [Eurogas] tribunal did not elaborate any reasons for the order, Slovakia had urged disclosure in order to verify whether any conflicts of interest might exist’). In Corona v. Dominican Republic, the tribunal also ordered the claimant to ‘indicate whether it had received funds from any third-party funder to cover the costs of this arbitration, and if so, to disclose its/their name(s), and the date when such funding started’, but the reasons for this order, which is not public, are not known. Corona Materials LLC v. Dominican Republic, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in accordance with Article 10.20.5 of the DR-CAFTA dated 31 May 2016, paragraph 22.

ii Disclosure and security for costs

The terms of a funding agreement that are most relevant to security for costs are those concerning whether the funder is liable to pay an adverse costs order against the claimant and whether and under what conditions the funder can stop funding the claimant. As discussed earlier, where a claimant is impecunious and its third-party funder is under no obligation to pay an adverse costs award or to remain in the case, there is a serious risk that the respondent will not be able to enforce a costs award.

To date, the only case in which disclosure of the terms of a funding agreement was ordered because of their relevance to a potential security for costs application is Sehil v. Turkmenistan. The tribunal stated:

Claimants shall confirm to Respondent whether its claims in this arbitration are being funded by a third-party funder, and, if so, shall advise Respondent and the Tribunal of the name or names and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration.

Among the ‘factors’ justifying this decision, the tribunal expressly stated:

although it has not yet done so, Respondent has indicated that it will be making an application for security for costs. It is unclear on what basis such application will be made, e.g., Claimants’ inability to pay Respondent’s costs and/or the existence of a third-party funder.

Two other investor–state tribunals have denied requests for disclosure of the terms of a funding agreement on this basis. In Guaracachi v. Bolivia, the tribunal noted that the claimants had not denied that the funding agreement ‘would not cover the payment of a possible award on costs’ and that it would ‘draw such inferences as it deems appropriate when deciding on’ the respondent’s request for security for costs. The tribunal ultimately denied the security for costs application, but did not indicate what ‘inferences’ it drew.

In South American Silver v. Bolivia, the tribunal also rejected the respondent’s request for disclosure of the terms of the financing agreement between the claimant and its third-party funder. The tribunal explained that, as it decided not to award security for costs, disclosure

66 Von Goeler, Third-Party Funding, pages 195–196 (‘[R]easonable grounds for wanting to know about certain parameters of the relationship between the litigation funder and the funded party embodied in the litigation funding agreement seem more likely to exist because funding-related facts can have an impact on issues of arbitral procedure. To take one of the situations . . . an issue relating to security for costs and third-party funding shall be invoked: the risk that a funded claimant is suddenly left without funding (and thus without means to satisfy a potential adverse costs award) may depend on the precise circumstances under which its litigation funder is contractually entitled to terminate the funding agreement (only on narrow enumerated grounds or entirely at its discretion?), thereby affecting the respondent’s entitlement to security for costs’).

67 Id., paragraph 13.

68 Id., paragraph 10.


of the terms of the agreement was ‘not relevant under these particular circumstances to
determine whether the third-party funder would assume or not an eventual costs award in
favor of Bolivia’.72

iii Disclosure and jurisdiction
As explained above, whether the third-party funder is the real party in interest to a claim
could manifest itself in various ways, including through the proportion of the claim being
funded, the proportion of an award to be received by the funder, and the role of the funder
in appointing counsel and experts, in deciding the witnesses for the claimant, or in making
other calls about strategy. Accordingly, to determine whether the third-party funder is the real
party in interest, the claimant should disclose provisions relevant to these matters.

To date, only the Sehil v. Turkmenistan tribunal has recognised that disclosure of the
terms of a funding agreement may be justified to ‘identify the true party to the case’.73 In
South American Silver v. Bolivia, this was one of the reasons presented by the respondent in
support of disclosure of the terms of the funding agreement, but the tribunal does not seem
to have analysed this reason in its ultimate decision.74

iv Scope of disclosure and privilege
Two additional issues arise in the context of disclosure: first, whether disclosure of an entire
funding agreement is warranted, and second, privilege.

With respect to the first issue, disclosure of certain provisions of a funding agreement,
such as those identified as relevant to security for costs and jurisdiction, may not be sufficient
for a complete analysis of the impact of the third-party funding relationship on the case.
Accordingly, it may be necessary to disclose the entire funding agreement, as the tribunal
ordered in Sehil v. Turkmenistan, rather than selected provisions.

---

72 Id., paragraph 81.
73 Sehil v. Turkmenistan, paragraph 1.
74 SAS v. Bolivia, Respondent's Request for Cautio Judicatum Solvi and Disclosure of Information dated
8 October 2015, paragraph 39(a) ("The disclosure of the terms of the funding agreement will allow
verifying at least . . . who the real interested parties in this arbitration are. Indeed, the information
requested is necessary for Bolivia to confirm whether – as part of the funding agreement – Claimant has
assigned some or all of its claims in this arbitration to the third-party funder"); SAS v. Bolivia, Procedural
Order No. 10 dated 11 January 2016, paragraph 82 ("[N]o additional circumstances have been proven
that . . . warrant the modification of the decisions already taken concerning document production in
the corresponding procedural phase"). In its order for document production, the SAS v. Bolivia tribunal
decided that the respondent's request for disclosure of the third-party funding agreement and any
documents related to its conclusion and performance 'go beyond the discussion on the relevance and
materiality of the documents in the context of the dispute, or the even simpler discussion about the need
to produce documents or lack thereof, which is the purpose of this phase. Consequently, the Tribunal
considers that this is not the form or the procedural phase to deal with these matters. Therefore, the
Tribunal will deny the production of the Documents Requested . . . without prejudice to the Respondent
submitting a separate duly justified request'. SAS v. Bolivia, Procedural Order No. 7 dated 21 July 2015,
paragraph 26(iv).
Second, a potential objection to the disclosure of the terms of a funding agreement is that the agreement is privileged. However, municipal courts have ordered the production of entire funding agreements, with and without redactions.\textsuperscript{75} And at least some funders recognise the need to disclose certain terms of their funding arrangements.\textsuperscript{76}

\section*{VI CONCLUSION}

Investment arbitration is no longer a ‘no man’s land’ as far as third-party funding is concerned. The field is increasingly populated by arbitral decisions, commentaries and attempts to codify applicable rules on this issue. A consensus is forming around some issues, such as conflicts of interest and certain disclosure obligations. With respect to other issues, such as security for costs and jurisdiction, there is less agreement. During this formative period, it is particularly important that arbitral tribunals provide fully reasoned decisions on issues relating to third-party funding, in the interest of assessing the legal implications of this phenomenon and developing the most appropriate principles.

\textsuperscript{75} See, e.g., Berger v. Seyfarth Shaw LLP, US District Court for the Northern District of California, Opinion dated 22 October 2008, 2008 US Dist LEXIS 88811 (ND Cal 2008), pages 8–9 (finding that a letter and agreement relating to the financier’s financial contribution were not privileged and should be produced); Charge Injection Technologies Inc v. E I DuPont De Nemours & Company, Superior Court of Delaware, Opinion dated 27 February 2014, 2014 WL 891286, n. 14 (‘The Court noted that the bulk of the Financing Agreement does not appear to fall under the work product doctrine and DuPont has substantial need of the Agreement’); Charge Injection Technologies Inc v. E I DuPont De Nemours & Company, Superior Court of Delaware, Opinion dated 31 March 2015, 2015 WL 1540520, page 5 (finding only that the payment terms in the financing agreement, which were redacted, were covered by the work product doctrine); Federal Court of Australia, Practice Note CM 17: Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth) dated 9 October 2013, Clause 3.6 (‘At or prior to the initial case management conference each party will be expected to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. Any funding agreement disclosed may be redacted to conceal information which might reasonably be expected to confer a tactical advantage on the other party’). US courts have also ordered production of fee arrangements with lawyers and have held that they are not privileged. See, e.g., Murray v. Stuckey’s Inc, US District Court for the Northern District of Iowa, Western Division, Order dated 29 December 1993, 153 FRD 151 (ND Iowa 1993), page 153; Montgomery County v. Microvote Corporation, US Court of Appeals for the Third Circuit, Opinion dated 30 April 1999, 175 F.3d 296 (3d Cir. 1999), page 304; In the Matter of Richard D Priest et al v. Hennessy, Court of Appeals of New York, Opinion dated 8 July 1980, 51 N.Y.2d 62, pages 69–70; In re Grand Jury Subpoena served upon John Doe, Esq. (Slotnick). Richard Roe (Colombo) v. United States of America, US Court of Appeals for the Second Circuit, Opinion dated 9 January 1986, 781 F.2d 238 (2d Cir. 1986), pages 247–248.

\textsuperscript{76} Scherer et al, ‘Funder’s Perspectives’, page 218 (one funder observed that ‘once the proceedings are in place, the decision may be in the hands of the tribunal either because of conflicts issues or because the tribunal wants disclosure of the real player behind the claimant. Funders therefore have to anticipate their possible exposure in arbitral proceedings even where the funding agreement provides for a confidentiality clause. Such disclosure ultimately may be justified in certain circumstances’).
Chapter 11

MULTIPARTY PROCEEDINGS
AND MASS CLAIMS

Jeffrey Sullivan, Marie Stoyanov and Lucia Raimanova

I INTRODUCTION

In the history of the ICSID Convention, claims by multiple investors are by no means unusual. Indeed, when the Decision on Jurisdiction and Admissibility in the game-changing claim initially brought by 180,000 Italian bondholders against Argentina, *Abaclat v. Argentina*, was issued on 4 August 2011, 27 out of 358 claims registered with ICSID involved more than two claimants, with the number of claimants ranging from three to 137. However, up until *Abaclat*, almost all of these claims were brought by a more contained number of closely affiliated claimants either through family ties or corporate structure (e.g., joint venture

---

1 Jeffrey Sullivan and Marie Stoyanov are partners at Allen & Overy LLP and Lucia Raimanova is counsel at Allen & Overy Bratislava s.r.o.
2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States submitted for signature and ratification to member Governments of the International Bank for Reconstruction and Development on 18 March 1965 and which entered into force on 14 October 1966 (the ICSID Convention or the Convention).
5 This excludes *Abaclat* (*supra* note 4); *Ambiente*, (*supra* note 3) and *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014 (Alemanni) (Sir Franklin Berman KCMG, President, Karl-Heinz Böckstiegel and Christopher Thomas, Arbitrators), available at www.italaw.com/sites/default/files/case-documents/italaw4061.pdf, which will be discussed in this chapter.
6 Multiparty cases were identified on the list by using the phrase ‘and others’. The tribunal in *Ambiente* clarified that this wording indicated the existence of three or more claimants, since otherwise the case name included the name of the two claimants, without the addition of ‘and others’. *Ambiente* Decision (*supra* note 3), paragraph 135 and footnote 44. See the list on the ICSID official website: https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx, last accessed on 6 March 2017.
7 See, for example, *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 10 May 2011 (*Anderson*) (involving 137 Canadian claimants proceeding under the ICSID Additional Facility); *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 7 April 2009 (*Funnekotter*) (involving 13 named claimants with over 1,500 other potential participants waiting in the wings). There are other large-scale arbitrations commenced either
Multiparty Proceedings and Mass Claims

partners\(^9\) or groups of companies)\(^10\) and concerned the same investment, as opposed to an unrelated mass of claimants as was the case in *Abaclat*. These ‘related multiparty arbitrations’ no longer give rise to controversy\(^11\) and are not further examined in this chapter. In the small number of instances that involved multiple unaffiliated claimants pre-*Abaclat*, no jurisdictional or admissibility objection based on the number of claimants or the lack of affiliation among them was raised.\(^12\)

The unprecedented number of unrelated claimants in *Abaclat* brought the issue of ‘mass claims’ and those of multiparty proceedings involving unrelated claimants into focus.\(^13\) In *Abaclat*, approximately 180,000 individual and institutional bondholders brought a claim for breach of the Argentina–Italy BIT\(^14\) in response to Argentina’s default on its sovereign debt in the aftermath of its 2001 economic crisis and a subsequent voluntary exchange offer that substituted the old debt instruments for new bonds at 35 per cent value of the original rights. Two-thirds of the investors eventually withdrew from the proceedings, reducing the total number of claimants to 60,000. Two further claims against Argentina having the same factual background but involving separate groups of Italian bondholders followed – *Ambiente v. Argentina*\(^15\) and *Alemanni v. Argentina*\(^16\). While those claims only

---

9 See, for example, *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010.

10 See, for example, *AES Corporation and Tau Power BV v. Kazakhstan*, ICSID Case No. ARB/10/16, Final Award, 1 November 2013.


12 See, for example, *Funnekotter* (supra note 8) where 14 Dutch investors, who directly or indirectly owned farms in Zimbabwe, jointly brought a claim against Zimbabwe under the applicable Netherlands–Zimbabwe BIT, alleging that the government’s land acquisition programme breached its obligations. See also *Ambiente* (supra note 3), paragraph 158, where the claimants described *Funnekotter* as follows ‘[t]he only existing link between the individual claimants and their respective claims was that all of them had suffered the same harm by virtue of the measures adopted by the host state, which deprived each one of them of its investment without a just compensation’. In the case involving the highest number of claimants prior to *Abaclat*, *Anderson* (supra note 8), none of the jurisdictional objections related to the multiplicity of claimants. In *Anderson*, the claim was brought by 137 claimants in relation to deposits made into a fund scheme.


14 Agreement between the Republic of Italy and Argentine Republic for the Promotion and Protection of Investment signed on 22 May 1990 and which entered into effect on 14 October 1993.

15 *Ambiente* (supra note 3).

16 *Alemanni* (supra note 5).
involved 90 and 74 claimants respectively, the jurisdictional decisions rendered in those cases continued to attract a high level of interest because of the lack of clear affiliation among the claimants and their investments that was equally lacking in *Abaclat*. With further groups of unaffiliated claimants choosing to go down the route of collective proceedings, and not just against Argentina, it seems that the string of these three Argentinian cases were not the last proceedings of this nature.

In what is a relatively new phenomenon of claims in the realm of investment treaty arbitration, claimants who are not related and did not make an investment jointly bring claims in a single reference on the basis that: (1) the investments are similar (e.g., bonds); (2) the legal and regulatory framework applying to the investments is identical; (3) the factual matrix underpinning the claims is identical or very similar; and (4) the basis for the individual claims, and the instrument giving the tribunal jurisdiction, are identical. For convenience,
this chapter uses the umbrella term ‘collective proceedings’ to describe this type of claim, regardless of the number of claimants involved. The principal question tribunals faced with collective proceedings have to tackle is whether the specific features of collective proceedings, and particularly those brought by a mass of claimants, affect their jurisdiction or otherwise make such collective claims incapable of being adjudicated together lest there be a breach of due process or impossibility for the tribunal to assess its jurisdiction.

Indeed, the three Argentinian cases invoked different and sometimes conflicting lines of reasoning and, in Abaclat and Ambiente, generated vehement dissents. The cases also sparked a vivid discussion among commentators. While the three tribunals ultimately were in agreement that collective proceedings could be heard under the ICSID framework as long as the consent to arbitrate on the part of all involved can be established and proper procedures can be and are put in place to ensure a fair hearing, the precise limits (if any) of these claims are not clear. While the Alemanni tribunal’s reasoning appears to suggest that there is no limit on the number of claimants provided that their claims relate to a ‘single dispute’, no tribunal has had to tackle the practical consequences that might result from having a true mass of claimants. With Abaclat recently settled, it may be some time before any tribunal does.

---


20 Alemanni (supra note 5), Concurring Opinion of Mr J Christopher Thomas, paragraph 2 (‘[T]he tribunal sees no additional requirement for a special consent. The claims either fall to be considered as a single dispute within the Tribunal’s jurisdiction or they do not.’).
At this stage, a few comments on terminology are necessary. The term ‘mass proceedings’\textsuperscript{21} was used by the majority in *Abaclat* as a label of convenience to denote ‘the high number of claimants appearing together as one mass’,\textsuperscript{22} although the majority also noted that there was no ‘uniform terminology concerning the various kinds of proceedings involving a high number of parties’.\textsuperscript{23} Some questioned this characterisation, noting that a mass claim in the traditional sense involves a high number of claims decided individually, whereas in *Abaclat* the claims were to be decided as one.\textsuperscript{24} Faced with 90 (as opposed to 60,000) unrelated claimants, the majority in *Ambiente* used the term ‘multi-party proceeding’,\textsuperscript{25} which it contrasted with a ‘mass claim’ that it considered was characterised by the need ‘for modifications or adaptations of the procedural arrangements to guarantee the manageability or fairness of the case’\textsuperscript{26} because of ‘the sheer number of claimants’ involved. The *Alemanni* tribunal also did not consider 74 claimants as befitting ‘the descriptor “mass”’,\textsuperscript{27} but refused to engage in a ‘battle of terminologies’, underscoring that these terms had no recognised meaning in international law and even lacked uniform understanding in national courts.\textsuperscript{28}

Another distinction, among many, that can be drawn is between aggregate and representative proceedings. The former are viewed as proceedings in which claimants participate in their own right,\textsuperscript{29} with their claims being aggregated judicially and managed together at the pretrial stage in the interest of procedural efficiency.\textsuperscript{30} The latter are viewed as proceedings where the claim is managed by a *negotiorum gestor* or agent on behalf of an unnamed group of claimants.\textsuperscript{31} The *Abaclat* majority considered that the proceedings before it displayed features of both and described them as a ‘hybrid kind of collective proceedings’.\textsuperscript{32}

\textsuperscript{21} *Abaclat*, paragraph 480.
\textsuperscript{22} Ibid., paragraph 480.
\textsuperscript{23} Ibid., paragraph 480.
\textsuperscript{25} *Ambiente* (supra note 3), paragraph 120 (‘Whilst the Tribunal does not take any stand on the question of the appropriate terminology to be used in that case, it would emphasize that the dimension of the Claimants in the case to be decided by the present Tribunal can in no way be compared to the Abaclat case, being merely one thousandth of the latter’).
\textsuperscript{26} Ibid. paragraph 120.
\textsuperscript{27} *Alemanni* (supra note 5), paragraph 267.
\textsuperscript{28} Ibid. (supra note 5), paragraph 267.
\textsuperscript{29} See, for example, *Abaclat* (supra note 4), paragraph 487 and H van Houtte and B McAsey, ‘Case Comment, Abaclat and others v. Argentine Republic: ICSID, the BIT and Mass Claims’ (supra note 19), page 234.
\textsuperscript{30} See, for example, *Abaclat* (supra note 4), paragraph 483 and M Aggarwal and S Maynard, ‘Investment Treaty Arbitration Post-Abaclat: Towards a Taxonomy of “Mass” Claims’ (note 11, supra), page 829.
\textsuperscript{32} The majority considered the ‘individual and conscious choice’ by each claimant to join the arbitration and their identification by name as features of aggregate proceedings (*Abaclat* (supra note 4), paragraph
The dissenting arbitrator, Professor Abi-Saab, labelled the majority's hybrid as a 'brain-child of the majority award's legal imagination', and classed the proceedings as aggregate (given that the claims retained their individual character), which he considered would, in turn, require appropriate modifications to the procedure that were not within the tribunal's power to make. Further, he equated 'representative proceedings' with class actions, which are common in some national systems of law. Among commentators, van Houtte, for example, stressed that '[a]ny stage which necessarily involve[s] a determination based on an individual claimant’s circumstances cannot, by its very nature, invoke the “representative proceedings” description'. The Ambiente tribunal was cautious not to characterise the proceedings as representative and instead focused on the claimants being clearly identified individuals acting in their own names. It held that it was ‘certainly not in the presence of a class action or anything close to it’, which it equated with representative proceedings, and that therefore its findings would only bind the individual claimants as opposed to their third-party representative.

While the debate over the appropriate terminology and characterisation of different types of collective proceedings continues, the distinctions only matter if they denote a tribunal’s approach to the determination of the claim before it (and the terms in question are not being used as mere labels of convenience). For example, the characterisation of a claim as a mass claim may denote that the standard procedure of taking of evidence is considered unmanageable and will have to be modified to allow for a simplified procedure or even sampling, which may in turn raise due process considerations that do not arise in collective proceedings with fewer claimants. Similarly, if proceedings are characterised as ‘representative’ (as opposed to ‘aggregate’), it is questionable how a tribunal is to satisfy itself that it has jurisdiction over an unnamed group of claimants.

487) and the fact that the investors were represented jointly by an association of banks who acted as intermediaries in the original sale of bonds, Task Force Argentina (TFA), and had a vested authority to conduct the proceedings in the common interest of the group (rather than its individual members) and a responsibility to bear all the associated cost as features of a representative proceeding (Abaclat (supra note 4), paragraphs 65–69, 458 and 486–488).

33 Abaclat Dissenting Opinion (supra note 31), paragraph 145.
34 Ibid., paragraphs 139–140.
35 Ibid., paragraphs 132.
37 H van Houtte and B McAsey, ‘Case Comment, Abaclat and others v. Argentine Republic: ICSID, the BIT and Mass Claims’ (supra note 19), page 235.
38 Ambiente, (supra note 3), paragraphs 115–119. While North Atlantic Société d’Administration was representing the claimants, this was not considered determinative.
39 Ambiente (supra note 3), paragraphs 116.
40 Abaclat (supra note 4), paragraphs 531 and 667.
41 For example, at paragraphs 99–104 of his Dissenting Opinion on the Decision on Jurisdiction and Admissibility dated 2 May 2013 in Ambiente (supra note 3) (Ambiente Dissenting Opinion), Dr Santiago Torres Bernárdez classified ‘representative’ mass proceedings as falling outside the framework of the ICSID system, which could not be remedied by the consent of a given respondent state, whereas, in contrast, ‘aggregate proceedings’, which allow due process examination of each individual claim, were capable of being remedied by an ad hoc additional manifestation of consent on the part of the respondent state.

127
In the sections that follow, this chapter first explores the issues of consent arising out of collective proceedings brought under the ICSID Convention (Section II), before their compatibility with the ICSID framework, as well as certain practical considerations, are considered (Section III). While this chapter primarily draws on the reasoning in the three Argentinian cases, similar questions are bound to arise in all cases where non-affiliated parties bring claims in a single reference.

II CONSENT

It has become a somewhat trite statement that consent is the cornerstone of all arbitration proceedings, including those under the ICSID Convention, although its importance should not be overlooked. At the same time, it is important to recall that, in contrast to commercial arbitration, investment-treaty arbitration is characterised by what Paulsson coined ‘arbitration without privity’, with the state’s consent to arbitrate given through a unilateral, standing offer, capable of acceptance by an unnamed investor by commencing arbitration proceedings as prescribed in the applicable treaty. While it is true that investment treaties do not regulate collective arbitrations, they do not expressly provide that a state’s offer to arbitrate may


43 This is of course contingent on meeting any conditions that are specified in the applicable treaty.

44 In contrast, Article 6(5) of Chapter II of the draft text of the Transatlantic Trade and Investment Partnership (TTIP), prepared by the European Commission, seeks to exclude class actions from its application (‘Claims submitted in the name of a class composed of a number of unidentified claimants, or submitted by a representative intending to conduct the proceedings in the interests of a number of identified or unidentified claimants that delegate all decisions relating to the proceedings on their behalf, shall not be admissible’), available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf, last accessed on 6 March 2017. Separately, some multilateral treaties, such as the Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and Its Member States, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf, although silent on collective proceedings, do regulate the consolidation of claims. In particular, Article 8.43 of Chapter 8, ‘Investment’, provides as follows: ‘[i]f, after hearing the disputing parties, a consolidating division is satisfied that claims submitted pursuant to Article 8.23 [Submission of a claim] have a question of law or fact in common and arise out of the same events or circumstances, and consolidation would best serve the interests of fair and efficient resolution of the claims including the interest of consistency of awards, the consolidating division of the Tribunal may, by order, assume jurisdiction over some or all of the claims, in whole or in part’. The distinction between collective proceedings and consolidation of claims is significant. While multiparty proceedings include plurality of investors together commencing a single arbitration, ‘consolidation’ covers joinder of two or more separate proceedings already pending before arbitral tribunals (see, for example, G Kaufmann-Kohler et al, ‘Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations be Handled Efficiently?’ – Final Report on the Geneva Colloquium held on 22 April 2006 (2006) 21 ICSID Rev. – Foreign Investment Law Journal, page 59). The importance of the distinction was further underscored by the majority in Ambiente when it rejected the requirement of specific consent in multiparty proceedings, but confirmed that this additional hurdle needs to be met when consolidating proceedings (see Ambiente, (supra note 3), paragraphs 123–125).
only be accepted by one or any particular number of investors per proceeding. In ICSID proceedings, the additional jurisdictional requirements contained in Article 25 of the ICSID Convention must of course also be fulfilled.

Argentina raised jurisdictional objections in all three cases outlined above. Chief among them was the objection that the tribunal lacked jurisdiction because no special or secondary consent by Argentina to collective or mass claims had been given. In Abaclat, Argentina also argued that the claimants’ consent to submit to ICSID ‘in writing’ was lacking. The requirements for consent of both claimant and respondent are therefore addressed next.

i Claimant’s consent

In Abaclat, Argentina argued that the failure by some of the claimants to sign the request for arbitration invalidated the group’s consent, as it fell foul of the requirement contained in Article 25(1) that the consent to submit to ICSID must be ‘in writing’. However, the tribunal accepted Abaclat’s argument that the omission had been rectified by each of the 60,000 claimants signing an ‘individual consent to pursue claims’ and a power of attorney mandating a third party, Task Force Argentina (TFA), to represent the group in the proceedings. Each claimant also produced evidence of nationality, domicile and ownership. Further, the tribunal recognised that it would have to be able to establish jurisdiction over each individual claimant, thus recognising its duty to verify its jurisdiction objectively. The difficulty, addressed in Section III, infra, lies in how that might be achieved when faced with 60,000 claimants.

45 See, however, the draft text of the TTIP (supra note 44).
46 See, for example, C McLachlan, L Shore and M Weiniger, International Investment Arbitration: Substantive Principles (Oxford University Press 2007), MN6.06.
47 Abaclat (supra note 4), paragraphs 501 and 658. Argentina also argued that the claimants’ consent was vitiated because TFA comprised Italian banks that originally sold the bonds to the investors and therefore had a clear conflict of interest. Argentina argued that this was demonstrated by the consent declaration, which mandated TFA, requiring claimants temporarily to waive their rights to pursue civil litigation against the banks, which, according to Argentina, amounted to ‘fraud, coercion or essential mistake’. While the tribunal found TFA’s approach to be ‘morally condemnable’, it did not consider that the claim was rendered inadmissible. At the same time, the majority stressed that any concerns regarding the alleged abuse of rights and legitimacy of individual claims would be addressed as part of the merits.
48 Abaclat (supra note 4), paragraphs 501 and 658.
49 Article 25(1) of the ICSID Convention (‘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 requirement for an agreement in writing is further reiterated in Article 36(1) of the ICSID Convention, which obliges potential claimants to address their arbitration requests to the Secretary General (‘Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.’).
50 See comments by Ms Carolyn B Lamm of White & Case LLP, the lead advocate for Abaclat claimants in A Raviv, ITA-ASIL 2014: Mass and Class Claims in Arbitration, (supra note 17). See also M Weiniger and M McClure, ‘Looking to the Future: Three “Hot Topics” for Investment Treaty Arbitration in the Next Ten Years’ (supra note 19), page 3.
51 Abaclat (supra note 4), paragraph 490.
Respondent’s consent

Reconciling the nature of collective proceedings with the state-consent-centric premise of international investment law has sparked a vivid debate over the scope of states’ general consent to arbitration. Some perceive the ‘mass aspect’ of the proceedings as separate from jurisdictional considerations, arguing that the sheer number of claimants should not necessitate any additional consent on the part of the state. Others draw on a US Supreme Court decision in *Stolt-Nielsen v. AnimalFeeds*, where it was held that a party must give affirmative consent to participate in a class action. In the context of ICSID proceedings, the discussions concerning the requirement for specific consent or lack thereof are best examined by reference to international investment treaties and the ICSID Convention respectively.

Consent grounded in international investment treaties

Each of the three tribunals in *Abaclat*, *Ambiente* and *Alemanni* addressed, at varying length, the issue of Argentina’s consent to collective proceedings being inherent in its general consent contained in the Argentina–Italy BIT. In *Abaclat*, the majority rejected Argentina’s argument that the treaty’s silence on the issue of collective claims meant that they were excluded from

---


53 See, for example, H van Houtte and B McAsey, ‘Case Comment, Abaclat and others v. Argentine Republic: ICSID, the BIT and Mass Claims’ (*supra* note 19), page 233, where the authors described the ‘mass’ issue as a ‘stand-alone feature’ that should be dealt with via case management techniques rather than through deliberation on respondent’s valid consent. See also A Newcombe, ‘Mass Claims and the distinction between jurisdiction and admissibility’ (*supra* note 19).


56 *Abaclat* (*supra* note 4), paragraph 489 (‘The only remaining question is whether a specific consent regarding the specific conditions in which the present arbitration would be conducted is required, i.e., regarding the form of collective proceedings’); *Ambiente* (*supra* note 3), paragraph 145 (noting that the pertinent question was whether, within the framework of the ICSID Convention, the original submission of multi-party claims requires a specific or additional act of consent on the part of the Respondent beyond the general consent requirement pursuant to Art 25(1) of the Convention’); *Alemanni* (*supra* note 5), paragraph 270 (‘the separate question [is] of what the Respondent had consented to in its “standing offer” under the BIT. That follows from the fundamental fact that the procedure under the Convention can be employed only if the parties to the dispute have consented to submit their dispute to ICSID arbitration’).
its application. It concluded that, contingent on its ability to establish jurisdiction in respect of individual claimants, ‘it is difficult to conceive why and how the Tribunal could lose such jurisdiction where the number of Claimants outgrows a certain threshold.’

The majority’s decision seems to have generated as many critics as it has supporters. In his dissent, Professor Abi-Saab underscored that neither international nor national law dictate that a ‘mere acceptance to arbitrate . . . cover[s] collective mass claims actions’. Weiniger, for example, noted that ‘[s]ometimes the absence of something means simply that it is not there’, citing a report by the WTO Appellate Body as an authority encouraging a strict interpretation of a treaty’s silence.

Supporters of the majority’s decision rejected the requirement of a secondary consent, with some arguing that ‘the request of a special/secondary consent would clearly “overturn the equilibrium” of investment arbitration, where the host State’s consent to arbitration “given in advance” has to be seen as a procedural guarantee for stimulating and protecting foreign investments’. The Ambiente majority also concluded that in the absence of any evidence in the treaty militating against ‘plurality of claimants jointly submitting a claim’, Argentina’s general consent should extend to collective proceedings.

---

57 *Abaclat* (supra note 4), paragraph 516–519.
58 *Abaclat* (supra note 4), paragraph 490.
59 *Abaclat Dissenting Opinion* (supra note 30), paragraph 190.
62 See also *Brown v. Stott* [2003] 1 AC 681 (UK, Privy Council), paragraph 703 on the interpretation of the European Convention on Human Rights and any other treaty ‘(In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the Convention. The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept. As an important constitutional instrument the Convention is to be seen as a “living tree capable of growth and expansion within its natural limits” (*Edwards v. Attorney General for Canada* [1930] AC 124, 136 per Lord Sankey LC), but those limits will often call for very careful consideration’).
65 *Ambiente* (supra note 3), paragraph 146. See also *Guarachi America Inc and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, where multiple claims were brought in a single arbitration under two different bilateral investment treaties by
Although the Alemanni tribunal also rejected Argentina’s objection, it criticised both majority decisions for not sufficiently considering the effect of the ‘mass aspect’ on consent and instead focusing the analysis on procedural admissibility issues.\textsuperscript{66} The Alemanni tribunal was unimpressed with the debate about the need for, or the relevance of, a special consent.\textsuperscript{67} Rather, the tribunal considered that the crux of the issue was whether adequate consent was given at all, observing that ‘[c]onsent is not more valid by being given twice, any more than it is less valid for having been given only once’.\textsuperscript{68} The tribunal saw the resolution of the matter in a ‘proper interpretation of the BIT’.\textsuperscript{69} While relying on Article 31(1) of the VCLT,\textsuperscript{70} the tribunal warned against unnecessary ‘lexicographical literalism’ and rejected Abaclat’s strong reliance on the use of the term ‘investors’ in the plural.\textsuperscript{71} Instead, the tribunal focused its analysis on the meaning of the term ‘dispute’, concluding that a state’s consent to multiple claims can only be established if they relate to a ‘single dispute’ in which the interests represented on each side are identical ‘in all essential respects’.\textsuperscript{72} However, the tribunal deferred the consideration of whether this requirement had been met to the merits stage. Some commentators expressed serious concerns given the delays and increase in cost a deferral to the merits is likely to cause, particularly in the context of large-scale proceedings.\textsuperscript{73}
Consent grounded in the ICSID Convention

Given the Convention’s silence on the question of collective claims, Argentina argued in all three cases that one of the implications of this is that an ICSID tribunal lacks jurisdiction to hear such claims. In Abaclat, the majority took a purposive approach and concluded that it would be ‘contrary to the . . . spirit of ICSID to interpret this silence as a “qualified silence” categorically prohibiting collective proceedings’. The majority also considered the negotiating history of the Convention, but found the brief discussions on multiparty proceedings inconclusive of the intention of the contracting parties to either accept or reject collective arbitrations, concluding that it was impossible for the drafters of the Convention to anticipate all kinds of possible . . . disputes and, in particular, collective proceedings which were “quasi inexistent” at the time.

Given that ‘the possibility of there being more than two parties to a dispute’ was raised during the course of negotiations of the Convention, but never implemented, some commentators felt that the majority sought unduly to fill a gap in the Convention. In his dissent, Professor Abi-Saab further posited that even if the silence in the Convention could be explained by reference to the drafters’ inability to anticipate proceedings of the type in Abaclat, the lack of foreseeability of claims of such an ‘extraordinary’ nature, ‘paradoxically bears in favour of interpreting the silence of the ICSID Convention as not extending to cover [this] type of judicial activity’. On the other hand, it bears noting that the drafting history also reveals that the same delegate who raised the issue of multiparty claims stated that he hoped ‘the possibility of there being more than two parties to a dispute was implicit throughout the draft even though express mention were not made of that fact where it was applicable’, which would seem to run counter to Professor Abi-Saab’s conclusion.

Some commentators criticised both the majority and Professor Abi-Saab for failing to consider the rationale behind Article 25(1) referring to ‘a national’ of a contracting state in the singular, although there does not appear to be consensus on what conclusions should be drawn from this. For example, Waibel cautions against expansive interpretation of treaties on the basis that in international law ‘consent to jurisdiction is the exception, not the default

74 Abaclat, (supra note 4), paragraph 511; Ambiente (supra note 3), paragraph 128; Alemanni, (supra note 5), paragraph 130.
75 A Newcombe, ‘Mass Claims and the distinction between jurisdiction and admissibility’ (supra note 19); Abaclat (supra note 4), paragraph 519.
76 Abaclat (supra note 4), paragraph 519.
77 Ibid.
78 Ibid.
81 Abaclat Dissenting Opinion (supra note 31), paragraph 166.
82 History of the ICSID Convention, ‘Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States’, (supra note 79), page 413.
83 H van Houtte and B McAsey, ‘Case Comment, Abaclat and others v. Argentine Republic: ICSID, the BIT and Mass Claims’ (supra note 19), paragraph 235.
Schreuer, on the other hand, notes that the ICSID history has seen a number of multiparty arbitrations in which Article 25 was accepted as referring to a multitude of nationals and that early drafts of the Convention described ‘nationals’ as inclusive of natural and juridical persons as well as associations of such persons. The omission of this reference from the final text made other scholars wonder whether that in fact meant that multiparty arbitrations stood excluded from the Convention. It is, however, worth noting that travaux préparatoires rarely clearly reveal the parties’ intention and it is, therefore, not surprising that both the Abaclat majority and some commentators found them inconclusive on these points.

In Ambiente, the majority sought to conduct a more textual examination of Article 25(1), but saw no reason why the term ‘national’ should not encompass a ‘plurality of individuals’, noting that the contrary argument had failed in Klöckner v. Cameroon. As for the negotiating history, it agreed with Abaclat that the material was inconclusive and added that the very existence of the discussions weakened Argentina’s argument that collective proceedings would effectively “extend the horizon of foreseeability” of the [ICSID] drafters. Endorsing Abaclat, it concluded that ‘[n]othing ha[d] emerged from the preceding legal analysis that would militate in favour of interpreting the “silence” of the ICSID Convention as standing in the way of instituting multi-party proceedings’. In a vehement dissent, Dr Bernárdez, on the other hand, insisted that general international law required ‘manifest consent’ and that ‘silence’ was not enough to establish it.

The Alemanni tribunal focused its analysis on the meaning of the term ‘dispute’ in Article 25(1) and queried whether the phrase ‘dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State’ could be understood as meaning ‘dispute between a Contracting State and one, but only one, national of another Contracting State’. Having considered the negotiating history discussed above, the tribunal unanimously concluded that there was nothing in the context or supplementary
materials relevant for the purposes of Article 32(a) of the VCLT\textsuperscript{95} that would form a reasonable basis for implying into the text of Article 25(1) the phrase ‘but only one’.\textsuperscript{96} The tribunal interpreted the Convention’s silence in favour of collective proceedings, emphasising that, by their very nature, proceedings either are or are not within the ambit of the Convention, and if they are not, no additional consent can alter the result.\textsuperscript{97} The tribunal thus rejected the notion of a special or secondary consent.

**Concluding remarks**

While the requirement for a special or secondary consent for institution of collective proceedings under the ICSID Convention has been largely discredited, the implications the ‘mass aspect’ may have for such proceedings remain a matter of debate and controversy. In *Abaclat*, the majority treated the question of whether a mass claim can be heard in a single proceeding as one of admissibility and compatibility with the ICSID procedural framework rather than one of consent.\textsuperscript{98} The *Ambiente* majority refused to ‘classify’ the legal issues before it as either issues of jurisdiction or admissibility,\textsuperscript{99} while the *Alemanni* tribunal did not consider such distinctions to be useful or important.\textsuperscript{100}

\textsuperscript{95} Article 32 of the VCLT provides as follows: ‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure, or (b) Leads to a result which is manifestly absurd or unreasonable.’

\textsuperscript{96} *Alemanni* (supra note 5), paragraph 271. The tribunal acknowledged that discussions on multiparty proceedings indeed took place at ‘a regional meeting during the Convention’s drafting process’, but were subsequently dropped and never implemented in the ICSID Convention. The tribunal noted that it was also aware of the ‘anecdotal evidence’ given by a World Bank former employee that, during the Third Annual Meeting of the ICSID Administrative Council on 29 September 1969, the then Secretary General Aron Broches referred to a possibility of developing and putting before the Centre a set of rules that would govern multiparty dispute and that this plan has never materialised. However, the tribunal did not perceive any of the material as ‘decisive enough to serve for the particular purpose stated in Article 32(a)’ of the VCLT.

\textsuperscript{97} *Alemanni* (supra note 5), paragraphs 280–292 and Concurring Opinion of Mr J Christopher Thomas, paragraph 2: ‘[T]he tribunal sees no additional requirement for a special consent. The claims either fall to be considered as a single dispute within the Tribunal’s jurisdiction or they do not.’ See also *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, paragraphs 92–93: ‘If a tribunal is established by or under a treaty made by States, its jurisdiction is fixed by that treaty. Its jurisdiction can be altered by the agreement of the States Parties to treaty; but it cannot be altered by the parties to disputes who present themselves to the tribunal.’

\textsuperscript{98} *Abaclat* (supra note 4), paragraphs 491–492.

\textsuperscript{99} *Ambiente* (supra note 3), paragraph 574. See also paragraph 572 where the majority highlighted that neither the Argentina–Italy BIT nor the ICSID Convention or Arbitration Rules distinguish between ‘mandatory’ and ‘non-mandatory’ requirements or ‘jurisdictional’, ‘admissibility’ or ‘procedural’ prerequisites.

\textsuperscript{100} *Alemanni* (supra note 5), paragraph 257.
Views of commentators on this aspect are similarly mixed. While some agree with Abaclat, others remain convinced that the question is one of consent, and thus jurisdiction. The distinction may potentially turn out to be significant if a tribunal is faced with a resubmitted claim. For example, had the Abaclat claim been dismissed because of the high number of claimants and had 60 separate claims comprising 1,000 claimants each been resubmitted, a tribunal potentially could hear such a claim if the original claim was dismissed on (subsequently cured) grounds of admissibility, but not if the claim was dismissed for lack of jurisdiction.

Given the lack of uniformity in framing the issue of compatibility of collective proceedings with the ICSID framework as an extension of jurisdictional deliberations or a question of admissibility, it is equally important for both investors and states to consider the procedural difficulties associated with collective proceedings, which are addressed next.

III COMPARABILITY OF COLLECTIVE PROCEEDINGS WITH THE ICSID FRAMEWORK

Having classified the question of whether a ‘mass claim’ can be heard in a single proceeding as one of admissibility, the Abaclat majority went on to examine whether it could effectively discharge its mandate given the exigencies of a mass claim and do so in compliance with the ICSID framework. While the majority considered that it would have to modify the ICSID


102 See, for example, A Newcombe, ‘Mass Claims and the distinction between jurisdiction and admissibility’, (supra note 19).


104 See Abaclat (supra note 4), paragraph 247 for this proposition. See also Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, paragraph 64 (‘If such a [jurisdictional] requirement is not satisfied, the Tribunal may not examine the case at all for lack of jurisdiction. By contrast, an objection relating to admissibility will not necessarily bar the Tribunal from examining the case if the reasons for the inadmissibility of the claim are capable of being removed and are indeed removed at a subsequent stage’), but cf. Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, commenting on the reasoning in Abaclat at paragraph 118 (‘The Abaclat Tribunal further expanded on the issue by contending that in case admissibility is refused the defect giving rise to refusal may be cured and the claim resubmitted, while the same does not hold true when jurisdiction has been denied by the same Tribunal. Again, the practical utility of this theoretical distinction at best is suspect. If an ICSID Award is issued holding that the claim is not admissible, it may be indeed possible to cure the defect and to resubmit the case. The “re-submitted” claim, however, will be aired before a new tribunal. But where jurisdiction has been denied, the same procedural outcome is possible if the denial was caused by a lack of consent that was later granted, thus allowing for the case to be filed before a different tribunal’).

105 Abaclat (supra note 4), paragraphs 521–533.
procedure to reflect ‘certain particular characteristics’ of mass claims, it also considered that it had the power to do so by virtue of Article 44 of the ICSID Convention and Rule 19 of the ICSID Arbitration Rules. At the same time, the majority stressed that the modifications would have to be limited in scope and were permissible only subject to certain conditions.

The first condition was that the modifications could only relate to the method of examination of the claims and the manner in which the claimants were represented, without altering the substance and object of the examination. This is because the majority considered that tribunals are bound to examine all of the necessary jurisdictional elements (e.g., claimant’s nationality and its status as investor) as well as the facts necessary to substantiate a claimant’s complaint (e.g., the existence of a breach of the applicable BIT and its effect on the claimant’s investment), notwithstanding the difficulties the presence of multiple claimants poses.

The second condition the majority imposed was that the procedures could not be modified in a way that would impede due process. The majority rightly recognised that the modifications required to enable a mass claim to be heard could limit the state’s ability to address each individual claim (as well as the ability of each claimant to present its case fully). In the majority’s view, the challenge was to strike the right balance between limiting parties’ rights and employing appropriate examination procedures that would effectuate the hearing of mass claims. To that end, the majority examined the following three questions: (1) when may it be acceptable to examine the claims on a group basis rather than an individual basis; (2) to what extent might Argentina’s defence rights be affected (in comparison to having to defend 60,000 separate proceedings); and (3) is it permissible to deprive claimants of certain procedural rights? The first question (which attracted most attention) is examined next, and the remaining two are covered in Section III.ii, as part of due process considerations.

i Homogeneity

On the first, threshold point – when may it be acceptable to modify the method of examination of the claims to one on a group basis – the majority considered that such modifications would be acceptable if the claims are ‘identical or at least sufficiently homogeneous’ (i.e., when the claimants establish that they share ‘homogeneous rights of compensation for a homogeneous damage caused to them by potential homogeneous breaches by [the state] of homogeneous obligations provided for in the BIT’). The introduction of this threshold test therefore

106 Ibid., paragraph 519.
107 The pertinent part of Article 44 of the ICSID Convention provides: ‘[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules . . . the Tribunal shall decide the question’.
108 Abaclat (supra note 4), paragraph 508. In the pertinent part, ICSID Arbitration Rule 19 provides: ‘[t]he Tribunal shall make the orders required for the conduct of the proceeding’.
109 Abaclat (supra note 4), paragraphs 519, 530 and 533.
110 Ibid., paragraphs 530–533.
111 Abaclat (supra note 4), paragraph 529.
112 Ibid. See also A Newcombe, ‘Mass claims and the distinction between jurisdiction and admissibility (Part II)’ (supra note 19).
113 Abaclat (supra note 4), paragraph 536–539.
114 Ibid., paragraph 538.
115 Ibid., paragraph 539.
116 Ibid., paragraph 540.
117 Ibid., paragraph 541.
appears to seek to establish a common link among the claimants’ claims and thus at least partly eradicate the specificities of a mass claim. On the facts, the majority was satisfied that the claims were sufficiently homogeneous since: (1) the investment rights were ‘the same’ for all claimants insofar as deriving from the same BIT provisions; and (2) each claimant’s individual claim was created by the same type of financial investment, each of which was affected in the same way by the same measures.\textsuperscript{118}

In \textit{Ambiente}, the majority declared that it did not find it necessary to engage with the question whether Article 25 of the ICSID Convention required a minimum standard of a necessary link between the investors’ claims, and whether such claims needed to be ‘homogeneous’ or simply ‘sufficiently comparable’ to satisfy any such standard.\textsuperscript{119} Presumably this is because the majority did not consider any procedural modifications to be necessary given the significantly lower number of claimants. Nevertheless, the majority went on to endorse \textit{Abaclat}’s comments on homogeneity in support of a different point, namely that a requirement of a contractual link between claimants seeking to institute joint proceedings has no basis in the ICSID legal framework.\textsuperscript{120} At the same time, the majority expressed doubts whether completely unrelated claims could be brought by a plurality of claimants,\textsuperscript{121} but considered that a sufficient link existed in terms of the treaty claim for collective proceedings to proceed.\textsuperscript{122} While dismissing the requirement of a contractual link, the majority noted that potential variations in factual circumstances affecting any contractual claims (and possibly quantum considerations), such as the dates and the series of the bonds under which the respective security entitlements were acquired, would be considered as part of the merits.\textsuperscript{123}

The \textit{Alemanni} tribunal also did not find it necessary to consider homogeneity, but it criticised the drawing of distinctions between treaty and contract claims, noting that different circumstances of each claimant, such as the timing of acquiring an investment, may have

\begin{itemize}
\item \textsuperscript{118} Ibid., paragraph 543. At paragraph 144 of the \textit{Abaclat Dissenting Opinion} (supra note 31), Professor Abi-Saab expressed a view that the imposition of the homogeneity requirement based solely on the ‘same fact pattern’ was sufficient only to aggregate and register claims for the purposes of pretrial management, and did not justify the examination of complaints as if they were one claim.
\item \textsuperscript{119} \textit{Ambiente} (supra note 3), paragraph 154.
\item \textsuperscript{120} Ibid., paragraphs 155–159.
\item \textsuperscript{121} Ibid., paragraph 153. Indeed, in \textit{Erhas Di Ticaret Ltd Sti and others v. Turkmenistan}, UNCITRAL, Award, 8 June 2015 (\textit{Erhas}), unpublished but reported in L E Peterson, ‘An UNCITRAL tribunal declines jurisdiction over a joint treaty claim brought against Turkmenistan by a series of unrelated claimants’, IA Reporter, 23 June 2015, available to subscribers at: www.iareporter.com/articles/an-uncital -tribunal-declines-jurisdiction-over-a-joint-treaty-claim-brought-against-turkmenistan-by-a -series-of-unrelated-claimants/, the tribunal declined jurisdiction jointly to adjudicate unrelated claims involving a group of unrelated Turkish investors. While the majority classified the issue as one of consent, Stanimir Alexandrov considered that the claim was inadmissible due to the lack of commonality of the claims. For a further discussion of the decision in \textit{Erhas}, see also L G Radicati di Brozolo and F Ponzano, ‘Chapter 10. Representative Aspects of “Mass Claim” Proceedings in Investor-State Arbitration’ in B Hanotiau and E A Schwartz (eds), \textit{Class and Group Actions in Arbitration}, ICC Institute of World Business Law 2016, pages 127–145, page 130.
\item \textsuperscript{122} Ibid., paragraph 161. Notably, the claimants: (1) complained about the same measures; (2) based their claims on the same provisions of the BIT and the Convention; (3) made identical demands for relief; and (4) based their claims on virtually the same factual background.
\item \textsuperscript{123} \textit{Ambiente} (supra note 3), page 162.
\end{itemize}
'jurisdictional consequences', although it deferred such considerations to the merits. More broadly, the necessary link among the claims that the Alemanni tribunal preferred was one of a 'single dispute' discussed above.

### ii Due process

Having satisfied itself that the claims were sufficiently homogeneous to allow procedural modifications, the Abaclat majority considered the modifications that would need to be made and the extent to which they might affect both Argentina's and the claimants' due process rights. The majority was upfront about the fact that it would not be 'in a position to examine all elements and related documents in the same way as if there were only a handful of Claimants' and that a 'simplified verification of evidentiary material' would be required. To that end, it proposed a threefold method of examination of evidence: (1) matters of general nature, applying to all claimants uniformly; (2) claimant-specific matters that may require a case-by-case analysis; and (3) matters that generally apply to all claimants but present certain objective features that would require distinguishing among various groups of claimants. With respect to the latter group, the majority indicated that it would be identified by using a sampling procedure. The majority was conscious that the use of sampling (often associated with traditional mass claim processes) may pose due process issues, but seemingly decided that it was premature to tackle any such concerns until it gained a better understanding of the merits.

Like the dissenting arbitrator, some commentators found the majority's findings and the suggestion of sampling 'difficult to reconcile with arbitral due process'. Others averred that, however valid these concerns may be, it was not possible to say ex ante that the modified procedures would indeed deprive respondents of due process.
A separate question of due process the majority pondered was whether the refusal to allow collective proceedings in the first place could constitute denial of due process, or even of justice, as claimants might find it uneconomical to file individual claims.\textsuperscript{134} The majority considered that a separate filing of each individual claim would not be practically possible and insisting on such an approach would constitute a ‘shocking’ denial of justice.\textsuperscript{135} Some commentators criticised the majority’s views as extreme, pointing out that what the majority identified as ‘denial of justice’ was in reality a ‘denial of special justice’ to ICSID.\textsuperscript{136} There are, of course, likely to be millions of bondholders who will never have access to ICSID because of the absence of a relevant BIT.\textsuperscript{137}

These considerations resonate with those pertaining to class actions comprising small plaintiffs who would not, on their own, be able to initiate proceedings otherwise. Even if they could, the cost of defending a large number of small claims would make the cost to states prohibitive. On the other hand, in domestic systems, class actions are only available where specific legislation provides for them, and it is a legitimate question to ask why arbitration should be any different. Equally, there is a point to the \textit{Ambiente} tribunal’s suggestion that the existence of domestic legislation is not relevant to international law considerations and interpretation of the relevant instruments, including, in particular, the ICSID Convention.\textsuperscript{138}

### iii Practical considerations

As noted above, the \textit{Abaclat} majority confirmed that a tribunal’s power to adapt ICSID standard procedure in no way dispenses with its obligation to verify, objectively: (1) all elements establishing jurisdiction (e.g., nationality of the investor); and (2) the legitimacy of a claim such as frustration of legitimate expectations.\textsuperscript{139} Carrying out those responsibilities in proceedings that have ‘mass characteristics’ raises practical issues that also vary depending on one’s role in the proceedings: claimant, respondent or tribunal.

Starting with jurisdictional issues, the first question that arises is whether tribunals are bound to establish their jurisdiction over each and every claimant individually and, if so, at what stage of the proceedings this should happen. In \textit{Ambiente}, the majority followed \textit{Bayview v. Mexico}\textsuperscript{140} and considered it sufficient for ‘at least some of the Claimants qualify[ing]...'}
as nationals of another Contracting State’ to establish jurisdiction *rationae personae*, thus allowing the case to proceed to the merits. It considered that a more detailed analysis of the individual cases could be made ‘at a later stage as necessary and appropriate’, but did not specify any sampling methods or exclusion procedure should a claimant fail to satisfy the requisite conditions. The *Abaclat* majority even found Argentina’s ‘serious doubts’ about some of the claimants’ purported nationality as ‘irrelevant’ at the jurisdictional stage, and so despite Argentina’s submission of expert evidence supporting forgery allegations. ‘Two questions arise from these decisions: (1) how meaningful respondents’ potential objections to jurisdiction in mass proceedings really are; and (2) whether the burden imposed on a state to investigate all of the claimants individually is excessive. As Argentina argued in *Alemanni*, the cost of ascertaining the critical facts on an individual basis could impair a state’s right to analyse and address each claim individually. But if each claim were brought individually, presumably the costs would be even higher. Further, how does one determine reasonableness of costs incurred when dealing with untested cases such as *Abaclat*?

Turning to merit-related issues, the *Alemanni* tribunal confirmed that in cases concerning a deprivation of rights or a breach of legitimate expectations, tribunals must determine ‘what those rights and expectations are and whether or how far each of the Claimants ha[s] been deprived of them’. However, the tribunal did not assess at that stage the actual rights and expectations of particular claimants and decided that such determination should be joined to the merits. The decision does not, however, explain how that assessment would be carried out during the merits phase. For example, it is unknown what method the tribunal might employ to test whether each and every claimant relied on a particular legitimate expectation. Would individual testimony be required from all claimants? How would a tribunal assess whether a claimant has suffered a substantial deprivation in value establishing an indirect expropriation claim? In the context of a modified procedure, the *Abaclat* majority, on the other hand, proposed that ‘certain issues, such as the existence of an expropriation, will have to be examined collectively’, but that proposal has not been tested.

In terms of the relief, the final award would also need to identify each claimant in a manner allowing for an appropriate calculation of the relief sought by each individual

141 *Ambiente* (*supra* note 3), paragraph 324.
142 Ibid., paragraph 325.
143 *Abaclat* (*supra* note 4), paragraph 410. See also S Perry, ‘Green Light for Mass Claim against Argentina’, (*supra* note 19).
144 *Alemanni* (*supra* note 5), paragraph 138.
145 Ibid., paragraph 293 (‘Where, as here, the essence of the Claimants’ claim is a deprivation of rights or a breach of expectations, the Tribunal would have to determine what those rights and expectations were and whether or how far each of the Claimants had been deprived of them. In order to do so, the Tribunal would be required to apply to the facts of the case the law specified in Article 42(1) of the ICSID Convention, i.e., (unless otherwise agreed between the Parties) “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”’).
146 *Alemanni* (*supra* note 5), paragraph 293.
147 *Abaclat* (*supra* note 4), paragraph 536.
clamant. What formula would be used for determination of damages? From the perspective of states, some practitioners point to a difficulty that a victorious state would face when enforcing a cost award against thousands of small clamants.

Finally, further questions arise as to the practicality of collective proceedings from the clamants’ point of view. Some commentators suggested that the Abaclat proceedings were workable solely because of an effective coordination undertaken by counsel and TFA as well as the broad scope of powers of attorney given to TFA. This inevitably triggered further questions such as: ‘what if . . . there were multiple counsel representing multiple groups of clamants in one proceeding? What if cooperation between counsel was non-existent or broke down after a determination on jurisdiction had been made? What if the clamants had common legal representation initially but splinter groups were formed with different counsel representing each group? How should an ICSID tribunal deal with such scenarios, if indeed it even has the capacity to?’ Those questions, at least for the time being, remain unanswered given that Abaclat has recently settled.

**IV CONCLUSION**

Collective proceedings is an area of evolving jurisprudence. While the three Argentinian cases considered in this chapter suggest that collective proceedings are, in principle, permissible under the ICSID Convention, the precise limits of such claims are not clear. Nevertheless, the following overarching conclusions can perhaps be drawn from the current jurisprudence.

First, special consent by a state to collective proceedings is not necessary, unless stated in the arbitration agreement. While a state’s consent to arbitrating collective proceedings

---

150 In particular, the clamants created a database that would include the information on each investor as well as documentation setting forth the evidence in support of each individual’s claims. See comments by Ms Carolyn B Lamm of White & Case LLP, the lead advocate for Abaclat clamants in A Raviv, ‘ITA-ASIL 2014: Mass and Class Claims in Arbitration’, (supra note 17). See also C B Lamm, E R Hellbeck and others, ‘Chapter 9. Mass Claims in Investment Arbitration: Jurisdiction and Admissibility’ (supra note 19).
151 See, for example, M Weiniger and M McClure, ‘Looking to the Future: Three “Hot Topics” for Investment Treaty Arbitration in the Next Ten Years’ (supra note 19), page 5; H van Houtte and B McAsey, ‘Case Comment, Abaclat and others v. Argentina Republic: ICSID, the BIT and Mass Claims’ (supra note 19), page 232.
152 H van Houtte and B McAsey, ‘Case Comment, Abaclat and others v. Argentina Republic: ICSID, the BIT and Mass Claims’ (supra note 19), page 232.
should not be taken lightly at times when the investor–state dispute settlement mechanism is under attack, that alone cannot justify a departure from the ordinary canons of treaty interpretation when it comes to interpreting the arbitration agreement contained in the applicable international treaty, without presumptions in favour of either investors or states.

Second, there needs to be some link between the unaffiliated claimants’ claims that justifies their being heard together in a single proceeding. Tribunals’ views differ on what that link is and for what purposes it needs to be established, but it seems unlikely that an ICSID tribunal would accept jurisdiction over a proceeding brought by different investors in different investments and with different complaints concerning different state measures. That, however, may be a theoretical scenario as it is difficult to see what synergies such unaffiliated investors could see in bringing a collective action.

Third, tribunals cannot dispense with their obligation to verify, objectively, all of the elements establishing jurisdiction and the legitimacy of a claim with respect to each individual claimant. However, if the number of claimants is exceptionally large, this may be impossible to achieve without compromising due process. The Abaclat majority sought to circumvent this problem by introducing the homogeneity requirement that would justify a departure from an individual examination of each claim in all respects, but the idea has not been tested.

Finally, in contrast to mass aggregate proceedings, it is unlikely that an ICSID tribunal could ever accept a true mass representative proceeding comprising an unnamed and unidentified group of claimants given the specific requirements of Article 25 of the ICSID Convention.
Chapter 12

CORRUPTION, FRAUD AND ABUSE OF PROCESS IN INVESTMENT TREATY ARBITRATION

Carmen Martinez Lopez and Lucy Martinez

I INTRODUCTION AND OVERVIEW

This chapter addresses the issue of misconduct and improprieties by claimants and investors in investor–state arbitration, including corruption, bribery, fraud, illegality and abuse of process. Investor–state tribunals consistently deny such claims, either at the jurisdiction and admissibility or merits phase, often awarding costs to the state. However, tribunals have not clearly articulated the burden and standard of proof for such allegations, and greater consistency and clarity is needed in this important area.

Section II of this chapter summarises cases in which tribunals have dismissed claims on the basis of misconduct by the claimant or investor, across three broad categories: (1) corruption and bribery; (2) fraud, illegality, misrepresentation or lack of good faith; and (3) abuse of process. Section III discusses the timing of challenges by states based on investor

---

1 Carmen Martinez Lopez is a partner and Lucy Martinez is counsel in the London office of Three Crowns LLP. This chapter contains the authors’ personal views and not necessarily the views of other lawyers in the firm, or the views of our clients. The authors were involved as counsel in some of the cases discussed herein; all references are to publicly available information. The authors thank Farshad Ghodoosi, María Juliana Muci and Rana Sebaly for their assistance in relation to this chapter.

Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration

misconduct, and Section IV examines the burden and standard of proof for such allegations. Section V summarises remedies available to tribunals and states when faced with investor misconduct (or allegations or suspicions thereof), and Section VI sets out our conclusions.

II CASES INVOLVING INVESTOR MISCONDUCT

This section discusses three broad categories of investor misconduct: (1) corruption and bribery; (2) fraud, illegality, misrepresentation or lack of good faith; and (3) abuse of process. The section summarises cases where the investor misconduct has been ‘outcome-determinative’, leading to dismissal of the case, and does not address cases where tribunals have rejected such allegations. Cases are presented in chronological order, to illustrate the jurisprudential evolution.

i Corruption and bribery in relation to the investment

Corruption is widely condemned under international and national law for its far-reaching economic, social and political impact. As noted by former UN Secretary-General Kofi Annan:

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.

To date, only two tribunals have dismissed investor–state claims on the basis of corruption or bribery, as discussed herein.


4 UN Convention, foreword, page iii.


The first investor–state tribunal to dismiss a claim on the basis of corruption was in World Duty Free v. Kenya. The claimant alleged expropriation of its contractual rights regarding duty free concessions in airports. Remarkably, the claimant’s CEO admitted in his witness statement to making a ‘personal donation’ of US$2 million to the Kenyan president. The CEO testified that he felt ‘uncomfortable’ about this ‘donation’, but ‘was given to understand that it was lawful and that [he] didn’t have a choice if [he] wanted [his] investment contract’. Perhaps unsurprisingly in light of this direct admission by the claimant, the tribunal dismissed the claims on the basis of ‘international public policy common to the community of nations’, as the original investment was procured through bribery. The tribunal found that the claimant ‘is not legally entitled to maintain any of its pleaded claims in these proceedings’, denouncing corruption in the following terms:

Such corruption is more odious than theft; but it does not depend upon any financial loss and it requires no immediate victim. Corruption of a state officer by bribery is synonymous with the most heinous crimes because it can cause huge economic damage; and its long-term victims can be legion. The offence lies in bribing a person to exercise his public duty corruptly and not in accordance with what is right and proper for the state and its citizens. Like any other contract, a state contract procured by bribing a state officer is legally unenforceable, as an affront to the public conscience.

The tribunal found that ‘there can be no successful party on the merits in the traditional sense’ and directed each party to bear its own costs and fees.

Metal-Tech v. Uzbekistan (2013)

The claimant alleged expropriation of its investment in a plant for the production of molybdenum. The state objected to jurisdiction on the basis of, inter alia, alleged corruption in the making and operation of the investment. The chair and CEO of the claimant testified that he paid US$4 million to consultants with connections to state officials, including the brother of the Prime Minister, but maintained that these payments were for lobbying services. The tribunal dismissed the claim on the basis of lack of jurisdiction, because the investment had not been ‘implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made’, as required by Article 1(1) of the relevant BIT. The tribunal found that the claimant had failed to substantiate the services provided by the consultant. In reaching this conclusion, the tribunal emphasised the need to promote the rule of law:

6 World Duty Free v. Kenya, paragraphs 74 and 76. The claim was commenced pursuant to a contract providing for ICSID arbitration; i.e., this was not a treaty claim.
7 Id., paragraph 130(19).
8 Id., paragraphs 148 (quoting a 1963 ICC award), 157 and 188.
9 Id., paragraph 173.
10 Id., paragraphs 190–191.
11 Metal-Tech v. Uzbekistan, paragraph 110(i).
12 Id., paragraphs 86, 90 and 240.
13 Id., paragraph 372.
While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.\(^\text{14}\)

The tribunal ordered the parties to bear their own costs, on the basis that the state had participated in ‘creating the situation that leads to the dismissal of the claims’ (i.e., the corruption).\(^\text{15}\)

**Commentary**

\(a\) To date, only two tribunals have dismissed claims on the basis of bribery or corruption (*World Duty Free v. Kenya* and *Metal-Tech v. Uzbekistan*).

\(b\) The claims were dismissed on the basis of ‘international public policy’, and lack of jurisdiction or inadmissibility, namely lack of a protected ‘investment’.

\(c\) In both cases, the tribunals directed the parties to bear their own costs.

\(d\) Some commentators have criticised these awards for permitting a state to rely on its own wrongful conduct to escape liability.\(^\text{16}\)

\(e\) Some commentators suggest that allegations of corruption are likely to increase in investor–state disputes, and tribunals have a duty to investigate a potential issue of corruption *sua sponte*, to ensure the enforceability of the award.\(^\text{17}\)

\(f\) Allegations of corruption or bribery may also lead to settlement of the dispute.\(^\text{18}\)

\(g\) In most cases to date, allegations of bribery or corruption have been dismissed on the basis of insufficient evidence.\(^\text{19}\) This issue is discussed further in Section IV *infra*, regarding the burden and standard of proof.

\(^\text{14}\) Id., paragraph 389.

\(^\text{15}\) Id., paragraph 422.

\(^\text{16}\) See, e.g., Ross; Llamzon 2008, pages 210–211.

\(^\text{17}\) See, e.g., Llamzon, page 227; Hwang and Lim, pages 8–14.

\(^\text{18}\) See note 5, *supra*.

\(^\text{19}\) See, e.g., Vladislav Kim et al *v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 (*Kim v. Uzbekistan*); MOL Hungarian Oil & Gas Plc *v. Republic of Croatia*, UNCITRAL, PCA Case 2014-15, Award, 16 August 2014 (*MOL v. Croatia*) (Respondent filed an application to annul the award before the Swiss Federal Tribunal on 1 February 2017; the application is pending); EDF (Services) Ltd *v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (*EDF v. Romania*); Waguih Elie George Siag & Anor *v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 (*Siag v. Egypt*); TSA Spectrum de Argentina SA *v. Argentina*, ICSID Case No. ARB/05/5, Award, 19 December 2008 (*TSA v. Argentina*); African Holding Co of America Inc & Anor *v. The Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award, 29 July 2008 (*African Holding v. Congo*); Rumeli Telekom & Anor *v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (*Rumeli v. Kazakhstan*).
Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration

ii Fraud, illegality, misrepresentation or breach of good faith

To date, at least eight tribunals have dismissed investor–state claims on the basis of fraud, illegality, misrepresentation or breach of good faith. Three are discussed herein, together with one case where the tribunal found that the investor had ‘cured’ the relevant illegality.


The claimant alleged expropriation of its contractual rights in relation to vehicle inspection services, awarded in a public bid process. The state objected to jurisdiction on the basis of alleged fraud.

The tribunal found that the claimant’s contract bid was based on forged financial documents regarding its financial condition, intentional misrepresentation of its experience and qualifications, and concealment of its relationship with another bidder.21 The tribunal held that it had no jurisdiction on the basis of, inter alia, lack of consent, fraud, illegality, international public policy, and lack of good faith:

[The foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, ‘nobody can benefit from his own fraud’. . . .]

By falsifying the facts, Inceysa violated the principle of good faith from the time it made its investment and, therefore, it did not make it in accordance with Salvadorian law. Faced with this situation, this Tribunal can only declare its incompetence to hear Inceysa’s complaint, since its investment cannot benefit from the protection of the BIT, as established by the parties during the negotiations and the execution of the agreement. . . .

20 (1) Société d’Investigation de Recherche et d’Explotation Minière v. Burkina Faso, ICSID Case No. ARB/97/1, Award, 19 January 2000 (SIREXM v. Burkina Faso); (2) Inceysa Vallisoletana, SL v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, 2 August 2006 (Inceysa v. El Salvador); (3) Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award, 16 August 2007 (Fraport v. Philippines Award I), Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010 (Fraport v. Philippines Annulment Decision); Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/11/12, Award, 10 December 2014 (Fraport v. Philippines Award II); (4) Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008 (Plama v. Bulgaria); (5) Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010 (Anderson v. Costa Rica); (6) Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, 14 July 2010 (Saba Fakes v. Turkey); (7) Lihananco Holdings Co Ltd v. Republic of Turkey, ICSID Case No. ARB/06/8, Award, 2 September 2011 (Lihananco v. Turkey) (part of a series of claims against Turkey; the other claims are discussed below in relation to abuse of process); (8) Valeri Belokon v. Kyrgyz Republic, UNCITRAL, Award, 24 October 2014 (Belokon v. Kyrgyz Republic Award) (dismissing the State’s allegation of money laundering on the basis of insufficient proof) and Cour D’Appel de Paris, No. 15/01650, 21 February 2017 (Belokon v. Kyrgyz Republic Court Decision) (setting aside the award on public policy grounds, finding that there was sufficient evidence of money laundering), D Charlotin, ‘BIT Award against Kyrgyzstan annulled in Paris, with court giving weight to money-laundering allegations that had earlier failed to persuade arbitrators’, Investment Arbitration Reporter, 23 February 2017 (the state gathered additional evidence of the illegal activities between the award and the court ruling).

It is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which . . . is a principle of international public policy.\textsuperscript{22}

While the relevant BIT did not expressly require an investment to be made ‘according to law’, the tribunal considered correspondence exchanged during the negotiation of the treaty and determined that the state parties intended to exclude investments in contravention of the host state’s laws from the scope of the BIT.\textsuperscript{23} The tribunal ordered the claimant to pay the costs of the proceedings, while each party was responsible for its own legal fees.\textsuperscript{24}

\textit{Plama v. Bulgaria (2008)}

The claimant alleged expropriation and other breaches of the Energy Charter Treaty (ECT) in relation to an oil refinery. The state objected to jurisdiction on the basis that, \textit{inter alia}, the claimant ‘obtained its investment . . . via misrepresentations in violation of Bulgarian law’.\textsuperscript{25}

In the jurisdictional phase, the tribunal reserved its decision on this issue, and ‘join[ed] the issue of misrepresentation to the consideration of the merits of the case’.\textsuperscript{26} The tribunal ultimately dismissed the claim, on the bases that the investment was obtained through fraud and misrepresentation, in breach of the principle of good faith and international public policy, and contrary to Bulgarian and international law:

\begin{quote}
The investment . . . was, therefore, the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities required to resume operation of the Refinery . . . .

This behavior is contrary to other provisions of Bulgarian law and to international law and . . . it, therefore, precludes the application of the protections of the ECT. . . .

Granting the ECT’s protections to Claimant’s investment would be contrary to the principle nemo auditur propriam turpitudinem allegans\textsuperscript{[27]} . . . . It would also be contrary to the basic notion of international public policy – that a contract obtained through wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal . . . .

The Tribunal finds that Claimant’s conduct is contrary to the principle of good faith which is part not only of Bulgarian law . . . but also of international law . . . .\textsuperscript{28}
\end{quote}

\textsuperscript{22} Id., paragraphs 234, 239, 242, 249 and 335–337.
\textsuperscript{23} Id., paragraph 195.
\textsuperscript{24} Id., paragraph 338. A decision on rectification was issued in November 2006, but is not public.
\textsuperscript{25} \textit{Plama v. Bulgaria}, paragraph 96.
\textsuperscript{26} Decision on Jurisdiction, 8 February 2005, paragraphs 229–230.
\textsuperscript{27} Nobody can benefit from his or her own wrong.
\textsuperscript{28} \textit{Plama v. Bulgaria}, paragraphs 135 and 143–146.
The tribunal reached this conclusion even though the ECT ‘does not contain a provision [expressly] requiring the conformity of the Investment with a particular law’.\(^{29}\) The tribunal ordered the investor to pay over US$7 million of the state’s legal fees and costs.\(^{30}\)

**Anderson v. Costa Rica (2010)**

The claimant alleged that the state failed ‘to provide proper vigilance and regulatory supervision over the national financial system’.\(^{31}\) The state objected to jurisdiction on the basis that, *inter alia*, there was no investment, as the claimants had invested money in what turned out to be an illegal ‘Ponzi scheme’ run by two brothers (the Villalobos brothers).\(^{32}\)

The tribunal dismissed the claim on the basis of lack of jurisdiction *ratione materiae*. The tribunal noted that the BIT expressly required all investments to be ‘made’ or ‘owned’ in accordance with the law, and this requirement had to be met ‘regardless of [the investor’s] knowledge of the law or his or her intention to follow the law’.\(^{33}\) The tribunal found that the Villalobos brothers engaged in financial intermediation without the authorisation of the relevant state authority, the Central Bank, in contravention of Costa Rican law and the resulting acquisitions by the claimant were not legal:

> The entire transaction between the Villalobos brothers and each Claimant was illegal because it violated the Organic Law of the Central Bank. If the transaction by which the Villalobos acquired the deposit was illegal, it follows that the acquisition by each Claimant of the asset resulting from that transaction was also not in accordance with the law of Costa Rica. Although the Claimants may not have committed a crime by entering into a transaction with the Villalobos, the fact that they gained ownership of the asset in violation of the Organic Law of the Central Bank means that their ownership was not in accordance with the laws of Costa Rica and that therefore each of their deposits and resulting relationships with Villalobos did not constitute an ‘investment’ under the BIT.\(^{34}\)

The tribunal noted that this interpretation reflects ‘sound public policy’ and ‘sound investment practice’, and these investors had not undertaken sufficient due diligence before committing funds.\(^{35}\) The tribunal directed the parties to share the costs and fees of the arbitrators and ICSID, and to bear their own legal expenses.\(^{36}\)

\(^{29}\) Id., paragraphs 138–139. But see *Anatolie Stati et al v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, paragraph 812 (‘Respondent has also argued that Claimants’ investments were either illegal from the beginning or became so at a later stage. First, the Tribunal notes that the ECT contains no requirement in this regard. Indeed, if the contracting States had intended there to be such a requirement, they could have written it into the text of the Treaty . . . . This consideration is even more valid in view of the extremely detailed definition of investment and other details regulated in the ECT. At least with regard to jurisdiction, the Tribunal does not see where such a requirement could come from. Whether that aspect is also relevant for the merits of the case, will have to be examined later in this Award’), paragraph 1093 (rejecting the state’s claim of illegality, on the merits).

\(^{30}\) *Plama v. Bulgaria*, paragraph 324.

\(^{31}\) *Anderson v. Costa Rica*, paragraph 16.

\(^{32}\) Id., paragraphs 29–35.

\(^{33}\) Id., paragraphs 51–53.

\(^{34}\) Id., paragraph 55.

\(^{35}\) Id., paragraph 58. See also paragraph 22 (the investors did ‘little investigation and research’ and were ‘[d]rawn by the high interest rates and confidential nature of the scheme’).

\(^{36}\) Id., paragraph 66.
Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration

Mamidoil v. Albania (2015)37

The claimant commenced arbitration in relation to a lease in the country’s main port to build an oil storage container. The state objected to jurisdiction on the basis that the investor failed to acquire the necessary permits and the ‘purported investment . . . never acquired any legal status under Albanian law’.38

The tribunal dismissed the objections to jurisdiction, but ultimately found in favour of the state on the merits. On jurisdiction, the tribunal noted that the BIT expressly required legality of an investment, and that illegality of an investment may occur through breach of substantive law (i.e., ‘it does not comply with material norms regulating investments’) or procedural ‘norms and regulations’, such as fraud or corruption.39 The tribunal noted that ‘not every trivial, minor contravention of the law should lead to a refusal of jurisdiction’:

[The Tribunal] must strike a balance between two criteria. On the one hand, neither Claimant nor the Tribunal may presume that the host State waives its sovereignty and agrees to the arbitration of disputes when the investor made the investment in violation of its substantive or procedural legislation. On the other hand, States must not be allowed to abuse the process by scrutinizing the investment post festum with the intention of rooting out minor or trivial illegalities as a pretext to free themselves of an obligation. A State must act consistently with its obligations and not resist jurisdiction because it wants to escape the consequences of its standing agreement to arbitrate.40

In the circumstances of this case, the tribunal concluded that although the investment was originally made in violation of Albanian law, ‘the real issue is less one of the seriousness or triviality of the illegality but, rather, concerns finality’ because the state’s actions, including its offers to regularise or legalise the investment, were indications ‘that it was ready to disregard the illegality for the past, to suspend it for the present and to repair it for the future’.41 The tribunal concluded:

It is true that a State cannot be expected to have consented to an arbitral dispute settlement mechanism for investments made in violation of its legislation. However, it can be expected to accept the jurisdiction of an arbitral tribunal when, in that State’s own appreciation, the illegality of the investment was susceptible of being cured, as that State’s legalization offers show.42

In these circumstances, the tribunal found that it had jurisdiction to hear the case, but ultimately (by majority) rejected the claims on the merits.43 The illegality issue was thus not ‘outcome-determinative’ in this case, but it is included in this chapter in light of the unusual factual scenario (illegality cured by subsequent state conduct).

38 Id., paragraph 324.
39 Id., paragraphs 372 and 378 (confirming that the ECT, an alternative basis for the claim, does not protect unlawful investments).
40 Id., paragraph 483.
41 Id., paragraph 493.
42 Id., paragraph 494.
43 Id., paragraphs 495 and 839.
Commentary

a  When an investor commits fraud, misrepresents material facts, violates the law of the host state or international law, or does not act in good faith, tribunals will generally dismiss the claim on jurisdictional or admissibility grounds or, less commonly, during the merits phase.44

b  Tribunals will dismiss the claim even when the relevant treaty does not expressly require an investment to be made in good faith or in accordance with the law of the host state or international law.45

c  Tribunals will generally not accept jurisdiction over an illegal investment, even if the investor was unaware of the illegal nature of the investment (Anderson v. Costa Rica).

d  Tribunals may accept jurisdiction over an illegal investment if the state has subsequently ‘cured’ the illegality, or otherwise waived the illegality issue (Mamidoil v. Albania).

e  In assessing the legality of an investment, tribunals generally consider: (a) the timing of the illegality; (b) the ‘materiality’ of the illegality;46 (c) whether denial of jurisdiction

44 See, e.g., Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010 (Hamester v. Ghana), paragraph 127 (‘The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment (‘made’) and (2) legality during the performance of the investment. Article 10 [regarding investments made prior to the treaty’s entry into force] legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal’s jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the scope of application of the BIT (and hence this Tribunal’s jurisdiction) – albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT. Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor’s conduct during the life of the investment is a merits issue’); Phoenix Action Ltd v. The Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009 (Phoenix Action v. Czech Republic), paragraph 104 (‘There is no doubt that the requirement of the conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the merits. However, if it is manifest that the investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction.’).

45 See, e.g., Inceysa v. El Salvador, paragraph 195; Plama v. Bulgaria, paragraphs 138–139; Mamidoil v. Albania, paragraph 293.

46 See also Hochtief Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, paragraph 199 (‘not every technical infraction of a State’s regulations associated with an investment’ will constitute illegality); Peter A Allard v. The Government of Barbados, PCA Case No. 2012-06, Award on Jurisdiction, 13 June 2014, paragraph 94 (non-compliance with the Exchange Control Act was an inadvertent and technical breach of local law and did not involve breach of fundamental legal principles of the state); ECE Projektmanagement International GmbH & Anor v. Czech Republic, PCA Case No. 2010-5, Award, 19 September 2013 (ECE v. Czech Republic), paragraph 3.170 (distinguishing between cases of fraud or corruption and a failure to comply with construction code rules, and noting that the latter is not of the same order of gravity); Tokios Tokelės v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, paragraph 86 (‘minor errors’ do not constitute illegality).
would be proportionate to the illegality; and (d) whether the illegality, if known to the state, would have prevented the investment from occurring, applying some form of causation analysis.

Some tribunals have distinguished between illegality in procuring the investment, which is generally considered an issue of jurisdiction or admissibility, and illegality in operating the investment, which is generally considered an issue for the merits.

Where tribunals have found illegality, fraud, misrepresentation or a breach of good faith, the claimant is generally ordered to pay all or part of the state’s costs.

iii Abuse of process

To date, at least nine tribunals have dismissed investor-state claims on the basis of abuse of process (also known as ‘abuse of right’). Six are discussed herein.

**Phoenix Action v. Czech Republic (2009)**

The claimant alleged expropriation in relation to metal companies. Ownership of these companies was transferred from Czech nationals to the Israeli claimant while disputes involving these companies were pending before Czech courts. The state objected to jurisdiction on the basis that, *inter alia:* (1) there was no ‘investment’ within the meaning of the ICSID Convention or the BIT; and (2) the claimant’s ‘abuse of a corporate structure’.

---

47. See, e.g., *Kim v. Uzbekistan* (majority decision), paragraph 541 (‘Respondent either has failed to establish that Claimants acted in noncompliance with various laws or that such acts of noncompliance do not result in a compromise of an interest that justifies, as a proportionate response, the harshness of denying application of the BIT’); see also Carmen Martinez Lopez and Lucy Martinez, ‘Proportionality in Investment Treaty Arbitration And Beyond: An “Irresistible Attraction”?’ *BCDR International Arbitration Review* No. 2 (2015) pages 1–28.


53. Id., paragraphs 38 and 40.
The tribunal dismissed the claim on the basis of lack of jurisdiction, concluding that: (1) ‘only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected’; and (2) an investment made ‘not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the [state]’ was not a ‘good faith’ investment and therefore was not entitled to protection:54

The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith, obtained for example through misrepresentation, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and bona fide investments . . . .

States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith. The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance . . . .

The Tribunal is concerned here with the international principle of good faith as applied to the international arbitration mechanism of ICSID. The Tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.55

The tribunal considered that ‘the whole “investment” was an artificial transaction to gain access to ICSID’, was not bona fide, and was an abuse of process:

The abuse here could be called a ‘détournement de procedure’, consisting in the Claimant’s creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled . . . . The conclusion of the Tribunal is therefore that the Claimant’s initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration.56

The tribunal ordered the claimant to bear all the costs and fees of the state.57

This appears to be the first investor–state decision dismissing a claim based on abuse of process.58

54 Id., paragraphs 113, 142–143 and 145.
55 Id., paragraphs 100, 106 and 113 (emphasis in original).
56 Id., paragraphs 143–144.
57 Id., paragraph 152.
58 In terms of precedents for lifting the corporate veil, see, e.g., Barcelona Traction, Light and Power Co Ltd (Belgium v. Spain), 1970, I.C.J. 3, paragraph 56 (‘the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, . . . or to prevent the evasion of legal requirements or of obligations’). In relation to the origins of abuse of process, see, e.g., Hersch Lauterpacht, Development of International Law by the International Court, London, 1958, page 164 (‘There is no right, however well established, which could not, in some circumstances, be refused recognition on
Europe Cement v. Turkey (2009) and CNH v. Turkey (2009)

These cases relate to hydroelectric plants repossessed by the state in 2003. In both cases, the claimants originally alleged that, prior to their repossession, they were non-Turkish investors. However, both cases were ‘unusual’ in that the parties eventually agreed that the case should be dismissed for lack of jurisdiction, albeit differing on the reasons for this request. In both cases, the tribunals found that the true claimants were Turkish nationals (the Uzan family) improperly trying to obtain the protection of the ECT by backdating share transfer transactions and other documents purporting to show timely ownership.

The tribunal in Europe Cement v. Turkey found that ‘the claim to ownership of the shares at a time that would establish jurisdiction was made fraudulently’. The tribunal found that ‘there was in fact no investment at all, at least at the relevant time, and the lack of good faith is in the assertion of an investment on the basis of documents that according to the evidence presented were not authentic’. The tribunal concluded that the claimant had not acted in good faith and had committed an abuse of process:

If, as in Phoenix, a claim that is based on the purchase of an investment solely for the purpose of commencing litigation is an abuse of process, then surely a claim based on the false assertion of ownership of an investment is equally an abuse of process.

Similarly, in CNH v. Turkey, the tribunal found that the claim was ‘fraudulent’ and an abuse of process because the claimant has ‘intentionally and in bad faith abused the arbitration; it purported to be an investor when it knew that this was not the case. This constitutes indeed an abuse of process’. The tribunal also found that the claimant’s conduct ‘fails to meet the requisite standard of good faith conduct. The claim is manifestly ill-founded’.

59 The third case in this trifecta is Libananco v. Turkey, which was also dismissed on the basis of investor misconduct (misrepresentation), but not on the basis of abuse of process.
60 CNH v. Turkey, paragraph 109; Europe Cement v. Turkey, paragraph 81.
61 CNH v. Turkey, paragraphs 122–28; Europe Cement v. Turkey, paragraphs 141–144; see also Libananco v. Turkey paragraphs 150, 249–251; Kemal Uzan & Ors v. Turkey, ECHR Application No. 18240/03, Judgment, 29 March 2011 (dismissing the claim as manifestly ill-founded).
62 Europe Cement v. Turkey, paragraph 167.
63 Id., paragraph 175.
64 Id.
65 CNH v. Turkey, paragraph 159.
66 Id., paragraph 157.
In both cases, the tribunals rejected the state’s requests for moral damages arising from the claimant’s abuse of process.67 However, the tribunals ordered the claimants (collectively) to pay the state’s legal fees, expenses and costs (~US$5 million for CNH; ~US$4 million for Europe Cement; plus ~US$15 million for the parallel Libananco claim68).

**Philip Morris v. Australia (2015)**

The claimant alleged expropriation and other breaches of international law in relation to tobacco ‘plain packaging’ measures. Ownership of the relevant assets was transferred to a Hong Kong company two months before the final state measure.69 The state objected to jurisdiction on the basis that, *inter alia*, the claimant had restructured its corporate group with the principal aim of commencing BIT arbitration.

The tribunal found that the claims were inadmissible and thus it was ‘precluded’ from exercising jurisdiction; the test for abuse of right or process revolved ‘around the concept of foreseeability’; and a dispute is foreseeable when there is ‘a reasonable prospect’ that ‘a measure which may give rise to a treaty claim will materialise’.70 The tribunal found that this dispute was foreseeable at the time of the restructuring, and rejected the claim that the restructuring had been for tax or other business reasons.71 The tribunal concluded that:

> the commencement of treaty based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable.72

The tribunal reserved the issue of costs for a final award, which has not yet been rendered.

**Ampal v. Egypt (2016)**

The corporate claimant commenced UNCITRAL arbitration under the Egypt–Poland BIT in relation to a gas pipeline. In parallel, the individual who had a controlling interest in the UNCITRAL corporate claimant commenced ICSID arbitration in relation to the same pipeline, under the US–Egypt BIT. The state objected to jurisdiction in the ICSID case on the basis of, *inter alia*, abuse of process.73

---

67 *Europe Cement v. Turkey*, paragraph 181 (‘the Tribunal need not go this far as it does not consider that exceptional circumstances such as physical duress are present in this case to justify moral damages’); *CNH v. Turkey*, paragraph 170 (‘the Respondent requests, in the case at hand, that the Arbitral Tribunal grant compensation for moral damages based merely on a general principle, i.e., abuse of process. It is doubtful that such a general principle may constitute a sufficient legal basis for granting compensation for moral damages’).

68 *CNH v. Turkey*, paragraph 178; *Europe Cement v. Turkey*, paragraph 186; *Libananco v. Turkey*, paragraph 569.

69 *Philip Morris v. Australia*, paragraphs 163–165.

70 Id., paragraphs 554, 567–569 and 588.

71 Id., paragraph 584.

72 Id., paragraph 585.

73 *Ampal v. Egypt*, paragraph 312. The state also objected on the basis of alleged illegality. The tribunal noted: ‘It is a well-established principle of international law that a tribunal constituted on the basis of an investment treaty has no jurisdiction over a claimant’s investment which was made illegally in violation of the laws and regulations of the Contracting State’. Id., paragraph 301. However, the tribunal found that the state had failed to discharge its burden of proof on this issue, as discussed further in Part IV below.
In November 2015, the UNCITRAL tribunal apparently upheld jurisdiction over the claim.\textsuperscript{74} In February 2016, the ICSID tribunal found that, in these specific circumstances, pursuit of the two parallel proceedings ‘crystallized’ an abuse of process, but emphasised that there was no bad faith:

\textit{[W]hile the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals. However, the Tribunal wishes to make it very clear that this resulting abuse of process is in no way tainted by bad faith on the part of the Claimants as alleged by the Respondent. It is merely the result of the factual situation that would arise were two claims to be pursued before different investment tribunals in respect of the same tranche of the same investment.}\textsuperscript{75}

The ICSID tribunal invited the claimants to ‘cure’ the abuse of process by electing to pursue their claims either before the UNCITRAL tribunal or the ICSID tribunal.\textsuperscript{76} The ICSID claimants then abandoned a portion of their claims in the parallel UNCITRAL arbitration, and thus ‘cured’ the abuse of process.\textsuperscript{77}

\textit{Churchill Mining v. Indonesia (2016)}

The claimants commenced arbitration in relation to coal mines. The state asked the tribunal to dismiss all claims on the basis that the survey mining licences and related approvals were forged and fabricated, and the upgrade to exploitation licences was secured through deception and fraud.\textsuperscript{78}

The tribunal noted that the ICSID Convention and the relevant BITs did not ‘address the consequences of unlawful conduct by claimant during the performance of an investment’ and the BITs only contained ‘admission requirements applying at the time of establishment of an investment’.\textsuperscript{79} The tribunal thus considered general principles of international law to determine the consequences of the forgeries, and found the claims to be inadmissible as a matter of international public policy, and as they were an abuse of process:

\textit{Claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy. . . . The Tribunal cannot but hold that all the claims before it are inadmissible. This conclusion derives from the facts analyzed above, which demonstrate that the claims are based on documents forged to implement a fraud aimed at obtaining mining rights. . . . the seriousness, sophistication and scope of the scheme are such that the fraud taints the entirety of the Claimants’ investment. . . . As a result, the general principle of good faith and the prohibition of abuse of process entail that the claims before this Tribunal cannot benefit from investment protection under the Treaties and are, consequently, deemed inadmissible.}\textsuperscript{80}

\begin{itemize}
  \item \textsuperscript{74} Id., paragraphs 332–333.
  \item \textsuperscript{75} Id., paragraph 331.
  \item \textsuperscript{76} Id., paragraph 334–339.
  \item \textsuperscript{77} Ampal v. Egypt, Decision on Liability and Heads of Loss, 21 February 2017, paragraph 22.
  \item \textsuperscript{78} Churchill Mining v. Indonesia, paragraph 106.
  \item \textsuperscript{79} Id., paragraph 488.
  \item \textsuperscript{80} Id., paragraphs 508 and 528.
\end{itemize}
Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration

In reaching this conclusion, the tribunal emphasised the seriousness of the fraud, and the claimants’ lack of due diligence overseeing the licensing process and forgery allegations. The tribunal ordered the claimants to pay 75 per cent of the state’s expenses, plus the full tribunal and ICSID costs.

Commentary

a. When an investor commits an abuse of process, tribunals will generally dismiss the claim on jurisdictional or admissibility grounds or, less commonly, during the merits phase.

b. Tribunals will generally dismiss the claim even when the relevant treaty does not refer to ‘abuse of process’ (which most treaties do not).

c. Abuse of process generally ‘denotes conduct that is not prima facie illegal’. Thus, abuse of process is distinct from illegality as an objection to jurisdiction or admissibility, but overlaps with the notion of conduct that is not in good faith. Cases that were decided solely on ‘good faith’ grounds before 2009 would perhaps also now be decided on ‘abuse of process’ grounds.

d. To date, tribunals have found an abuse of process in three situations: (i) claimants attempting to establish international jurisdiction by transfer of ownership or corporate restructuring while a dispute is pending or foreseeable (Philip Morris v. Australia); (ii) claimants pursuing parallel proceedings in different international fora involving essentially the same facts and legal issues (Ampal v. Egypt); or (iii) false or fraudulent assertions of ownership, involving forged documents (CNH/Europe Cement v. Turkey; Churchill Mining v. Indonesia).

e. In relation to (d)(i): the line between legitimate corporate restructuring and ‘abuse of process’ can be difficult to distinguish. One key issue is whether the dispute is ‘actual’, ‘foreseeable’, ‘highly probable’ or ‘crystallized’. Tribunals will also consider: the timing of the investment; the timing of the claim; the substance of the transaction; the true nature of the operation, for example, any ‘economic activity in the market

81 Id., paragraph 509. See also Id., paragraph 515 (the acts of forgery brought to light in these proceedings are of a particularly serious nature in light of the number and nature of forged documents and of the aim pursued, namely to orchestrate, legitimize and perpetuate a fraudulent scheme to gain access to valuable mining rights), paragraphs 516 and 527 (The seriousness of the fraud just discussed is compounded by the Claimants’ lack of diligence . . . . Claimants’ absence of diligence became apparent in the present proceedings when they filed or produced 34 forged documents to support their claims).

82 Id., paragraphs 553–556. The claimant recently applied to annul this award; the annulment application remains pending.

83 Gaillard, page 2.

84 Phoenix Action v. Czech Republic; CNH v. Turkey; Europe Cement v. Turkey; Churchill Mining v. Indonesia.

85 See, e.g., Pac Rim Cayman v. The Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, paragraph 2.99 (the 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 a possible controversy . . . . [T]his dividing-line will rarely be a thin red line, but will include a significant grey area; the tribunal went on to reject the State’s argument that the restructuring was an abuse of process); Levy v. Peru, paragraphs 185–189; Gaillard, page 4 ([a]buse of process will arise where a corporate claimant makes or restructures its investment in order to gain access to a dispute with the host State that is foreseeable, but may not yet have crystallized).
place’, business plan, refinancing programme and economic objectives; and the degree of foreseeability of the government action. Tribunals should be cautious in labelling corporate restructuring an ‘abuse of process’.

In some circumstances, the abuse of process may be ‘cured’ by the claimant (Ampal v. Egypt) (similar to an illegality being ‘cured’ or ‘waived’ by the state, as discussed above, Mamidoil v. Albania).

To date, no tribunal has awarded moral damages to the state arising from an abuse of process, although it has been requested on at least two occasions. Most tribunals award full or partial costs to the state, when dismissing a case on the basis of abuse of process.

### III TIMING OF THE CHALLENGE

In ICSID arbitrations, a respondent state may raise a challenge on the basis of alleged claimant misconduct at virtually every stage of the proceedings.

First, a respondent state may raise a preliminary objection pursuant to ICSID Rule 41, asking the tribunal to reject the claim as ‘manifestly without legal merit’.

Second, the state may raise issues of investor misconduct as a jurisdictional or admissibility objection, pursuant to Article 41 of the ICSID Convention. At this point, the tribunal may bifurcate the proceedings and render a decision on jurisdiction or admissibility only, or join jurisdictional issues to the merits.

Third, the state may raise the objection in the merits phase, for example, when evidence of investor misconduct emerges during cross-examination of a factual witness.

Fourth and finally, a state may request revision or annulment of the award on the basis of investor misconduct, pursuant to Articles 51 and 52 of the ICSID Convention, as was done in Siemens v. Argentina. However, new allegations or evidence of investor misconduct may not be raised in the annulment phase.

---

86 See, e.g., Phoenix Action v. Czech Republic, paragraphs 135–144; Transglobal v. Panama, paragraphs 102–103.

87 See note 67, supra.

88 See, e.g., Churchill Mining v. Indonesia, paragraph 556 (claimants to bear 75 per cent of the state’s costs, US$8.64 million); Levy v. Peru, paragraphs 201–202 (claimants to pay entire administrative costs plus contribute US$1.57 million to the state’s legal fees and expenses); Transglobal v. Panama, paragraphs 126–127 (claimants to pay almost all costs and fees of the arbitration); CNH v. Turkey, paragraphs 177–178 (claimants to bear all ICSID costs, plus ~US$5 million of the state’s legal costs).

89 The Secretary-General may also refuse to register a request for arbitration on the basis that the dispute is ‘manifestly outside the jurisdiction of the Centre’, pursuant to Article 36 of the ICSID Convention. To date, and unsurprisingly, it appears that no such refusals have been based on investor misconduct.

90 ICSID Arbitration Rules (2006), Rule 41(5); see, e.g., Rachel S Grynberg & Ors. v. Grenada, ICSID Case No. ARB/10/6, Award, 10 December 2010, paragraphs 4.6.15–4.6.16 (State alleging, inter alia, abuse of process through attempt to re-litigate a claim), 7.31–7.37 (Tribunal noting that ‘the initiation of the present arbitration is thus an improper attempt to circumvent the basic principles set out in Convention Article 53 and the procedures available for revision and rectification of awards provided for in Article 51’, but not applying the ‘abuse of process’ label).


92 See, e.g., EDF v. Romania; Siag v. Egypt; Rumeli v. Kazakhstan.

93 See, e.g., RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14, Annulment Proceeding, Decision on the Application of RSM for a Preliminary Ruling, 7 December 2009, paragraphs 21–30 (no new evidence regarding alleged corruption, in the annulment phase).
Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration

For non-ICSID arbitrations, the respondent state may, depending on the applicable arbitration rules, raise allegations of investor misconduct as a preliminary objection, in the merits phase, or in applications for recognition and enforcement.

IV PROVING MISCONDUCT – BURDEN AND STANDARD OF PROOF

Once a respondent state has raised a challenge based on investor misconduct, at whatever stage of the proceedings, the state must then prove that allegation – but the question of burden and standard of proof remains unsettled.

i Burden of proof

Tribunals have adopted different approaches to determine the burden of proof for establishing investor misconduct. Generally, the burden of establishing the factual basis of the claim, as a whole, is upon the claimant. However, when it comes to proving an individual factual allegation, the burden generally rests upon the party alleging the fact, whether claimant or respondent (actori incumbit probatio, ‘who asserts must prove’).94

Some commentators have suggested a ‘shifting burden’ of proof to these evidentiary issues, at least partly due to the difficulty of procuring evidence of fraud, corruption, illegality, abuse of process and other investor misconduct.95 In other words, the state makes a prima facie showing of misconduct, through witness statements or documentary evidence, and the burden then shifts to the claimant–investor to establish that it has met the relevant requirements (legality, good faith, non-abuse of process, etc.). However, some tribunals have expressly rejected this ‘shifting burden’ approach.96

ii Standard of proof

The standard of proof for allegations of investor misconduct is also unsettled. Some tribunals apply a heightened standard of proof (e.g., ‘clear and compelling evidence’) or a more flexible standard that takes into account the difficulty of obtaining evidence of fraud, corruption and other improper conduct.

Cases endorsing a high standard of proof for allegations of investor misconduct include:

94 See, e.g., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility Judgment, 29 November 1984, ICJ Reports 1984, paragraph 101 (‘That a litigant seeking to establish a fact bears the burden of proving it is a commonplace, well-established in the jurisprudence’).

95 See, e.g., Mills, page 9 (‘Because of the near impossibility to “prove” corruption, where there is a reasonable indication of corruption, an appropriate way to make a determination may be to shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met’); see also Europe Cement v. Turkey, paragraphs 163–164 (referring to evidence of fraud adduced by the State, and noting that the claimants could have rebutted this inference – thus suggesting a shifting burden).

96 See, e.g., Llamzon, paragraph 9.09; Siag v. Egypt, paragraphs 315–317 (‘As to the burden of proof, the general rule, well established in international arbitrations, is that the Claimant bears the burden of proof with respect to the facts it alleges and the Respondent carries the burden of proof with respect to its defences . . . . Egypt asserted that it had proved Mr Siag’s non-Lebanese nationality and that accordingly ‘the burden has shifted.’ The Tribunal does not accept this latter submission. Because negative evidence is very often more difficult to assert than positive evidence, the reversal of the burden of proof may make it almost impossible for the allegedly fraudulent party to defend itself, thus violating due process standards. It is for this reason that Tribunals have rarely shifted the burden of proof’).
a **Siag v. Egypt:** the state alleged that the claimant fraudulently obtained a different nationality to manufacture treaty jurisdiction.  
97 Noting that ‘[i]t is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof,’ the tribunal applied a ‘clear and convincing evidence’ standard, which is ‘greater than the balance of probabilities but less than beyond reasonable doubt’.  
98 The tribunal ultimately rejected the state’s allegations of fraud.  
99

b **EDF v. Romania:** the tribunal rejected the claimant’s allegations of attempted bribery by the state and adopted a ‘high standard of proof’.  
100 The tribunal asserted: ‘corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof’.  
101 The EDF tribunal concluded that the investor’s allegations of bribery had not been proven because the investor’s witness lacked credibility, relied on hearsay evidence, and was not ‘clear and convincing’.  
102

c **Hamester v. Ghana:** the tribunal ‘examine[d] whether the investment was illegal from its very inception’, and found that the state ‘ha[d] not fully discharged its burden of proof in this regard’.  
103 There was evidence that some invoices had been inflated, but there was no proof that these invoices induced the state to sign the relevant agreement or that the alleged fraud prevented the state from entering into the agreement.  
104

d **African Holding v. Congo:** the tribunal dismissed the state’s allegation of corruption, finding that this allegation was ‘very grave’, requiring ‘irrefutable evidence’ and a particularly high standard of proof ‘such as the evidence required for the investigation or criminal prosecution of corruption in countries where it is considered a criminal offense’.  
105

e **Kim v. Uzbekistan:** the tribunal (by majority) found that the state ‘has not proven, either to the standard of “clear and convincing evidence”, or “reasonable certainty” that the payment of US$3 million to Mr Bizakov was an act contrary to the international public policy against corruption thereby rendering the claim inadmissible. The Tribunal therefore denies Respondent’s objection to its jurisdiction on these grounds’.  
106

---

97 *Siag v. Egypt*, paragraphs 219–221.  
98 Id. paragraphs 325–326.  
99 Id., paragraph 358.  
100 *EDF v. Romania*, paragraph 221.  
101 Id.  
102 Id., paragraphs 224 and 227.  
103 *Hamester v. Ghana*, paragraphs 131–134, paragraph 138 (‘Hamester’s practices might not be in line with what could be called ‘l’éthique des affaires,’ but, in the Tribunal’s view, they did not amount, in the circumstances of the case, to a fraud that would affect the Tribunal’s jurisdiction. The Tribunal sees the over-statement of invoices as an issue bearing upon the balance of equities between the two parties, rather than the existence itself of the contract or the investment. Such elements would have been taken into consideration by the Tribunal when discussing the merits, if it had found that any compensation was due to Hamester’).  
104 *African Holding v. Congo*, paragraph 52 (unofficial translation from the original French text).  
105 *Kim v. Uzbekistan*, paragraph 614.  
161
Commentators have recognised some contradiction in this approach, which recognises that corruption and other investor misconduct is notoriously difficult to prove and yet sets a very high standard of proof.106 Perhaps in light of this contradiction, other tribunals have adopted a lower standard of proof. For example:

a **Europe Cement v. Turkey**: the tribunal accepted the allegation of investor misconduct, based on ‘circumstantial evidence’ and the claimant’s refusal to produce documents: ‘the Tribunal has no direct evidence that any particular document placed before it was or was not authentic, but the implication of lack of authenticity is overwhelming. . . . Indeed, the evidence points to the conclusion that the claim to ownership of the shares at a time that would establish jurisdiction was made fraudulently’.107

b **CNH v. Turkey**: the tribunal noted that it ‘cannot allow evidentiary perfection to be the enemy of common sense and judgment. There is ample evidence to conclude that the claimed transactions never occurred’.108

c **Fraport v. Philippines Award I**: the (first) tribunal rejected the claimant’s request to apply a criminal standard of proof (i.e., beyond reasonable doubt) in determining whether the investor had violated Philippine law in procuring its investment.109

d **Libananco v. Turkey**: the tribunal recognised that fraud was a serious allegation but held that it did not require a ‘heightened standard of proof’.110

Other tribunals have simply referred to multiple potential standards of proof, without deciding which standard should be applied. For example:

a **Ampal v. Egypt**: the tribunal dismissed the state’s allegations of illegality as follows: ‘whether the Tribunal applies a high standard of clear and convincing evidence or even a less demanding one or a combination thereof, in the circumstances, the Tribunal is not persuaded that the Claimants’ investment was procured illegally. The Respondent’s allegations are all based on innuendos. In sum, the Respondent has failed to discharge its burden of proof’.111

b **Metal-Tech v. Uzbekistan**: the tribunal noted that it had ‘relative freedom’ to determine the standard of proof in relation to allegations of corruption, because the BIT provided no instruction on this issue.112 The tribunal concluded:

---

106 See, e.g., Partasides, paragraphs 42–44 (commenting on **EDF v. Romania**: ‘[t]he tribunal is telling us that allegations of this type of illegality are by definition ‘notoriously’ difficult to prove. Yet, it nevertheless proceeds to impose an enhanced standard of proof on the allegation. Its message is difficult to accept: ‘Dear investor, you will inevitably find the allegation almost impossible to prove, but we are nonetheless going to raise the evidential hurdle to make it even harder’. I fear this kind of juxtaposition (‘The tribunal recognises that it is very difficult to prove corruption, but we are regardless going to make it even more difficult to prove’) is precisely where international arbitral tribunals can show themselves to live in the most remote of ivory towers’).

107 **Europe Cement v. Turkey**, paragraph 167.

108 **CNH v. Turkey**, paragraph 121.

109 **Fraport v. Philippines Award I**, paragraph 399.

110 **Libananco v. Turkey**, paragraph 125.

111 **Ampal v. Egypt**, paragraph 306.

112 **Metal-Tech v. Uzbekistan**, paragraph 238.
While the debate about standards of proof and presumptions is an interesting one, the Tribunal finds that it does not require the application of the rules on burden of proof or presumptions to resolve the present dispute. In this case, facts emerged in the course of the arbitration. Because those facts raised suspicions of corruption, the Tribunal required explanations . . . .

As in World Duty Free, the present factual matrix does not require the Tribunal to resort to presumptions or rules of burden of proof where the evidence of the payments came from the Claimant and the Tribunal itself sought further evidence of the nature and purpose of such payments. Instead, the Tribunal will determine on the basis of the evidence before it whether corruption has been established with reasonable certainty. In this context, it notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence.  

Based on this brief survey, it appears that there is currently no consensus among international tribunals and commentators regarding the burden and standard of proof for allegations of investor misconduct. More certainty in this important area would be welcome.

V REMEDIES FOR INVESTOR MISCONDUCT

Once misconduct is established, a tribunal has a number of options to sanction such conduct, and to discourage future claims, including:

a dismissing the claim for lack of jurisdiction or inadmissibility, on the basis that:
   • the investment or investor was not protected by the relevant treaty;
   • the investment or investor was not ‘made in accordance’ with law;
   • there was no ‘consent’; or
   • there was a breach of international or transnational public policy;

b awarding costs in favour of the state;

c awarding moral damages to the state;

d ordering security for costs; or

e permitting counterclaims by the sovereign state against the investor, depending on the terms of the relevant treaty.

In addition to seeking the above remedies from tribunals, states may anticipate such claims by re-drafting the definitions of ‘investor’ and ‘investment’ in investment treaties expressly
to preclude protection of investments made or operated in contravention of domestic or international law, or to require express approval from the relevant state for all investments to be protected by the treaty.\footnote{See, e.g., US Model BIT 2012, footnote 2, definition of ‘investment’ (‘Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law’).}

VI CONCLUSION

The number of investor–state cases involving investor misconduct (alleged or proven) remains relatively small. However, as the number of investment-treaty arbitrations continues to rise, it is likely that cases involving investor misconduct will also increase. The cases discussed in this chapter provide useful lessons for all participants in investor–state arbitration.

Investors: Make sure your ‘house is in order’ before coming to a tribunal with an investment treaty claim. Gather all evidence of a \textit{bona fide} investment before initiating arbitral proceedings.

States: Be aware that there are unscrupulous, vexatious, frivolous and fraudulent claimants lurking in the penumbra of investor–state arbitration. It may be a long and expensive battle, but usually these claimants end up where they belong – out in the cold, without treaty protection, and often subject to significant costs orders. Due diligence of potential investors, and potential claims, is of the utmost importance – carefully scrutinise their financial statements and qualifications, and raise any concerns in writing at the earliest opportunity.

Tribunals: Be aware of these issues, and be ready to sanction investor misconduct – where it is proven. Also be aware that states are increasingly raising allegations of investor misconduct, sometimes without foundation, and tribunals must be ready to dismiss frivolous allegations of investor misconduct (potentially with costs).

Academics: this is a fertile area of research. The authors (as practitioners, not academics) hope this modest contribution will provide a useful starting point for future discussion of these important issues.
Part III

SUBSTANTIVE PROTECTIONS
With the advent of investment arbitration or investor–state dispute settlement as a primary tool of resolving disputes between foreign investors and host states at an international level, most of the cases involving takings or property are brought in accordance with bilateral investment treaties (BITs) or other international investment agreements (IIAs). Fortunately, the more traditional espousal of expropriation claims in the course of diplomatic protection has become extremely rare, which means that the aggrieved investors have more control of their claims and bear ultimate responsibility for how they are presented without having to ask their home governments to intervene.

Despite expropriation or taking of property by the government being one of the oldest concepts of public international law, it nonetheless remains one of the most hotly debated. The proliferation of IIAs providing for numerous protections of foreign investors, which has been taking place since the 1980s, did not make expropriation a less popular cause of action. The wave of nationalisations of extracting industries in Latin America in the 2000s and the ‘Yukos affair’ left dozens of affected investors having to sue the host states for damages. The flipside of the investments arbitration’s relative success as an investment protection tool is the acute criticism that comes from various quarters from governments to non-government organisations to academia.

An exhaustive study of the modern law and practice of expropriation is definitely beyond the ambit of this publication. The authors have designed this chapter to be a handy, if short, guide to the contemporary law of takings in international investment law. This chapter is divided into two sections; the first dealing with the state of play with direct expropriation and the second with indirect expropriation.
I DIRECT EXPROPRIATION

i Definition of expropriation in IIAs

Protection from expropriation of investments has been one of the central safeguards offered by IIAs to foreign investors, which despite being largely similar in most IIAs, may still vary significantly in their scope and coverage. For instance, Soviet and Chinese BITs from the late 1980s and early 1990s provided that only disputes regarding the compensation for the expropriation would be submitted to the jurisdiction of investment tribunals under those BITs.5

The term ‘expropriation’ is usually used alongside the term ‘nationalisation’,6 and they are often used interchangeably. For instance, the Energy Charter Treaty (ECT) provides that investments may not be ‘nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation’.7

In addition to ECT, the North American Free Trade Agreement (NAFTA), the Dominican Republic–Central America–United States Free Trade Agreement (CAFTA–DR) and many other IIAs use the term ‘expropriation’ as an umbrella term for both stricto senso expropriation and nationalisation.8 In addition, some IIAs use such terms as ‘alienation’, ‘confiscation’,9 ‘dispossession’10 and ‘requisition’.11

It is of notice that as a general rule IIAs do not contain a specific definition of what activities of the host state amount to a direct expropriation. The Australia–Chile FTA, for instance, sheds some light on the treaty definition of direct expropriation by defining a state’s actions resulting in investment being ‘nationalised or otherwise directly expropriated through formal transfer of title or outright seizure’, while similar formulation was also adopted by CAFTA-DR and the text of the EU–Canada Comprehensive and Economic Trade Agreement (CETA).12

As a general rule, IIAs permit states to expropriate property subject to a set of requirements. Such requirements include the existence of (i) a legitimate public purpose; (ii) a non-discriminatory manner; (iii) compliance with due process; and (iv) a payment of compensation.

Particular IIAs may differ in terms of wording and precise formulation of the above requirements. For instance, the Cyprus–Egypt BIT uses the term ‘public interest’;13 the Israel–Cyprus BIT, ‘public purpose related to the internal needs’;14 the Finland–India BIT,
Expropriation

‘public purpose, authorised by the laws’; the UK–Bolivia BIT, ‘public purpose and for a social benefit related to the internal needs’; whereas the Germany–Qatar BIT refers to ‘public benefit’. As regards the due process requirement, IIAs may refer to such terms as ‘domestic legal procedure’ and ‘due process of law of general application’. As to the requirements for compensation, many IIAs incorporate the standard of prompt, adequate and effective compensation, known as the ‘Hull formula’. However, the precise wording of these requirements may vary among IIAs, which sometimes add additional qualifications for such compensation. For instance, the Austria–Bulgaria BIT uses term ‘preliminary and adequate compensation’; the Spain–Hungary BIT, ‘just compensation’; the Croatia–Finland BIT specifically mentions that in addition to being prompt, the compensation ‘shall be paid without delay’; the UK–Bolivia BIT requires compensation to be ‘just and effective’; while the Lithuania–Kazakhstan BIT requires it to be ‘appropriate’; and the Sweden–India BIT to ‘be made expeditiously’. As well as many other IIAs, require compensation to be ‘fully realizable’ and ‘freely transferable’.

Another important issue with respect to compensation where IIAs may have differing approaches is its valuation. ECT, NAFTA and other BITs require that the amount of compensation shall be based on ‘fair market value’ of the expropriated investment. IIAs also may refer to ‘genuine value’, ‘genuine market value’, ‘full value’, ‘real value’, ‘actual value’ or ‘real international markets values’. IIAs also usually provide that such compensation shall carry interest that can be ‘market rate’, ‘normal commercial rate’, ‘commercially reasonable rate’ or make reference to particular weighted rate (e.g., LIBOR).

One has to bear in mind that IIAs normally do not distinguish between compensation due for lawful taking of investments and one due for unlawful expropriation. However, the prevailing practice of all investment tribunals to date appears to follow the customary

15 Finland–India BIT, Article 5.
16 UK–Bolivia BIT, Article 5.
17 Germany–Qatar BIT, Article 4.
18 Estonia–Norway BIT, Article 6.
19 Spain–Kuwait BIT, Article 5.
20 Austria–Bulgaria BIT, Article 5.
21 Spain–Hungary BIT, Article 4.
22 Austria–Bulgaria BIT, Article 5; Croatia–Finland, Article 5.
23 Sweden–India BIT, Article 5.
24 NAFTA, Article 1110.
25 France–Mexico BIT, Article 5.
26 NAFTA, Article 1110; ECT, Article 13; US–Egypt BIT, Article 3.
27 UK–Argentina BIT, Article 5; UK–Bahrain BIT, Article 5; UK–Chile BIT, Article 4.
28 Denmark–Turkey BIT, Article 4.
29 UK–Bangladesh BIT, Article 5.
30 UK–Morocco BIT, Article 6; Turkey–Ukraine BIT, Article 3.
31 Switzerland–Kuwait BIT, Article 7; Spain–Kuwait BIT, Article 5.
32 Italy–Kazakhstan BIT, Article 5.
33 ECT, Article 13 Switzerland–Kenya BIT, Article 6.
34 UK–Bahrain BIT, Article 5.
35 US–Argentina BIT, Article 4.
36 Austria–Croatia BIT, Article 4.
international law rule embedded in Article 36 of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts37 – i.e., that the compensation, as a form of 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’.38

In the same vein, the majority of investment tribunals to date have also made a clear distinction between expropriations conducted in accordance with IIAs and illegal takings of property.39 In the latter case, full compensation, including lost profits, is to be awarded.

ii Direct expropriation in scholarly writings

A good number of scholars have expressed their views on the issue of direct expropriation. However, this subject has tended to receive less attention in legal writings recently than the indirect expropriation. Consequently, as some scholars note, the standard of compensation at the quantum phase has been the primary preoccupation of international tribunals in cases of direct expropriation.40

For instance, Christoph Schreuer notes that direct expropriation or nationalisation has become relatively rare.41 He further concludes that the unfavourable publicity engendered by such a drastic step and the negative effect on the investment climate of the host state make it unwise to seize foreign-owned property openly.42 Another author in the same vein recently noted that ‘today direct expropriation occurs only in exceptional cases and international law has stipulated well-defined requirements for such expropriations to be recognized as valid under international law’.43

As regards scholarly definitions of the direct expropriation, those are usually provided in the similar fashion. In particular, the direct expropriation is usually defined as the physical taking of the investment by the host state or under its authority, usually by way of an outright seizure of the investment or a compulsory transfer of legal title to the investment.44

37 Article 36 of the Draft Articles reads as follows: ‘1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.’
38 The Chorzów Factory case (Germany/Poland), 13 September 1928, Series A, No. 17 (substantive issue), page 47.
41 Christoph Schreuer, the Concept of Expropriation under the ECT and other Investment Protection Treaties (revised 20 May 2005), available online at www.univie.ac.at/instlaw/pdf/csunpubpaper_3.pdf.
42 Ibid.
Expropriation

Another illustrative example of definition of direct expropriation as ‘an open, deliberate and unequivocal intent, as reflected in a formal law or decree or physical act, to deprive the owner of his or her property through the transfer of title or outright seizure’. 45

It should be also noted that some scholars distinguish a number of types of direct expropriation. Namely, if the entire industries or sectors of the economy are taken by the state, those measures are defined as nationalisation. 46 If expropriation of property is made during wartime or the state of national emergency, such measures are often called requisition. 47 At the same time, despite the particular terminology used to describe the state's conduct, in all cases it boils down to the government measures resulting in a state-sanctioned compulsory transfer of property from the foreign investor to either the government or a state-mandated third party. 48

iii Direct expropriation in arbitration practice

Arbitral tribunals have undertaken numerous attempts to develop a definition of direct expropriation. In Roussalis v. Romania, for example, the ICSID arbitral tribunal defined direct expropriation as ‘a deliberate formal act of taking’. 49 In LG&E v. Argentina, another tribunal described the same concept as ‘the forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action’. 50 BG v. Argentina is another example where arbitrators reached the same conclusion as did the arbitral tribunal in LG&E v. Argentina and found that a direct expropriation requires a forcible appropriation. 51

Other arbitration tribunals attempted to elaborate an all-encompassing test as to what conduct of the host state may amount to a direct expropriation. A notable example of such attempt is the case Burlington v. Ecuador, where the arbitral tribunal articulated the following standard of conduct of the host state constituting a direct expropriation: host state's actions amount to a direct expropriation where such actions (i) deprive the investor of their investment; (ii) the deprivation is permanent; and (iii) the deprivation finds no justification under the police powers doctrine. 52 The arbitral tribunal in Quiborax v. Bolivia agreed with such enunciation of the relevant standard for direct expropriation. 53

47 Ibid.
48 Ibid.
53 Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award, 16 September 2015, paragraph 200.
We will now examine whether such test offered by the arbitral tribunals is all-encompassing, and based on the analysis of the findings that investment arbitral tribunals reached in various cases, determine what may be the other qualifying criteria of direct expropriation, if there are any.

It is universally recognised that an act must be of governmental nature to constitute an expropriation. Such conclusion was, for example, reached by the arbitration tribunals in *Saipem v. Bangladesh*\(^{54}\) and *Kardassopoulos v. Georgia*. In the latter, the tribunal found that in a decree the government of Georgia deprived the investors of their rights in the investment and, therefore, such actions of the host state amounted to the direct expropriation of the claimant’s investments.\(^{55}\)

Moreover, for an expropriation to qualify as direct, such actions of the state must be deliberate. In *Quiborax v. Bolivia*, the arbitral tribunal found that in order to ascertain direct expropriation, the claimant shall succeed in proving the existence of a positive intent of the host state to transfer property and ownership and a cause-and-effect link between the measures taken by the host state as well as that the title to property is being affected by such measures.\(^{56}\) Arbitrators in *Siag v. Egypt* in the same manner found that direct expropriation takes place when the title of the owner is affected by the measures in question, which suggests that a causal link between the measures taken by the recipient of investments and the divestment of the investor from its proprietary rights is an essential element of expropriation.\(^{57}\)

The final element of expropriation is that the title to the investment must be formally transferred from the foreign investor to the state itself or to the state-appointed party. Such conclusion can be made from the analysis of the award in *National Grid v. Argentina*, where the tribunal found that there had been no direct expropriation, since no formal title to property had been transferred to the state or to other parties designated by the state, reasoning that ‘[d]epivation of title to property is inherent in a direct expropriation’.\(^{58}\) In *EL Paso v. Argentina* the arbitral tribunal arrived at a similar conclusion, finding that since there had been no transfer of title in the shares of the Argentinian companies to Argentina or to another public or private company, no direct expropriation took place.\(^{59}\) In *Enron v. Argentina*\(^{60}\) and *Sempra v. Argentina*,\(^{61}\) the tribunals found that no direct expropriation may


take place at least some essential component of property rights has not been transferred to a
different beneficiary, in particular to the state. In *Generation v. Ukraine* the arbitral tribunal
found that the actions of the Kiev City State Administration could not be characterised
as ‘direct expropriation’ of Generation’s investment because it never purported to transfer
Generation’s proprietary rights in its investment to the state of Ukraine or to a third party.62

Another form of direct expropriation takes place where the object of the claimant’s
investment is effectively seized by way of a forceful takeover over the investor’s property by the
state. In *Burlington v. Ecuador* the tribunal concluded that by Ecuador’s physical occupation
of oil fields it expropriated the investor’s investments.63

Taking into account the above analysis of cases, one will arrive at a conclusion that
the modern jurisprudence – both in theory and practice – understands direct expropriation
as a deliberate act of the government of the host state directed against the investor by way
of issuing a formal legislative act or decree, or actual takeover over the investment; any such
formal action shall be aimed at the formal transfer of title in such investments from the
investor to the host state or a host-state designated third party.

II INDIRECT EXPROPRIATION

i Defining indirect expropriation in IIAs

The majority of modern IIAs do distinguish between direct and indirect expropriation by
employing the wording as measures ‘equivalent’64 or ‘tantamount’65 to the expropriation. Some IIAs also specifically point to the fact that expropriation measures may deprive the
investor of its investment *de jure* or *de facto*.66

However, the recent practice of states is to qualify ‘measures tantamount to expropriation’ with various conditions. For instance, the 2012 United States Model BIT in Annex B states that ‘the determination of whether an action or a series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry’.67

According to a footnote to Article 6 of the Model BIT, which deals with expropriation and measures equivalent to expropriation, that article shall be interpreted in accordance with Annex B.

In the same vein, Article 8.13(1) of the CETA provides that provisions on expropriation must be interpreted in accordance with Annex 8-A, which provides that:

> The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors: (a) the economic impact of the measure or series of measures,

64 See, e.g., ECT, Article 13.
65 NAFTA, Article 1110.
66 Italy–Ecuador BIT, Article 5; Italy–Jordan BIT, Article 5.
although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (b) the duration of the measure or series of measures of a Party; (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and (d) the character of the measure or series of measures, notably their object, context and intent.68

It is posited that CETA is indicative of a global trend to make sure that indirect expropriation is not given too broad an interpretation by arbitral tribunals, and that states preserve certain freedoms of manoeuvre in promoting their policies and in exercise of their public authority.

ii Indirect expropriation in scholarly writings

One of the first authors to write extensively on the measures tantamount to expropriation was George C Christie, who in a seminal 1962 article wrote that a state’s actions may render a foreign investment so useless that the state will be deemed to have expropriated the investment, even thought it might not have purported to.69 These first attempts to clarify which state measures, short of overt taking of property, should be deemed expropriatory were rather cautious. In more than 50 years since then, however, both arbitral tribunals and legal commentators have achieved rather modest results in an effort to provide more certainty to the nebulous concept of indirect expropriation.

It has been posited elsewhere that indirect expropriation occurs when the host state takes seemingly legitimate measures, which in effect completely deprive the foreign investor of the benefits associated with his investment.70 Indirect expropriation does not necessarily result in the investor losing the formal title to the investment, but in the wake of such expropriation the investor’s control of his or her investment, or the revenues he or she derives from it, do to such an extent decrease that it becomes commercially unfeasible for the investor to continue operating in the host state.

However, the legal doctrine’s position as to whether any sort of reliable guidance can be drawn up remains split. On the one hand, the affirmative opinion holds that at least some general principles can universally be applied to each indirect expropriation case. Such principles can take the form of a checklist, based on which an arbitral tribunal should build its analysis of indirect expropriation. Writers advocating this opinion have already proposed versions of such a checklist, mostly produced by summarising the relevant criteria that various tribunals have taken into account in the past.71

The opinion on the other hand, however, questions the need for the said general guidelines. This opinion holds it to be impossible to produce a guideline versatile enough to

70 Andrew Newcombe and Lluís Paradell list a number of other terms which were used along with ‘indirect expropriation’ to denote the concept, including constructive, de facto, disguised, consequential expropriation, and measures equivalent or tantamount to expropriation. (Andrew Newcombe, Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment, Kluwer Law International, 2009, page 325).
be a standard point of reference for the tribunals ruling on indirect expropriation.\textsuperscript{72} Instead, the proponents of this second opinion prefer to leave it up to the tribunal to pick particular issues by which to assess an indirect expropriation claim.\textsuperscript{73}

iii Indirect expropriation in arbitration practice

As the Metalclad tribunal pointed out, measures equivalent to expropriation include ‘covert or incidental interference with the use of property which has the effect of depriving the owner of . . . the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State’.\textsuperscript{74} A more recent ICSID tribunal appears to be more reserved, stating that ‘the decisive criterion for most tribunals . . . is not the fact of having incurred a damage and/or the loss of value as such, but the finding . . . “that the owner has truly lost all the attributes of ownership”.’\textsuperscript{75}

It is no surprise that establishing a successful claim of indirect expropriation requires extensive analysis of the circumstances of each particular case. In ruling on indirect expropriation, a tribunal is expected to carefully balance important public policy considerations with private interests vital to a particular investor. The practical difficulty here is that, in the words of the El Paso tribunal, ‘no absolute position can be taken in such delicate measures, where contradictory interests have to be reconciled.’\textsuperscript{76} For this reason, as aptly observed by the Feldman tribunal, recognising direct expropriation is relatively easy, however, it is much less clear when governmental action that interferes with broadly defined property rights crosses the line from valid regulation to a compensable taking.\textsuperscript{77}

Recent investment arbitration cases readily recognise that the practical approach to indirect expropriation remains unsettled. A number of tribunals has admitted that the law is yet to produce the clear, practical guidelines to identify indirect expropriation claims.\textsuperscript{78}

The arbitral practice demonstrates that investment tribunals normally prefer to pick those issues that they deem relevant to assess whether the indirect taking has taken place.

\textsuperscript{74} Metalclad Corp v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paragraph 103.
\textsuperscript{75} Mamidoil Jetoil Greek Petroleum Products Societe Anonyme SA v. Republic of Albania (ICSID Case No. ARB(11/24), Award, 30 March 2015, paragraph 566.
\textsuperscript{77} Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, paragraph 100, page 36.
\textsuperscript{78} See, for example, Feldman case, where the tribunal noted that ‘it is fair to say that no one has come up with a fully satisfactory means of drawing the line [to set direct expropriation aside from indirect]’ (Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, paragraph 100, page 36); and Saluka case, where the tribunal observed that ‘international law has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment’ (Saluka Investments BV (The Netherlands) v. The Czech Republic, Arbitration under UNCITRAL Rules, Partial Award, 17 March 2006, paragraph 263, page 53).
First, they would usually set a very high threshold ruling on the merits of an indirect expropriation claim. To achieve that threshold, a variety of factors is taken into account, some of which may even not be entirely legal. As observed by the *Generation v. Ukraine* tribunal, the decisive considerations depend not only on the specific facts of a grievance, but also on the way the evidence is presented, and the legal bases pleaded.

Second, investment arbitration cases decided in the recent years also appear to admit that no reliable test to rule on indirect expropriation can yet be made. Some guidance, of course, can be derived from the previous practice, but, at the end of the day, a tribunal every time would produce a bespoke test based on differing considerations reflecting the specific measure at issue.

Thus, for example, in the recent *Rusoro* case the tribunal decided on the investor’s claim that various export and currency control measures adopted by the Venezuelan government to regulate the gold mining industry were in fact a creeping expropriation that led to eventual nationalisation of the investor’s assets. In its decision, the tribunal only considered the connection between those measures and the eventual government’s decision to nationalise the gold mines. Based on that consideration, the tribunal found that Venezuela was following ‘a hidden agenda to nationalise the private gold sector’.

In a similar fashion, the tribunal in three consolidated *Yukos* cases has found that the assets of the claimants were subjected to measures equivalent to expropriation since the ‘the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets’.

In another Venezuela-related case, *Venezuela Holdings*, the investor claimed that the government’s changes to the tax regime, making it more burdensome for the investor, were in fact an indirect expropriation. Here, the tribunal’s key consideration was that indirect expropriation ‘requires a total loss of the investment’s value or a total loss of control by the investor of its investment, both of a permanent nature’. Given that no such total loss occurred, the tribunal rejected the investor’s indirect expropriation claims.

---

79 According to UNCTAD database, available at http://investmentpolicyhub.unctad.org/ISDS (last accessed on 11 March 2017), out of 227 cases decided between 1994 and 2015 where foreign investors claimed indirect expropriation, only 44 held such claims to be founded.

80 *Generation Ukraine Inc v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, paragraph 20.29, page 90.

81 As it was done by the tribunal, for example, in *Enron & Ponderosa* case, where the tribunal directly referred to a list of measures, which have been considered as tantamount to indirect expropriation in the earlier *Pope & Talbot* case. In the *Enron & Ponderosa* award, the tribunal stated its view that the *Pope & Talbot* list is representative of the legal standard required to make a finding on indirect expropriation (*Enron Corporation, Ponderosa Assets LP v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, paragraph 245, page 78).


Other cases also discussed indirect expropriation as being allegedly caused by, for example, various environmental or public health regulations.

The common denominator in each such case was that the conclusion, whether in favour of the host state or the investor, was reached by a specific, narrowly crafted analysis with few or no generalisations being made.

iv Concluding remarks

Reflecting the above observations, the investment arbitration practice does not afford a clear-cut test to evaluate indirect expropriation claims. A wealth of academic writing and arbitral awards have so far attempted to delineate such a test. Yet, the general discussion on this point is far from being concluded.

Given that the specificity approach is also increasingly being preferred in the recent bilateral investment treaties, it may be expected that the tribunals in the following years will continue to tend to a highly specific consideration of particular facts in ruling on indirect expropriation.

Admittedly, this may not be an entirely positive sign to the investors, as such position being a prevailing one makes it more difficult to foresee what a particular tribunal would base its ruling on when deciding on whether to award compensation to an investor. However, such position is perhaps the most flexible one to deal with the often politicised issues of states’ regulatory measures, each affecting foreign investment to a different extent.

85 For example, the well-known Methanex case discussed the measures taken by the United States of America and by the State of California individually to limit the use of one of the components of methanol based on the alleged environmental hazard caused by that component (Methanex Corporation v. The United States of America, Arbitration under UNCITRAL rules, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, paragraphs 7–28, pages 57–64).

86 See, for example, Philip Morris discussing various cigarette packaging requirements enacted by the government of Uruguay citing public health reasons (Philip Morris Brands Sàrl et al v. The Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016, paragraphs 272–307, pages 76–88).

87 See, e.g., 2012 US Model BIT and CETA, as discussed above.
OBSERVANCE OF OBLIGATIONS

Ceyda Akbal Schwimann

I INTRODUCTION

One of the most debated issues of investment arbitration is the interpretation and application of the provisions on the observance of obligations found in most bilateral and multilateral investment treaties such as the Energy Charter Treaty or the North American Free Trade Agreement. These are clauses that require the contracting states, as host states, to observe obligations that they have entered into with the investors of the other contracting states. They are described as ‘umbrella’, ‘mirror effect’, ‘sanctity of contract’, ‘pacta sunt servanda’ or ‘parallel of contract’ clauses. The most commonly used metaphor is ‘umbrella clause’ because it places the contract under the protection of the treaty.

There is an ongoing debate between investment treaty tribunals and scholars who argue that bilateral investment treaty claims should be separated from contract claims, and those who take the position that through the application of an umbrella clause, contract claims are elevated to the level of an investment treaty claim. This debate is crucial in determining the authority of an investment treaty tribunal to hear a dispute arising from an investment contract, alongside a domestic court or arbitral tribunal constituted pursuant to an arbitration clause in a contract between the investor and the host state (‘contract tribunals’).

The dissensus among the investment treaty tribunals led to a fragmented jurisprudence, which looks like, in the words of Judge James Crawford, ‘a crazy quilt rather than a Persian rug’. Before the analysis of diverging opinions and jurisprudence on the interpretation and application of clauses on observance of obligations, their history, which should not be disregarded for interpretation purposes, shall be briefly explained.

II ORIGINS OF UMBRELLA CLAUSES

The umbrella clause first emerged in the advice provided by Elihu Lauterpacht to the Anglo-Iranian Oil Company in late 1953 and 1954 in the settlement of the Iranian oil nationalisation dispute, followed by other advice given by the same author in 1956–1957 to a group of companies contemplating a trunk pipeline from Iraq to the Eastern Mediterranean...
Sea.\textsuperscript{5} In each case, Lauterpacht proposed an umbrella treaty that would confer international protection on a particular investment contract.\textsuperscript{6} They were drafted to ensure ‘parallel protection’, according to which, breach of the contract constitutes a breach of the treaty. Another common feature of draft treaties is that dispute settlement mechanisms exclude the application of the exhaustion of local remedies rules. Proposals to incorporate the umbrella treaty mechanism served as a basis for the further protection of investments. They were followed by the Abs-Shawcross’ Draft Convention on Foreign Investment of 1959 and OECD Draft Conventions on the Protection of Foreign Property of 1962 and 1967.

Article 2 of the Abs-Shawcross Draft Convention, the purpose of which is to provide, in the words of Shawcross, ‘the binding force of the contract’ and ‘the right to own property’,\textsuperscript{7} states:

\begin{quote}
Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party.\textsuperscript{8}
\end{quote}

Schwarzenberger has remarked that this provision applies to contractual commitments. According to Schwarzenberger, its effect is to ‘transform obligations towards objects of international law which as such are beyond the pale of international law, into obligations under international law’.\textsuperscript{9} He characterised the article as ‘a far-reaching departure from the law as it stands, and may tilt the balance too far in favour of the investor’.\textsuperscript{10}

The next development in the chronology of international instruments containing an umbrella clause is the OECD Draft Convention on the Protection of Foreign Property of 1967. Article 2 states:\textsuperscript{11}

\begin{quote}
Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.
\end{quote}

This article is described as an application of the general principle of \textit{pacta sunt servanda}. Haight remarks that it is the ‘basic norm of every legal system governing agreements between States and foreign nationals’.\textsuperscript{12} Its effect is described as the elevation of a breach of an individual investment contract by the host state into a breach of international law. Thus both the foreign investor and his or her home state may invoke the dispute settlement mechanism under the treaty.

Dolzer and Stevens state that under such an umbrella clause the investor’s contractual rights are protected against any interference that might be caused by a simple breach of

\begin{footnotesize}
\begin{enumerate}
\item Sinclar, page 413.
\item Sinclar, page 418.
\item H Shawcross, ‘The Problems of Foreign Investment in International Law’ (1961), 102 RCADI, pages 335 and 341.
\item Abs-Shawcross Draft, cited in Sinclar, \textit{supra} no. 2, page 421.
\item Ibid, page 155.
\item OECD Draft Convention, Sinclar, \textit{supra} no.1, page 427. The definition of property including contract rights is given in Article 9 of the Draft Convention.
\item G W Haight, ‘American Foreign Trade and Investment Disputes’ (1959), 14 ADRLJ, page 46.
\end{enumerate}
\end{footnotesize}
Observance of Obligations

Mann has also noted the importance of such a provision as protecting the investor against any interference with his contractual rights resulting either from a mere breach of contract or a legislative or an administrative act, and independently of the question whether such interference amounts to a breach of a substantive provision of the treaty.

Umbrella clauses found in modern BITs are strongly influenced by the Abs-Shawcross and 1967 OECD draft conventions. However, it is worth noting that some umbrella clauses are worded differently, which may give ground for a narrower or broader interpretation. In the following, I will limit my analysis to the typical example of modern umbrella clauses, an example of which is Article 10(1) of the Energy Charter Treaty:

*Each Contracting Party shall observe any obligation it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.*

### III EFFECT OF THE UMBRELLA CLAUSE

It is possible to identify three different approaches to the effect of umbrella clauses in modern BITs. The first approach adopts an extremely narrow interpretation of umbrella clauses, allowing them to be only operative if the claimant can prove that the parties to the BIT jointly intended any breach of contract to be a breach of the BIT. In the absence of proof of such intention, the supporters of this approach do not allow contract claims to proceed before investment treaty tribunals on jurisdictional grounds.

---

14 F A Mann 'British Treaties for the Promotion and Protection of Investments' (1981), 52 *BYIL* pages 241 and 246.
The second approach adopts a cautious interpretation of the effect of umbrella clauses. The supporters of this approach draw a sharp distinction between the ‘scope’ of the obligations, which should be ‘ascertained’ by the local courts, and the performance of those obligations, and take the position that the umbrella clauses cause only ‘respect’ of contracts between the investor and the host state to be an obligation under a BIT. Tribunals adopting the cautious approach accept jurisdiction over contract claims but refuse to proceed with them on admissibility grounds until the competent national courts or contract tribunals make a final ruling under the applicable law of the contract based on the scope of the contractual obligations.

The third approach is in line with the cautious approach, because the supporters of this approach interpret umbrella clauses making only ‘respect’ of contracts between the investor and the host state an obligation under a BIT. However, they refuse the argument that the claim is inadmissible because its effect would be to deny the umbrella clause its purpose and effect to the same extent as if the jurisdiction was denied.

It is counterproductive to discuss dozens of decisions on umbrella clauses since they are not consistent regarding the effect, interpretation and the application of umbrella clauses. However, the respective decisions of the tribunals in three cases filed by SGS Société Générale de Surveillance SA (SGS), which set out the frameworks of the approaches summarised above, shall be briefly explained to illustrate the main patterns of views adopted by investment treaty tribunals regarding the effect of the umbrella clause.

The narrow approach was adopted by the tribunal in SGS v. Pakistan, the first tribunal that addressed umbrella clauses directly. The tribunal was clearly concerned with flooding

---


18 Judge Crawford, who was one of the arbitrators in SGS v. the Philippines, proposes a similar approach as ‘integrationist approach’ in his article cited in supra no. 3.


20 Article XI of the BIT between Switzerland and Pakistan provided that ‘[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments
Observance of Obligations

Investment treaty tribunals with contract claims. The tribunal had justifiable concerns: (1) if the broad interpretation (as argued by the claimant in this case) is adopted, the term ‘commitment’ would be open to indefinite expansion, including state contracts, statutory and administrative commitments of the state; 21 (2) the international responsibility of the host state would be engaged without demonstrating the breach of substantive provisions of the treaty (which would render substantive provisions of the treaty otiose); (3) any mutually agreed procedure of dispute settlement would be rendered ‘a dead letter, at the investor’s choice’. 22 Recognising that the parties to a BIT may adopt dispositions on the conversion of contract breaches into breaches of the BIT, 23 the tribunal in SGS v. Pakistan held that the consequences of interpretation of the clause by the claimant are ‘so burdensome’ that ‘clear and convincing evidence that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan BIT in incorporating Article 11 in the BIT must be adduced by the claimant.’ 24 The tribunal found that there was insufficient evidence in this case.

The cautious approach was adopted by the tribunal in SGS v. the Philippines only four months after the decision of the tribunal in SGS v. Pakistan. This tribunal did not follow the approach of the one in SGS v. Pakistan when it stated that the umbrella clause of the BIT between Switzerland and the Philippines 25 includes ‘commitments or obligations arising under contracts entered into by the host State’. 26 Contrary to the finding of the tribunal in SGS v. Pakistan, the tribunal in SGS v. the Philippines looked at the ordinary meaning of the language of the umbrella clause with a view to give effect to the clause. Furthermore, it held that, consistent with the object and purpose of the treaty, any uncertainty must be resolved in favour of the investments covered, 27 and recognised that the umbrella clause has the effect of transforming into breach of treaty failure on the part of the host to respect its contractual obligations concerning an investment. 28 The tribunal rejected the possibility that their interpretation would open the term ‘commitment’ to indefinite expansion, stating that ‘[f]or Article X(2) to be applicable, the host State must have assumed a legal obligation, and it must have been assumed vis-à-vis the specific investment, not as a matter of the application of some legal obligation of a general character. This is very far from elevating to the international level all ‘the municipal legislative or administrative or other unilateral measures of a Contracting Party’.’ 29 The tribunal did not give any concrete examples of which type of obligation would fall within the ambit of Article X(2). The arbitrators adjusted this interpretation by ruling that the issue of the extent or content of such obligations is still governed by the proper law of the contract and falls within the exclusive jurisdiction of the court vested with jurisdiction by the dispute settlement clause in the contract out of which the dispute arose. 30 The tribunal decided that the contractually agreed dispute

21 SGS v. Pakistan, paragraph 168.
22 Ibid.
23 Ibid., paragraph 173.
24 Ibid., paragraph 167.
25 Article X(2) of the BIT between Switzerland and the Philippines provided that ‘[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.’
26 SGS v. the Philippines, paragraph 127.
27 Ibid., paragraph 116.
28 Ibid., paragraph 126.
29 Ibid., paragraph 121.
30 Ibid., paragraph 128.
Observance of Obligations

Resolution clause in favour of the ordinary courts of the Philippines made the claim under the umbrella clause premature and inadmissible. This part of the decision, which was subject to a dissenting opinion, was criticised by Professor Emmanuel Gaillard on the ground that it results in depriving the dispute resolution process of any meaning, and that it was not the intention of the authors of the treaty to derive from the umbrella clause. Professor Gaillard, who was counsel for claimant in SGS v. Pakistan and SGS v. the Philippines, is of the opinion that an investment treaty tribunal may assert jurisdiction over claims arising out of a contract but 'with respect to the host State's international obligations under the observance of undertakings clause'. The solution in SGS v. the Philippines is also criticised by Professor Christoph Schreuer and Professor Wälde for reintroducing the requisite of exhaustion of domestic remedies.

As remarked in SGS v. the Philippines, the umbrella clause in the BIT between Pakistan and Switzerland was formulated in different and rather vaguer terms than the umbrella clause in the BIT between the Philippines and Switzerland, giving grounds for a narrower interpretation. Nevertheless, both SGS v. Pakistan and SGS v. the Philippines came to the conclusion that with an exclusive jurisdiction clause in favour of national courts or contract tribunals, an investor intends to renounce the right to arbitrate contract claims in a treaty forum and allow contractually agreed forums to proceed with contract claims. The tribunal in SGS v. Pakistan rejected the claims based upon non-jurisdiction, while the tribunal in SGS v. the Philippines suspended the proceedings based upon inadmissibility.

In February 2010, the tribunal in SGS v. Paraguay applied the broad interpretation of the umbrella clause to interpret the umbrella clause in the BIT between Paraguay and Switzerland, which is worded identically to the umbrella clause in the BIT between Pakistan and Switzerland. The tribunal held, in line with the tribunal in SGS v. the Philippines, the umbrella clause to mean that a contract breach leads to a treaty breach, while also finding that a forum selection clause in the contract was no obstacle to reaching these conclusions. Disagreeing with SGS v. the Philippines, the tribunal refused the argument that the claim is inadmissible because the effect would be to 'divest the provision of its core purpose and effect' to the same extent as if the jurisdiction was denied outright. Furthermore, the tribunal was concerned that the dismissal of claims under the umbrella clause may read an implied waiver of treaty rights into every investment contract that specifies a dispute resolution mechanism other than ICSID. The tribunal remarked that given the significance of investors’ rights under a BIT and of the international law as a ‘safety net’ of protections, separate from and supplementary to domestic

---

33 Gaillard, page 345.
35 SGS v. the Philippines, paragraph 119.
36 Crawford, page 367.
37 Ibid., paragraphs 170–175.
38 Ibid., paragraph 176.
39 Ibid., paragraph 177.
law regimes, such rights should not be lightly assumed to have been waived.\textsuperscript{40} It concluded that 
at least in the absence of an express waiver, a contractual forum selection clause should not be 
permitted to override the jurisdiction of investment treaty tribunals.

Although both \textit{SGS v. the Philippines} and \textit{SGS v. Paraguay} permitted the umbrella clause to 
embrace the host state’s commitments of all kinds,\textsuperscript{41} they reached diverging functional 
conclusions based upon legitimate but different concerns. While the tribunal in \textit{SGS v. the 
Philippines} focused on separating treaty and contract claims and on giving effect to the choice 
of forum selection in the investment contract, the main concern of the tribunal in \textit{SGS v. 
Paraguay} was to provide effective protection to investors under the system of investment treaty 
protection.

\section*{IV NATURE OF THE COMMITMENT: COMMERCIAL OR OF SOVEREIGN 
CHARACTER?}

Another controversial issue for the interpretation and application of umbrella clauses is 
whether it is necessary that the commitment has more than a ‘merely commercial’ character, 
i.e., whether governmental powers or prerogatives (\textit{ius imperii}) are exercised or at stake. A 
number of tribunals have adopted an approach whereby the pivotal element of the analysis 
is the nature of state conduct. The tribunals that pursue this approach\textsuperscript{42} usually take the view 
that states have to respect contracts freely entered into with a foreign entity, provided that 
such contracts have at least to some extent a ‘governmental’ character. This means that any 
breach of contract implicates the specific powers of the government, and the claims thus 
rely on a violation of the traditional standards of investor protection, such as protection 
against expropriation, breach of legitimate expectations (which is usually subsumed under 
the principle of ‘fair and equitable’ treatment). This was, for instance, the position taken by 
the tribunal in \textit{Joy Mining Machinery Ltd v. Egypt}, which declared that:

\begin{quote}
it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could 
have the effect of transforming all contract disputes into investment disputes under the Treaty, unless 
of course there would be a clear violation of the Treaty rights and obligations or a violation of contract 
rights of such a magnitude as to trigger the Treaty protection.\textsuperscript{43}
\end{quote}

The tribunals adopting this approach want to prevent, in the words of the tribunal in \textit{Sempra 
Energy v. Argentina}, an ‘indefinite and unjustified extension of the umbrella clause’.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{40} Ibid., paragraph 178.
\item \textsuperscript{41} Ibid., paragraph 170.
\item \textsuperscript{42} \textit{Joy Mining v. Egypt}; \textit{Pan American Energy LLC and BP Argentina Exploration Company v. the Argentine 
italaw.com/cases/808 (last visited: 13 February 2017); \textit{El Paso Energy International Company v. the Argentine 
Republic}; ICSID Case No: ARB/03/15 (hereafter \textit{El Paso Energy v. Argentina}), Decision on Jurisdiction, 
(last visited: 13 February 2017); \textit{Sempra Energy International v. Argentine Republic}, ICSID Case 
No. ARB/02/16 (hereafter \textit{Sempra v. Argentina}), Award of the Tribunal, 28 September 2007, available 
at https://icsid.worldbank.org/en/Pages/casedetail.aspx?CaseNo=ARB/02/16 (last visited: 
21 February 2017).
\item \textsuperscript{43} \textit{Joy Mining Machinery Ltd v. Egypt}, paragraph 81.
\item \textsuperscript{44} \textit{Sempra Energy v. Argentina}, paragraph 310.
\end{itemize}
The approach summarised above was explicitly rejected by the tribunal in *SGS v. Paraguay*\(^ {45} \) based upon the principles set forth in *SGS v. the Philippines* and *BIVAC v. Paraguay*. According to the tribunal, the language of the umbrella clause means what it says, and does not justify any distinction between acts of a sovereign character and acts of a non-sovereign character.\(^ {46} \) Judge Crawford also criticises this approach on the ground that it is odd for a state to defend itself ‘by arguing that it was acting for commercial reasons’.\(^ {47} \) The text of the umbrella clause does not justify such a distinction, which may lead to arbitrary results.\(^ {48} \) Similarly, Professor Dolzer and Professor Schreuer express the opinion that there is no justification for ignoring or revising the principles of interpretation set forth in the Vienna Convention on the Law of Treaties.\(^ {49} \)

**V  BREACHES OF OBLIGATIONS UNDERTAKEN IN THE DOMESTIC LAW BY THE HOST STATE**

Another controversial aspect of the umbrella clause is whether the protection by umbrella clauses is limited to contractual breaches or whether it includes breaches of obligations undertaken in domestic legislation. The jurisprudence on this issue is quite scarce. The tribunal in *SGS v. Philippines* clarifies that, under the umbrella clause, a failure to observe contractual commitments is regarded as a breach of the bilateral investment treaty,\(^ {50} \) yet it did not comment on the breach of the commitments undertaken in domestic legislation.

One view is that the term ‘any obligations [the state] may have entered into with regard to investments’ in an umbrella clause is concerned with ‘consensual obligations’ that are entered into with regard to ‘specific persons’, and such consensual obligations are also ‘specific concerning the investment’. This was, for instance, the position taken by the ad hoc committee in *CMS Gas Transmission Company v. Argentine Republic (Annulment)*,\(^ {51} \) which annulled the tribunal’s conclusion on the umbrella clause for failure to state reasons, leaving it open whether the broad interpretation adopted by the tribunal would have constituted an excess of power had it been properly motivated.\(^ {52} \) Judge Crawford endorses the approach of the ad hoc committee. He expresses the opinion that no law (whether specific or general) falls within the application of an umbrella clause, and in the absence of express stabilisation, investors take the risk that the obligations of the host state under its own laws may change.\(^ {53} \) The majority of the tribunal in *Ioan Micula, Viorel Micula, S C European Food SA, S C Starmill SRL and* 

\(^{45} \) *SGS v. Paraguay*, paragraphs 166–170.

\(^{46} \) Ibid., paragraph 167.

\(^{47} \) Crawford, paragraph 368.


\(^{50} \) *SGS v. the Philippines*, paragraph 128.


\(^{52} \) Crawford, page 370.

\(^{53} \) Ibid.
Observance of Obligations

*S C Multipack SRL v. Romania*54 adopted a similar but narrower interpretation; without having to express any opinion on the applicability of the umbrella clause to obligations of general nature,55 the tribunal held that the umbrella clause is triggered only if the obligation of the state gave an actionable ‘vested’ right under the domestic law.56,57

The view set forth above can be contrasted with a broader interpretation without specificity requirement. For instance, the tribunal in *Enron Corporation Ponderosa Assets LP v. Argentine Republic*,58 dealing with – as in *CMS v. Argentina* – the failure of Argentina to abide by the stabilisation clauses in the licences granted to the claimants with a view to promote investments in the gas transportation and distribution sectors, took this position.59 Based upon a textual interpretation of the umbrella clause, it concluded that the umbrella clause is applicable to the obligations undertaken under the contract, law and regulation ‘with respect to investments’. In another dispute dealing with the same issue, the tribunal in *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v. Argentine Republic*60 adopted a similar approach and focused its analysis on the purpose of the ‘specific’ obligations undertaken by foreign investors, namely ‘to induce the entry of foreign capital’.61 An *ad hoc* tribunal constituted under the Arbitration Rules of the United Nations Commission on International Trade Law went to the extreme, and without any detailed explanations concluded that the term ‘any obligations’ in the umbrella clause of the Energy Charter Treaty encompasses the statutory obligations of the respondent state, including under its foreign investment law.63

VI CONTRACTS ENTERED INTO BY A STATE ENTERPRISE, A MUNICIPALITY OR A PROVINCE

Another special problem of the umbrella clause arises when an entity of the host state, a municipality or a province fails to honour its commitments under an investment contract. The tribunal in *Bosh v. Ukraine* ruled that ‘the term “Party” in the umbrella clause refers to any situation where the Party is acting qua State’, meaning that ‘where the conduct of entities

55 Ibid., paragraph 422.
56 Ibid., paragraphs 448–454 and 459.
57 The arbitrator Dr Stanimir Alexandrov adopted a broader approach, whereby the criterion for triggering the umbrella clause is that the state has undertaken ‘firm commitment’ with regard to the claimant, and the scope of that commitment was to provide substantially the same incentives during a specific period of time (Ibid., paragraphs 455–458).
61 Ibid., paragraph 175.
62 A similar approach is suggested by Pecoraro, page 20.
Observance of Obligations

can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of ILC Articles on State Responsibility), such entities are considered to be ‘the Party’ for the purposes of [the umbrella clause]. This position, which is in line with the position in *Noble v. Romania*, an can be contrasted with the view of the tribunal in *Impregilo SpA v. Islamic Republic of Pakistan*, which refused to apply the international law rules on state responsibility to breaches of contract by a state entity and therefore refused jurisdiction over claims of contractual breaches by state entities.

VII CONCLUSION

From the controversial nature of the decisions rendered by investment treaty tribunals, we may conclude that the effect of umbrella clauses in modern BITs is still open to debate. On the one extreme, there is a tide of jurisprudence interpreting the umbrella clause broadly, encompassing host state commitments of all kinds, including, but not limited to, contractual obligations. On the other extreme, there exists a jurisprudence reflecting a restrictive interpretation, which is a reaction to the downsides of the broad interpretation. In a third category there is a cautious approach to interpret the umbrella clause broadly based upon its wording, but apply it cautiously through the traditional jurisdiction regulating rules, namely, the *lis alibi pendens* and *res judicata* rules, and taking into account the legitimate concerns expressed by the supporters of the narrow interpretation.

The application of the cautious approach is a means to overcome concerns about flooding investment treaty tribunals with contract claims. Such concerns clearly form the basis of imposing requirements as to the nature of the commitment or that of the breach, which are not usually justified by the text of the umbrella clause. To interpret the umbrella clause there is no reason to deviate from the principle set forth in Article 31(1) of the Vienna Convention on the Law of Treaties, namely that ‘[a] treaty 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.’ The same is true for the application of the umbrella clause to the obligations undertaken in domestic law. The term ‘enter into’ set forth in the umbrella clause means ‘to start to become involved in something, especially in discussion or agreement’, and cannot be used in the context of laws or regulations, in the absence of an undertaking with regard to the investor to remain bound by it for a certain period of time.

Special attention must be paid to the fact that investors’ power to negotiate contracts with states or state enterprises is often limited. For instance, states operate (especially in highly regulated sectors such as energy, telecoms and pharma) through state enterprises. Investors very often have to sign their investment contract with the entity designated by the state for this purpose and cannot choose their contract parties. It is, therefore, ‘legitimate to resolve uncertainties’ in the interpretation of umbrella clauses ‘so as to favour the protection of covered investments’ in line with the object and purpose of BITs, which is the promotion and protection of foreign investments.

64 *Noble v. Romania*, paragraphs 68–70.
66 Ibid., paragraph 210.
67 Cambridge Dictionary.
68 *SGS v. the Philippines*, paragraph 116.
Investments overseas, especially in politically unstable countries, may be exposed to the adverse effects of unpredictable actions or inactions of the host government. Political risk insurers can help manage such risks by providing coverage for certain losses related to political causes. If the insured investor’s loss satisfies the relevant terms and conditions under its insurance contract, the insurer will compensate the insured accordingly. By increasing confidence and reducing uncertainty in investment planning, the availability of political risk insurance (PRI) in a risky developing country helps investors obtain funding for insured investments and helps the host state attract more investment, thereby supporting the economic interests of all parties involved. In addition to this contractual arrangement, investors and investments may be protected by and entitled to compensation under an investment treaty. Thus, on the road to recovering losses from government wrongdoing, PRI providers and insured investors may have to deal with the complicated interplay between insurance and investment treaty regimes.

This chapter will discuss how insurance contracts governed by applicable law and investment treaties governed by public international law principles may differ on the protections available for risks and losses and on how claims are assessed. Such differences are highlighted in the example of expropriation. If an investor is successful with an insurance claim, the insurer may want to recover the compensation paid and consider either stepping into the shoes of the investor to itself claim against the host state in an investment arbitration, which may involve complicated problems with bilateral investment treaty (BIT) subrogation clauses and issues of standing, or making other arrangements so that the investor can pursue investment arbitration and pass the ultimate benefits to the insurer.

I AN INTRODUCTION TO THE POLITICAL RISK INSURANCE MARKET

Political risks are those associated with government actions or inactions that deny or restrict the right of an investor to use or benefit from the investor’s assets, or that reduce the value of the investment.  

---

1 Huawei Sun is a partner and Danni Wang and Chang Liu are both associates at Zhong Lun Law Firm.
Political Risk Insurance

making foreign direct investment in developing economies. The top two political risks that worry investors are adverse regulatory changes in the host state and a breach of contract by the state.

Political risk insurers commonly provide coverage to protect against losses that arise from five types of risks: expropriation, transfer restrictions, political violence, arbitral award default (in relation to a breach of contract) and denial of justice.

There are three main types of PRI providers: (1) public state-sponsored providers, such as the Overseas Private Investment Corporation (OPIC), a governmental agency backed by the full faith and credit of the United States, and China Export and Credit Insurance Corporation (Sinosure), a company funded by the Chinese government with the purpose of promoting foreign trade and economic cooperation; (2) multilateral providers such as the Multilateral Investment Guarantee Agency of the World Bank (MIGA), the Asian Development Bank and the African Trade Insurance Agency; and (3) private providers, such as Lloyd’s of London (a syndicated consortium of private insurers), Sovereign Risk Insurance of Bermuda and AIG of the United States. In the Berne Union, a leading association for the global export credit and investment insurance industry with 84 members (including OPIC, Sinosure and MIGA), public providers dominate the PRI market in overall amounts insured because of the availability of enormous funding support provided by its sovereign sponsors.

According to a Berne Union survey, in 2015, its members provided US$97.167 billion in investment insurance for new transactions (of which US$5.875 billion was for China) and paid claims worth US$151 million in total (US$48 million was paid for political violence, the most common specified basis, followed by US$16 million for breach of contract). PRI providers paid US$19 million to US$34 million for losses in each of Libya, Nigeria, Turkey and Russia, the top four countries where insurance claims were paid, while US$8 million worth of claims were paid for losses in China.

As Chinese outbound investments have been robust in recent years, especially in infrastructure projects in developing countries, Chinese investors are increasingly facing political risks in those countries. For example, in 2011, tens of thousands of Chinese nationals were evacuated after a civil riot broke out in Libya, and Sinosure paid compensation of 490 million yuan for 29 companies that suffered losses in the riot.

It is apparent that PRI has become a useful tool for managing risks to outbound investments in politically unstable economies.

II INSURANCE CLAIMS VS INVESTMENT TREATY ARBITRATION CLAIMS

Insurers will have their own governing policies for the terms of coverage for the five most common types of risk, being expropriation (government acts that deprive the investor of ownership or control rights to its investment), transfer restrictions (restrictions to transferring currency or converting currency at the reference rate of exchange), political violence (the

4 MIGA-EIU Political Risk Survey 2013, World Investment Political Risk 2013, MIGA, page 42.
destruction or disappearance of tangible assets or the total inability of the investor to conduct
operations as a result of violent political or military acts), arbitral award default (where the
government is not complying with an arbitral award against it in cases where it was found
to breach a contract with the investor) and denial of justice (an inability to obtain an award
as a result of government acts that render the dispute resolution procedure specified in the
contract impossible or impracticable). From a review of publicly available OPIC arbitral
awards and claims determinations, it appears that the precise terms of each insurance contract
are negotiated and tailored according to the circumstances of the investment.8

The scope of protection and compensation for loss may be different under a PRI policy
and under an investment treaty. Insurance policies exist in the ambit of contract law so the
terms and conditions for successful claims and compensation from the insurer are defined
by the contract and interpreted in accordance with its applicable law. As these types of losses
arise from government conduct, the investor may also have protected rights and claims
under an investment treaty; such claims are assessed on the basis of treaty provisions, in
accordance with international law. Thus, the scope of protection available to the investor and
the investor’s ability to be compensated under a PRI policy may not overlap completely with
that under an investment treaty. For example, a loss that could be successfully claimed on the
basis of the fair and equitable treatment principle under a treaty may not be covered by a PRI
policy. Note also that arbitral award default coverage is unique to PRI policies.

The difference and interaction between the two regimes can be seen in the course of
claims determination. Some contracts, such as the MIGA sample contracts, provide that the
applicable law should be ‘general principles of law’,9 which may allow for the consideration
of principles of public international law. Other contracts, especially that of national PRIs,
may provide for the law of the home state, for example, Sinosure’s policy provides that all
disputes between the insured and Sinosure shall be resolved before China International
Economic and Trade Arbitration Centre (CIETAC) in accordance with PRC law. A local law
may not be as developed, or may even be silent on certain issues that may find a resolution by
applying the more developed jurisprudence of public international law; for example, indirect
expropriation. However, the role of public international law in claims determinations under
insurance contracts will depend on whether local laws allow for its consideration. Where
international law was necessary to resolve a dispute but was restricted from applying by
the domestic applicable law, tribunals have in the past invoked the idea of an ‘international
contract’ and stated that it was ‘necessary to resort to the general principles of law and to apply
them’ to resolve the dispute.10 Given the complexity of the issue, there will be uncertainties
as to how international law principles will be applied by local tribunals.

A review of the OPIC claims determinations published on their website reveals OPIC
taking a textual approach to interpreting the insurance contract, as is to be expected. These
claim determinations did not involve in-depth discussions about public international law.
However, an investor dissatisfied by a rejected claim may instigate commercial arbitration

8 See generally the arbitral awards published on the OPIC website www.opic.gov/who-we-are/transparency/
claims-and-arbitral-awards.
9 Article 14.2, MIGA Contract of Guarantee for Equity Investments (Sample), 5 August 2013; and
Article 14.2 of the MIGA Contract of Guarantee for Shareholders Loan (Sample), 5 August 2013; Rules of
10 See, e.g., Aramco 27 International Law Reports 117 (1958); Topco v. Libya, extracts in Yearbook Volume IV
proceedings against OPIC and the tribunal may treat the international law principles relating to the claim differently to OPIC. For example, in the case of Revere, OPIC determined the investor’s actions were the real cause of its loss and the investor was still in control of its assets, however, the tribunal held that the investor’s control was no longer effective because it could not continue to make certain business decisions.\textsuperscript{11}

An insurer may wish to be aware of all the nuances of public international law when it drafts its insurance contract and creates guidelines on claims determination. The insurer would then, in turn, be aware of how its own claims determinations may be aligned with or differ from the way (1) a commercial arbitration tribunal might assess an insurance compensation claim under a contract; and (2) an investment arbitration tribunal might assess a treaty claim against the host government at international law. Such awareness would help the insurer make an informed decision about defining the scope of its mandate, and avoid, if it wishes to, the likely divergent results it may face in another forum for particular issues. The insurer will also have a clearer idea about which kinds of claims would be likely to be successful at treaty arbitration and are worth pursuing.

III EXPROPRIATION: INSURANCE CONTRACT TERMS VS INTERNATIONAL LAW

The differences between PRI policies and treaty protection can be seen in claims assessment for loss resulting from expropriation, for example.

One of the requirements for finding expropriation is an interference by a host state causing the substantial loss of control or economic value of a foreign investment. International law and insurance contracts may differ on the level of deprivation required.

Some contracts contain a sufficiently detailed definition that resembles the widely accepted international law standard of ‘total or substantial deprivation’.\textsuperscript{12} For example, MIGA refers to:

\begin{quote}
loss due to any legislative action or any executive or administrative action or omission . . . in one or a series of events, attributable to the Host Government which, directly or indirectly (a) deprives or prevents the Guarantee Holder from exercising its ownership rights in, or effective control of, all or a substantial portion of the Guaranteed Investment; or otherwise deprives the Guarantee Holder or the Project Enterprise of a substantial benefit of the Guaranteed Investment . . . (emphasis added).
\end{quote}

Other contracts may make a different stipulation. MIGA’s sample guarantee for a shareholders’ loan provides for material deprivation of the insured’s rights, and any deprivation of the insured’s repayment funds to constitute expropriation.\textsuperscript{14} Sinosure’s policies provide that any or partial deprivation will fall within the protection of its various policies.\textsuperscript{15} This calls into question whether the policies provide wider protection than investment treaties.

\textsuperscript{11} See, e.g., Revere Copper and Brass Inc v OPIC, AAA, No. 16 10 0137 76 (Haight, Wetzel, Bergan, arbs.) reprinted in 17 International Legal Matters 1321 (1978).
\textsuperscript{12} See, e.g., Société Générale v. Dominican Republic, Award, 19 September 2008, paragraph 64; Alpha Projectholding v. Ukraine, Award, 8 November 2010, paragraph 408.
\textsuperscript{13} Article 4.1, MIGA Contract of Guarantee for Equity Investments (Sample), 5 August 2013.
\textsuperscript{14} See Article 4.1 of the MIGA Contract of Guarantee for Shareholder Loans (Sample), 5 August 2013.
\textsuperscript{15} Based on our review of Sinosure’s sample terms, which are not publicly available.
MIGA’s reference to ‘a series of events’ (see above) also provides coverage for creeping expropriation. Sinosure’s policies do not make such an express reference so it may not provide coverage for creeping expropriation.

As another example of the difference between insurance policies and international law, MIGA excludes from its expropriation coverage ‘bona fides non-discriminatory measures of general application that governments normally take for the purpose of regulating economic activity’.16 Recent versions of Sinosure contracts contain similar exemptions. Unlike these contracts, treaties rarely contain such provisions and it is unclear how the scope of these exemptions compares to a state’s regulatory freedom under international law.

Few insurance contract claims determinations discuss international law principles in much depth. An OPIC determination involving expropriation summarised the international law principles and cited jurisprudence that supported its contractual terms and briefly applied such principles in the determination.17 It further states that the OPIC provisions ‘comports with customary international law’ and ‘reflects a body of international investment law that recognizes the expropriatory effects of state actions that prevent, unreasonably interfere with, deprive, or unduly delay effective enjoyment of an investor’s fundamental rights in its investment.’18

In any case, it may be fair to say that insurers have developed insurance policies to be a class of their own, which may or may not correspond to international law standards.

IV SUBROGATION

Insurers have an interest in recovering compensation paid to the insured, especially when the insured has the right to claim compensation from a host state in another forum. Thus, PRI contracts usually include a subrogation clause, where the insured investor’s rights and claims against the host state are assigned to the insurer after payment or with an undertaking to make payment. To seek compensation from a host state in investment arbitration, the PRI provider will also need to rely on a BIT provision that recognises its subrogation right. The next sections will address the subrogation rights provided for in the contract and by operation of an investment treaty. Local laws on subrogation may also operate in the absence of contractual subrogation, however, this chapter will not discuss this.

V SUBROGATION UNDER CONTRACT

A standard contractual subrogation clause may look like this, from MIGA:

Upon payment of compensation by MIGA, MIGA shall be fully subrogated, up to the amount of such compensation, to all claims, causes of action, recoveries and other rights the Guarantee Holder has against the Host Government . . . in respect of the Covered Risk causing the Loss, and the Guarantee Holder shall take no action whatsoever to prejudice MIGA’s rights of subrogation.19

---

16 Article 4.2, MIGA Contract of Guarantee for Equity Investments (Sample), 5 August 2013.
18 Ibid. 4.
19 Article 11.1 of the MIGA Contract of Guaranty for Equity Investments (Sample), 5 August 2013 and Article 11.1 of the MIGA Contract for Guarantee for Shareholder Loans (Sample), 5 August 2013.
VI RECOGNITION OF SUBROGATION UNDER A BIT

BITs typically contain a provision expressly obliging the host state of the investment to recognise the subrogation of the investor’s rights under the BIT to the home state insurer or its designated agency. However, few BIT provisions cover all insurers, so private PRI providers are usually excluded from the subrogation clause. We consider some examples below.

Many BITs contain subrogation clauses similar to Article 7 of the China–Germany BIT 2003, which states:

if one Contracting Party or its designated agency makes a payment to its investor under a guarantee given in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party shall recognize the assignment of all the rights and claims of the indemnified investor to the former Contracting Party or its designated agency, by law or by legal transactions, and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right to the same extent as the investor.

Some BITs provide for the subrogation of insurers generally, including private insurers, with the aim of protecting the different types of providers in the home market. For example, the Dutch Model BIT 2004 at Article 8 states: ‘[i]f the investments of a national of the one Contracting Party are insured . . . any subrogation of the insurer . . . to the rights of the said national pursuant to the terms of such insurance or under any other indemnity given shall be recognised by the other Contracting Party.’ Nearly all the Dutch BITs contain such a subrogation clause.20  The Norway Model BIT (draft) 2015 also states: ‘[i]f the investments of an insurer are insured against non-commercial risks, any subrogation of the claims of the investor pursuant to this Agreement shall be recognised by the other Party’.21

More interestingly, the Mexico–Netherlands BIT 1998 contains an unusual provision: the subrogation of ‘a wholly privately owned and controlled insurance corporation’ to the rights of the national (investor) of the same contracting party shall be recognised by the other contracting party and ‘[o]nly the national or the insurance corporation shall be entitled to exercise such rights and to engage in a dispute with respect to those rights’.22

Some BITs set out the rights of the investor after it subrogates its rights to the insurer. The New Zealand–China BIT FTA 2008 provides that ‘where a Party (or any agency, institution, statutory body or corporation designated by it) has made a payment to an investor of that Party and has taken over rights and claims of the investor, that investor shall not, unless authorized to act on behalf of the Party or the agency of the Party making the payment, pursue those rights and claims against the other Party.’ The China–Korea FTA 2015 contains a similar provision and also clarifies: ‘For greater certainty, the investor shall continue to be entitled to exercise its rights that have not been subrogated.’23

However, the China–Mexico BIT 2008 clearly excludes altogether the availability of arbitration (national or international) for resolving disputes between the subrogee and the other contracting party.24

21 Article 22 of the Norway Model BIT, draft version, 13 May 2015.
22 Article 7 of the Netherland-Mexico BIT, signed on 13 May 1998 and effective from 1 October 1999.
23 Article 12 of the China-Korea FTA, signed on 1 June 2015 and effective from 20 December 2015.
24 Article 9 of the China-Mexico BIT, signed on 11 July 2008 and effective from 6 June 2009.
VII THE INSURER’S STANDING TO EXERCISE ITS SUBROGATION RIGHTS IN INVESTMENT ARBITRATION

Where a BIT subrogation clause covers the insurer, the rules of various dispute resolution institutions will determine whether the insurer has standing to bring a claim.

A state-backed insurer may not be eligible to be a party in an arbitration at the International Centre for Settlement of Investment Disputes (ICSID) arbitration under the ICSID Convention because arbitration is only available for investment disputes between a contracting state or a designated subdivision or agency of the state, and a ‘national of another Contracting State’ as per Article 25(1). As the state-backed PRI provider is usually deemed a governmental entity, it would therefore not be a qualified ‘national of another Contracting State’. The drafting history of the Convention shows that an exception to Article 25(1) was considered in the context of subrogation, however, ICSID deliberately chose to deny party status to an investor’s indemnifying state as a procedural matter of standing (but this does not affect the right to subrogation, per se).

To distinguish private PRI providers from public ones, the tribunal in CSOB v. Slovak Republic confirmed that ‘for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a “national of another Contracting State” unless it is acting as an agent for the government or is discharging an essentially governmental function.’ Thus the determinative criteria for distinguishing public and private PRI providers is whether they administer the PRI system on behalf of the investor’s home state. While some say ‘financial dependence’ on the host state is a criterion for disqualification from being a ‘national of another Contracting State’, others say ownership or control of the government will not, alone, disqualify an entity. As Sinosure is a state-owned and policy-oriented enterprise, its qualification as ‘investor’ under the ICSID Convention will be subject to challenge.

If ICSID arbitration is not available, given an effective subrogation clause in the BIT, the state-backed insurer may nevertheless have recourse to ad hoc arbitration if allowable under the relevant arbitration rules. For example, the UNCITRAL Rules do not contain a definition of ‘investor’ and do not reject subrogation rights. Interestingly, in addition to the subrogation clause, Annex C of the draft Norway Model BIT 2015 further states that if an insurer does not have legal standing under Article 25(1) of the ICSID Convention, the contracting parties consent to submission by an insurer of a dispute to arbitration under the UNCITRAL Arbitration Rules, but that the procedural rules of ICSID shall apply.

28 Supra 48, 188.
29 Ibid.
31 See the UNCITRAL Arbitration Rules 2013.
A private PRI provider covered by a BIT subrogation clause (such as the Dutch and Norwegian BITs) has standing to be a party to an ICSID proceeding in conformity with Article 25(1) of the ICSID Convention. However, many BIT subrogation clauses do not provide for the private PRI, so investment arbitration, at ICSID or otherwise, would nevertheless not be available, as discussed above.

VIII SPECIFIC AGREEMENTS WITH HOST STATES TO RECOGNISE AND EXERCISE SUBROGATION RIGHTS

Some public PRI providers will only issue an insurance contract if the host state of the investment meets certain conditions. For example, OPIC may not offer insurance for a project in a country with which the United States does not have an investment agreement, and it must determine that ‘suitable arrangements’ exist for protecting its interest, including its right to subrogation. These conditions are fulfilled in the form of an investment incentive agreement or investment guarantee, which provides for ad hoc interstate arbitration for disputes involving questions of international law. There is one case of interstate arbitration where the US government issued a Request for Arbitration to the government of India to claim for damages in excess of US$110 million, which is the amount OPIC compensated the investor.

MIGA issues guarantees for investments in a member state (a signatory to the Convention) that flow from other member states. The signatory member is required under the Convention to recognise MIGA’s right of subrogation, however, host states have the right to object to the issuance of a PRI contract. MIGA cannot conclude a contract of guarantee with an investor ‘before the host government has approved the issuance of the guarantee by the Agency against the risks designated for cover’, and approval is deemed to have been given unless the member objects within a reasonable period after notification. MIGA requires the insurer as subrogee to first engage in settlement negotiations and then conciliation with the member host state. Failing a resolution, MIGA may pursue ad hoc arbitration with the host state, which shall be guided by the procedures of the ICSID Arbitration Rules.

Sinosure, however, does not have a membership programme or any requirements similar to the above for the issuance of a contract. Any potential actions against the host state will be based on the clauses of the relevant BIT.

33 22 USCA 2197(a).
34 22 USC Section 2197(b).
37 Article 2(a) of the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention), amended 14 November 2010.
38 Article 18 of the MIGA Convention, amended 14 November 2010.
39 Articles 15 and 38(b) of the MIGA Convention.
40 Article 57(b) of the MIGA Convention and Articles 2 and 3 of Annex II thereto.
41 Article 4(e) of Annex II to the MIGA Convention.
IX WHEN THE INSURER IS UNABLE TO CLAIM IN ARBITRATION IN ITS OWN RIGHT

If the insurer cannot resort to the subrogation provisions of the BIT, it may still make the following arrangements to support or compel the investor to first make a claim against a host state with the aim of benefitting the insurer. The insurer will also have to make arrangements with the insured on the costs of the arbitration.

i Assignment

The assignment of an ICSID claim from an insured investor to its insurer should be possible if the necessary jurisdictional conditions are fulfilled by the investor first and the assignment occurs after arbitration is instituted. In CSOB v. Slovakia, the investor CSOB assigned its right to claim against Slovakia under a contract to its home state, the Czech Republic, against a monetary consideration, similar in effect to an insurance payout. Slovakia argued that the Czech Republic had become the real party in interest and that it was disqualified from stepping into CSOB’s shoes under Article 25(1) of the ICSID Convention. The Tribunal noted that standing is a jurisdictional matter determined by reference to the date the proceedings are instituted (CSOB had standing at that date), and as the assignment occurred after that time, the Tribunal had jurisdiction to hear the case. However, the issue of assignment sometimes refers to a case where it appears that the assignment was engineered to attract jurisdiction that was otherwise lacking. In such a case, a tribunal will likely react more negatively.

ii Directing the investor to make a treaty claim

The insurer could also request the insured investor to pursue its rights under an investment treaty and arrange for the proceeds to pass to the insurer.

The insurer may require that the insured investor ‘exhaust’ its rights of recourse to proceedings before receiving compensation under insurance. Such a clause would reduce the attractiveness of the policy and the insured will undoubtedly weigh up the cost of the premiums to be paid to obtain the insurance and its obligations to recover in another forum. Thus, the more common alternative is conditional payment – i.e., the insurance policy provides that the insurer will compensate the insured on the condition that the investor pursues its rights of recourse.

Sinosure’s policy for equity investments provides that after Sinosure pays compensation, the insured is obligated to file claims in its own name against the host state if so requested by Sinosure. Otherwise, Sinosure has the right to refuse to pay further compensation and ask for repayment of the paid amounts.

A less demanding formulation than those discussed above can be seen in MIGA’s sample contracts where the investor is not required to make a claim, but if it makes a claim and receives compensation, it must hold those proceeds on trust for MIGA.

---

42 ICSID, News from ICSID Volume 7, No. 2 Summer 1990, page 5.
44 Article 11.3 of the MIGA Contract of Guaranty for Equity Investments (Sample), 5 August 2013 and Article 11.4 of the MIGA Contract for Guarantee for Shareholder Loans (Sample), 5 August 2013.
The relative market power of the insurers and potential investors and the motivations of the insurer may affect whether the arrangement is more beneficial to the insurer or the insured and account for the different approach between MIGA and Sinosure above.

A potential problem may arise against the investor’s right to claim in investment arbitration (for the insurer’s benefit) when it also has a right to compensation from an insurance provider. The tribunal in the only ICSID case on this issue to date, Hochteif v. Argentina, stated that the insurance payment Hochteif received from the German Government’s Federal Guarantees for Direct Investment in Foreign Countries programme should not be deducted from the amount due to Hochteif from Argentina as awarded. The Tribunal remarked that the insurance payment ‘does not reduce the losses caused by Respondent’s actions in breach of the BIT’ and there is no principle of international law that ‘requires that such an arrangement . . . should reduce Respondent’s liability’. The tribunal further recognised that the investor itself paid for the insurance arrangement with a third party (the insurer), and the investor may be obliged to hand over the damages recovered, but that was a matter of private contract into which the tribunal has no cause to enquire.

iii An agreement with the host state regarding the investor

To prevent the type of challenge against investors discussed in Hochteif, some BITs contain a provision that indemnification by a third party would not affect the investor’s rights of recourse to arbitration (at ICSID or otherwise).

For example, the Canada–China BIT 2012 provides that ‘a disputing Contracting Party shall not assert, as a defence, counterclaim, right of setoff or otherwise, that the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.’ Other BITs may state that a contracting party cannot ‘raise as an objection’ that the investor has received indemnity for its losses, or that such payment shall not affect the right of the investor in a proceeding.

X CONCLUSION

PRI policies and BITs provide separate regimes for protecting investors’ investments from wrongful government conduct. Investors attracted to the contractual protection of an insurance contract and its other benefits would prefer to obtain compensation under its policy, for which it paid a premium, over the costly and difficult process of claiming against a host state in investment arbitration. On the other hand, the insurer will likely want to recover compensation paid. The insurer's right to commence investment arbitration against a host state will depend on an insurance contract clause providing for subrogation, an applicable BIT clause recognising the subrogation and having standing in a particular forum, each of which involves limitations and difficulties. The insurer could instead request the investor to institute a claim and make arrangements for assignment or for the proceeds to be passed to

---

45 Partial Award (29 December 2014) Hochteif AG v. Argentine Republic (ICSID Case No. ARB/07/31), paragraph 309.
46 Partial Award (29 December 2014) Hochteif AG v. Argentine Republic (ICSID Case No. ARB/07/31).
47 Article 13(2) of the China-Canada BIT, signed on 9 September 2012, effective from 1 October 2014.
48 Article 8(1) of the Paraguay-UK BIT, signed on 4 June 1981, effective from 23 April 1992.
the insurer. If investment arbitration against the host state is an option, through whichever avenue, the insurer will need to evaluate the claim's chance of a success under international law – the government wrongdoing must constitute a breach of a treaty. The possible differences between the substantive protections under an insurance policy and a BIT means that not every risk insured will attract the same protection under a treaty, and government misconduct that leads to a successful claim under the contract may not give rise to a breach of a treaty obligation, as each realm applies its own system of legal principles to claims assessments.

Different insurers have different agendas when setting their insurance and coverage policies, and different insurers may invoke and be influenced by public international law principles and jurisprudence in different ways. While insurers have rarely sought treaty arbitration, with increasing use of PRI (e.g., by Chinese investors investing in infrastructure projects in politically unstable economies) insurers may be more likely to confront situations involving huge claims where investment arbitration would be a worthy pursuit. It will be interesting to see how developments in international law, treaty arbitration and the global foreign-investment environment may affect insurance policies and the PRI industry in the future.
Part IV

DAMAGES
Chapter 16

CONTRIBUTORY FAULT, MITIGATION AND OTHER DEFENCES TO DAMAGES CLAIMS

Eric M Runesson and Rasmus Josefsson

I INTRODUCTION

For the purposes of this brief review, a foreign investor is assumed to be, in principle, entitled to compensation in damages, resulting from a breach by a host state of its obligations relating to the protection of an investment (wrongfulness). The right to compensation arises under the applicable law, which is here taken to be 'rules of international law' as may be the case when the claims are based on the breach of a treaty, the parties have expressly or implicitly agreed that such rules shall apply or when the arbitrators in some institutional arbitrations find that the application of rules of international law is most appropriate. What is said may also be of interest when national law applies to the dispute, but its application has to be checked with reference to rules of international law; cf. International Centre for Settlement of Investment Disputes (ICSID) Convention Article 42 (1) and ICSID Additional Facility Rules (Arbitration) Article 54 (1).

It is further assumed that the host state puts up a defence with a view to reduce the entitlement of the investor. Such defence may be that compensation should be denied or reduced because of contributory fault or failure to mitigate the loss. A defence may also be based on the doctrine of investment risk, the doctrine of necessity or even on the very fact that the respondent is an entity of a public nature.

II REDUCTION OF DAMAGES DUE TO CONTRIBUTORY FAULT

Contributory fault is recognised within international law. The International Law Commission's Articles of State Responsibility (ILC Articles) Article 39 sets out: 'In the determination of reparation, account shall be taken of the contribution to the injury by

---

1 Eric M Runesson is an attorney-at-law, professor adjunct, and Rasmus Josefsson is an associate at Sandart & Partners Advokatbyrå KB.

2 Consequently, we will not discuss circumstances that may preclude wrongfulness such as consent, self-defence, countermeasures, force majeure and distress. See further International Law Commission’s Articles of State Responsibility Chapter V. See hereto A Newcombe and A Paradell, Law and Practice of Investment Treaties, 2009, page 510 et seq. We will, however, touch upon the doctrine of necessity in spite of the fact that necessity may preclude wrongfulness altogether.


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 successfully invoked by states in a number of disputes.

MTD v. Chile\(^6\) (an ICSID arbitration under the Chile–Malaysia bilateral investment treaty (BIT)) regarded a contract between MTD and Chile’s Foreign Investment Commission (FIC) for the development of a real estate project consisting of the construction of a self-sufficient satellite city. The project required the rezoning of the land by the Ministry of Housing and Urban Development. MTD had made its investment upon approval of the contract by the FIC, although the necessary rezoning had not yet been approved. As it turned out, MTD could not start the works and suffered economic loss. The arbitral tribunal found that Chile, by authorising an investment that could not take place for reasons of its urban policy, was in breach of the fair and equitable treatment standard defined in the BIT. The tribunal did, however, also find that MTD was in contributory fault, since it failed to adequately control that the project would receive necessary permits, or at least failed to structure the investment in such a way that the injury would be as small as possible if necessary permits were not granted. MTD was found not to have acted as a ‘wise investor’ and hence that it had contributed to its own misfortune.\(^7\) The arbitral tribunal found that MTD should bear 50 per cent of the damages it had suffered, but did not develop the reasoning behind the apportionment.

Chile filed a complaint against the award, and an ICSID annulment committee reviewed the award in 2007.\(^8\) The committee emphasised the general difficulties in apportioning fault in investor–state disputes and also noted that contributory fault by an investor often leads to a fifty–fifty apportionment of the damages in international investment arbitrations. The committee stated that:\(^9\)

> As is often the case with situations of comparative fault, the role of the two parties contributing to the loss was very different and only with difficulty commensurable, and the Tribunal had a corresponding margin of estimation. Furthermore, in an investment treaty claim where contribution is relevant, the respondent’s breach will normally be regulatory in character, whereas the claimant’s conduct will be different, a failure to safeguard its own interests rather than a breach of any duty owed to the host State. In such circumstances, it is not unusual for the loss to be shared equally. International tribunals which have reached this point have often not given any ‘exact explanation’ of the calculations involved.

One way to rationalise the outcome would be to say that given the difficulties, an apportionment may end anywhere between the end points on a stick. The least arbitrary point on the stick is the middle point. So if none of the parties can convince the tribunal that another apportionment is more reasonable, then the middle point will be chosen as it is the least arbitrary point of decision.

---

6 2 MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile, final award of 25 May 2004, ICSID case No. ARB/01/7.
7 Paragraph 242.
9 Paragraph 101.
The middle-point approach is not generally prevailing, however. In the ICSID arbitration *Occidental v. Ecuador*\(^{10}\) the arbitral tribunal came to the conclusion (with a dissent) that the investors should bear 25 per cent of the loss. The award illustrates an upside-down application of contributory fault. The investor was in breach, but the state’s reaction to the breach was disproportionate so that the investor became entitled to an apportioned compensation. Occidental had, in 1999, entered into a participation contract with Ecuador to explore and exploit hydrocarbons in a certain region of the country. Occidental later concluded an agreement with another investor to which a share of Occidental’s hydrocarbon interest was transferred. This triggered Ecuador to terminate the participation contract and to resort to certain expropriation measures.

The arbitral tribunal found that Occidental’s agreement with the other investor amounted to a breach of the participation contract as well as Ecuadorian law. The tribunal, however, also found that Ecuador’s termination of the participation contract not only had been made in violation with Ecuadorian law, the BIT and customary international law, but also was a disproportionate response to Occidental’s actions. The Tribunal found that Ecuador had not suffered any quantifiable loss as a direct result of the other investor taking economic interest in the hydrocarbon exploitation. Since Ecuador’s measures were disproportionate, Occidental was entitled to damages. However, as a party in breach, Occidental was found to have contributed to its own loss, which caused a 25 per cent reduction of the claimed damages.

*Occidental v. Ecuador* can be compared with *Genin et al v. Estonia*.\(^{11}\) The dispute concerned the cancellation by a state-owned bank of an operating licence held by a financial institution in which the claimants were shareholders. The reason for the cancellation was said to be financial uncertainties with the financial institution. The tribunal found that the bank had taken actions because of the behaviour of the investors comprising the non-disclosure of the true ownership of the financial institution. The behaviour of the investors was found to have caused the bank’s cancellation of the operating licence, and was the sole cause for the alleged injury. The state’s conduct was, therefore, not found to be in breach of the relevant BIT, and the investors’ claim was therefore denied in its entirety.

More recently, the principle of contributory fault was applied in the consolidated arbitrations usually referred to as the *Yukos Awards*.\(^{12}\) The arbitrations concerned measures taken by Russia primarily between 2003 and 2007. The investors claimed that Russia had breached the Energy Charter Treaty by failing to treat the investments in a fair, equitable and non-discriminatory manner. The investors further claimed that Russia unlawfully expropriated the investments.

The tribunal found that Russia’s measures had included forced sale of one of Yukos’ main oil production complexes, tax reassessments, harassment and more. Russia, however,

---

\(^{10}\) *Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, final award of 5 October 2012, ICSID case No. ARB/06/11. The award was partially annulled; decision of 2 November 2015.


as defence, invoked several instances of alleged misconduct by the investors, including skimming of profit, abuse of Russian corporate law, engagement in a tax optimisation scheme and obstruction of enforcement of tax claims.

The arbitral tribunal found that one of the invoked misconducts was to be seen as contributory fault by the investors according to Article 39 of the ILC Articles, namely the investors’ abuse of low-tax regions. The tribunal seemingly regarded this to be one of the underlying causes of events that followed (i.e., wrongful measures taken by Russia).

Because of this, the tribunal reduced the claimed damages by 25 per cent without any detailed explanation of the basis for the apportionment. The tribunal acknowledged that it had a wide discretion to apportion responsibly, and that a 25 per cent reduction would best represent the parties’ shares of responsibility.

III REDUCTION OF DAMAGES DUE TO FAILURE TO MITIGATE LOSS

Reduction resulting from failure to mitigate loss refers to a situation where the injured party is, in principle, entitled to compensation, but fails to take ‘reasonable steps’ to reduce the loss.

Although it is widely recognised in civil law as well as in common law that failure to mitigate may lead to a reduction of the compensation, the standing and closer meaning of the principle as part of international law is not entirely clear, and there is no reference to the mitigation principle in the ILC Articles. It finds its strongest manifestation in contract law. A duty to mitigate is, for example, explicitly expressed in the UNIDROIT Principles of International Commercial Contracts (PICC) and in the Convention on the International Sale of Goods (CISG).

In the case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), a leading ICJ case, the court established that while the principle of an injured party’s duty to mitigate is internationally recognised, it can only be invoked as a base for calculating damages. Thus, failure to mitigate can never materially justify a wrongful act. The court concluded that the ‘duty to mitigate’ is not a legal obligation that itself entails responsibility, but rather that a failure to mitigate by the injured party precludes recovery to that extent.

In AIG v. Kazakhstan the dispute arose after Kazakhstan’s expropriation of the investors’ investment in a joint-venture real estate development project. The state argued that the investors had failed to mitigate since they had declined an offer to develop on an alternative site instead of on the site that had been expropriated. The tribunal found that the investors were under no circumstances obligated to accept the alternative site, by law or by contract. Hence, the choice by the investors to decline the offer did not amount to a failure to mitigate. The tribunal stated that:

> When it comes to taking of the property of a foreign investor and to offers of ‘an alternative solution’ more favourable to the host State, this Tribunal is of the view that once the host State decides to expropriate or to take measures tantamount to expropriation of property, it would be wrong in

---

13 S Ripinsky and K Williams, op cit, page 319.
14 See, for example, Article 7.4.8 in the PICC and Article 77 in CISG.
17 Paragraph 10.6.4 (5) (a).
principle to impose on the injured party (the creditor or foreign investor) a ‘duty’ to examine (and if reasonable, to accept) an alternative solution. Such an imposition would only encourage Governments to breach with impunity solemn provisions of an international treaty and weaken the protection of foreign investors – which such a treaty is expressly designed to safeguard.

IV INVESTMENT RISK

Investments are made subject to risk, meaning that the expected return on the investment may not materialise. That is because of ordinary business risk. International investments are further exposed to an additional risk – country risk – which causes the investor to seek a higher rate of return. A portion of the country risk may be referred to as political risk. The country risk, of course, increases in proportion with the expected timescale of the investment. The doctrine of investment risk seeks to filter out losses resulting from commercial risk and some elements of the country risks, so that investment treaties do not work as an insurance against risks that the investor shall bear. Any part of the loss that results from impudence shall be eliminated from the compensation. In brief summary, it seems correct to say that when a loss is caused by a number of factors, the compensation shall be based only on the factors that are relevant to the purpose of the treaty.

Himapurna v. PLN\(^{18}\) illustrates one way to go about it. The arbitration took place under the UNCITRAL arbitration rules. The substantive law governing the energy sales contract under dispute was found to be Indonesian law. The parties had agreed, however, that the tribunal should not be bound by rules of law insofar as their application would contradict the terms of the contract. The tribunal applied international law since the parties had referred to international authorities in their pleadings and submissions showing ‘tacit common position as to the permissibility of such references’. Himapurna was found to be entitled to compensation for \textit{lucrum cessans}. Himapurna submitted that the total projected revenues through 2030 would amount to US$4.048 billion if discounted at 8.5 per cent. Himapurna then deducted the present value of costs at the same discount rate to get the the \textit{lucrum cessans}. The tribunal reduced the compensation sought because of a number of factors, which we will not detail here. As regards the remaining portion of the claim, the tribunal determined the present value of the future net income. Himapurna had, as mentioned above, applied a discount rate of 8.5 per cent to the projected revenue stream and to the costs associated with the revenues. The Tribunal adjusted the discount rate, having regard to the risks facing the project, and found that the rate should be 19 per cent, which brought down the compensation considerably. The tribunal pronounced:\(^{19}\)

\textit{The fact remains that it is riskier to enter into a 30 year venture in Indonesia than in more mature economies. . . . [T]here are documents which by their terms allot 100 per cent of the risk to the debtor bonds. Although they may be denominated in US dollars, although they may stipulate absolute obligation to pay, it still makes a difference whether the issuer is Switzerland or Swaziland.}

Thus, the level and type of risk that an investor generally needs to assess depends on the risk profile of the state where the investment is made. This is also illustrated by the \textit{AMT v. Zaire}...
dispute. The dispute concerned damage that had been made to certain property owned by the investor by Zairean armed forces. The tribunal found that Zaire was in breach of the relevant BIT but did not award the investor the claimed damages in full. The tribunal indicated that the awarded damages should be lower than they would have been if the investment had been made in a more economically and politically stable state. The tribunal found that the investor seemed to have calculated the claimed damages with a method practicable under normal circumstances in an ‘ideal country’ with a very stable climate of investment and, therefore, decided to use another method for calculating fair compensation. The tribunal pronounced that:

Preferably, the Tribunal will opt for a method (for calculating damages) that is most plausible and realistic in the circumstances of the case, while rejecting all other methods of assessment which would serve unjustly to enrich an investor who, rightly or wrongly, has chosen to invest in a country such as Zaire, believing that by doing so the investor is constructing a castle in Spain or a Swiss chalet in Germany without any risk, political or even economic or financial or any risk whatsoever.

There are also examples where states, as a ground for reduction or decline of damages claims, have successfully argued that the investor has made an inadequate assessment of relevant investment risks prior to the investment, or voluntarily accepted the relevant risks, which should lead to a reduction of damages. See *MTD v. Chile*, mentioned above.

*Azurix v. Argentina* is an example of when a tribunal specifically considers business risk taken by the investor when deciding on the apportionment of damages. An American company, through an Argentinian subsidiary, invested in a 30-year water concession in the Buenos Aires province. The concession was, however, terminated by the province in only its third year. The tribunal found that the termination by the state was wrongful. The tribunal, however, also found that the investor had made an irrational business decision by overpaying for the concession. Because of this, the tribunal found that the investor had to have assumed the risk of not recouping the investment. The tribunal found that most of the investor’s loss was because of the irrational business decision rather than because of the state’s conduct.

V STATE OF NECESSITY

The ILC Articles describe ‘necessity’ as circumstances that may preclude wrongfulness by a state. A state of necessity refers to a situation where a state’s only option to safeguard an essential interest against a grave and imminent peril is to pursue actions in breach with, for example, a BIT. Article 25 of the ILC Articles provides the following:

---

22 *Azurix Corp v. The Argentine Republic*, final award of 14 July 2006, ICSID case No. ARB/01/12.
23 In international investment arbitrations, parties sometimes argue that the ILC Articles cannot apply in investor–state disputes since the articles only address responsibilities between states. However, according to the wording of, for example, Articles 1 and 76 it is clear that they are intended to cover all international obligations of the state. For further discussion regarding this, see, for example, K Hobér, *Selected Writings on Investment Treaty Arbitration*, page 53 et seq.
1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

   (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

   (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

   (a) the international obligation in question excludes the possibility of invoking necessity; or

   (b) the State has contributed to the situation of necessity."

Article 27(b) of the ILC Articles defines state of necessity as a circumstance that may be invoked as a circumstance precluding wrongfulness regarding the question of damages.

The possibility for a state to invoke necessity (or similar) as a defence, and the preconditions to do so, is also, in some cases, explicitly stated in BITs.24

State of necessity has been invoked by Argentina in several international investment disputes with American companies with similar factual circumstances. In CMS,25 Enron26 and Sempra Energy27 Argentina invoked state of necessity, both treaty-based and according to customary international law, because the state, as a result of a political, social and economic crisis in the late 1990s and early 2000s, had to take certain measures to maintain public order and protect its essential security interests.

In all of the above-mentioned arbitrations, the necessity defence was rejected by the tribunal since the requirements according to international law for invoking state of necessity were not met. Since necessity could not be invoked according to international law, the tribunals did not find it necessary to take further judicial overview according to the BIT.28

However, in LG&E v. Argentina,29 which had similar factual circumstances to the disputes discussed above, the tribunal found Argentina’s invocation of necessity according to the relevant clause in the BIT and general international law justified. The tribunal considered the overall conditions that were invoked by Argentina and found that they ‘constituted the highest degree of public disorder and threatened Argentina’s security interests’.30

---


26 Enron Corporation and Ponderosa Assets LP v. Argentine Republic, final award of 22 May 2007, ICSID Case No. ARB/01/3. The award was partially annulled; decision of 30 July 2010.


28 The tribunals and, in the CMS case, the annulment committee did put a lot of attention to the issue whether or not the invoking of the relevant clause in the BIT should be considered as independent to the invoking of international law as manifested in the ILC Articles. For further discussion regarding this issue, see, for example, Yearbook on International Investment Law & Policy 2008–2009, page 370 et seq.


30 Decision of liability, 3 October 2006, paragraph 231.
was, therefore, excused from liability during the specific period when the tribunal found that it was in a state of necessity. The state, however, had to pay damages for wrongful measures taken outside this period.

VI  THE PUBLIC NATURE OF THE STATE

Sergey Ripinsky and Kevin Williams observe that there are indications that the public nature of the respondent state may have an effect on compensation because of a wrongdoing. This may be the case when the wrongdoing does not result in any transfer of wealth and in cases where a large amount of compensation would have a serious adverse effect on the state’s welfare.31

The emerging view was perhaps aptly summarised by Professor Sir Ian Brownlie in his separate opinion in CME v. Czech Republic:32

"[I]t is simply unacceptable to insist that the subject-matter is exclusively commercial in character or that the interests at issue are, more or less, of essential elements in a Treaty relation. The first element is the significance of the fact that the Respondent is a sovereign State, which is responsible for the well-being of its people. This is not to confer a privilege on the Czech Republic but only to recognize its special character and responsibilities. The Czech Republic is not a commercial entity."

VII  CONCLUSION

We have in this brief chapter discussed some of the most commonly seen defences in investor–state arbitrations. However, the law regarding defences to damages claims in investment arbitrations appears to be under development. This is in our opinion particularly true when it comes to the doctrine of investment risks, which also requires that the arbitrators shall be susceptible to economic theory. Another field under development is the consideration of the public nature of the respondent state, which in some instances may be an answer to some of the political criticism voiced against international investment arbitration.

31 S Ripinsky and K Williams, op cit, pages 353 et seq.
Part V

POST-AWARD REMEDIES
Chapter 17

ANNULMENT OF INVESTMENT ARBITRATION AWARDS

Sundra Rajoo

I INTRODUCTION

Annulment is a mechanism utilised as a post-award remedy aiming to nullify and invalidate an arbitral award. The increasing number of unsuccessful applications for annulment in the past few years reflects the impact of previous experiences on the awards rendered by arbitral tribunals and expresses the maturity of the system.

The purpose of this chapter is to compare and contrast the annulment mechanism in relation to ICSID and non-ICSID systems. It analyses the different ways of pursuing the annulment of an investment award. In addition, it exposes issues and inconsistencies in the current practice of annulment of an investment award. It concludes with a brief discussion on how the system can be improved.

II OVERVIEW OF THE ANNULMENT MECHANISM

What is annulment in investment arbitration?

Investment arbitration offers litigants a few options when it comes to post-award remedies. Rectification, supplementation, revision and interpretation are methods of resubmitting issues to the same tribunal that rendered the final award.2

The modern system of international arbitration is guided by the principle of finality, which involves the sacrifice of usual methods of review to obtain greater efficiency and economy.3 The rationale underlying the national courts multi-tiered appeal mechanism is to submit judgments to be reviewed, confirmed or changed to the better judgment of a superior court. This process usually extends the time needed for a final judgment and subsequent enforcement.

The annulment procedure is designed to preserve the legitimacy of the process of decision-making contained in the award.4 It is a safeguard mechanism that protects the integrity of the law contained without addressing issues of substantive accuracy of awards. It is an exceptional remedy designed for specific causes.

---

1 Sundra Rajoo is the Director of the Kuala Lumpur Regional Centre for Arbitration and Past President of the Chartered Institute of Arbitrators (2016).
The annulment process now struggles with the increasing number of awards being challenged and the complexity involved in those cases. In particular, it faces the problem of crafting a coherent system that reconciles the principle of finality with the correctness of an award, both essential to investment arbitration.\(^5\)

Investor–state dispute settlement presents no unified legal regime that governs annulment proceedings. There is a dichotomy between a self-contained regime\(^6\) and another that uses extended rules of review designated for commercial arbitration awards.\(^7\)

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention or the ICSID Convention)\(^8\) established the ICSID system. It is a fully autonomous procedure where arbitration is independent from any national legal system. This self-contained regime is extended to all phases of the arbitral process, including enforcement and annulment of awards.\(^9\)

Recognition and enforcement of non-ICSID awards is not automatic, as it may be refused under certain conditions set forth by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).\(^10\) Should a party want to oppose the enforcement of an award, it has the prerogative to pursue its setting aside at the place where it was rendered. The situs of the arbitration plays an undeniable controlling role in ascertaining the correctness of a decision.\(^11\)

The Model Law on Commercial Arbitration of the United Nations Commission on International Trade Law (the UNCITRAL Model Law)\(^12\) successfully sets forth the basis for setting aside an arbitral award (reproducing the concepts that were previously set in the New York Convention).\(^13\) Under those grounds, national courts of Model Law jurisdictions are uniformly entrusted with the formal analysis of an award without exercising an extensive de novo revision over issues settled by an award.

---


\(^6\) The ICSID system has been described as a self-contained regime because it provides specific rules for arbitration, annulment, revision and enforcement.


\(^8\) The Convention on the Settlement of Investment Disputes between States and Nationals of Other States was signed on 18 March 1965 in Washington, DC. It established the International Centre for Settlement of Investment Disputes (ICSID) under the auspices of the World Bank.


ii How is annulment used?

The challenges to an investment award under the ICSID Convention are submitted to an annulment committee formed on a case-by-case basis and appointed by the president of ICSID’s administrative council. The designated ad hoc committee has limited powers to analyse the award and determine if it should be enforced or annulled partially or completely. This ‘arbitration-based process’ protects a decision made by an annulment committee against intervention or interference by a national court.14

The application for the annulment of a non-ICSID investment award follows the same logic as the setting aside of a commercial arbitration award. The vacatur (also referred to as annulment or set aside, depending on the applicable law at the corresponding seat) of an investment award is a challenge against the recognition and enforcement of an award at the courts of the seat of the arbitration based on formal compliance of the award with procedural rules (as set forth by the New York Convention). It is not based on subject matter review. It is a process that must comply with the legal framework established by national laws.15

According to a study on the annulment of ICSID and non-ICSID awards, a total number of 78 ICSID annulment proceedings generated 16 full or partial annulments17 where, in comparison, 46 cases brought to court for setting aside generated five annulments.18 These numbers show that ICSID annulment procedures succeed (to a certain extent, at least) roughly 20 per cent of the time, whereas court set-aside procedures succeed roughly 10 per cent of the time. However, these numbers have to be taken with a grain of salt, as due consideration must be given to all applicable circumstances. In particular, the setting-aside standards vary from jurisdiction to jurisdiction.

III FUNDAMENTAL ASPECTS OF THE ANNULMENT MECHANISM

i Annulment of ICSID awards

The Washington Convention, in its Article 53, envisages the prompt enforcement of the arbitration award. It defines that ICSID awards are binding upon the parties without the possibility of being subjected to any appeal or remedy, with the exception of those provided by the Convention in its Articles 50 to 52.19

14 Idem.
17 Tidewater Investment SRL and Tidewater Caribe CA v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, decision dated 26 December 2016 where an award was only partially annulled: ‘The Committee is convinced – not differently from the Occidental committee – that reasons of procedural economy militate in favor of this decision. In addition, the high value of finality of awards, which is emphasized by Article 53 of the ICSID Convention, is best respected when the part of the Award, for which no ground for annulment exists, is maintained as res iudicata, and only the annulable portion of the award is extinguished.’
19 Articles 50, 51 and 52 deal, respectively, with interpretation, revision and annulment of arbitration awards.
Article 52(1) of the ICSID Convention establishes the hypothesis where a party may request the annulment an award. The general grounds for challenging an award are:

- The improper constitution of the arbitral tribunal;
- Manifest excess of powers, lack, excess or non-exercise of jurisdiction, and the failure to apply proper law;
- The arbitral tribunal was involved in corruption;
- The tribunal’s decisions present a serious departure from a fundamental rule of procedure, there is lack of impartiality, they threaten the parties’ right to be heard, lack of proper deliberations, and lack of opportunity to present evidence and proof; or
- The tribunal’s failure to state the reasons of the decision, silence or absence of reasons, insufficient or inadequate reasons, contradictory reasons, or failure to address all the issues in dispute.

Improper constitution of the arbitral tribunal

Chapter IV, Section 2 of the ICSID Convention regulates the improper constitution of the arbitral tribunal. This issue was brought up at the annulment proceedings in Vivendi v. Argentina II\(^{20}\) regardless of not being a recurrent ground for pursuing annulment.

Argentina affirmed in its application for annulment that the tribunal was not properly constituted and had no powers to hear the dispute. It argued that an arbitrator lacked the impartiality requirements imposed by the ICSID Convention because she occupied an important position at a company interested in the dispute. Furthermore, it contended that the arbitration, by not revealing this fact and by refusing to step down, had created when objectively viewed a conflict of interest that was incompatible with the necessary appearance of impartiality required of an ICSID arbitrator.\(^{21}\)

The annulment committee decided not to annul the award after criticising the arbitrator’s conduct. They reasoned that the arbitrator’s judgment was not impaired, ‘despite most serious shortcomings’, because she was unaware of an existing conflict of interest until after the rendering of the award.\(^{22}\)

Manifest excess of powers

The first two annulment cases before ICSID, Klöckner v. Cameroon\(^{23}\) and Amco Asia v. Indonesia,\(^{24}\) were challenged and annulled on the basis of the arbitral tribunal exceeding its powers. In both cases, the annulment committees were criticised for crossing the line between annulment and appeal, and exercising an extensive examination of the merits.\(^{25}\) The boundaries between jurisdictional issues and the applicable law became a highly complex problem to solve.

\(^{20}\) Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic, ICSID Case No. ARB/97/3, Second Annulment.
\(^{21}\) Ibid., paragraph 77.
\(^{22}\) Ibid., paragraph 238.
\(^{23}\) Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise de Engrais, ICSID Case No. ARB/81/2.
\(^{24}\) Amco Asia Corp & others v. Republic of Indonesia, ICSID Case No. ARB/81/1.
The argument of failure to apply the proper law is a recurrent ground for pursuing the annulment of an award. In spite of not being expressed \textit{ipsis litteris} by the ICSID Convention, it is understood that the application of the proper law is an essential part of the tribunal’s powers granted by the parties’ agreement.\textsuperscript{26}

The annulment committee in \textit{El Paso v. Argentina},\textsuperscript{27} emphasised the ‘manifest’ aspect of the jurisdictional excess of powers analysis. The \textit{ad hoc} committee reached the conclusion that the wording of Article 52 of the ICSID Convention should be interpreted as ‘obvious, clear, self-evident, and extremely serious’.

The annulment committee in \textit{Soufraki v. UAE}\textsuperscript{28} refused to annul the award and set up a crucial distinction between ‘failure to apply the proper law’, which is a reason for annulment, and an ‘error in the application of the law’, which is not a ground for annulment.

Similarly, the \textit{ad hoc} committee in \textit{CMS v. Argentina}\textsuperscript{29} considered that annulment is not an automatic response to the presence of errors in an award.

The thin line between improperly applying the law and failing to apply the law is an easy one to cross. The \textit{ad hoc} committee on dismissing the application for annulment in \textit{Duke Energy v. Peru}\textsuperscript{30} provided a clear interpretation of the concept of proper law. The committee pointed out that the proper law criteria refer to an entire legal system of a contracting state and the ‘whole of the law’, which cannot be restricted to a ‘particular portion of it’.\textsuperscript{31}

The annulment committee in \textit{Sempra v. Argentina}\textsuperscript{32} reasoned that because of its ‘egregious nature’, in ‘exceptional cases’, a manifest error of law may be equivalent to a manifest excess of powers. Likewise, the \textit{ad hoc} committee in \textit{Enron v. Argentina}\textsuperscript{33} annulled the arbitration award on the basis that the arbitral tribunal failed to address Argentina’s argument. The necessity defence was not properly interpreted in connection with a specific provision of the bilateral investment treaty.

Another issue of interpretation may arise out of the concept of investment. The annulment committee in \textit{Malaysian Historical Salvors v. Malaysia}\textsuperscript{34} was criticised for creating a different notion of investment. The tribunal applied an overly restrictive definition to the term when it included the jurisdictional element of ‘contribution to the economic development of the host State’.\textsuperscript{35} The annulment committee considered that the tribunal’s restrictive interpretation of the term ‘investment’ diverged from the broad definition provided by the bilateral investment treaty and it was not in line with the ICSID Convention.

\textsuperscript{26} C Schreuer, ‘From ICSID Annulment to Appeal Half Way Down the Slippery Slope’, op cit, page 223.
\textsuperscript{27} \textit{El Paso Energy International Company v. The Argentine Republic}, ICSID Case No. ARB/03/15.
\textsuperscript{28} \textit{Hussein Nuaman Soufraki v. The United Arab Emirates}, ICSID Case No. ARB/02/7.
\textsuperscript{29} \textit{CMS Gas Transmission Co v. Argentine Republic}, ICSID Case No. ARB/01/8, Annulment Decision, paragraph 158.
\textsuperscript{30} \textit{Duke Energy International Peru Investments No. 1 Ltd v. Republic of Peru}, ICSID Case No. ARB/03/28.
\textsuperscript{31} Ibid., paragraph 96.
\textsuperscript{32} \textit{Sempra Energy International v. The Argentine Republic}, ICSID Case No. ARB/02/16, Annulment Decision, paragraph 164.
\textsuperscript{33} \textit{Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets LP v. Argentine Republic}, ICSID Case No. ARB/01/3.
\textsuperscript{34} \textit{Malaysian Historical Salvors SDN BHD v. The Government of Malaysia}, ICSID Case No. ARB/05/10.
More recently, the annulment committee in *Occidental v. Ecuador*\(^\text{36}\) found that the tribunal had exceeded its powers by ‘compensating a protected investor for an investment which was beneficially owned by a non-protected investor’. As a result, it annulled the quantification of damages reducing the value of compensation. It is worth noting that the Occidental Petroleum *ad hoc* committee decision differs significantly from recent annulment decisions, where tribunals refused to examine the real beneficial ownership of the investment.

**Grave departure from a fundamental rule of procedure**

The *Fraport*\(^\text{37}\) case represents a procedural heavy battle that took place between a potential investor and the Philippines, which resulted in a partial award recognising the lack of jurisdiction of the arbitral tribunal. The award was successfully challenged on the grounds of a grave departure from a fundamental rule of procedure. The annulment committee had to analyse whether the tribunal’s decision to disregard a motion filed by the claimant containing substantive information had an impact on the final judgment of the award.

The *ad hoc* committee annulled the award and stated that Article 52(1)(d) was meant to control the integrity of the arbitral process and the fundamental rules of procedure, which included the right to be heard.\(^\text{38}\)

**Failure to state reasons**

The annulment committee in *Klöckner*\(^\text{39}\) ruled in favour of annulling the award against Cameroon on the grounds of failure to state the reasons. The *ad hoc* committee confirmed that the tribunal failed to explain why it applied a particular rule that would affect the statute of limitations under the contract.\(^\text{40}\) The annulment committee was heavily criticised for making a detailed examination of every aspect of the ICSID review process and analysing substantive and factual questions. It mentioned that the criteria for analysing the reasoning expressed by the tribunal should not be ‘purely formal or apparent’. It concluded that the reasoning must be ‘sufficiently relevant’ and have ‘some substance’ to provide the basis for a decision.\(^\text{41}\)

The award in *Amco*\(^\text{42}\) against the host state was annulled after an extensive revision of facts and the applicable law. The annulment committee elaborated over the requirement of ‘sufficiently relevant’ reasoning, established by *Klöckner*, and created a higher standard by demanding ‘sufficiently pertinent reasons’.\(^\text{43}\)

\(^{36}\) *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Annulment Decision.


\(^{40}\) Ibid., page 257.

\(^{41}\) Idem.

\(^{42}\) Idem.

\(^{43}\) Idem.
In this context, it is worth referring to *MINE v. Guinea*. The ad hoc committee distanced itself from the previous annulment cases when it reinforced the principle of finality of the award. It considered that only frivolous or contradictory reasons would satisfy the minimum requirement for annulment.

The ad hoc committee in *CMS* faced an award with several mistakes and lacunae on the application of the law and interpretation of a bilateral investment treaty. However, the committee argued that even if the reasoning were flawed and although applying the law ‘cryptically and defectively, it applied it’.

### ii Annulment of non-ICSID awards

Article 34 of the UNCITRAL Model Law provides the grounds for the setting aside of arbitration awards. These provisions can read differently when in the context of several arbitration laws in spite of providing clear guidelines. The implementation of the Model Law is not uniform and leaves room for states to deviate in certain respects. Nevertheless, an overview of case law demonstrates that national courts conduct a careful examination when faced with applications for setting aside an award.

**Validity of the arbitration agreement**

The attacks on awards on the grounds of a violation of the arbitration agreement is a manifold option for those seeking to annul an award. Under its umbrella, this ground for setting aside includes issues of consent, formal requirements, content of the agreement, and scope of the arbitration.

Problems arising out of consent to arbitrate are a recurrent issue in annulment proceedings. The Russian courts in *OKKV v. Kyrgyz Republic* and in *Stans Energy v. Kyrgyz Republic* annulled both awards on jurisdictional grounds because of the contracting state’s lack of consent to arbitrate.

The Singaporean High Court ruled in favour of the annulment of *Sanum Investment v. Laos* regarding the scope of the agreement. It ruled that the parties had no intention of extending the application of a bilateral investment treaty to a territory of the contracting state. A different approach was taken by the Swedish courts when they dismissed the arguments for annulment in *Kyrgyz Republic v. Petrobart Ltd*. In that case, the arbitral tribunal decided to apply provisionally the Energy Charter Treaty to investors from Gibraltar, a UK territory.

---

47 Ibid., paragraph 136.
48 See Article 34 of the UNCITRAL Model Law.
50 A J van den Berg, ‘Should the Setting aside of the Arbitral Award Be Abolished?’, op cit, page 6.
51 *OKKV (OKKB) and others v. Kyrgyz Republic*, Russian Award, 21 November 2013.
Due process of law

Procedural fairness embodies the principle of natural justice. It is, perhaps, the most common ground for challenging an arbitration award. The protection of the proper conduct of the proceedings is a constant in almost all national laws and arbitration statutes. This concept is almost indissociable from public policy concerns.54

These types of challenge, however, tend not to be fruitful. Investment arbitration tribunals meticulously observe procedural rules in the context of their broad powers to combine civil law and common law elements. The approach creates a flexible practice that differs from a court system, but at the same time provide the parties with equal opportunities to present their cases.55

Excess of authority

Among the examples of excess of authority, the ultra petita judgment, the failure to apply the proper law, and the tribunal’s disregard of the parties’ choice of law are clear-cut definitions of conduct that exceeds the powers granted to the arbitral tribunal.

The Swedish Court of Appeals in CME v. Czech Republic stated that the award had to be set aside because of the arbitrators ‘evident’ application of a law of a different country in violation of the parties’ agreement.57

The consolidation of different proceedings was argued on multiple setting-aside proceedings. The results, however, were mostly unfavourable to the applicants. The French Court of Cassation reversed the annulment of an award in Organisation pour l’investissement et l’assistance économique et technique en Iran c. Société Eurodif et Sodedif et Commissariat à l’énergie atomique.58 Similarly, the US court in Karaha Bodas Company v. Pertamina59 rejected a challenge brought against an award rendered in Switzerland under the UNCITRAL Rules that ruled on the consolidation of claims arising out of closely related projects.60

Failure to state reasons and manifest disregard of the law

Failure to state reasons is not a usual ground for pursuing the setting aside of an award before national courts. State courts have taken a restrictive approach to this concept by presenting higher thresholds for its interpretation. In the United Kingdom, a failure to state reasons can be indicative of a ‘serious irregularity’, a circumstance where an award expresses no conclusion to a specific claim or argument.61

In the United States, the failure to state reasons is not considered to be part of the grounds for vacating a decision. However, the issue of manifest disregard of the law has been brought before US federal courts in different circumstances.

55 Idem.
56 A decision that goes beyond the scope of the matters submission to arbitration.
Annulment of Investment Arbitration Awards

The legal concept commonly utilised by the US courts was established by the decision in the commercial arbitration case *Wilco v. Swan*, which considers a manifest disregard of law as ‘situations in which it is evident, from the record, that the arbitrator recognised the applicable law, yet chose to ignore it’.

**Public policy**

Parties have frequently invoked the violation of public policy as a ground in seeking to set aside an award. It has caused the national courts to examine the merits of the dispute and evaluate whether the arbitral tribunal has substantively rendered an unjust or morally unconscionable decision.

Public policy has no specific definition. It is a broad term with multiple interpretations under different legislative systems. As a concept, however, it can be analysed on the basis of its scope of application. It is generally accepted that domestic public policy is broader than international public policy. Both are broader than transnational public policy.

A frequently cited explanation of public policy defines it as the state’s ‘most basic sense of morality and justice’. The Ontario Superior Court of Justice in *Feldman v. Mexico* applied a similar test to dismiss the application for annulment. It maintained that to cause the setting aside of an award, a violation of public policy must ‘offend the most basic and explicit principles of justice and fairness’.

As a rule, public policy grounds have been interpreted narrowly by national courts. In *Saar Papier v. Poland*, the Swiss courts set aside the award and held that the incorrect interpretation of a bilateral investment treaty constituted a breach of general principles of international law, which violated international public policy.

The application for the setting aside of the arbitration award in *SD Myers v. Canada* based on the violation of international public policy was dismissed. The courts held that the award rendered by the tribunal was not ‘patently unreasonable’, ‘clearly irrational’ or ‘totally lacking in reality’ such as to create a ‘flagrant denial of justice’.

### iii Outcomes and effects of the annulled awards

Once an award is annulled, it ceases to exist and can produce no legal effects. The operative part of the award is not affected by *res judicata*, therefore, the underlying dispute continues unsettled.

According to Article 52(6) of ICSID, parties interested in pursuing the dispute further must submit their claims to a new arbitral tribunal.

---

64 Ibid., page 640.
66 Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1.
67 *Saar Papier Vertriebs GmbH v. Poland*, UNCITRAL, Final Award, 16 October 1995.
70 Article 52(6) of the ICSID Convention: ‘If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter’.
71 Klöckner II, *Amco II*, and *Vivendi II* are examples of decisions disputes that were brought to arbitration after the annulment of their initial awards. See also P Rambaud, ‘*La compétence du tribunal C.I.R.D.I.*'.
In line with the provisions of Article 34(4) of the Model Law, in some jurisdictions, a national court, when dealing with the set aside procedure, may reopen the potestas of the arbitral tribunal and order the dispute to be sent back to it. In other cases, the dispute must be submitted to the consideration of a new tribunal.

Furthermore, under non-ICSID systems, after an award is set aside at the seat of arbitration, it can be recognised and enforced by other states.72

IV IS THERE A NEED FOR A REFORM?

Investor–state arbitration, the ICSID system in particular, has been criticised for creating a judicial environment where inconsistent decisions can coexist. Much has been discussed regarding the improvement of the system and the possibility of extending the scope of revision of an award.

It has become a routine for the losing party to try to overturn an award in annulment proceedings. Applications for annulment became complex documents that scrutinise unfavourable awards and attack several points of the decision under the grounds for annulment.73

Some ad hoc committees have criticised the awards of the original tribunals. They have adopted the posture of a superior court and reprimanded tribunals for making mistakes on the application of the law.74

An effective manner of controlling such annulment committee activism could be the introduction of a ‘material violation standard’, implying that to annul an award, the grounds for annulment need to be followed by a material impact upon the parties and the outcome of the case.75

Alternatively, an appeal mechanism aiming to assure correctness and consistency is a recurrent topic of discussion. Crafting a coherent ICSID appeal mechanism would be a big task. It would require substantive restructuring of the system and numerous alterations to the ICSID Convention.

Furthermore, the current set-up of the annulment committee is incompatible with the far-reaching review of an appellate process.76 An appeal process that avoids exposing the award to the higher degree of experience of an appellate body would not serve its goals of achieving correctness. It would be a review of the award by another panel of three arbitrators that is unlikely to carry legitimacy or authority over this scrutiny.77

---

73 C Schreuer, ‘From ICSID Annulment to Appeal Half Way Down the Slippery Slope’, op cit, page 213.
77 C Schreuer, ‘Revising the System of Review for Investment Award’, op cit, page 2.
An effective means of achieving judicial coherence and consistency could be the adoption of preliminary rulings. G Kaufmann-Kohler has proposed a mechanism that envisages a situation where the tribunal can suspend the proceedings to request a decision on a question of law from another body established for that purpose.78

V CONCLUSION

The annulment mechanism is an exceptional remedy that deals with extraordinary circumstances. As a consequence, ICSID and non-ICSID arbitration systems establish strict grounds to void awards rendered by international arbitral tribunals.

The self-contained ICSID regime possesses a unified annulment process that protects the award against the intervention of a national court. It offers clear-cut advantages if compared with the annulment of non-ICSID investment awards, where the recognition and enforcement of the awards, as well as the application for the setting aside of an award, are subject to review in multiple jurisdictions.

The ICSID practice sets forth principles that guide and explain the role of an annulment committee. It is well established that an ad hoc committee has a narrow and limited mandate that does not allow it to correct the law, but provides it with a minor discretion to reconstruct reasons if the tribunal failed to address the law.

Therefore, to improve the annulment regime and preserve the integrity of the system, without promoting drastic reforms, the current system could adopt a standardised criterion of material violation, or consider implementing the preliminary rulings model. With these updates, annulment of investment awards would be made in a consistent and cohesive manner.

I INTRODUCTION

Once a party has prevailed in an investment treaty arbitration, to collect on its award it must begin the process of enforcement. Foreign states have increasingly been challenging investment treaty awards rather than voluntarily paying investors, and in some instances post-award proceedings rival the arbitration in complexity or duration. Enforcement procedures differ for awards issued under the International Centre for Settlement of Investment Disputes (ICSID) Convention and for non-ICSID awards: ICSID awards are automatically effective, while enforcement of non-ICSID awards proceeds under the New York Convention or a similar treaty.

Most states, with some exceptions, have voluntarily satisfied ICSID awards in compliance with their treaty obligations. ICSID Convention Article 53(1) provides that an ICSID award ‘shall be binding on the parties and shall not be subject to any appeal or to any other remedy’ except for the annulment remedy provided for in Article 52. Where an annulment application is made, the enforcement may be stayed at the discretion of the three-person ad hoc committee that ICSID appoints to consider the annulment application, as further discussed in chapter 17 of this Review. The fact that ICSID is a World Bank
Enforcement of Awards

Enforcement of Awards

An institution surely has been a disciplining influence, encouraging states to pay ICSID awards for fear of the impact on the state’s World Bank projects if the state were to flout its ICSID Convention obligations.

ICSID awards are directly and immediately enforceable. ICSID Convention Article 54(1) requires all Member States to treat ICSID awards as binding and to enforce such awards as if they were ‘a final judgment’ in the Member State’s court. A party seeking to enforce an ICSID award merely needs to provide, pursuant to Article 54(2), a copy of the award certified by the ICSID Secretary-General to the court or other authority that the Member State has designated with ICSID.7

Non-ICSID awards, on the other hand, must be enforced through the New York Convention8 or a similar multinational treaty on enforcement of arbitration awards. A court may refuse to recognise or enforce a non-ICSID award under the narrow grounds provided in the New York Convention or another applicable enforcement treaty.9 Furthermore, as discussed in chapter 17 of this Review, a party opposing enforcement of an adverse non-ICSID award may seek to have the award annulled in the courts of the arbitration situs.10 If a set-aside proceeding is lodged, enforcement may be stayed.11

A significant challenge to enforcing both ICSID and non-ICSID investment treaty arbitral awards is finding a sovereign’s assets that are not immune from execution. The ICSID Convention does not provide for waiver of state immunity from execution – it expressly states in Article 55 that it does not affect immunity of a sovereign’s assets from execution and, in Article 54(3), that such immunity is subject to the law governing the execution of domestic court judgments in the country where enforcement is sought. The New York Convention contains no rules on sovereign immunity. Thus, all investment treaty awards – ICSID and non-ICSID – are in the same position at the execution stage.

Enforcing courts look to their own law. In the United States, the Foreign Sovereign Immunities Act (FSIA) limits execution against sovereign assets. But, the FSIA does not limit post-judgment discovery that is available concerning award or judgment debtor assets.12 The FSIA provides that assets of foreign states are not immune from execution in the United States if, inter alia, the foreign sovereign waived immunity from execution or if the property was used for commercial as opposed to sovereign activity.13

Besides pursuing enforcement in national courts, there are other potential avenues for seeking enforcement against resistant states. An investor can seek diplomatic protection, which is allowed under ICSID Convention Article 27 when a state fails to pay an ICSID award. For

9 New York Convention Article V enumerates seven grounds upon which a court may refuse to recognise or enforce an award, including if a party was not given proper notice of the arbitration proceedings, if the composition of the arbitral panel was not proper, or if recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought.
10 New York Convention Article V(1)(e).
11 Id. Article VI.
13 28 USC Section 1610(a).
example, after Argentina failed to honour its investment treaty arbitration commitments, the United States linked its compliance with US support for international financing to Argentina from the World Bank and other multilateral lending institutions. The United States likewise pressured Costa Rica to comply with an ICSID award by invoking US support for its bid to join the Organisation for Economic Co-operation and Development. An investor can also enlist its home state to use trade remedies to incentivise compliance, as when the United States in 2012 suspended Argentina's trade benefits under the Generalized System of Preferences programme. Finally, Article 64 of the ICSID Convention allows an investor's home state to bring a claim on behalf of the investor against the non-compliant state in the International Court of Justice (ICJ). As at the time of writing, however, this mechanism has not yet been used.

II RECENT DEVELOPMENTS

i Enforcement of intra-EU investment treaty awards

In last year’s edition, this chapter discussed extensively the December 2013 *Micula v. Romania* ICSID arbitration award, the investors’ efforts to enforce the award and the European Commission’s ruling prohibiting Romania from paying the award. EU proceedings and enforcement proceedings remain pending and the conflict between EU competition and trade law and EU Member State ICSID treaty obligations remains unresolved.

In brief, the underlying arbitration concerned Romania’s revoking of investment incentives to comply with the EU’s rules on state aid as part of its accession to the EU. Swedish investors who had relied on these incentives brought an ICSID arbitration against Romania under the 2003 Sweden–Romania bilateral investment treaty (BIT) and in December 2013 won a €178 million ICSID award. The tribunal rejected Romania’s argument that it was complying with EU law and found it liable for failing to ensure fair and equitable treatment of the investments by prematurely repealing the incentives and by failing to provide timely notice that it would do so.

**EU proceedings**

The investors sought execution of the award in Romania in March 2014, but the European Commission prohibited Romania from doing so – this was the first-ever injunction issued

---

15 Id., page 104.
Enforcement of Awards

by the European Commission requiring a Member State to refrain from executing an ICSID award. The European Commission, in a 30 March 2015 decision, ruled that the EU prohibition on Member States providing state aid superseded a Member State’s ICSID treaty obligation.\(^\text{21}\) It decided that Romania’s fulfilment of the ICSID award would effectively confer distorting economic advantages and thus constituted illegal state aid.\(^\text{22}\) The Commission viewed the Sweden–Romania BIT on which the award was based as superseded by EU law and invalid as of Romania’s accession to the EU.\(^\text{23}\)

The investors pursued an enforcement strategy in multiple jurisdictions and these proceedings remain ongoing in the United States, France, Belgium, Luxembourg and Sweden.\(^\text{24}\) In late 2014 and late 2015, the investors also filed three applications to the General Court of the European Union (GCEU) to have the European Commission’s 30 March 2015 decision annulled for errors of fact and law.\(^\text{25}\) Two of these GCEU cases remain pending. Romania also unsuccessfully attempted to have the award annulled by ICSID.\(^\text{26}\)

Over the past several years, there has been increasing debate about the compatibility of intra-EU BITs with EU law. The European Commission has ruled that EU law supersedes intra-EU-BITs, putting countries such as Romania in a difficult position of satisfying an adverse ICSID arbitration award in violation of EU law prohibiting state aid.\(^\text{27}\) In response, Romania terminated its intra-EU BITs through legislation adopted on 17 March 2017.\(^\text{28}\) Other countries appear to be heading in this direction as well.\(^\text{29}\)

The German Federal Court of Justice (BGH) in Achmea v. Slovak Republic decided to stay the proceedings and ask questions of the Court of Justice of the European Union (CJEU)
Enforcement of Awards

in order to gain clarity on the CJEU’s position on the compatibility of intra-EU BITs with EU law.\textsuperscript{30} An opinion by the CJEU is currently pending and is expected later this year. As a practical matter, even if the CJEU issues a decision finding intra-EU BITs incompatible with EU law and other countries pass legislation terminating these BITs, such termination will not be instantaneous as many intra-EU BITs include sunset clauses providing for their continued application for a period of time after termination.\textsuperscript{31} Thus, states may still remain liable for treaty violations throughout the sunset period of any terminated intra-EU BIT.

Micula enforcement proceedings in the UK

Just as a court in Germany stayed enforcement of the \textit{Achmea} award, an English court recently stayed enforcement of the \textit{Micula} award pending the outcome of proceedings in the EU courts regarding the intra-EU BITs. The English Commercial Court ruled on 20 January 2017 that the registration of the award as an English judgment or confirmation was proper, but it stayed the enforcement or execution of the award because the court could not enforce an award in circumstances where: (1) the European Commission had prohibited Romania from making any payment under the award to the claimants, and (2) a challenge to that decision was pending before European Union courts.\textsuperscript{32} The Court addressed the conflicts of law issue it faced by ruling that registration of the award was distinct from enforcement. This holding allowed it to comply, at least partially, with English legislation requiring English courts to recognise and enforce an ICSID award as though it were a judgment of the English High Court and also to comply with EU law prohibiting the execution of that award that the European Commission had ruled violated EU law on state aid.\textsuperscript{33} Under EU law, the European Commission has exclusive responsibility for assessing the compatibility of measures with EU rules on state aid, and national court decisions are not permitted to conflict with European Commission decisions.\textsuperscript{34} Pursuant to EU law, where there is a risk of conflict with a decision of a European Court, the national court is to stay proceedings, and so the English Court stayed enforcement.\textsuperscript{35}

\textsuperscript{30} BGH, 3 March 2016, I ZB 2/15. Specifically, the BGH asked the CJEU to issue a preliminary ruling on the compatibility of arbitration agreements concluded under intra-EU BITs with Articles 344, 267 and 18 of the TFEU. Notably, in its request, the BGH argued that Article 344 of the TFEU applies only to disputes between Member States and not to disputes between Member States and investors.

\textsuperscript{31} For example, the Netherlands–Poland BIT has a sunset clause providing protection for investments 15 years after the BIT terminates. See Agreement on Encouragement and Reciprocal Protection of Investments, Neth.–Pol., 1 February 1994. However, some countries have been able to successfully circumvent sunset provisions in their BITs. For example, the Czech Republic and Denmark used a two-step approach. First they exchanged notes constituting a mutual agreement to terminate their BIT; then, they agreed to ‘amend’ the sunset clause so that it ‘shall not further apply’. See Luke Eric Peterson, Czech Republic Terminates Investment Treaties In Such A Way As To Cast Doubt On Residual Legal Protection For Existing Investments, \textit{Investment Arbitration Reporter}, 1 February 2011.


\textsuperscript{33} Id. at paragraphs 109–112, 118–126.

\textsuperscript{34} Id. at paragraphs 65, 68, 203.

\textsuperscript{35} Id. at paragraphs 172, 203.
Enforcement of Awards

In 2015, two New York lower courts granted investors’ request for same-day ex parte confirmation of two different ICSID awards. Both cases remain pending in the Second Circuit Court of Appeals and their resolution may have an impact on whether New York federal courts remain the favoured destination for petitioners to confirm their ICSID awards on an ex parte basis, in contrast to the DC federal court where an ex parte proceeding was not permitted for this purpose. At issue, as a practical matter, is the speed with which parties will be able to have their ICSID award recognised and be able to proceed to post-judgment discovery in their search for assets.

As discussed in depth in last year’s edition of this chapter, US lower courts came to different conclusions on the procedure called for in the US implementing statute for ICSID award enforcement. US federal district courts in New York and the District of Columbia had permitted ex parte enforcement actions of ICSID Convention awards for which notice to the opposing party was not required including in the February 2015 New York federal court decision, Mobil Cerro Negro Ltd v. Bolivarian Republic of Venezuela, enforcing a US$1.6 billion ICSID award for Venezuela’s expropriation of Mobil’s interests in oil projects. The Mobil Cerro court identified a gap in the US implementing statute concerning the procedural mechanism by which an award is converted into an enforceable federal court judgment and filled the gap by looking to state law that allowed ex parte recognition of judgments made by courts of sister states. Then, in spring 2015, the US District Court for the District of Columbia in Micula v. Government of Romania (Micula I) ruled that an enforcement action must be filed as a plenary action, subject to the ordinary requirements of process and notice to the opposing party.

A few days after the Micula I DC court decision, the investors succeeded in obtaining same-day ex parte confirmation of the same ICSID award in the Southern District of New

---

36 For additional discussion of the US lower court’s conflicting decisions on the procedure required to enforce an ICSID award see Bilaniuk, note 20 supra, pages 178–181.
37 See 22 USC Section 1650a(a). The implementing statute provides, in relevant part: ‘The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States’.
39 Id. at 579, 582 (citing 22 USC Section 1650a and noting that the Rules of Decision Act provides that ‘[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply’ and citing 28 USC Section 1652).
40 Petitioner Viorel Micula was one of the prevailing investors in the ICSID award against Romania discussed supra.
42 Id. at 49.
43 Id.
Enforcement of Awards

York federal court in *Micula v. Government of Romania (Micula II)*. The New York court rejected the *Micula I* court’s decision, eliminating the distinction between ‘recognition’ and ‘enforcement’, and underscored that the ICSID Convention mandated both, and so the statute’s silence as to recognition was a gap appropriately filled by reference to state court law on recognition, as the *Mobil Cerro* court ruled. The US government weighed into the dispute when it accepted the Second Circuit’s invitation to file an amicus brief in the *Mobile Cerro* appeal in March 2016 arguing that proper service of a foreign sovereign under the Foreign Sovereign Immunities Act (FSIA) was required because the FSIA was the sole source of the court’s subject matter jurisdiction for the enforcement action and because the ICSID implementing statute and FSIA did not permit federal courts to borrow procedures from state laws.

The pending Second Circuit appeals have halted the *Micula* investors’ attempt to collect on the award. After succeeding in having the award confirmed, the investors proceeded to propound post-judgment discovery and seek the lower court’s assistance in sanctioning Romania for not cooperating. The *Micula II* court on 6 June 2016 denied the investors’ request for sanctions and stayed post-judgment discovery pending the appeal in the case or the appeal in *Mobil Cerro*.

### Enforcement battles in the Yukos case

In last year’s edition, this chapter briefly discussed the pace of investors’ enforcement in multiple jurisdictions of the now infamous US$50 billion *Yukos* arbitration award from July 2014, finding that the Russian Federation had expropriated Yukos Oil Company from its shareholders. The 20 April 2016 set aside of this award by a lower court in The Hague and the shareholders’ appeal of the set aside have had varied impact on the ongoing enforcement proceedings. In France and Belgium, the award has been confirmed and the shareholders are trying to execute against Russia’s assets. In the US, proceedings to confirm and enforce the award have been stayed. In the Netherlands, confirmation and enforcement are currently precluded. This case has brought to the forefront important issues of public international law (including relating to the operation of treaties), arbitration law of various jurisdictions and issues of sovereign immunity.

44 *Micula v. Govt of Romania*, Case No. 1:15-mc-00107-LGS, 2015 WL 4643180, *2–4* (SDNY 5 August 2015) (hereinafter *Micula II*) reconsideration denied, 2015 WL 5257013 (SDNY 9 September 2015), appeal docketed, Case No. 15-3109 (2d Cir. 5 October 2015). Investor Viorel Micula brought the DC court action, and the court ruled by telephonic conference on 16 April 2015 that a plenary action was required. Id. at *2. A few days later, on 21 April 2015, fellow prevailing investors Ioan Micula and Micula businesses petitioned to have the very same ICSID award confirmed, and the court granted the *ex parte* petition on the same day, beginning the enforcement process. Id. Then Viorel Micula moved to intervene and was added to the amended judgment on 28 April 2015. Id.
45 Id. at *3.
Enforcement of Awards

The underlying arbitration

The underlying arbitration proceeding was conducted under the UNCITRAL Rules, administered by the Permanent Court of Arbitration, and seated in The Hague. The arbitration was commenced under the Energy Charter Treaty (ECT). The case involved allegations of unlawful expropriation under the guise of taxation and the tribunal ruled in favour of the claimants, former Yukos shareholders: Hulley Enterprises (Hulley), Yukos Universal Limited (YUL) and Veteran Petroleum Limited (Veteran).49

In the arbitration, the Russian Federation asserted both jurisdictional defences and defences on the merits. Inasmuch as post-award remedies implicate solely jurisdictional issues, we do not address the merits of the case. The Russian Federation’s key jurisdictional objection was that the ECT, although signed by the Russian Prime Minister, had never been ratified by the parliament and, as such, was not binding on Russia and did not constitute its consent to arbitration. The shareholders’ rejoinder was that the ECT applied provisionally, by operation of its Article 45(1).50

Under Article 45(1), provisional application is possible to the extent it ‘is not inconsistent with [the state’s] constitution, laws or regulations’. The Russian Federation argued that the application of the ECT was inconsistent with Russian law, while the shareholders argued that it was consistent. Further, the Russian Federation argued that the ECT provisions had to be assessed individually for inconsistency, while the shareholders argued for an all-or-nothing approach (i.e., that the treaty either applied or did not apply as a whole).51 The tribunal accepted the shareholders’ arguments on both points and concluded that the treaty as a whole was not inconsistent with Russian law and thus it applied provisionally and constituted Russia’s consent to arbitrate disputes that arose.

Set aside in the Netherlands and its impact on enforcement in that state

The Hague District Court set aside the award on 20 April 2016 on jurisdictional grounds, concluding that the ECT was not binding on Russia.52 The Hague District Court disagreed with the tribunal’s interpretation of the words ‘to the extent’ in Article 45(1) of the ECT to mean ‘if’.53 The Court pointed out that the phrase ‘to the extent’ typically signifies a ‘degree of application’ and the court concluded that these words suggest that the provisional

49 Final Award, Yukos Universal Ltd v. The Russian Federation, Case No. AA 227 (Perm. Ct. Arb. 2014). There were three proceedings before the tribunal composed of Mr Yves Fortier (Chairman), Charles Poncet, and Stephen M Schwebel, one by each of the three claimants, Hulley, YUL and Veteran, and they resulted in three virtually identical awards. For ease of reference, when discussing these three proceedings and awards, we refer to them collectively.
50 Article 45(1) reads as follows: ‘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’.
51 Final Award, Yukos Universal Ltd, Case No. AA 227 at paragraph 292.
52 It should also be noted that the set-aside proceedings predated the current arbitration law in effect at the time of writing – the New Dutch Arbitration Act 2015. Under the 2015 Act, the District Court level has been abolished and setting aside proceedings under that Act would have to be initiated at the Court of Appeal level, subject only to cassation appeal.
53 That interpretation holds that if a provisional application is not inconsistent with Russian law, then it is permissible.
application depended on the ‘compatibility of separate treaty provisions with national laws’, thus siding with the Russian Federation’s position on the provision-by-provision application of the ECT.\textsuperscript{54}

The court then determined whether the provisional application of the ECT is ‘incompatible’ with Russian law: the shareholders argued it was incompatible with Russian law if Russian law prohibited it and Russia argued it was incompatible if Russian law did not provide for it.\textsuperscript{55} The Hague Court sided with Russia’s interpretation, holding that the arbitration provision is contrary to Russian law ‘if there is no legal basis’ for the relevant method of dispute settlement.\textsuperscript{56} The Court considered various sources of Russian arbitration law and concluded that Russian law did not provide for such arbitration and proceeded to set aside the award.\textsuperscript{57}

The shareholders appealed the set aside and the appeal is unlikely to be decided before late 2018.\textsuperscript{58} Although another level of appeal to the Dutch Supreme Court is available in principle, in practice, the current proceeding may be the last opportunity for the shareholders to argue about the implication of relevant provisions of Russian law because review by the Supreme Court is limited to issues of law and the Supreme Court will treat questions of Russian law as questions of fact.\textsuperscript{59}

As a result of the set aside, enforcement progress varies by jurisdiction. In the Netherlands, all enforcement efforts must be suspended pursuant to the Dutch Arbitration Act of 1986 as long as the set-aside decision remains valid.\textsuperscript{60} This Act does not, however, preclude enforcement efforts outside the Netherlands. Neither does the New York Convention.\textsuperscript{61}

**France**

The award has been confirmed in France and enforcement proceedings are now in the execution phase. The shareholders were able to obtain, on 1 December 2014,\textsuperscript{62} an *exequatur* enforcement order despite the set aside, given France’s liberal enforcement law. French courts


55 Id. at paragraphs 5.32-5.34.

56 Id. at paragraph 5.33.

57 Id. at paragraph 5.96.

58 The former shareholders have until 14 March 2017 to file their memorandum of appeal and Russia has until 5 September 2017 to file its memorandum of defence. Dates in March and June 2018 have been reserved for a hearing, ‘Hague Court Will Not Split Yukos Appeal’, *Global Arbitration Review*, 23 January 2017.


60 Dutch Arbitration Act, 2 July 1986, Article 1062(4).

61 Article V(1) of the New York Convention provides that ‘recognition and enforcement of the award may be refused’ on the grounds listed in that article – not that it must be refused. The natural and ordinary meaning of the word ‘may’ expresses a possibility, an opportunity, or a permission. It does not express compulsion. Nevertheless, even if the courts have discretion to enforce an award that has been set aside at the seat, they generally tend to take into account the status of award in the award situs and, frequently, express deference to decisions of situs courts. The level of deference varies by jurisdiction.

have enforced foreign awards annulled at the arbitral seat, reasoning that French arbitration law does not include annulment among the narrow grounds on which a French court may deny confirmation of a foreign award and the New York Convention expressly allows enforcing parties to avail themselves of the enforcement mechanisms available in ‘the law or the treaties of the country where such award is sought’.

After the _exequatur_ was issued, the shareholders began their collection efforts. As early as 2 June 2015, the shareholders were able to secure attachments of assets such as bank accounts, client receivables and real property. Russia at the same time appealed the enforcement order and moved to stay enforcement pending appeal, on 17 December 2015, the Paris Court of Appeal declined Russia’s stay request but ordered that all seized assets be placed in escrow pending appeal. This decision permits the shareholders’ continued efforts to pursue Russia’s assets, but restricts their ability to take immediate possession of them.

Although the shareholders experienced some setbacks in collecting on the award, those setbacks were not triggered by the set aside. Instead, French courts have released a number of previously attached assets, ruling that the assets belonged to Russian state-owned companies and not Russia itself. In so ruling, the courts rejected the shareholders’ alter egos argument, noting that the companies had distinct identities and separate properties, and that they maintained decisional independence.

Another setback has been France’s recent broadening of the immunity from execution that a sovereign’s assets have. In December 2016, France adopted a law that requires an award or judgment creditor to obtain advance court authorisation to attach foreign assets. The law also provides that such court authorisation will be granted only where the sovereign has expressly consented to such a measure, or where: (1) the property has a connection to the entity against which the proceeding is initiated; and (2) it used for a commercial and not public purpose. In addition, a sovereign’s consent to such a measure for diplomatic property requires specific and express consent.

---

63 See, e.g., _Putrabali v. Rena – Société PT Putrabali Adyamulia v. SA Rena Holding_, Cour de Cassation 1e civ., 29 June 2007, Bull. Civ. 1, No. 05-18.053 (Fr.).
64 French Code of Civil Procedure (CPC) Articles 1514 and 1520.
65 New York Convention, Article VII(1).
67 For example, on 19 January 2016, the Evry Court of First Instance released attachments on assets of the Russian space agency Roscosmos that Hulley and Veteran had attached on 30 June 2015. On 15 April 2016, the Paris Court of First Instance released attachments on assets of three Russian state-owned enterprises, Russian Satellite Communications Company, real estate company Goszagransobstvennost, and press agency RIA Novosti that Hulley had attached on 2 June 2015. The Paris Court of Appeal in its order of 23 November 2016 affirmed this decision. On 10 February 2017, the Evry Court of First Instance released attachments on assets of two Russian aerospace companies – TiENKI and NPO Lavotchkin that Veteran had attached on 12 April 2016.
69 Id. Article L. 111-1-2.
70 Id. Article L. 111-1-3.
Enforcement of Awards

Belgium

The award was confirmed in Belgium, but the impact of the set-aside decision on continued enforcement is less clear at this time. On 24 June 2015, one of the shareholders, YUL, obtained an *exequatur* enforcement order from the Brussels Court of First Instance. The Russian Federation did not have an opportunity to be heard because *exequatur* is granted in an *ex parte* proceeding. Russia filed a third-party submission opposing *exequatur*. YUL argued that Russia was only permitted to challenge the *exequatur* by filing an appeal, and not a third-party opposition pursuant to a 1925 bilateral treaty between Belgium and the Netherlands. The Court sided with YUL in a 9 December 2016 decision rejecting Russia’s arguments. First, the Russian Federation argued that, in its initial *exequatur* application, YUL had relied on Article III of the New York Convention and thus it had waived a right to invoke the application of the Treaty under Article VII of the New York Convention. The Court found that the New York Convention does not establish different mechanisms under Articles III and VII and these articles are to be read in harmony and, in any event, both Articles pointed to provisions of the Treaty that pre-empted provisions of Belgian domestic law due to the principle of supremacy of international law. Russia also argued that the 1925 Treaty applied to adversarial proceedings (and not *ex parte* proceedings) but the Court pointed out that this limitation applied only to the enforcement of foreign judgments, not foreign arbitral awards. Lastly, Russia argued that the Treaty was obsolete, but the Court found that it remained in effect pursuant to the Vienna Convention of the Law of Treaties because there was no evidence the Treaty had been revoked. Accordingly, the Court ruled that Russia’s third-party opposition was inadmissible. At the time of writing, the execution order remains in place.

The set-aside decision and changes in Belgian law may pose obstacles to enforcement. The Brussels Court of First Instance did not consider what impact the set aside of the award would have on enforcement in Belgium, but the Antwerp Court of First Instance weighed in on the issue. On 24 June 2016, it issued an order prohibiting attachment of two ships owned by the University of Kaliningrad in Russia. The Court refused the attachment, noting,

---

72 Id.
73 Id.
74 Article III of the New York Convention reads as follows: ‘Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.’
75 Article VII of the New York Convention reads, in relevant part, as follows: ‘The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.’
77 Id.
without discussion, that the awards had been set aside.\(^78\) It is also unclear whether the Belgian Arbitration Act of 2013’s prohibition on *exequatur* of foreign awards annulled at their seat will apply to the *Yukos* case, as it appears to apply to cases commenced after it was enacted.\(^79\) Additionally, like France, Belgium broadened the immunity that a sovereign’s assets have from execution in a law adopted in August 2015.\(^80\)

**The United States**

Proceedings to confirm and enforce the award have been stayed in the US pending resolution of the shareholders’ appeal of the award annulment in The Hague. Soon after the award was issued, the shareholders filed a petition to confirm in the US District Court for the District of Columbia.\(^81\) Russia sought dismissal of the action for lack of subject-matter jurisdiction, arguing it was entitled to sovereign immunity under the US FSIA.\(^82\) Following the set-aside in The Hague, the shareholders requested a stay of enforcement pending their appeal of the set aside to the Hague Court of Appeal. The Russian Federation disagreed, insisting on dismissal arguing that the US Court deciding the jurisdictional question of whether Russia was to be entitled to sovereign immunity under the FSIA was not related to the decision on annulment by the Hague Courts.\(^83\) The Court granted a stay, noting that a power to stay proceedings is ‘incidental to the power inherent in every court to control the disposition of the cases on its docket’.

**iv A sovereign’s protecting assets from execution**

The *Crystallex v. Venezuela* case is an example of a foreign sovereign trying to dissipate its US assets to avoid execution against those assets in the event of an unfavourable arbitral award. As Canadian mining company Crystallex International Corp and Venezuela were litigating in a US court over the legality of Venezuela’s transactions (i.e., whether they were legitimate business transactions or undertaken in the effort to evade enforcement), the arbitration that had triggered this controversy was concluded with an arbitral award issued on 4 April 2016.\(^84\) The tribunal, acting under the ICSID Additional Facility Rules, found in favour of Crystallex, awarding it US$1.2 billion, plus interest, for Venezuela’s expropriation of the company’s investment in one of the world’s largest undeveloped gold deposits.\(^85\)

---

78 Order in Technical State University of Kaliningrad, Court of First Instance of Antwerp, 24 June 2016, No. 16/2008/B.
79 Id.
80 This Belgian law is substantially similar to the later adopted French law. Belgian Judicial Code, 23 August 2015, Act C-2015/09459.
84 *Crystallex Int’l Corp v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/12, Award (4 April 2016).
85 Id. at paragraph 961. The arbitration was filed in February 2011. The tribunal upheld Crystallex’s claims that Venezuela breached two articles of the investment treaty with its unlawful expropriation of the
While the ICSID(AF) arbitration was pending, Crystallex alleged that Venezuela, through its alter-ego company, Petróleos de Venezuela (Petróleos), had a wholly owned US subsidiary, Citgo Holding Inc (Citgo), issue US$2.8 billion in bonds, almost all of which Citgo transferred, without consideration, to its immediate parent PDV Holding Inc (PDVH) as a shareholder ‘dividend’. PDVH was also a wholly owned US subsidiary of Petróleos and in turn paid a ‘dividend’ in the same amount to Petróleos. Prior to the issuance of the award, Crystallex brought an action against PDVH and Citgo alleging that the transfers violated the Delaware Uniform Fraudulent Transfer Act (DUFTA) as they intended to interfere with Crystallex’s expected enforcement efforts. Crystallex alleged that these transactions left Citgo insolvent and commenced an action in Delaware court seeking the return of the funds and injunction against future transfers. Defendants Citgo and PDVH filed a motion to dismiss.

On 9 September 2016, i.e., a few months after the award was issued, the Delaware Court ruled on the motion dismissing Citgo but not PDVH. As the court explained, under DUFTA, a creditor, such as Crystallex, can only bring a claim against debtor-transferors or transferees. The Delaware Court found that Citgo was neither a qualifying debtor, nor transferee, nor even a party to a fraudulent transfer under DUFTA because it had not directly transferred the dividend outside of the US. PDVH was deemed to be a non-debtor transferor of debtor property for purposes of DUFTA because the final dividend in the series of transactions that moved the funds outside of the US was made from PDVH to Petróleos and, on that basis, the Court denied PDVH’s motion to dismiss. On 28 October 2016, PDVH filed an interlocutory appeal to the Third Circuit Court of Appeals.

Venezuela had refused to provide Crystallex with an environmental permit for a mining project after Crystallex had already invested more than US$1.2 billion by that point. The tribunal found that Venezuela’s had frustrated Crystallex’s legitimate expectations and had caused the company’s investments to become virtually worthless. Id. paragraphs 575, 623.

86 Complaint at paragraphs 7–8, Crystallex Int’l Corp v. Petróleos de Venezuela SA et al, Case No. 1:15-cv-01082-LPS (D. Del. 24 November 2015), ECF No. 1. In its complaint, Crystallex also alleged that Petróleos was Venezuela’s alter ego because the government has full control of the company and such control is dictated by Venezuelan law, including its constitution. Id. paragraphs 77–90.
87 Id. at paragraphs 7–8.
88 Id. at paragraphs 6–9.
89 Id. at paragraph 8.
90 Id. at paragraph 9.
91 Defendants PDV Holding Inc and Citgo Holding Inc’s Memorandum Of Law In Support Of Their Motion To Dismiss Pursuant To Federal Rule Of Civil Procedure 12 (b)(6), Crystallex Int’l Corp, Case No. 1:15-cv-01082-LPS (D. Del. 3 February 2016), ECF No. 9.
92 Memorandum Opinion, Crystallex Int’l Corp, Case No. 1:15-cv-01082-LPS (D. Del. 30 September 2016), ECF No. 34.
93 Id. at 9–11.
94 Id. at 10–11.
95 Defendant PDV Holding Inc’s Memorandum In Support Of Its Motion For Certification Of Interlocutory Appeal, Crystallex Int’l Corp, Case No. 1:15-cv-01082-LPS (D. Del. 28 October 2016), ECF No. 42. PDVH argues that (1) the lower court incorrectly rejected PDVH’s argument that the Foreign Sovereign Immunities Act (FSIA) requires dismissal of Crystallex’s claim against PDVH because the claim would nullify a sovereign’s prejudgment transfer of assets, and (2) the lower court erred in rejecting PDVH’s argument that, in order to state a claim under DUFTA, Crystallex must have alleged a transfer ‘by a debtor’ or alter ego of the debtor, and holding that PDVH could be liable as a non-debtor transferor because it paid a dividend to its parent, Petróleos. Id. at 4, 9–10.
Enforcement of Awards

day, Crystallex also filed a second fraudulent transfer action against PDVH for another transfer to its parent Petróleos.\(^96\) Crystallex alleged that PDVH’s agreeing to give a lien on over half of its shares in its subsidiary Citgo to the creditors of its parent Petróleos as security for US$3.4 billion of Petróleos’ new debt was a fraudulent transfer.\(^97\) PDVH filed a motion to stay and a motion to consolidate Crystallex’s two fraudulent transfer actions.\(^98\)

After the tribunal issued its award against Venezuela on 4 April 2016 in the midst of Crystallex’s fraudulent transfer litigation, Crystallex within three days moved to enforce the award in both the US and Canada.\(^99\) The award was enforced in Canada on 20 July 2016. The Ontario Superior Court found that Venezuela consented to arbitrate through Article XII of the Canada–Venezuela BIT, which provides that each party gives its unconditional consent to arbitrate disputes under the BIT, that Venezuela had been appropriately served under Canada’s State Immunity Act and that recognising the award would not violate public policy.\(^100\)

v  Post-enforcement settlement

The *Gold Reserve v. Venezuela* case is an example of an enforcement strategy that resulted in the sovereign negotiating a settlement to pay on the award after the investor obtained a pair of favourable enforcement decisions in the US and UK. Gold Reserve Inc had prevailed in an arbitration seated in Paris under the ICSID Additional Facility Rules and the Canada–Venezuela BIT for expropriation of its mining concessions.\(^101\) The award, dated 22 September 2014, was for US$713 million.\(^102\) In October 2014, Venezuela moved to annul the award at the Paris Court of Appeal.\(^103\)

Gold Reserve Inc, a Canadian mining company, moved to confirm the award in UK and US courts in mid-2015 and by late February 2016 obtained favourable decisions in both jurisdictions. In the UK, Gold Reserve moved to confirm the award *ex parte* and, on 20 May 2015, the English High Court granted the *ex parte* order. Venezuela challenged the order, but the High Court upheld its prior *ex parte* order on 2 February 2016, confirming the award against Venezuela on behalf of Gold Reserve.\(^104\) It rejected Venezuela’s sovereign immunity arguments and ruled that confirmation could proceed *ex parte*.\(^105\) Venezuela also claimed that Gold Reserve was not a ‘qualifying investor’ under the Canada–Venezuela BIT because it had not made an investment in Venezuela but had, instead, ‘acquired indirect ownership’ of shares and mining rights when it became the parent company of Gold Reserve.

---

97 Id. at 2.
98 See Motion to Consolidate and to Stay, *Crystallex Int’l Corp*, Case No. 1:16-cv-01007 (D. Del. 23 November 2016), ECF No. 8.
100 Id. at paragraphs 22–24, 30–31, 41.
101 *Gold Reserve Inc v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014).
102 Id.
105 Id.
The High Court rejected this argument, finding that Gold Reserve did qualify as an investor because, after it purchased Gold Reserve Corp, it expended nearly US$300 million in the Venezuelan mining project. These assets qualified as an investment under the BIT, making Gold Reserve an ‘enterprise incorporated ... in accordance with the applicable laws of Canada ... who [made] the investment in the territory of Venezuela.’ The High Court also found that Venezuela had been properly served in accordance with the requirements of the State Immunity Act of 1978.

In the US, Gold Reserve succeeded in having the award confirmed on 20 November 2015. As in the English High Court’s decision, the District Court also rejected Venezuela’s argument that Gold Reserve did not qualify as an investor for purposes of applying the BIT. Here, Venezuela argued that Gold Reserve was not a bona fide Canadian enterprise because it was headquartered in the United States. The District Court was not persuaded by this argument and found that the tribunal had correctly ruled that Gold Reserve and not one of its subsidiaries, was an investor that could properly bring the claim because Gold Reserve had incorporated in Canada before the dispute arose and for legitimate business purposes (rather than just to take advantage of BIT protections). It also rejected Venezuela’s arguments that it did not have a fair opportunity to present its case or that it was deprived of due process, noting the lengthy arbitration proceeding. Venezuela appealed and also moved to stay execution of the November 2015 judgment pending appeal. On 24 February 2016, the District Court denied Venezuela’s request for a stay in execution.

After Venezuela’s failure to block enforcement in the US and UK, but with set-aside proceedings still pending in France, it entered into a memorandum of understanding, which included a settlement agreement and joint venture agreement, with investor Gold Reserve. While the terms of the settlement were not made public, the agreement was reportedly for over US$770 million and provided for a schedule for payment, with a first payment of US$300 million due on or before 30 November 2016. A couple of months after this payment was due, the Paris Court of Appeals issued its decision declining to set aside the

106 Id. at paragraphs 18–19.
107 Id. at paragraphs 46–51.
108 Id. at paragraphs 48–50, 58–60, 64–66.
110 Gold Reserve Inc, 2015 WL 7428532, at *10-13. As part of this analysis, the Court also rejected Venezuela’s attempt to stay enforcement of the award pending the decision by the Paris Court of Appeal, applying a multi-factor analysis to balance the New York Convention’s general objectives favouring timely award enforcement against competing concerns focused on international comity. Id. at *16-19 (applying Europcar Italia SpA v. Maiellano Tours Inc, 156 F.3d 310 (2d Cir. 1998)).
award on 7 February 2017. The Court rejected each of Venezuela’s arguments, confirming that (1) the tribunal had proper jurisdiction over the matter, (2) the parties were treated equitably, (3) the tribunal ruled within its jurisdiction, and (4) the award did not conflict with French public policy. According to a press release issued by Gold Reserve at the time that the Paris Court issued its decision, Venezuela had not yet made its first payment under the settlement agreement.

vi Set-aside proceedings as an impediment to enforcement

Moldovan investors’ enforcement of the late 2013 *Anatolie Stati v. Republic of Kazakhstan* US$506 million award, issued under the Rules of the Stockholm Chamber of Commerce (SCC) and the Energy Charter Treaty, was impeded by Kazakhstan’s filing for annulment. Kazakhstan filed the set-aside action with the Svea Court of Appeals in Sweden (Svea Court), while the Moldovan investors pursued enforcement of the award in the US and the UK.

With the pending set aside action in Sweden, the courts in the US and UK *sua sponte* stayed enforcement proceedings. The UK court stayed proceedings for efficiency and because of comity concerns until after Kazakhstan’s pending challenge in Swedish court was decided. The UK court reasoned that the Swedish court’s annulment or altering of the award would create a ‘substantial likelihood’ of rendering an enforcement hearing unnecessary and, additionally, that a stay would ‘reduce the risk of inconsistent judgments’ given the considerable overlap of issues considered during the annulment and enforcement proceedings. The US District Court also stayed the case in its decision of 5 August 2016 after applying a multi-factor analysis developed by the Second Circuit to balance the New York Convention’s general objectives favouring timely award enforcement against competing concerns focused on international comity.

The Svea Court, on 9 December 2016, rejected Kazakhstan’s request to set aside the award for alleged procedural infirmities by the tribunal and also awarded the Moldovan investors attorney fees incurred for opposing the set aside. The Svea Court rejected each of Kazakhstan’s arguments, finding that (1) the award was not incompatible with Swedish public policy, (2) there was a valid arbitration agreement between the parties, and (3) the tribunal did not commit any procedural errors affecting the outcome of the case. The Svea Court did not grant leave to Kazakhstan to appeal the decision to the Swedish Supreme Court, so

---

115 *Gold Reserve Inc*, Court of Appeal of Paris, Case No. 14/21103.
116 Id.
117 Id.
120 See id. at Sections 5.3.1- 5.3.5.
rather than appealing, Kazakhstan filed a ‘motion to quash’ the Svea Court decision. The Stati investors moved to lift the stay in US court arguing that Kazakhstan’s action to set aside came to an end when the Svea Court did not grant it leave for appeal to the Swedish Supreme Court and that Kazakhstan’s motion improperly attempted to circumvent the Svea Court’s decision. Kazakhstan argued that it has a pending motion before the Swedish Supreme Court and that its set-aside action remains pending. With a decision not to set aside the award at least in the court of first instance and a dispute between the parties over Swedish procedural law, it remains to be seen how the US court will apply the stay analysis balancing the New York Convention’s enforcement objectives with international comity concerns.

vii A tangential link to a party does not establish arbitrator bias

The AWG v. Argentina case is an example of a sovereign unsuccessfully opposing enforcement of an investment treaty arbitral award at the arbitral situs by seeking a set aside for arbitral bias and the tribunal’s exceeding its powers. UK-based AWG Group Ltd (AWG) sought enforcement of a US$21 million arbitration award it obtained against Argentina in an arbitration seated in Washington, DC. The tribunal composed of Professors Jeswald W Salacuse (Chairman), Gabrielle Kaufmann-Kohler and Pedro Nikken found that Argentina had wrongfully terminated a 30-year water and sewage contract and ruled in favour of claimants: AWG; Suez, Sociedad General de Aguas de Barcelona SA (Suez); and Vivendi Universal SA (Vivendi). The arbitration was administered by ICSID, but it had two components: an arbitration of Suez and Vivendi against Argentina under ICSID Rules and an arbitration of AWG against Argentina under the UNCITRAL Rules. Accordingly, only AWG needed to seek enforcement under the New York Convention and did so in the US District Court for the District of Columbia. Argentina opposed enforcement by seeking to vacate the award arguing that: (1) one of the arbitrators, Professor Gabrielle Kaufmann-Kohler, acted with ‘evident partiality’; and (2) the tribunal exceeded its powers.

The US District Court noted that twice during the 12-year arbitration, Argentina had challenged Professor Kaufmann-Kohler for bias (the first challenge was because she had served on a tribunal in a different case that had ruled against Argentina and the second challenge was because she failed to disclose her appointment to the board of directors of UBS, a shareholder in the other two claimants in the underlying arbitration – Suez and Vivendi).

123 See Respondent Republic of Kazakhstan’s Response to Petitioners’ Motion to Lift the Stay and Application for Security at 2, Stati et al, Case No. 1:14-cv-1638-ABJ (D.D.C. 21 February 2017), ECF No. 47.
124 See Petitioners’ Reply to Respondent Republic of Kazakhstan’s Response to Petitioners’ Motion to Lift the Stay and Application for Security at 1-2, Stati, Case No. 1:14-cv-1638 (D.D.C. 28 February 2017), ECF No. 48. Stati explains that Kazakhstan’s motion to quash asks the Swedish Supreme Court to ‘review the procedural conduct of the lower court; it does not ask the Supreme Court of Sweden to reconsider the set-aside decision on the merits’. Id. at 2 (emphasis in original).
125 See Respondent Republic of Kazakhstan’s Response to Petitioners’ Motion to Lift the Stay and Application for Security at 3-4, Stati, Case No. 1:14-cv-1638-ABJ (D.D.C. 21 February 2017), ECF No. 47.
127 Id. at paragraphs 2–3.
128 In response to the second challenge, Professor Kaufmann-Kohler represented that, until Argentina’s challenge, she had no knowledge that UBS held about 2 per cent interest in two claimants. She also
The Court noted that the other two arbitrators had rejected both challenges and that Professor Kaufmann-Kohler had resigned from the UBS board a year before the tribunal's issuance of the Decision on Liability and six years before its issuance of the final award. The US District Court rejected the 'bias' argument finding too tenuous a link to set aside the award. The Court found, given UBS's overall business, that the 2 per cent ownership in each of the other claimants was 'inconsequential'. To illustrate the 'ubiquitous nature of UBS's business', the Court also pointed out that Argentina itself had been a client of USB even while the arbitration was pending. The Court concluded that Professor Kaufmann-Kohler's role 'was so remote and trivial that no reasonable person would conclude she was partial to a party as a result of that relationship' given, inter alia, her inconsequential, compensation and non-executive board role.

The US District Court also rejected Argentina's allegations that the tribunal exceeded its powers and found that it acted well within its authority in its deciding on the computation of damages and in considering the necessity defence. On the issue of damages, the Court noted that Argentina did not question the tribunal's mandate under applicable principles of international law – rather, Argentina challenged how the tribunal calculated such damages. The Court noted that the tribunal's decision was to be accorded significant deference under US law including the tribunal's appointing of a highly regarded independent financial expert, and the Court found no evidence in the record that the tribunal had acted in excess of its authority. On the necessity defence, Argentina claimed that the tribunal had exceeded its authority by failing to define the applicable legal standard on the scope of the necessity defence under international law. Interestingly, Argentina insisted that the requisite level of definition was required by a decision of an ICSID ad hoc committee issued in a different case on the same day. The Court pointed out that it was not clear how the tribunal could have known of the pronouncement of the ad hoc committee and why that pronouncement was binding or even persuasive authority for the tribunal. The Court concluded that given that the standard of review is whether the tribunal was ‘arguably construing or applying the contract’, the applicable standard was met as the tribunal expressly analysed the relevant treaty and articulated its application of international law. The Court confirmed the award.

stated that she was an independent, non-executive director with no involvement in individual investment decisions. Memorandum Opinion at 8, Republic of Argentina, Case No. 15-cv-01057-BAH (D.D.C. 30 September 2015), ECF No. 27.

129 Id. at 8, 20.
130 Id. at 24.
131 Id. at 24. To put this in perspective, AWG asserted that the UBS’ investments at issue ‘represented a mere one-twentieth of 1 per cent (0.056 per cent) of UBS’s total investments worldwide’. Id. at 25.
132 Id. at 27.
133 Id. at 33.
134 Id. at 33–37.
135 Id. at 39.
136 Id. at 39.
137 Id. at 39.
138 Id. at 40.
A recent enforcement case underscores the importance of finding a sovereign's assets against which to collect

In *Walter Bau AG v. Thailand*, Germany’s highest court, the Federal Supreme Court, upheld the decision by a lower German court, the Higher Regional Court of Berlin, to enforce a Swiss arbitral award against the Kingdom of Thailand for €29 million plus interest.¹³⁹ Thailand had appealed the German lower court’s enforcement decision rejecting Thailand’s defence that the UNCITRAL tribunal did not have jurisdiction over the dispute under the Germany–Thailand BIT.¹⁴⁰ The German Federal Supreme Court affirmed the Higher Regional Court of Berlin’s decision. The investor had prevailed in the Swiss arbitral award dated 1 July 2009,¹⁴¹ but it was able to obtain a final enforcement decision only in October 2016.¹⁴² It appears that the investor will be able to collect against this award after having conducted pre-enforcement due diligence on Thailand’s assets. When bringing its enforcement action in Germany, the investor had identified an asset – the Thai Crown Prince’s jet – against which to collect, and seized the jet after it had landed in Germany in 2009.¹⁴³ Having seized the jet, the investor was able to obtain a bank guarantee from Thailand in 2011 for the value of the arbitral award as a condition for the release of the jet.¹⁴⁴

---

¹³⁹ *Walter Bau AG v. Thailand*, Federal Court of Justice (Bundesgerichtshof), Case No. 1 ZB 13/15, 6 October 2016.

¹⁴⁰ *Walter Bau AG v. Thailand*, Higher Regional Court of Berlin (KG Berlin), Case No. 20 Sch 10/11, 23 February 2015, at 1. The dispute arose from a contract for the construction and operation of the Don Muang Tollway project, a toll road to the central airport of Bangkok. Id. at 2. German construction company Walter Bau AG initiated arbitration, under the Germany–Thailand BIT, in UNCITRAL ad hoc proceedings in Switzerland and subsequently sought to enforce the 2009 award in Germany. The Court ruled that the tribunal had jurisdiction over the dispute because the project qualified as an ‘investment’ under the Germany–Thailand BIT and so Thailand had indeed waived its sovereign immunity. Id. at 8, 11–12.

¹⁴¹ *Walter Bau AG*, Case No. 1 ZB 13/15 at paragraphs 8, 13.

¹⁴² Id. at paragraphs 75, 76.

¹⁴³ *Walter Bau AG*, Case No. 20 Sch 10/11 at 2.

Part VI

MULTILATERAL TREATIES
I  INTRODUCTION

Investment arbitration faced yet another year full of formerly unseen developments, overhauls and dramatic shifts in public perception and the politics associated therewith. The year 2016 saw not only the introduction of a new dispute resolution system in CETA, but also casted doubts on the future of other multilateral treaties. In stark contrast to the aforementioned stands the success story of the Energy Charter Treaty (ECT), which saw – again – a big influx of new cases. It has been and remains the international investment agreement most used by investors.

Its prominence can be explained by its geopolitical and economic origin. For the past two years the key factor for the activity surrounding the ECT was its availability for investors in the solar energy sector to challenge the revocation of incentives that a number of states had granted to investors during the 2000s.

Against that backdrop, the editor of last year’s chapter on the ECT devoted this chapter to a discussion of ‘solar claims’ and the related arbitral awards expected to be rendered against Spain in the course of 2016. However, against all expectations, no award has been rendered since the Charanne award, which was discussed in last year’s edition. The only decisions rendered after the Charanne award was published were a non-public award in the Isolux Infrastructure Netherlands BV v. Spain arbitration and a jurisdictional decision in RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l v. Spain. Other proceedings that are close to a final award are presently being delayed by a Spanish application to introduce new evidence. While Spain and Italy remain the (involuntary) poster boys of ECT arbitration, it is undeniable that the development of the ECT’s legal framework

---

1 Dr Patricia Nacimiento is the co-head of the German Dispute Resolution team at Herbert Smith Freehills Germany LLP.
3 See UNCTAD overview of investment arbitration cases filed, http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia.
5 Isolux Infrastructure Netherlands BV v. Spain, SCC Arbitration, Award, 13 July 2016.
6 RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l v. Spain, ICSID Case No. ARB/13/30, Award on Jurisdiction, 6 June 2016.
7 Eiser Infrastructure Limited et al v. Spain, ICSID Case No. ARB/13/36; Masdar Solar & Wind Cooperatief UA v. Kingdom of Spain ICSID Case No. ARB/14/1. On 27 December 2016, another award was rendered in Blusun SA, Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3. The Award, however, is not public.
in 2016 was marked, not by the southern European renewable energy cases in 2016 and arguably not even by decisions of any arbitral tribunals at all, but by several decisions of national courts, most prominently the decision of the District Court of The Hague setting aside the Yukos award.

This may be understood either as an interference in the delicate system of international arbitration or as the newly found courage of national courts leading to the mutual benefit of both the arbitration community and its users.

This year’s edition will focus on the most vibrant decisions both of arbitral tribunals and national courts rendered in 2016 and it will discuss the guidance provided by these decisions in relation to some key issues of ECT law and practice.

This chapter provides an overview of the ECT and its investment protection regime (Section II), an overview of the decisions rendered in 2016 (Section III), an analysis of certain sections of these decisions (Section IV), discusses the implications and risks that derive from these decisions in view of the still emerging ECT case law (Section V) and gives an outlook of what to expect for 2017.

II THE ECT AND AN OVERVIEW OF ITS INVESTMENT PROTECTION REGIME

The ECT 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’s 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.

The following will give 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
The Energy Charter Treaty

loss of control or economic value.\textsuperscript{10} 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):

\begin{quote}
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.
\end{quote}

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 is followed by payment of adequate and prompt compensation.

In the context of expropriation, it may be worth noting that 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’).\textsuperscript{11}

\section*{ii Guaranty of fair and equitable treatment under the ECT}

The FET clause of the ECT can be found in Article 10(1), which, in its pertinent parts, reads:

\begin{quote}
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.
\end{quote}

\textsuperscript{10} See, C Schreuer, \textit{The Concept of Expropriation under the ECT: Essays in Honour of Christian Tomuschat} (2006), pages 115, 144.

\textsuperscript{11} \textit{Saluka Investments BV v. The Czech Republic}, Permanent Court of Arbitration, Partial Award, 17 March 2006. However, it should be noted that 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.
The Energy Charter Treaty

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 in order 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 such an analysis, tribunals will analyse, inter alia, whether the state acted in accordance with its representations of a stable and predictable business and legal environment.12

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.13 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.14

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 more narrow approach demands that expectations must be based on clear and concrete assurances from the host state expressed in direct communication directed to 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 – i.e., 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 the time.15 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

12 Schreuer, footnote 10, supra.
13 Schreuer, footnote 10, supra.
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.\(^\text{16}\)

As stated by Patrizia et al.:\(^\text{17}\)

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.

\(\text{iii Dispute settlement under the ECT}\)

The dispute settlement mechanism of the ECT is enshrined in its Article 26(1), which sets out that disputes between ‘Investors’ of a ‘Contracting Party’ relating to ‘Investments’ effected by such ‘Investors’ in the ‘Area’ of another ‘Contracting Party’ 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 whether it wants the case to be administered under the ICSID Convention,\(^\text{18}\) \textit{ad hoc} arbitration under the UNCITRAL Arbitration Rules or arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce. We will turn to Article 26 ECT in detail in Section IV, \textit{infra}.

\(\text{iv The provisional application of the ECT}\)

As it was the subject of this year’s most prominent decision, it may be 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 subjected itself to the provisional application (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) to Article 45, the sophisticated wording of the ECT is striking.

\(^\text{16}\) Footnote 14, \textit{infra}.

\(^\text{17}\) Patrizia et al, op cit, footnote 15, \textit{infra}, pages 78–79.

\(^\text{18}\) 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.
III THE ECT CASES OF 2016

As mentioned above, 2016 was a year in which primarily the decisions of national courts influenced the development of ECT case law. The list below contains decisions of both arbitral tribunals and national courts that emerged during 2016 and up to this writing. Of the nine decisions, three were judgments of national courts. In two of the three judgments the state party was victorious, while of the six awards three were decided in favour of the state, two were decided in favour of the investor and one is not public.

<table>
<thead>
<tr>
<th>No.</th>
<th>Name</th>
<th>Date of the award or decision</th>
<th>Case No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>JKX Oil &amp; Gas plc, Poltava Gas BV and Poltava Petroleum Company JV v. Ukraine</td>
<td>Award, 6 February 2017</td>
<td>SCC</td>
</tr>
<tr>
<td>2</td>
<td>Energoalliance Ltd (Ukraine) v. the Republic of Moldova</td>
<td>Decision of the Paris Cour d’appel, 12 April 2016</td>
<td>Registration Number 13/22531</td>
</tr>
<tr>
<td>3</td>
<td>Russian Federation v. Veteran Petroleum and Ors</td>
<td>The Hague District Court, Judgment, 20 April 2016</td>
<td>Combined cases: C/09/477160 / HA ZA 15-1; C/09/477162 / HA ZA 15-2; C/09/481619 / HA ZA 15-112</td>
</tr>
<tr>
<td>4</td>
<td>Cem Cenzig Uzan v. the Republic of Turkey</td>
<td>Award on Respondent’s Bifurcated Preliminary Objection, 20 April 2016</td>
<td>SCC Arb V 2014/023</td>
</tr>
<tr>
<td>5</td>
<td>RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l v. the Kingdom of Spain</td>
<td>Award on Jurisdiction, 6 June 2016</td>
<td>ICSID Case No. ARB/13/30</td>
</tr>
<tr>
<td>6</td>
<td>Isolux Infrastructure Netherlands BV v. the Kingdom of Spain</td>
<td>Award, 13 July 2016</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Republic of Kazakhstan v. Stati et al</td>
<td>Svea Court Set-Aside Ruling, 9 December 2016</td>
<td>Case No. T2675-14</td>
</tr>
<tr>
<td>8</td>
<td>Bluun SA, Jean-Pierre Lecorci and Michael Stein v. Italy</td>
<td>Final Award, 27 December 2016</td>
<td>ICSID Case No. ABR/14/03</td>
</tr>
<tr>
<td>9</td>
<td>Yukos Capital SARL v. Russian Federation</td>
<td>Decision on Jurisdiction, February 2017</td>
<td>UNCITRAL</td>
</tr>
</tbody>
</table>

* A final decision in this proceeding is still pending.

IV A CLOSER LOOK AT THE 2016 ECT DECISIONS

In the following, we will take a closer look at the two decisions of national courts which concerned the awards rendered in Energoalliance Ltd v. the Republic of Moldova,19 Russian Federation v. Veteran Petroleum et al20 and at the arbitral award in Yukos Capital SARL v. The Russian Federation dealing with a common issue.21

---

21 Yukos Universal Limited (Ile of Man) v. The Russian Federation, Interim Award on Jurisdiction and Admissibility, 30 November 2009.

After the widely discussed final award in Yukos Universal (Isle of Man) v. The Russian Federation was rendered on 18 July 2014, the Russian Federation filed an application to set aside the award on 10 November 2014.

The Russian Federation put forward several arguments, based on each of which, it argued, the award should be set aside. The key issue for the court to decide was the exact interpretation of Article 45 ECT. The District Court of The Hague established that the Russian Federation signed the ECT on 17 December 1994 without making use of Article 45(2) of the ECT to submit a declaration that it is not able to accept provisional application of the ECT. The Duma, however, never ratified the ECT.

During the arbitration, the Russian Federation argued that Article 45(1) ECT required the tribunal to analyse the consistency of every provision of the ECT with the Russian constitution, laws and regulations of the respective signatory. Yukos, on the other hand, argued that the tribunal only should determine whether the principle of provisional application is consistent with the constitution, laws and regulations of the Russian Federation.

The tribunal finally sided with the claimants and reasoned that Article 45(1) ECT refers to the provisional application of the Treaty as a whole – an interpretation that, in the eyes of the tribunal, can be best reconciled with the principle of pacta sunt servanda and Article 27 VCLT, as it does not allow states to circumvent the provisional application through recourse to their own national law. The tribunal concluded that any other interpretation would ‘create unacceptable uncertainty in international affairs’. Following its all-or-nothing approach, the tribunal analysed the Constitution, law and regulations in effect at the time of the signing of the ECT by the Russian Federation, finding no inconsistency between the regime of the provisional application and the Federation’s domestic law.

In an obiter dictum, the tribunal turned to the extensive arguments advanced by the parties relating to the alleged inconsistency between the dispute resolution clause of the ECT and Russian law. Citing Russia’s explanatory notes to the ECT, the Russian Foreign Investment Law and addressing Russia’s argument that the missing ratification of the ECT within six months after the signing of the ECT by the Duma rendered the ECT void, the tribunal rejected Russia’s argument and found Russia to be bound to the provisional application of the ECT.

The District Court of The Hague now attached particular importance to the fact that Article 45(1) not only refers to the Constitution but also to regulations. The Court stated

---

22 In the following, only the Court’s reasoning regarding the provisional application of the ECT will be discussed. However, for the sake of completeness Russia’s remaining arguments were ‘the absence of valid arbitration agreement, in connection with which the Tribunal was not competent to take cognizance of and given an award on the defendant’s claims; [that] the Tribunal overstepped its remit; there were irregularities in the Tribunal’s composition, particularly because assistant Valasek evidently played a significant substantive role in assessing the evidence, in the deliberations of the Tribunal and in preparing the Final Awards; the Yukos Awards lack substantiation in several critical aspects; the Yukos Awards are contrary to Dutch to public policy and public morality, including in this case the fundamental right of the Russian Federation to a fair trial, since the Awards show the Tribunal’s partiality and biases.’

23 See the Judgment of the district court of The Hague, footnote 21, supra, pages 7–8.

24 Yukos Universal Limited (Isle of Man) v. The Russian Federation, Interim Award on Jurisdiction and Admissibility, 30 November 2009, footnote 22, supra, paragraph 315.

25 Yukos Universal Limited (Isle of Men) v. The Russian Federation, footnote, 22 supra, paragraph 330 et seq.
that while a ban on the provisional application in general may be well embodied in the Constitution and laws of a state, it is inconceivable that the ban of provisional application is enshrined in delegated legislation.26

As to the tribunal’s argument that any other interpretation would lead to hazard on the international stage, the District Court found that Article 25 VCLT itself refers to a possible limitation of the provisional application. Further, a state invoking its national law for non-compliance with the provisional application of the ECT does not act contrary to the principle of pacta sunt servanda, i.e., Article 26 and 27 VCLT, as the basis for the non-compliance is ‘encased in the ECT itself – i.e. at the Treaty level’.27

After dismissing the significance of state practice, earlier decisions by tribunals and the travaux preparatoires, the District Court agreed with Russia’s interpretation of Article 45(1). Additionally, it held that Russia was not required to submit a declaration pursuant to Article 45(2)(a) in order to discharge itself from applying the ECT provisionally.28 Finally, the Court went on to analyse the consistency between the applicable Russian laws and Article 26 of the ECT, finding Article 26 ECT to be inconsistent with Russian law,29 and thus set aside the award on the ground that the tribunal lacked jurisdiction.

ii Yukos Capital SARL v. The Russian Federation, UNCITRAL, Decision on Jurisdiction of 22 February 2017

It did not take long for another tribunal to be confronted with the question of provisional application. In February 2017, a tribunal hearing the dispute of Yukos Capital SARL v. The Russian Federation held that Russia was bound by the provisional application of the ECT. Although the decision is not public, as the arbitration is understood to be subject to a strict confidentiality agreement, it again raises the question of the interpretation of Article 45.

It further uncovers the danger of contradicting decisions, especially given the fact that the tribunals and the District Court ruled on the legal interpretation of the very same clause, not on different factual circumstances. The two awards and the decision by the District Court of The Hague leave in disarray what once was to be believed a very cornerstone of the application of the ECT. Further implications will be discussed in Section V infra.

iii Energoalliance v. Republic of Moldova, Paris Court of Appeal

In Energoalliance v. Moldovia, the Paris Court of Appeal, in quite a similar fashion to the District Court of The Hague, provided a judgment on a substantive issue of the ECT, namely the requirements of an ‘investor’ pursuant to Article 1(6) of the ECT. This was in addition to the fact that the Paris judgment set aside the Award rendered by a tribunal constituted under the UNCITRAL rules.

The underlying dispute arose out of a tripartite agreement to deliver electricity from Ukraine to Moldtranselectro, a Moldovan state-owned company. Energoalliance was to deliver the electricity to Derimen, a company incorporated in the British Virgin Islands and the third party to the agreement, which would then sell the electricity to Moldtranselectro.

26 Judgment of the district court of The Hague, footnote 21, supra, paragraph 5.13.
27 Judgment of the district court of The Hague, footnote 21, supra, paragraph 5.19.
28 Judgment of the district court of The Hague, footnote 21, supra, paragraph 5.24 et seq.
29 The complete reasoning of the Court shall not be replicated here. For the purposes of this overview, it is sufficient to note that the Court concluded that there is, at least, some inconsistency between Russian laws and Article 26 of the ECT.
The Energy Charter Treaty

The deliveries were taking place at the Ukrainian–Moldovan border. As Moldtranselectro stopped making payments under the agreement to Derimen, Energoalliance acquired the debt owed to Derimen and tried to collect the debt from Moldtranselectro in Moldovan courts.

It was during these proceedings that, according to the tribunal, Moldova breached its obligations under the ECT, *inter alia*, by issuing a decree to strip ‘Moldtranselectro of its assets and transferring them to other entities, and by engaging in quasi-judicial ex-parte proceedings which provided the Moldovan courts with the purported grounds to deny Energoalliance’s claims’. The tribunal found a breach of the fair and equitable treatment standard and concluded that the above-mentioned acts were in breach of Moldova’s obligation to ‘create stable, equitable, favourable and transparent conditions’. Energoalliance was awarded an amount of US$49 million, including pre-award interest, a part of Energoalliance’s attorney fees and the arbitration costs.

On 25 November 2013, Moldova filed a motion with the Paris Court of Appeal to set aside the award. Moldova relied heavily on the argument that Energoalliance would not qualify as an investor under the ECT, and, therefore, the tribunal lacked jurisdiction in the first place. It argued that the offer to arbitrate in Article 26 of the ECT does not cover disputes in the field of trading with electricity, as the claim of Energoalliance under the tripartite agreement against Moldtranselectro would not constitute an investment within the meaning of Article 1(6) of the ECT, evidenced by the fact that Energoalliance’s claim would not meet any of the characteristics of Article 1(6) ECT. Especially, Energoalliance’s claim does not fall under Article 1(6)(c) or Article 1(6)(f), as it neither constituted a contribution nor a monetary claim related to the pursuit of economic activities in the energy sector. The sole purpose of Derimen’s contractual right, of which Energoalliance’s right is derived, was to sell electricity.

Finally, Moldova claimed that, by acquiring Derimen’s claims, Energoalliance did not acquire an already ‘existing investment’ within the meaning of Article 1(8) of the ECT, this so because Derimen was a company incorporated under the laws of the British Virgin Islands, a country that is not a contracting party to the ECT. The second limb of Article 1(8), according to Moldova, was not fulfilled either as Derimen had never made any investments in others areas of business in Moldova. It concluded that in the absence of any economic contribution by Derimen, and consequently by Energoalliance, in the sense of Article 1(6), the tribunal lacked jurisdiction.

Lastly, Moldova argued that the investment was not made in the territory of Moldova as the electricity was only delivered to its border.

The Court held that the claims of Energoalliance were not associated with an investment, as it did not meet the condition of contribution, which, according to the Court, is a necessary requirement given the object and purpose of the ECT, namely ‘to catalyse economic growth

---

30 See judgment of the Paris Court of Appeal, footnote 20, supra.
32 Ibid.
33 Article 1(6)(c) reads: ‘[Investment means] . . . claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment.’
34 Article 1(6)(f) reads: ‘any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.’
by means of measures to liberalize investment and trade in energy.35 The Court explicitly held that Energoalliance’s claim is not covered by Article 1(6)(f) of the ECT, as the claim was missing any right to pursue economic activity, which, again, was held to be a requirement for investments under the ECT.

While the judgment, without any explicit mention of it, refers to the old discussion of reading the Salini criteria into the ECT, it is remarkable in the sense that a national court provides its opinion on an issue that was believed to be of the exclusive competence of investment arbitration tribunals. Similar to the Yukos set-aside judgment, it ruled on an issue of substance for an international treaty. The coming years and decisions will show whether this judgment provides guidance for arbitral tribunals constituted under the ECT, especially for those arbitrations seated in France.

V THE ROLE OF STATE COURTS IN 2016 – PAST EXAMPLES EQUAL FUTURE RISKS?

While we have seen that some state courts have provided insight on key issues pertaining to the ECT in 2016, the legal impact of their judgments remains to be determined. Arbitral tribunals may be very reluctant to accept judgments of state courts as guidance for their own decisions. However, one should not overlook that the state court judgments discussed above were rendered in France and the Netherlands – i.e., in two jurisdictions that frequently feature as seats for arbitrations. Against that background, arbitrators might turn out to be more willing to take these judgments into account when sitting on panels seated in those two jurisdictions, in order to avoid the risk of their awards being set aside.

While the above may promote consistent awards rendered by tribunals of the very same seat, the danger is imminent that the outcome of arbitral proceedings becomes more and more dependent on the respective seat of arbitration. Consequently, investors may want to opt for arbitration under the ICSID Convention in order to minimise the risk arising from the review by national courts.36

From a systematic point of view this development is even more regrettable. The different choices, open to the investor, for submitting a dispute to arbitration under the ECT were not envisaged to contribute to an increasing fragmentation of jurisprudence in investment law, but to allow an investor to choose rules it deemed fit for the specific circumstances of its case. First examples of this development may yet be seen in the contradicting decisions of the tribunals in the Yukos SARL v. The Russian Federation arbitration (seated in Switzerland) and the District Court of The Hague as discussed above.37

While one may argue that conflicting decisions are an inherent risk of investment arbitration, it is highly unsatisfactory from a rule of law perspective as these decisions will not create any legal certainty for investors and states alike.38 Under the applicable Swiss Arbitration Law, the Russian Federation has to (and most probably will) challenge the award

35 Preamble of the ECT.
36 It should be noted that the ICSID annulment committee does not shy away from altering the decisions of arbitral tribunals, as recently evidenced by decision in ExxonMobil v. Venezuela.
37 See supra pages 6–7.
38 It may be noted that the problem of the influence of the seat is probably not resolved by the newly proposed ‘investment court system’, see Joel Dahlquist, ‘Place of Arbitration in the Proposed “Investment Court” Scenario: An Overlooked Issue?’, in Kluwer Arbitration Blog, 23 March 2017.
rendered by the tribunal within 30 days, while the arbitral proceedings will enter the merits stage. The investor now faces a situation where (1) either an award on the merits predates the state court’s decision on Russia’s challenge of the decision on jurisdiction facing the risk that the latter is afterwards granted by the Swiss court, or (2) the state court may grant Russia’s challenge before the tribunal issues its final award leaving the investor with virtually nothing in hand.

A possible solution of that dilemma is to grant parties a right to preliminarily access state courts. To avoid situations of uncertainty as described above, parties should be allowed to apply to state courts to determine the jurisdiction of an arbitral tribunal. However, the benefit of that solution is rather limited as only a small number of states included corresponding provisions in their arbitration acts. It will also lead to increased cost and time spent. But it definitely serves the purpose of mitigating the systematic risk stemming from contradicting decisions and thus benefits the creation of legal certainty.

VI OUTLOOK

While 2016 will surely go down in history as a year in which national courts produced a number of headlines, it will also be remembered as a fluke, as 2017 is poised to be a year in which arbitral tribunals take back the centre stage. With awards in several Spanish and Italian renewable energy cases looming, the hearing in Vattenfall v. Germany concluded and CETA, and its investment court system, finally approved by the European Parliament, other issues surrounding the ECT will dominate in 2017.

39 See, e.g., Section 32(1) of the English Arbitration Act, Section 2(1) of the Swedish Arbitration Act, Section 1323(2) of the German Code of Civil Procedure, which reads: ‘Until the arbitral tribunal has been formed, a petition may be filed with the courts to have it determine the admissibility or inadmissibility of arbitration proceedings.’

40 This tool was therefore not available for both Russia and Yukos SARL as Swiss Law is lacking a corresponding provision.
Chapter 20

NAFTA: PAST, PRESENT AND FUTURE

Gordon E Kaiser

I INTRODUCTION

The North American Free Trade Agreement (NAFTA) did not happen overnight. NAFTA was originally driven by American concerns with Mexican nationalisation practices. Then the Canadians saw the opportunity to expand their automotive sector. The agreement was negotiated over five years. Agreement in principle was finally reached by President Reagan and Prime Minister Mulroney at the Shamrock Summit in Quebec City in 1987.

When NAFTA came into force on 1 January 1994, it was seen as a major innovation, but controversy quickly followed. That controversy continues to this day.

What was significant was that NAFTA created the world’s largest international free trade zone. The elimination of trade barriers between Canada, the United States and Mexico led to a substantial increase in trade between the three countries.

The growth in bilateral trade between Canada and the United States is particularly impressive. As Rosemary McCarney said recently:

It is big and growing. Here are a few of the 2015 numbers to pay attention to:

- Canada is the largest trading partner and largest customer of the United States – twenty-five years of free trade has had an impact;
- In 2015, bilateral trade in goods and services was 880 billion US dollars – that’s 2.4 billion US dollars crossing the border every day;
- Canadians buy more from the United States than Japan, China, and the UK combined, and more than the twenty-eight members of the EU combined;
- Nine million American jobs depend on this trade with Canada;
- Canada remains the largest supplier of US energy needs;
- Canada is the top export destination of thirty-five US states;
- Four hundred thousand people cross the Canada–United States border every day;
- There are 150 federal, provincial, and state bilateral agreements on environmental protection alone;
- The United States accounts for 51 percent of foreign direct investment in Canada representing 360 billion US dollars.

1 Gordon E Kaiser is an arbitrator at JAMS, Toronto and Washington, DC.
The real innovation was that the agreement gave private investors the right to bring claims directly and unilaterally in the host country. This was unique at a time when the arbitration world was dominated by state-to-state proceedings.

Major corporations quickly learned how they could put this new remedy to work to reduce regulatory risk. President Reagan was famous for his disdain of regulatory costs and America Complainants in particular quickly saw a new form of Regulatory Ombudsman, or as John Terry put it, ‘a last resort of judicial review’.4

However, governments on both sides of the border were quick to respond that private corporations were using NAFTA to curtail the right of governments to regulate in the public interest. This debate soon became worldwide, driven by leading academics and arbitrators.5

This debate is not limited to NAFTA. The same issue arose under the Energy Charter Treaty6 that followed NAFTA in 1994. Today there are over 30 arbitration claims under that treaty challenging the legislation by four different European governments to change their incentive programmes for renewable energy without notice.

This controversy in the NAFTA world was recently joined by another controversy driven by the economic nationalism of the new Trump administration in the United States. The issue there is not a state’s right to regulate, but a state’s right to eliminate trade deficits. It has put NAFTA under a new spotlight that includes the Chapter 11 dispute resolution mechanism.

This is not the first time NAFTA became a political football. Candidate Ross Perot took a swing at NAFTA in the US federal election in 1992, while in 2016, Candidate Trump raised the anti-NAFTA rhetoric to a new level in the form of 140-character tweets. Recently, the new President signed an Executive Order announcing that NAFTA will be renegotiated. The Order placed a broad set of issues on the table. Where that will end up is hard to say.

It will be surprising to some that the Americans appear to be the most vocal when it comes to criticising NAFTA. To date, there have been 38 NAFTA decisions, 17 in Canada, 12 in the United States and nine in Mexico. Canada has managed to lose nine cases, Mexico has lost five cases and the United States has lost none.

A review of the NAFTA jurisprudence in this chapter may lead to some preliminary conclusions of where things went off the rails. Before going there, we should remind ourselves what NAFTA has accomplished.

First and foremost, NAFTA has led the charge towards transparency – something that is important when arbitrators are dealing with public policy issues. Today all decisions and pleadings are on the public record. There is widespread participation by third parties.7 All hearings are broadcast to the public. In the recent Eli Lilly hearing8 there were nine different third-party intervenors.9

---

9 Canadian Chamber of Commerce, Canadian Generic Pharmaceutical Association, CIPPIC (University of Ottawa) and CIPP (McGill University), Dr Grosse Ruse-Khan, Dr Liddell and Dr Waibel of University
Second, most NAFTA Chapter 11 panels go to great lengths to explain their decision by reference to former arbitration decisions under NAFTA and other agreements. This might seem strange given that the NAFTA treaty specifically says that the prior decisions do not act as a precedent.\(^\text{10}\)

Regulators across North America stand by the same rule. Decisions of earlier panels are not binding on later ones. Nonetheless, all regulators attempt to justify their decision based on rulings of previous panels. Roadmaps are important particularly in the public policy arena, which is where Chapter 11 panels spend most of their time.

NAFTA Chapter 11 panels have worked hard to develop their own common law. They recognise that both states and investors require guidance on what rights they have and what rights they do not have. NAFTA tribunals have also done a good job of policing arbitrations. This is important in a world of private complainants. NAFTA Chapter 11 panels have declined jurisdiction where the claimant was not properly an investor within the terms of the treaty\(^\text{11}\) or was improperly double-dipping by filing the same claim elsewhere\(^\text{12}\) or litigating the same issue twice.\(^\text{13}\) NAFTA tribunals have also been very creative in cost awards, which has a meaningful impact on the future conduct of claimants.

NAFTA panels have also done well when it comes to appeals. Of the 34 NAFTA decisions rendered to date, 13 have been appealed. Of the 13, only one, Metalclad,\(^\text{14}\) was successful. In that decision, the BC Supreme Court set aside part of the award on the grounds that the tribunal had exceeded its jurisdiction.\(^\text{15}\)

Most of the NAFTA appeals have gone to Canadian courts.\(^\text{16}\) With the exception of the BC Supreme Court decision in Metalclad, the Canadian courts have been deferential to Chapter 11 panels. The best example is Cargill,\(^\text{17}\) where the court upheld a NAFTA panel that ordered Mexico to pay a US company US$41 million for the losses it suffered when Mexican regulations prevented the company from selling high-fructose corn syrup to its Mexican subsidiary.

There the Ontario Court of Appeal emphasised that the role of the reviewing court is to identify and narrowly defined any true question of jurisdiction.\(^\text{18}\) The court said that once

---

of Cambridge, ‘five intellectual property law scholars’, Innovative Medicines Canada and BIOTECanada, National Association of Manufacturers, PhRMA and AMIIF, and ‘seven intellectual property law professors’.

10 NAFTA Article 1136.
11 VG Gallow v. Government of Canada, Award (UNCITRAL 16 September 2011); St Mary’s VCNA LLC v. Canada, Settlement Agreement (UNCITRAL, 29 March 2013).
13 Apotex v. United States of America, ICSID Case No. ARB (AF) 12/1 (25 August 2014).
14 Metalclad Corp v. United Mexican States, ICSID Case No. ARB (AF) 97/1 Award (30 August 2000), 5 ICSID Rep. 212 (2002).
17 Archer Daniels Midland v. United Mexican States, ICSID Case No. ARB (AF) 04/1 (NAFTA).
the court concludes that the tribunal has made no error in its assumption of jurisdiction the
court does not go on to review the rest of the award to determine if the tribunal's result was
reasonable. This decision was upheld by the Supreme Court of Canada.\textsuperscript{19}

A number of NAFTA cases have settled.\textsuperscript{20} Chapter 11 tribunals have facilitated that
process. The Canadian government has settled four major cases. In some cases, Canada did
not pay damages but amended the legislation. In other cases, the government paid damages
as well. Some argue that these settlements are a bad thing and that they highlight the
growing regulatory chill under NAFTA. Settlements by governments are never a bad thing,
particularly in public interest cases. Governments are in a good position to balance the rights
of investors under an investment treaty with the government's right to regulate. Governments
understand why they entered into the treaty in the first place – it is in the public interest to
attract investment into the country.

There is, however, always room for improvement. Some of the potential amendments
are discussed in the last section of this chapter. These will face close examination soon; the
process just launched by the new American administration will ensure that.

II THE GROWING REGULATORY DIVIDE

Early in the history of NAFTA it became apparent that the majority of decisions turned on the
validity of legislation enacted in environmental areas, including cases involving intellectual
property. A number of the early decisions are set out below.

Investors objected to changes in the new laws because they harmed their business.
According to the investors the new laws breached their legitimate expectations as investors
under the principles of fair and equitable treatment. Investors also relied on the NAFTA
prohibition against expropriation without compensation given the NAFTA language that the
prohibition covered acts they were 'tantamount to expropriation'.

The Canadian and US governments, on the other hand, responded that the legislation
in question was valid legislation under the laws of the country and was enacted in the public
interest. The governments argued that regulation and legislation are not frozen in time and
provided it is lawful and in the public interest it cannot be set aside. The early decisions are
set out below. Two of them were settlements.

i SD Myers\textsuperscript{21}

Between 1995 and 1997 the Canadian government banned the export of toxic PCB waste in
order to comply with its obligations under the Basel Convention, of which the United States
is not a party. Waste treatment company SD Myers then sued the Canadian government
under NAFTA Chapter 11 for US$20 million in damages. The claim was upheld by a
NAFTA tribunal in 2000.

\textsuperscript{19} Mexican States v. Cagill Inc, 2012 SCC 10 May 2012.
\textsuperscript{20} Ethyl Corp v. Government of Canada, Settlement Agreement (UNCITRAL, 24 June 1998); Dow Agro
Sciences LLC v. Canada, Settlement Agreement (UNCITRAL, 2001); AbitibiBowater Inc v. Government
of Canada, Settlement Agreement (UNCITRAL, 24 August 2010); St Mary's VCNA LLC v. Government of
\textsuperscript{21} SD Myers v. Canada, Award (UNCITRAL, 21 October 2002).
ii Dow Agro Sciences\textsuperscript{22}

Dow Agro Sciences, a US corporation, served a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of NAFTA, for losses allegedly caused by a Quebec ban on the sale and certain uses of lawn pesticides containing the active ingredient 2,4-D. The tribunal issued a consent award after the parties to the dispute reached a settlement.

iii Apotex\textsuperscript{23}

Apotex Inc, a Canadian pharmaceuticals corporation, alleged that US courts committed errors in interpreting federal law, and that such errors were in violation of NAFTA Article 1102 (national treatment) and Article 1105 (minimum standard of treatment under international law). Apotex also alleged that the challenged US court decision in favour of the Pfizer drug company expropriated Apotex's investments in generic versions of the antidepressant Zoloft under NAFTA Article 1110 was manifestly unjust.

Apotex relied on the doctrine that a manifestly unjust domestic legal decision breaches international law and can be viewed as a substantive denial of justice. Apotex has also brought a similar claim involving US regulatory provisions concerning an abbreviated new drug development application for Pravastatin and patents allegedly held by Bristol-Myers Squibb. Apotex has two claims involving different generic products. The tribunal dismissed all of the claims and ordered Apotex to pay the United States’ legal fees and arbitral expenses.

iv Chemtura Corporation\textsuperscript{24}

Chemtura Corporation, a US agricultural pesticide products manufacturer, alleged that the Canadian government’s Pest Management Regulatory Agency (PMRA) wrongfully terminated its pesticide business in lindane-based products, which are used on canola, rapeseed, mustard seed and cole crops to control flea beetle infestations, and on cereal crops to control wireworm. Chemtura alleged NAFTA violations of Article 1105 (on minimum standards of treatment) and Article 1110 (on expropriation). All claims were dismissed by the Tribunal, given that the measure did not amount to a substantial deprivation of the claimant’s investment and was taken legitimately and without bad faith.

v Metalclad and Ethyl Corporation\textsuperscript{25}

The two environmental claims that received the most attention were the Metalclad claim against Mexico in 1995 and the Ethyl Corporation claim against Canada two years later.

In 1995, the Mexican government authorised Metalclad, a US corporation, to take over and operate a toxic waste facility in the small Mexican town of San Luis Potosi. In late 1996, after Metalclad invested US$20 million, the Governor of San Luis Potosi informed the company that its facility was an environmental hazard and would be shut down.

Although Metalclad was aware that the Mexican hazardous waste industry was highly regulated, the company filed a Chapter 11 claim against the Mexican government. The complaint alleged that 'having been denied the right to operate its constructed and permitted

\textsuperscript{22} Dow Agro Sciences v. Canada, Settlement Agreement (UNCITRAL, 2011).

\textsuperscript{23} Apotex Holdings Inc v. United States, ICSID Case No. ARB (AF) /12/11, 25 August 2014.

\textsuperscript{24} Chemtura Corporation v. Canada, Award (UNCITRAL, 2 August 2010).

\textsuperscript{25} Metalclad Corporation v. United Mexican States, Award (ICSID, 30 August 2000); Ethyl Corporation v. Government of Canada, Award (UNCITRAL, 24 June 1988).
facility, Metalclad’s property had therefore been, as a practical matter, expropriated.’ The Governor’s decision to halt the facility’s operation was supported by a geological audit performed by environmental impact analysts at the University of San Luis Potosi, which found that the facility was located on an underground alluvial stream and could therefore contaminate the local water supply. The most controversial claim, however, was brought by Ethyl Corporation against Canada. In 1997, Canada enacted a law banning methylcyclopentadienyl manganese tricarbonyl (MMT), a gasoline additive designed to prevent engine knocking. The Canadian government enacted the ban in response to a Canadian Environmental Health Directorate report that claimed that MMT exposure causes serious neurological problems similar to Parkinson’s disease.

In response, Ethyl, a US corporation, filed a US$250 million Chapter 11 claim against the Canadian government on behalf of Ethyl’s wholly owned subsidiary, Ethyl Canada, the sole Canadian importer, processor and distributor of MMT.

Ethyl alleged that the Canadian law constituted an expropriation of Ethyl’s business in Canada and required compensation under NAFTA’s Article 1110. Ethyl sought to recover its loss of sales and profits in Canada, loss of value of Ethyl Canada, loss of worldwide sales, the cost of reducing operations in Canada, expenses incurred in defending itself against Canada’s allegations, lobbying to defeat the law, and loss of its goodwill both inside and outside Canada.

In July 1998, the Canadian government settled the Ethyl dispute by paying Ethyl US$19 million and repealing the ban on MMT.

III  LEGITIMATE EXPECTATIONS AND INDIRECT EXPROPRIATION

The jurisprudence over the past 20 years indicates that most NAFTA decisions often rely on two principles: (1) an investors’ legitimate expectations, and (2) indirect expropriation. This raises a number of questions. Was there a specific representation by the government? Was it an important representation? Did the investor rely on the representation? Should the investor have known that the proposed investment was illegal or at least extremely risky?

Expropriation under NAFTA is a vague concept. It includes practices tantamount to expropriation. The term legitimate expectation is equally vague and the definition of investment or practices under the treaty is broad.

In Metalclad,26 the US claimants argued that Mexico had interfered with its development of a hazardous waste landfill contrary to Article 1110 of NAFTA. Construction permits for the landfill had been issued by the Mexican government prior to the claimant’s investment. The state government had issued an operating permit. Federal officials assured the claimant that further permits would not be required. The claimant relied on these representations and started construction which continued until the municipal government issued a Stop Work Order. The government subsequently denied a construction permit.

In addressing the claimant’s expropriation claim under NAFTA Article 1110, the tribunal stated expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host state, but also covert or incidental interference with the use of

26 Metalclad Corp v. United States, ICSID Case No. ARB (AF) /97/1, (2000).
property that has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property, even if not necessarily to the obvious benefit of the host state.\(^{27}\)

The tribunal held that the municipality, having refused to issue a construction permit on grounds that were not open to it, taken together with the representations of the federal government upon which the claimant relied, amounted to an indirect expropriation.

In **Feldman**,\(^ {28}\) a US investor claimed that Mexico’s refusal to recognize his right to a tax rebate constituted a breach of Article 1110 of NAFTA. The claimant stated that assurances had been given by Mexican tax officials that tax rebates would be paid. The rebates were paid for some time but following a change in Mexican tax laws, the Mexican authorities demanded repayment. The tribunal found that there was little persuasive evidence on the scope or nature of the assurances. Nor was there any written record of the agreement. The written and oral communications were deemed to be ‘at best ambiguous and misleading’.

In addition, the tribunal noted that the claimant’s investment failed to meet the specific conditions for a rebate under Mexican tax laws.

NAFTA is not an insurance policy against normal business risks. Investors are expected to do reasonable due diligence. In **Thunderbird**\(^ {29}\) the Tribunal pointed out that the investor should have known that gambling was illegal in Mexico.

The **Feldman** tribunal explicitly distinguished the facts of the case before it from those of **Metalclad**, where the assurances received by the investor had been ‘definitive, unambiguous and repeated’.

The claimant’s expectations in the context of an expropriation claim were also raised in **Waste Management**,\(^ {30}\) which involved a concession to supply waste disposal and street cleaning services in Acapulco. The city agreed not to grant any competing concessions to third parties and to enforce measures to protect the exclusive rights. In return, the investor agreed to build and operate a solid waste landfill. The investor encountered financial difficulties as a result of competition and claimed that the city had breached the agreement, which amounted to an expropriation contrary to NAFTA Article 1110.

The tribunal rejected this claim, stating that ‘the loss of benefits or expectations is not a sufficient criterion for an expropriation, even if it is a necessary one.’ There is a distinction between the expropriation of a right under a contract and the failure to comply with the contract. The tribunal found that the investor had entered into the contract on the basis of an over-optimistic assessment of the possibilities, stating:

> it is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance.\(^ {31}\)

---

27. **Metalclad Corp v. United Mexican States**, ICSID Case No. ARB(AF)/97/1, 30 August 2000, paragraph 103 (emphasis added).


In *Metalclad*, the US claimant argued that, in addition to constituting an expropriation, Mexico’s conduct constituted a failure to grant fair and equitable treatment to its investment, in violation of Article 1105 of NAFTA. The tribunal agreed with the claimant, citing the various representations of the federal authorities that the claimant had all of the necessary permits to undertake the landfill project. The claimant had relied on those representations in embarking on construction of the landfill, and subsequently relied on further federal assurances that, if it submitted an application for a municipal construction permit, the permit would be issued as a matter of course.

The tribunal found that the claimant had been entitled to place reliance on those representations, referring to ‘the lack of any transparent and predictable framework for the claimant’s business planning and investment’. The tribunal concluded that Mexico had failed to comply with the requirements of Article 1105.

The significance of the *Metalclad* award in relation to Article 1105 was somewhat diminished by the subsequent finding of the Supreme Court of British Columbia that part of the award was beyond the tribunal’s jurisdiction. However, *Metalclad* did establish that the failures of the state to live up to the specific assurances given to international investors does constitute a failure to grant fair and equitable treatment.

In *Waste Management*, the claimant again accompanied its arguments of expropriation with a claim that the respondent state had failed to grant fair and equitable treatment to its investment. The tribunal rejected this claim, just as it rejected the expropriation claim. The tribunal found there was no evidence that the city of Acapulco had acted in a wholly arbitrary manner or in a way that was grossly unfair. However, in describing in broad terms the scope of the fair and equitable standard under NAFTA Article 1105, the tribunal stated that:

> the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the state and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host state which were reasonably relied on by the claimant. (Emphasis added.)

*Methanex* concerned a claim by a Canadian investor that a Californian regulation banning the gasoline additive MTBE violated the United States’ obligations under NAFTA Articles 1102, 1105 and 1110. The tribunal concluded that the claimant had received no specific commitments from the US authorities as to future regulatory treatment when making its investment, nor had any other ‘special representations’ been made to the claimant.

In connection with its complaint that the Californian regulations constituted measures ‘tantamount to expropriation’ under Article 1110, the claimant relied in part on the test applied in *Metalclad* and allegations that the regulations at issue discriminated against it in favour of the US domestic ethanol industry. The tribunal responded:

> In the Tribunal’s view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of

---

general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then punitive foreign investor contemplating investment that the government should refrain from such regulation.

However, the tribunal found that the regulation was made for a public purpose, was non-discriminatory and was accomplished with due process. As a result, the California ban was a lawful regulation and not an expropriation. Methanex had failed to show that the California ban ‘manifested any of the features associated with expropriation’.

In Thunderbird, the claimant, who operated gambling facilities, requested an opinion from the Mexican authorities regarding the legality of gambling facilities under Mexican law. The company had received certain assurances and subsequently opened a number of gambling facilities in Mexico. However, following a change of government, Mexico began closing down those facilities and issued a resolution declaring that the machines used were prohibited.

The tribunal concluded that the regulator had not generated a legitimate expectation that Thunderbird could reasonably rely on. It pointed out that the information presented in the regulator had been incomplete and inaccurate. Furthermore, Thunderbird should have known when deciding to invest in Mexico that gambling was illegal under Mexican law. It was incumbent on Thunderbird to exercise ‘particular caution’ in pursuing its business venture in Mexico.

It is difficult to predict exactly what NAFTA Chapter 11 panels will do. In Metalclad, where the denial of the municipal construction permit prevented operation of a proposed hazardous waste landfill, the tribunal defined expropriation to include covert or incidental interference with the property interest that deprives the investor in whole or significant part of the reasonably-to-be-expected economic benefit of the property. That is a broad statement and subsequent tribunals retreated somewhat from that broad definition. Chemtura, for example, refers to substantial deprivation. In Feldman, the tribunal held that the measure in question was a valid governmental activity and was for a rational public purpose.

There are, however, red flags. The first would be misrepresentations relied upon by the investor. The second would be a lack of due process. The third is a government decision that does not appear to have a legitimate public interest component. The next would be a government action directed to a specific party that is clearly being discriminated against. Unequal treatment of parties in a similar position will concern tribunals. However, as the Windstream tribunal said, each case turns on its own facts.

IV RECENT DECISIONS

There have been five significant decisions in the past two years. Three of them have been appealed. There are also two significant cases waiting to be heard, although TransCanada’s US$15 billion claim against the United States will likely be settled.

33 Thunderbird Gaming Corp v. United States of Mexico, UNICITRAL, 26 January 2006.
i  Bilcon

The US claimants were planning to develop a quarry in Nova Scotia. The project underwent a lengthy environmental assessment, undertaken by a joint review panel (JRP) appointed by both the provincial and federal governments. The JRP rejected the project, concluding that it was incompatible with ‘community core values’ and that no mitigation measures could be taken to make the project acceptable. As a result, both governments rejected the project.

The investors claimed that the JRP’s focus on community core values was novel, and they had not received notice that this would be a significant element in the environmental assessment. The investors alleged that their legitimate expectations, created by the regulatory framework and specific expressions of encouragement by governments, were frustrated unfairly and in breach of Chapter 11 of NAFTA with respect to non-discrimination and fair treatment. The investors claimed they had received treatment less favourable than that granted to similar Canadian-owned investments.

The majority of the tribunal agreed, finding that Canada had breached both Article 1105 (minimum international standard) and Article 1102 (national treatment standard).34 Regarding the minimum international standard, the tribunal found that the conduct of the JRP was arbitrary, and effectively created a new standard of assessment in adopting the concept of community core values, without legal authority or providing notice to the investors.

The panel found that the investors’ application was assessed in a manner that fundamentally departed from the methodology required by Canadian and Nova Scotia law, and departure from domestic law constituted egregious state conduct that established a breach of Article 1105.

With regard to the national treatment standard, the tribunal found that the JRP’s failure to identify mitigation measures, which had been part of the environmental assessment in comparable cases, was sufficient to conclude that the investors received less favourable treatment than investors in comparable cases.

The Dissenting Opinion by Professor McRae argues that the concept of community core values is not novel or unknown to environmental assessments. To the contrary, community core values was simply a term given to an important component of what the JRP had to consider as set out in its terms of reference. The dissent found that the JRP’s position was principled and not arbitrary, even if it could not be supported by Canadian law. Professor McRae found that even if a judicial review of the JRP had found that it did not conform with Canadian law, an actual or potential violation of Canadian law is not sufficient to establish a violation of Article 1105, stating:

2. In large part, my disagreement is with the majority’s assessment of the facts, whether the report of the Joint Review Panel (JRP or ‘the Panel’) through endorsing the concept of ‘community core values’ and its treatment of the requirement of a ‘significant effects analysis’, ‘departed in fundamental ways from the standard of evaluation required by the laws of Canada’. At the same time, my disagreement is with the effect of the majority’s decision on the threshold for the application of the standard under Article 1105. The majority accepts the well-known statement in Waste Management as encapsulating the standard to be applied under Article 1105 and acknowledges that it is a ‘high threshold’. But it applies the standard in a way that it is met simply by an allegation of a breach of Canadian law.

3. The key component of the majority's conclusion that there has been a violation of Article 1105 is that the JRP relied upon the concept of 'community core values'. Less central, but also an important part of the majority's conclusion, is that the JRP did not provide in its report an assessment of the mitigation measures that might have been taken to avoid the significant environmental effects of the project. Both of these, in the majority's view, take the JRP's conclusions outside the scope of what is required by Canadian law. But, even if there had been a potential breach of Canadian law, this would not of itself constitute a breach of NAFTA Article 1005.

Canada moved to set aside the decision in Federal Court on the grounds that the tribunal exceeded its jurisdiction, but the application was dismissed. The tribunal bifurcated the damage phase of the hearing. That phase is still at the document production stage. Bilcon is claiming US$300 million.

ii Canada Mobil Investments Inc and Murphy Oil Corporation

The claimants, Mobile Investment Canada Inc and Murphy Oil Corporation, were US-based companies that invested in the Hibernia and Terra Nova offshore oil projects off the coast of Newfoundland. The projects were regulated jointly by the federal government and the Province of Newfoundland through the Canada Newfoundland Offshore Petroleum Board (the Board). Companies licensed to drill had to submit proposals for Board approval that contained a development plan outlining how the project would benefit the province through research and development (R&D) expenditures.

The Board had adopted a series of Guidelines, none of which contained specific expenditure requirements by investors. The Board changed this practice in 2004, and introduced Guidelines with specific expenditure targets. The claimants objected to the proposal on the basis that the earlier Guidelines did not have specific expenditure requirements.

The claimants were unsuccessful in an application to the Canadian courts to overturn the Guidelines and subsequently filed an arbitration claim in 2007.

The tribunal dismissed the claimants' fair and equitable treatment claim, finding there was no evidence that the respondent had made a clear and explicit representation regarding future changes to the regulatory framework or that the claimants had relied on any misrepresentations. Accordingly, the tribunal ruled that the respondent had not breached the standard, as it had not been denied due process in a manner that offended judicial propriety.

Next, the tribunal considered whether the 2004 Guidelines constituted performance requirements contrary to NAFTA Article 1106 and if so, whether Canada's reservation under Article 1108 covered the new Guidelines. The tribunal concluded that the expenditure requirements did fall under Article 1106 by interpreting the term services broadly. The Tribunal found that the 2004 Guidelines did compel the complainants to purchase certain local goods and services.35

The tribunal next considered whether Canada's Article 1108 reservation covered the 2004 Guidelines. The majority of the tribunal concluded that the new burdens imposed by the 2004 Guidelines were inconsistent with the underlying framework and held that they did not fall under the respondent's Article 1108 reservation.

35 Mobil Investments Canada Inc and Murphy's Oil Corp v. Canada, ICSID Case No. ARB (AF) 107/4 Award, (22 May 2012).
The tribunal then decided to bifurcate the liability and damage phases. The majority delivered its award on liability in May 2012 and its final award on damages in February 2015, almost three years later.\(^{36}\)

The majority also held that a breach giving rise to future prospective damages may in general terms fall within Article 1116. The majority concluded that Article 1116 does not preclude the tribunal from granting compensation for future damages. The majority also held that the claimants do not have to prove the amount of damages with absolute certainty, but just with a sufficient degree of certainty. In the award issued by the Tribunal on 20 February 2015, damages were set at US$17.3 million. The initial claim was for more than US$60 million.

Canada applied to set aside the award in the Ontario courts under Article 34 of the Commercial Arbitration Act arguing that the tribunal had exceeded its jurisdiction by using the wrong criteria to determine whether the Guidelines fell within the scope of the reservation. The court dismissed the application stating that Canada was not arguing jurisdiction but was simply attempting to reargue the merits of the case.\(^{37}\)

### iii  Eli Lilly

In 2013, Eli Lilly brought a claim against Canada under Chapter 11 of NAFTA claiming damages arising from the invalidation of two patents by the Canadian courts. Eli Lilly alleged that the interpretation of the term ‘useful’ in the Canadian Patent Act by the Canadian courts between 2002 and 2008 violated Canada’s obligations under NAFTA.

Canada argued that Eli Lilly’s claim went beyond the jurisdiction of the tribunal and was wholly without merit. Canada requested that the claim be dismissed in its entirety and Eli Lilly be ordered to bear all costs of the arbitration.

The patents in question were invalidated in 2010 and 2011, after generic drug producers challenged them on the basis of the promise utility doctrine in Canadian patent law. That doctrine requires courts to measure the utility of a claimed drug against promises of its effectiveness made in the disclosure of the patent. If the court finds that a promise existed, the applicant must prove that it has demonstrated or soundly predicted the promised result by the time the patent is filed.

Eli Lilly claimed that the doctrine violated NAFTA because it imposed a higher standard that must be met by pharmaceutical patent applications in Canada than in the United States and Mexico. Eli Lilly claimed Canada had expropriated its patent rights by discriminatory, arbitrary and unpredictable rulings.

The tribunal admitted six different amicus briefs in the course of the arbitration, supporting both sides of the dispute. These included the Canadian Chamber of Commerce, the US national Association of Manufacturers, a US consumer rights advocacy group, the Canadian Generic Pharmaceutical Association, as well as academics from the University of Ottawa and McGill University. The United States and Mexico, as parties to NAFTA, also filed submissions.

\(^{36}\) *Mobil Investments Canada Inc and Murphy’s Oil Corp v. Canada*, ICSID Case No. ARB (AF) 107/4 Award, (20 February 2015).

Eli Lilly asked the tribunal to rule that the alleged radical change in the interpretation of Canadian domestic law by the Canadian judiciary violated Canada's obligations under NAFTA. Canada responded by saying that the tribunal could only consider whether judicial decisions amounted to a denial of natural justice.

On 17 March 2017, the tribunal issued its award dismissing the Eli Lilly claims and confirming that Canada was in compliance with its NAFTA obligations. The Tribunal awarded Canada 75 per cent of its legal costs in addition to its full share of the arbitration costs.

The panel noted that Canada's Manual of Patent Office Practice described the new doctrine as merely a reiteration of a long-accepted standard. The tribunal ruled that since there had been no change in law, the US pharmaceutical company had no legitimate expectation that doctrine would not be applied to revoke its patents.

The main issue in the case was whether NAFTA signatories could be liable for expropriation as a result of judicial actions or whether that claim is limited to a denial of natural justice. The tribunal refused to rule definitively on this issue, stating that it was unnecessary because the tribunal had rejected the claim on the merits.

The tribunal did say, however, that it was possible that a judicial act or omission could lead to expropriation and the tribunal was unwilling to shut the doors on that claim. However, the tribunal did state that a NAFTA arbitration panel was not an appellate court and such claims would only be considered in very exceptional circumstances where there was clear evidence and shocking conduct.

The tribunal ordered Eli Lilly to pay US$750,000 in arbitration costs and US$3.3 million in legal costs.

iv Windstream Energy

In October 2012, Windstream filed a claim against the government of Canada in the amount of C$475 million. Following a 10-day hearing in February 2016, a panel of three arbitrators issued an award of C$26 million, resulting from Ontario's decision in 2011 to suspend all offshore wind development.

The panel accepted Windstream's argument that the government's decision frustrated Windstream's ability to obtain the benefits of the 2010 contract it had signed with the Ontario Power Authority (OPA).

In November 2009, Windstream submitted 11 feed-in tariff (FIT) applications for wind power projects, including an application for a 300MW 130 turbine offshore wind project near Wolfe Island in Lake Ontario. The OPA offered Windstream a FIT contract in May 2010, which Windstream signed in August of that year. Under the contract, the OPA would pay Windstream a fixed price for power for 20 years. In total, the contract was worth C$5.2 billion.

During this period, the Ontario government was conducting a policy review to develop the regulatory framework for offshore wind projects, including a proposed 5km shoreline exclusion zone. The policy review ceased on 11 February 2011, when the government of Ontario decided to suspend all offshore wind development until further research was completed.

The main ground for the Windstream claim was that the Ontario decision was arbitrary and was based on political concerns that the wind contracts would increase electricity rates. Windstream argued that the government really had no intention of pursuing scientific research.
Canada, in response, said that Ontario was entitled to proceed with caution on offshore wind development and that NAFTA does not prohibit reasonable regulatory delays.

Windstream made a number of claims under the NAFTA. The most important (and the only one that succeeded) was a breach of Article 1105(1), the Minimum Standard of Treatment provision, which reads: ‘Each Party shall accord to investments of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.’

The tribunal noted that any judgement as to what is fair and equitable will turn on the facts of each case.

In finding that there was a breach, the tribunal questioned whether the real rationale for the moratorium was the need for more scientific research. Just as important was the tribunal finding that Ontario made little, if any, efforts to accommodate Windstream, and seemed to deliberately keep Windstream in the dark. This is best set out in the decision at paragraphs 366 and 367:

366 The Tribunal notes that following the signing of the FIT Contract on 20 August 2010, the position of the Government of Ontario grew gradually more ambiguous towards the development of offshore wind. Thus, while the Government appears to have envisaged still in August 2010 that the relevant regulatory framework, including the setback requirements, would be in place possibly its position started changing in the fall of 2010. This change appears to have coincided with the receipt and analysis of the information generated through the EBR posting of 25 June 2010, which indicated an increasing resistance to the development of offshore wind.

367 It does not appear from the evidence that the various options that were being considered and the related concerns were communicated to Windstream, either at the meetings between the government officials and Windstream representatives or otherwise. On 10 December 2010, Windstream delivered a force majeure notice to the OPA, effective from 22 November 2010, stating that MNR’s failure to proceed with the permitting process, in particular the site release process, and MOE’s failure to take steps to implement its policy proposal to create an exclusion zone, had prevented Windstream from progressing the Project in accordance with the FIT Contract.

The tribunal concluded:

380 The Tribunal concludes that the failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the OPA, within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and the development of the Project created by the moratorium, constitutes a breach of Article 1105(1) of NAFTA. It was indeed the Government of Ontario that imposed the moratorium, not the OPA, so it cannot be said that the resulting regulatory and contractual limbo was a result of the Claimant’s own failure to negotiate a reasonable settlement with the OPA. The regulatory and contractual limbo in which the Claimant found itself in the years following the imposition of the moratorium was a result of acts and omissions of the Government of Ontario, and as such is attributable to the Respondent. The Tribunal therefore need not consider whether the conduct of the OPA during the relevant period must also be considered attributable to the Respondent.
NAFTA: Past, Present and Future

There was a further claim by Windstream that Ontario had violated Article 1102 of NAFTA by granting Windstream less favourable treatment than was accorded to other entities in similar circumstances. It was argued that the treatment of Windstream was less favourable than the treatment Ontario granted to TransCanada.

Both TransCanada and Windstream were parties to power purchase agreements with the OPA that guaranteed a fixed price for electricity. Both contracts were terminated. However, when Ontario terminated the TransCanada contract, Ontario awarded TransCanada a new project and compensated TransCanada for the costs of the cancellation. In contrast, Ontario failed to do the same thing for Windstream following the offshore moratorium.

The tribunal rejected Windstream’s argument, noting that Article 1102 deals with national treatment and most favoured nation treatment. However, the tribunal concluded that TransCanada was not in like circumstances. Unlike TransCanada, Windstream had a FIT contract for offshore wind.

There is no question that the TransCanada project was different from the Windstream project. TransCanada had a contract with the OPA to build a gas generation plant in Mississauga, near Toronto. The local residents were not happy with this, and the Liberal government cancelled the project in the heat of the provincial election. To keep TransCanada happy, the OPA negotiated an agreement that reimbursed them for their costs and gave them a new contract in another area.

The circumstances were different and so was the government’s response. In TransCanada there was extensive negotiation, whereas in Windstream there was none. The tribunal concluded that the two projects were totally different and, therefore, did not result in like circumstances. TransCanada does not even provide renewable energy, which is the basis of all FIT contracts.

Accordingly, the tribunal ruled that the moratorium and related measures did not apply to TransCanada in the first place. TransCanada was not affected by the moratorium on offshore wind. Moreover, the tribunal ruled that the moratorium was not applied in a discriminatory manner because it resulted in the cancellation of all offshore wind projects. Windstream had the only contract for offshore wind and the tribunal therefore concluded that it could not agree that Windstream had been treated less favourably than other developers of offshore wind.

### v Mesa Power

The decision of the NAFTA panel in Mesa Power was very different to that in Windstream Energy. It also involved claims under Article 1105 of the NAFTA and was heard in Toronto in 2016.

In 2011, Mesa Power Group, a US corporation owned by Texas oil tycoon T Boone Pickens, filed a C$775 million claim against Canada relating to the Province of Ontario’s policy of awarding power purchase agreements under the Ontario FIT programme for the supply renewable energy.

Mesa claimed that Canada adopted discriminatory measures, imposed minimum domestic content requirements and failed to provide Mesa with the minimum standard treatment, in violation of NAFTA’s investment provisions. In the end, the tribunal dismissed all of Mesa’s claims and ordered Mesa to bear the cost of the arbitration as well as a portion of Canada’s legal costs of nearly C$3 million.

Mesa argued that the reason it did not receive any FIT contracts was that the programme was mismanaged and Mesa was discriminated against when Ontario granted
unwarranted preferences to two other applicants. Windstream really turned on the legitimacy of the moratorium issued by Ontario to defer all offshore wind generation and the conduct of the Ontario government following the announcement of that moratorium.

The OPA launched the FIT programme in October 2009. During the first round of contacts, the OPA reviewed 337 applications and granted 184 contracts for a total of 2500MW of capacity. The second round of contracts took place in February 2011. Forty FIT contracts for a total of 872MW were issued. The third round of contracting took place in July 2011, resulting in 14 contracts totalling 749MW.

Mesa Power filed six applications under the FIT programme but was unsuccessful in all three rounds of contracting. The problem was that all the MESA projects were located in Bruce County. In order to obtain a contract all applicants had to demonstrate that they had the right to connect to the transmission system. Mesa was unable to obtain transmission connection because of the transmission constraints in Bruce County.

Mesa argued that the failure to acquire transmission access was because of flaws in the contracting process and preferences granted to two other parties, namely Next ERA Energy (an affiliate of Florida Light and Power) and the Korean Consortium led by Samsung.

Mesa argued that this conduct amounted to a breach of Article 1105(1) of NAFTA, which reads: ‘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.’

Before the tribunal could determine if Canada had failed to grant Mesa Power fair and equitable treatment, the tribunal had to define that term. The panel relied on the often-quoted standard set out in Waste Management:

the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

502. On this basis, the Tribunal considers that the following components can be said to form part of Article 1105: arbitrariness; ‘gross’ unfairness; discrimination; ‘complete’ lack of transparency and candor in an administrative process; lack of due process ‘leading to an outcome which offends judicial propriety’; and ‘manifest failure’ of natural justice in judicial proceedings. Further, the Tribunal shares the view held by a majority of NAFTA tribunals 38 that the failure to respect an investor’s legitimate expectations in and of itself does not constitute a breach of Article 1105, but is an element to take into account when assessing whether other components of the standard are breached.

The tribunal rejected all three claims that Mesa made that Canada had breached the fair and equitable treatment provisions of Article 1105 of NAFTA.

The tribunal rejected the allegation that the OPA had mismanaged the programme and did not treat all applicants fairly, noting that the OPA had retained an independent monitor to administer the FIT programme.
The tribunal also discounted the charge that NextEra had met with government officials, noting that this was common practice in the industry and there was no evidence of any preference. NextEra was given access to transmission facilities in Bruce County at one point, but apparently Mesa was also offered the opportunity.

The most contentious part of the Mesa allegations related to the Korean Consortium agreement. Mesa had argued that the agreement between Ontario and the Korean Consortium unfairly diminished the prospects for other investors including Mesa that were already participating in the renewable energy programme by setting aside transmission capacity for the Korean Consortium that was intended for FIT applicants.

Mesa also argued that Ontario was less than transparent in negotiating the agreement, and issued inaccurate and incomplete information. Canada responded that there was nothing manifestly arbitrary or unfair when a government enters into an investment agreement that grants advantages to an investor in exchange for investment commitments.

There were two points of dissent in Mesa by Arbitrator Brower. Canada had argued that its obligations under NAFTA Articles 1102 and 1106 did not apply because the investment under the FIT programme was procurement under Article 1108. The majority concluded that the FIT programme did constitute procurement and dismissed the claims under Article 1102. Arbitrator Brower dissented from the finding that the FIT Agreement did not constitute procurement.

Judge Brower did agree with the majority that any breach of Article 1105 should be defined by the test in Waste Management, which required a finding of gross unfairness, complete lack of transparency, and lack of due process leading to an outcome that offends judicial propriety. The majority, however, did not believe that the evidence supported that conclusion. In addition, the majority found that states should be given a high level of deference in deciding how to regulate their affairs. Judge Brower dissented from that finding, stating that Canada had breached Article 1105 by the grotesque preference given to the Korean Consortium, stating:

4. The nub of what I see as Ontario’s, hence Canada’s, violation of Article 1105 is that it torpedoed the Feed-In Tariff (“FIT”) program as offered at large, including in relation to Claimant’s Arran and TTD projects, to the extent of the 500 megawatts (“MW”) committed to the Korean Consortium on 17 September 2010 in implementation of the Green Energy Investment Agreement (“GEIA”) made on 21 January 2010 with the Korean Consortium. Up until then Claimant’s projects, as well as all other FIT applicants, had been competing for capacity that had been 500 MW or greater. Moreover, – and this can only be characterized as grotesque – as it actually happened, the Korean Consortium was thereby enabled to acquire low-ranked FIT applicants in order to fill its allotted 500 MW, thereby jumping clear losers in the FIT Program over higher-ranked, but ultimately unsuccessful FIT applicants, due to the reduced available megawattage. This effectively stood the FIT Program on its head, turned it upside down. Thus the Government of Ontario acted arbitrarily, grossly unfairly, unjustly, idiosyncratically, discriminated against the FIT applicants and in favor of the Korean Consortium, and acted with a complete lack of transparency and candor.
vi The latest claims

There are five claims pending against different NAFTA parties. Two are particularly interesting. The first is Lone Pine Resources.38

In September 2013, Lone Pine Resources, a US-based oil and gas exploration company launched a C$119 million challenge against Canada under NAFTA. The claim relates to the Province of Quebec’s suspension of oil and gas exploration under the St Lawrence River. The moratorium is part of a wider Quebec suspension of fracking, a form of horizontal drilling that has already been suspended in different US states and Canadian provinces.

Quebec declared the moratorium in 2011 in order to conduct environmental impact studies concerning the use of the chemicals involved and the impact on groundwater. This was of particular concern given that the permits that Lone Pine had acquired cover land directly under the St Lawrence River.

Lone Pine alleged that the moratorium contravenes Article 1105 (minimum standard of treatment) and 1110 (expropriation). More specifically, the claimant alleged that the passing of the legislation that created the moratorium was arbitrary, unfair and inequitable, and was based on political and populist grounds rather than actual environmental research. The claimant alleged that the revocation of the licence expropriated its investment without compensation.

The government of Canada has responded that the action is a legitimate measure in the public interest that applies indiscriminately to all holders of exploration licences that are located under or near the St Lawrence River. Canada argues that the legislation was enacted by a fundamental democratic institution in Quebec and was preceded by numerous studies that established the need to achieve an important public policy objective, namely the protection of the St Lawrence River.

Canada argues that the minimum standard treatment guaranteed in Article 1105 of NAFTA does not protect investors’ legitimate expectations. Even if this were the case, Canada says no representative of the government of Quebec communicated to the claimant any guarantee, promise or specific assurance that could create legitimate expectations relating to the development of hydrocarbon reserves and resources that may be found beneath the St Lawrence River.

Canada has also argued that the disputed measure does not substantially deprive Lone Pine of its investment because the legislation only revokes one of five exploration licences granted. Finally, Canada points out that the act is a legitimate exercise of the government of Quebec’s police power and accordingly the measure cannot constitute expropriation.

An arbitration tribunal was constituted in September 2014. The claimant filed a memorial and evidence on 10 April 2015. Canada filed a counter-memorial and evidence on 25 January 2016.

The second important pending case is the claim by TransCanada Pipelines based in Calgary, Alberta, against the United States for US$15 billion with respect to the Keystone XL pipeline.39 The claim is based on the US rejection of TransCanada’s application to build a pipeline to the US Gulf. To date, TransCanada has spent over US$3 billion on the pipeline, but the US$15 million claim includes compensation related to future expected profits.

Keystone XL, a US$5 billion project, was first proposed by TransCanada in 2008 to transport crude from Canada through the Midwest and Texas to the Gulf of Mexico. The US Department of State had been reviewing the pipeline for nearly seven years. The Canadian portion of the line obtained National Energy Board approval in 2010.

American approval has been held up by national environmental opposition and local opposition in Nebraska. The latter led to court decisions and ultimately action by the Governor to support the line shifting the focus back to the US Congress. In November 2014, the House of Representatives passed legislation that approved Keystone XL for the ninth time. That bill was subsequently defeated in the Senate by one vote.

The midterm elections the following November saw the Republicans obtain a majority in both the House and Senate for the first time in eight years. In January 2014, a vote passed both the house and Senate but failed to get the 67-vote majority required to override a presidential veto.

President Obama exercised his veto. That decision resulted in the TransCanada claim of US$15 billion under Chapter 11 on the ground that the denial of a presidential permit for Keystone XL was arbitrary, unjustified and breached the US administration’s NAFTA obligations.

TransCanada also filed a lawsuit in US federal court in Houston claiming the President’s decision to deny construction of Keystone XL exceeded his power under the US Constitution. All of this was revisited with the election of President Donald J Trump. On 24 January 2017, within days of moving into the White House, the new President signed an Executive Order approving the 1,179 mile line. TransCanada filed a new application two days later.

The TransCanada NAFTA application has not been withdrawn yet, but a settlement is expected.

V THE RIGHT TO REGULATE

Much of the analysis in NAFTA cases centres on the rights of the investor, the definitions of legitimate expectations, and indirect expropriation. These issues were canvassed in the last section. But what about the states right to regulate?

The state must have a right to regulate. It certainly has responsibilities to regulate. The difference is that the scope of this right is greater in the case of domestic investors than foreign investors protected by NAFTA.

One thing is clear: NAFTA states cannot discriminate against foreign investors. They must be treated the same as domestic investors. That means the law must be general in application and there must be a level playing field. Once legislation targets specific parties, there is a problem. That problem exists even in the case of domestic investors. It is also widely recognised that the new regulations and legislation cannot be arbitrary or developed without due process. That principle applies to domestic investors as well.

There is nothing wrong with states giving additional protections to foreign investors compared to domestic investors. That goes to the heart of investor state treaties. The purpose of the treaty is to attract investment.

It is generally recognised that the states enjoy police powers to provide essential services necessary to protect the public interest. These would include matters relating to security, the environment and public health.
Few would object to states exercising this jurisdiction provided the state acts in good faith, and does not discriminate or expropriate private property without fair compensation. The NAFTA decisions in Methanex\textsuperscript{40} and Chemtura\textsuperscript{41} seem to support this proposition.

In Chemtura, a US manufacturer of lindane, an agricultural insecticide said to be harmful to human health and the environment, claimed a breach of NAFTA by Canada’s prohibition of its sale. The tribunal rejected the claim, stating:

\textit{Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent’s police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State’s police powers and, as a result, does not constitute an expropriation.}

A state runs into problems under NAFTA where a specific promise is made to a specific investor, the investor relies on the promised undertakings as a condition of making the investment, and then the state rescinds the promise. However, in order to qualify for this rule, the promise must usually be made to a specific investor.

Legislation is always changing. Very few pieces of legislation have sunset clauses that declare when they end and no legislation or set of regulations lasts forever. Laws necessarily change with changing circumstances.

These concepts are not unique to NAFTA. Set out below are a number of decisions under different treaties that set out these same principles.

In Continental Casualty\textsuperscript{42} the tribunal stated:

\textit{[i]t would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case of crisis of any type or origin arose. Such an implication as to stability in the BIT’s Preamble would be contrary to an effective interpretation of the Treaty; reliance on such an implication by a foreign investor would be misplaced and, indeed, unreasonable.}

Similarly in EDF v. Romania\textsuperscript{43} the tribunal held:

\textit{The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might mean the virtual freezing of the legal regulation of economic activities, in contrast with the State’s normal regulatory power and the evolutionary character of economic life. Except where specific


\textsuperscript{41} Chemtura Corporation v. Canada, Award, (UNCITRAL, 2 August 2010).

\textsuperscript{42} Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/9, Award (5 September 2008) paragraph 258. The same conclusion was reached by the tribunal in Saluka Investments (n 87) paragraph 305.

\textsuperscript{43} EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award (8 October 2009) paragraph 217.
promises or representation are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework. Such expectation would be neither legitimate nor reasonable.

In *Total v. Argentina* the tribunal stated:

> In the absence of some ‘promise’ by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a ‘guarantee’ of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor.

And in *El Paso v. Argentina* the tribunal reminded us that:

> Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances and it would be unreasonable for an investor to rely on such a freeze.

The problem is that, ultimately, these things may come down to what is fair or reasonable. There is no bright-line but arbitrators will look for red flags; for example, giving undertakings that investors rely on and later rescinding them, obvious breaches of due process or situations where states claim that the new regulatory policies are for one purpose, such as the need for more scientific research, when that is not the real purpose. That situation has emerged in the renewable energy cases discussed in the concluding section of this chapter.

**VI DEFERENCE TO LEGISLATORS**

Deference is an important concept. In Canada and the United States courts routinely grant deference to both arbitrators and regulators. In investor–state arbitrations, arbitrators grant deference to governments, particularly where those governments are carrying out a regulatory function where the public interest is the dominant test.

In *Mesa Power* the tribunal pointed to the deference that NAFTA Chapter 11 Tribunals usually grant to governments when it comes to assessing how governments regulate and manage their affairs. The tribunal stated at paragraph 553 of the decision:

> 553 In reviewing this alleged breach, the Tribunal must bear in mind the deference which NAFTA Chapter 11 tribunals owe a state when it comes to assessing how to regulate and manage its affairs.

---

This deference notably applies to the decision to enter into investment agreements. As noted by the S.D. Myers tribunal, ‘[w]hen interpreting and applying the "minimum standard", a Chapter Eleven tribunal does not have an open-ended mandate to second-guess government decision-making.”

The tribunal in Bilcon, a case which the Claimant has cited with approval, also held that '[t]he imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard.'

In addition to the references in SD Myers and Bilcon pointed out by the Mesa tribunal, we can add the tribunal’s comments in Thunderbird at paragraph 127 that ‘the state has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct.’

There are two subcategories of the deference principle when it comes to international arbitration. First, tribunals have taken the position that they should defer to scientific findings states make on a non-discriminatory and non-arbitrary basis in accordance with due process. The conflict between the rights of investors and states often arises in the context of environmental issues. A number of those cases have been referred to in this chapter. Environmental cases invariably turn on scientific evidence.

In Chemtura, the tribunal noted that ‘[i]t is not within the scope of its task to second-guess the correctness of the science-based decision-making of highly specialised national regulatory agencies.” This is identical to the principle US and Canadian courts apply when they defer to government regulators.

The second subcategory of the deference principle is a long-standing international law principle called ‘police powers’. The principle is that certain state action is beyond compensation for expropriation under international law because states enjoy wide latitude to regulate within the realm of their police powers.

Police powers are often defined to include municipal planning, safety, health and environmental issues, as well as areas involving serious fines and penalties. In Chemtura the tribunal held that Canada’s regulations phasing out the use of harmful chemical lindane constituted a valid exercise of Canada’s police powers and did not constitute expropriation.

In summary, the deference principle routinely used by NAFTA arbitrators is not unique. It parallels the deference courts use in deferring to regulators. Deference is particularly appropriate where the regulatory agency is a specialised one with particular expertise in dealing with complex evidence of a scientific nature. However, it goes without saying that both courts and arbitrators will wade into the fight if there is an abuse of process.

VII GOING FORWARD

There is a growing demand to amend NAFTA, for a number of reasons.

49 Mesa, supra note 3 at n 297.
50 Mesa, supra note 3 at n 298.
51 International Thunderbird Gaming Corp v. United Mexican States, at paragraph 160, Award (UNCITRAL 26 January 2006).
52 Chemtura Corp v. Canada, at paragraph 134, Award (UNCITRAL 2 August 2010).
54 Chemtura Corp v. Canada, at paragraph 266, Award (UNCITRAL 2 August 2010).
First, the new American administration is concerned about the deficits that have developed over the past 10 years with both Canada and Mexico. There is no question they exist, but that has little to do with international arbitration. As a presidential candidate, Donald Trump described NAFTA as the worst trade deal in history. As President, he followed up on his complaints and signed an Executive Order, which according to its terms, will create a wholesale re-examination of NAFTA.

Next, we have what might be called the public policy conflict. When NAFTA was first negotiated, both the Canadians and Americans were on the same page. They were both mainly concerned with the Mexico and its history of nationalisation.

As a result, the definition of expropriation was broadened beyond anything anyone had seen in previous trade agreements. It included actions which were ‘tantamount’ to expropriation. This is now described as creeping expropriation. Just as importantly, the definition of ‘investments’ was broadened, as was the definition of ‘practices’. There is no doubt the prohibition became very comprehensive.

But here is the problem: after 20 years of NAFTA experience, the Canadians have discovered that these broad definitions have created a major vehicle for American multinationals to strike down Canadian environmental regulation. That is an oversimplification – but not by much. Canada has higher environmental standards than the United States. The Canadian federal and provincial governments all believe (with one exception) in climate change and carbon taxes. To be fair, the concern exists on both sides of the border. Americans are not amused when Canadian companies attempt to strike down regulations designed to protect California drinking water. Nor are Canadians happy when American companies attempt to strike down Canadian bans on fracking or pesticides.

The real concern may be that we have inadvertently created an ‘Appeal Court of the Last Resort’. In most cases, NAFTA parties first litigate in domestic courts and then appeal to NAFTA. NAFTA offers definite advantages. Damages are available under NAFTA, something that does not always exist under domestic administrative law.

In Apotex and Eli Lilly, both companies first went to the Canadian Federal Court to contest patent rulings. When they failed they went to NAFTA. Bilcon appealed the ruling of the Nova Scotia Environmental Commission to a local court. When that failed they went to NAFTA, where they succeeded.

55 NAFTA, Article 1139.
56 Methanex Corp v. United States, 44 I.L.M. 1345 (NAFTA Chap.11 Arb. Trib. 3 August 2015) (Final Award).
59 Apotex v. United States of America, ICSID Case No. ARB (AF) 12/1(25 August 2014).
62 Bilcon of Delaware Inc v. Canada, Award on Jurisdiction and Liability (10 March 2015), UNCITRAL.
Mercer International\textsuperscript{63} went first to the BC Utility Commission.\textsuperscript{64} When that did not work out they went to NAFTA. Mobil Investments\textsuperscript{65} first appealed the Newfoundland Board R&D directive to the local courts.\textsuperscript{66} When they lost they went to NAFTA, where they succeeded.

To make matters worse, NAFTA is a unique appeal court. Only foreign investors can bring cases. Consider the cases involving the Ontario ban on wind generation. An American company, Windstream, obtained a C$28 million judgment from a NAFTA panel\textsuperscript{67} when Ontario cancelled the programme. Trillium Wind, a Canadian company with the same complaint, was out of luck in the Ontario courts.\textsuperscript{68} The same thing happened in Sky Power.\textsuperscript{69} There the judge remarked: ‘While it may seem unfair when rules are changed in the middle of a game, but that is the nature of the game when one is dealing with government programmes’.

The next group of opponents are those that just do not like arbitrators. This group believes there should be an investment court with appeal procedures. These people exist on both sides of the border. It is an open question whether a multinational investment court will give us better decisions than arbitration panels. There is also a question of whether the Americans would buy into that concept, given the isolationist tendencies of the new administration. The Canadians seem to have bought into the concept. Courts have replaced arbitrators in the recently signed EU–Canada Trade Agreement (CETA).

This is really not a question of arbitrators versus courts. It is really about two different things. First, do we need such a broad definition of expropriation? Second, should private parties have direct access to tribunals or should investors go through their states?

Private access has its advantages. It certainly gives investors greater certainty and security, which is the intent of NAFTA.

When NAFTA was negotiated, private access was the flavour of the month. Legislatures in both Canada and the United States were rapidly granting private access to litigants in a wide range of public interest legislation including securities, competition law and antitrust. To this, we can add class action legislation. The horse may be out of the barn: going back to state-to-state proceedings may be neither welcome or efficient.

The real problem may be the broad definitions that both Canada and the United States supported 20 years ago to obtain the maximum protection against Mexican nationalisation. That is not the concern today. The problem today is that we have private investors exercising private interests to strike down important public policy regulation.

Something has to be done to address this issue. Is it simply a matter of paying more attention to definitions of expropriation, legitimate expectations, and investments? Article 1139 provides a very broad definition of investment. Do we really need that? Should we exempt certain types of regulation or provide a different onus in certain cases?

\textsuperscript{63} Mercer International Inc \textit{v.} Canada, 16 May 2014 (ICSID).
\textsuperscript{64} Fortis BC – Application for Approval of Stepped and Stand-By Rates Decision Stage II (24 March 2015).
\textsuperscript{65} Mobil Investments Canada Inc \textit{v.} Canada, ICSID Case No. ARB (AF) 107/4 Award (22 May 2012).
\textsuperscript{68} 2013 ONCA 683, 117, OR (3d) 721.
There may be process amendments that would be appropriate in these types of arbitrations. For example, the arbitration process could easily allow (as most regulatory proceedings do) that parties ‘directly affected’ can intervene. In addition, a right to intervene could be given to the provincial or federal Attorney General, which is not an unusual concept.

One thing is clear: we will see significant amendments to NAFTA over the next few years. The new American administration has put a stake in the ground. It will be a complicated discussion involving the benefits of free trade, the legitimacy of the arbitration process, and the merits of the investor–state dispute settlement process.

APPENDIX: NAFTA CHAPTER 11 DECISIONS

The following tables are drawn in part from Scott Sinclair, Trade and Investment Research Project, Canada Center for Policy Alternatives.

i Claims against Canada

<table>
<thead>
<tr>
<th>Date complaint filed</th>
<th>Investor</th>
<th>Issue</th>
<th>Amount claimed</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>14 April 1997</td>
<td>Ethyl Corporation¹</td>
<td>US chemical company challenged the Canadian ban on import and interprovincial trade of gasoline additive MMT.</td>
<td>US$250 million</td>
<td>After preliminary tribunal judgments against Canada, Canadian government repealed the MMT ban, issued an apology to the company and settled out-of-court with Ethyl for US$13 million.</td>
</tr>
<tr>
<td>2 July 1998</td>
<td>SD Myers Inc²</td>
<td>US waste disposal firm challenges temporary Canadian ban on export of toxic PCB wastes.</td>
<td>US$20 million</td>
<td>Tribunal ruled that Canada violated NAFTA Articles 1102 (national treatment) and 1105 (minimum standards of treatment). It awarded C$6 million in compensation, plus C$1 million 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>
</tr>
<tr>
<td>14 December 1998</td>
<td>Pope &amp; Talbot Inc³</td>
<td>US lumber company challenges lumber export quota system put in place by Canadian government to implement Canada–US softwood lumber agreement.</td>
<td>US$508 million</td>
<td>Tribunal ruled that Canada violated NAFTA Article 1105 (minimum standards of treatment). Canada was ordered to pay $460,000 in compensation (plus interest) and part of the investor's legal costs, totalling $870,000.</td>
</tr>
<tr>
<td>19 January 2000</td>
<td>United Parcel Service of America Inc⁴</td>
<td>Multinational US courier company alleges that Canada Post's limited monopoly over letter mail and public postal service enabled Canada Post to compete unfairly in express delivery. UPS alleges that Canada Post enjoys advantages denied to the investor.</td>
<td>US$60 million</td>
<td>On 14 May 2007, the tribunal, in a 2–1 decision, dismissed the investor's claims. The tribunal determined that NAFTA rules concerning competition policy could not be invoked under Chapter 11 dispute procedures. It ruled that certain activities of Canada Post were essentially arm's length from the Canadian government and therefore not subject to challenge by the investor. It also rejected claims that Canada Post unduly benefited from more favourable treatment.</td>
</tr>
<tr>
<td>Date complaint filed</td>
<td>Investor</td>
<td>Issue</td>
<td>Amount claimed</td>
<td>Status</td>
</tr>
<tr>
<td>---------------------</td>
<td>----------</td>
<td>-------</td>
<td>----------------</td>
<td>--------</td>
</tr>
<tr>
<td>6 November 2001</td>
<td>Chemtura Corp³</td>
<td>US-based agro-chemical company challenged the Canadian government ban on the sale and use of lindane, an agricultural pesticide. Following a 1998 decision by the US Environmental Protection Agency to close the border to Canadian canola treated with lindane, Canada restricted, and later banned, the domestic use of lindane.</td>
<td>US$83 million</td>
<td>On 2 August 2010, the tribunal dismissed the investor’s claims. The tribunal 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).</td>
</tr>
<tr>
<td>25 September 2006</td>
<td>Merrill and Ring Forestry LP⁴</td>
<td>Washington state forestry company alleges that Canadian federal and provincial regulations and policies restricting the export of unprocessed logs favour log processors in BC at Merrill and Ring’s expense, expropriates its investment in BC timber lands, and violates minimum standards of treatment.</td>
<td>US$25 million</td>
<td>Final award issued on 31 March 2010. The panel dismissed all the investor’s claims and ordered that the costs of the proceedings be split between the two parties.</td>
</tr>
<tr>
<td>12 October 2006</td>
<td>V G Gallo⁷</td>
<td>Canadian company planned to dispose of Toronto’s municipal waste by dumping it in a lake located in northern Ontario. In 2002, following the breakdown of negotiations between the company and the city of Toronto, ownership was transferred to a numbered company involving a US citizen, V G Gallo. In June 2004, the Ontario provincial government enacted legislation preventing the project from proceeding by banning the dumping of garbage in the Ontario lake. The claimant argues that this measure was ‘tantamount to expropriation’ without compensation.</td>
<td>C$105 million</td>
<td>On 15 September 2011, the tribunal dismissed the claim on jurisdictional grounds. The tribunal concluded that Mr Gallo could not prove the date when he acquired ownership and control of the enterprise or that this transfer occurred prior to the enactment of the Ontario legislation. Mr Gallo was ordered to pay the full costs of the proceedings.</td>
</tr>
<tr>
<td>3 August 2007</td>
<td>Mobil Investments Canada Inc &amp; Murphy Oil Corporation⁸</td>
<td>Mobil is a partner in the Hibernia and Terra Nova oil and gas fields off the coast of Newfoundland and Labrador. Murphy Oil Corporation, a US oil and gas company, is also active in Newfoundland offshore drilling. The investors allege that Canadian guidelines stipulating that energy companies active in the offshore invest in research and development within Newfoundland and Labrador are NAFTA-inconsistent performance requirements. The claimants previously challenged these guidelines in the Canadian courts and lost. The investors contend that the 2004 requirements that companies spend a fixed minimum amount on local research and development are more onerous than pre-existing agreements, which were expressly reserved from NAFTA by Canada. The investors also allege that the provincial R&amp;D guidelines represented a ‘fundamental shift’ in regulation that undermined the project.</td>
<td>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. The tribunal rejected, with a dissenting opinion, Canada’s arguments that the guidelines fell within the scope of the Canadian reservation with respect to Article 1106 for benefits plans under the authority of the Canada – Newfoundland Atlantic Accord Implementation Act. The tribunal also dismissed the investors’ claim that the R&amp;D guidelines breached Article 1105. The tribunal majority found Canada was in continuous violation of NAFTA Article 1106 since 2004, meaning that as long as the R&amp;D guidelines remain in effect, damages will accrue. The Damage Award was issued in February 2013. Damages were set at $132 million. A set-aside application by Canada in the Federal Court was dismissed.</td>
</tr>
<tr>
<td>Date complaint filed</td>
<td>Investor</td>
<td>Issue</td>
<td>Amount claimed</td>
<td>Status</td>
</tr>
<tr>
<td>---------------------</td>
<td>----------</td>
<td>-------</td>
<td>----------------</td>
<td>--------</td>
</tr>
<tr>
<td>8 February 2008</td>
<td>Bilcon Inc</td>
<td>Bilcon Inc proposed to construct and operate a massive quarry and marine terminal in southwestern Nova Scotia. In 2007, a joint federal–provincial environmental assessment panel recommended that the proposed project be rejected because of its potentially significant environmental impacts. Following the panel report, the NS and Canadian governments notified Bilcon that they would not approve the controversial project. The investor alleges that the administration of the environmental assessment review, along with various provincial and federal government measures, were discriminatory and/or violated minimum standards of treatment.</td>
<td>US$101 million</td>
<td>The tribunal in a dissenting opinion 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 16 June 2015. The application was denied. The tribunal has yet to hear submissions from the parties with respect to damages. Bilcon is claiming $300 million.</td>
</tr>
<tr>
<td>25 August 2008</td>
<td>Dow Agro Sciences LLC</td>
<td>Dow Agro Sciences LLC is a wholly owned subsidiary of the US-based multinational corporation, Dow Chemical Company. 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 alleges 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 alleges that the ban is 'tantamount to expropriation'.</td>
<td>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>
</tr>
<tr>
<td>25 April 2009</td>
<td>AbitibiBowater Inc</td>
<td>In November 2008, AbitibiBowater announced it would close its last pulp and paper mill in Newfoundland and Labrador. In December 2008, the provincial government enacted legislation to return the company’s water use and timber rights to the Crown and to expropriate certain AbitibiBowater lands and assets associated with the water and hydroelectricity rights.</td>
<td>US$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>
</tr>
<tr>
<td>Date complaint filed</td>
<td>Investor</td>
<td>Issue</td>
<td>Amount claimed</td>
<td>Status</td>
</tr>
<tr>
<td>---------------------</td>
<td>----------</td>
<td>-------</td>
<td>----------------</td>
<td>--------</td>
</tr>
<tr>
<td>15 January 2010</td>
<td>Detroit International Bridge Company</td>
<td>Detroit International Bridge Company is the owner and operator of the Ambassador Bridge between Detroit and Windsor. The investor objects to Canadian government plans to build a second bridge across the Detroit River. The dispute concerns Canadian federal legislation, the International Bridges and Tunnels Act of 2007, which gives the government of Canada authority over the construction, operation and ownership of international bridges. The investor asserts that the Act violates the Boundary Waters Treaty of 1909 and Canadian commitments to the investor made under the authority of that treaty. Canada contends that the arbitration should be 'time-barred' because the investor filed the claim more than three years after learning about the alleged breaches.</td>
<td>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 United States 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 $2 million in costs.</td>
</tr>
<tr>
<td>13 May 2011</td>
<td>St Mary’s VCNA LLC</td>
<td>St Mary’s VCNA is a US-based cement corporation alleges that its Canadian subsidiary, St Mary’s Cement Inc, was the victim of political interference in its attempt to open a quarry at a site near Hamilton, Ontario. Due to concerns related to groundwater, and in response to public pressure, 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 claims the 2010 zoning order was unfair, arbitrary, discriminatory and expropriatory.</td>
<td>US$275 million</td>
<td>Canada attempted to have the claim dismissed pursuant to NAFTA Article 1113 (denial of benefits) 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 $15 million in compensation from the Ontario government.</td>
</tr>
<tr>
<td>6 July 2011</td>
<td>Mesa Power Group LLC</td>
<td>Mesa Power Group is a Texas-based energy company owned by billionaire T Boone Pickens. Mesa controls four wind farm projects in southwestern Ontario. The Ontario feed-in tariff (FIT) programme provides incentives for renewable energy producers. Under the FIT programme, projects are ranked to determine priority for government Power Purchase Agreements and access to the transmission grid. The claimant alleges that 2011 changes to the FIT programme discriminated against Mesa by favouring other local and international investors.</td>
<td>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 $3 million. Mesa has appealed this decision to the District Court in Washington, DC.</td>
</tr>
<tr>
<td>Date complaint filed</td>
<td>Investor</td>
<td>Issue</td>
<td>Amount claimed</td>
<td>Status</td>
</tr>
<tr>
<td>---------------------</td>
<td>----------</td>
<td>-------</td>
<td>----------------</td>
<td>--------</td>
</tr>
<tr>
<td>7 October 2012</td>
<td>Windstream Energy LLC⁷</td>
<td>Windstream Energy is a US-based wind power company that proposed an offshore wind farm in Lake Ontario. In 2009, Windstream signed a 20-year feed-in tariff (FIT) contract with the Ontario Power Authority for the purchase of renewable energy. In February 2011, the government of Ontario announced a moratorium on freshwater offshore wind development on the grounds that further scientific research was needed into the impacts. Windstream claimed that the moratorium is discriminatory and tantamount to expropriation.</td>
<td>C$475 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 $25 million and $3 million in legal costs.</td>
</tr>
<tr>
<td>7 November 2012</td>
<td>Eli Lilly and Company⁸</td>
<td>Eli Lilly, a US-based multinational pharmaceutical company, produces and markets drugs. Zyprexa was first patented in Canada in 1980. Eli Lilly received a patent extension in 1991 on the grounds that it had found new uses for the drug. In 2009, the Canadian Federal Court invalidated the patent extension because the drug had not delivered the promised utility. Eli Lilly contested the invalidation of its patents in the Canadian courts. When it lost, Eli Lilly filed under NAFTA claiming the new test was discriminatory.</td>
<td>C$500 million</td>
<td>On 17 March 2017, the tribunal unanimously dismissed Eli Lilly’s claims and confirmed 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 $5.2 million.</td>
</tr>
</tbody>
</table>

Notes
2. SD Myers v. Canada, Award (UNCITRAL, 21 October 2002).
5. Chemtura Corporation v. Canada, Award (UNCITRAL, 2 August 2010).
8. Mobil Investments Canada Inc and Murphy’s Oil Corp v. Canada, ICSID Case No. ARB (AF) 107/4 Award (22 May 2012); Mobil Investments Canada Inc and Murphy’s Oil Corp v. Canada, ICSID Case No. ARB (AF) 107/4 Award, (20 February 2015).
12. Detroit International Bridge Company v. Canada, Award on Jurisdiction, 2 April 2013 (UNCITRAL).
## Claims against the United States

<table>
<thead>
<tr>
<th>Date Complaint Filed</th>
<th>Investor</th>
<th>Issue</th>
<th>Amount Claimed</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 October 1998</td>
<td>The Loewen Group Inc and Raymond Loewen¹</td>
<td>Loewen, a Canadian funeral home operator, challenges a civil case verdict by a jury in a Mississippi state court that awarded $500 million in compensation against it. Loewen also alleges that bond requirements for leave to appeal were excessive.</td>
<td>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>
</tr>
<tr>
<td>6 May 1999</td>
<td>Mondev International Ltd²</td>
<td>The investor is a Canadian real estate developer with a contract dispute with the Boston Redevelopment Authority. The investor alleges that a Massachusetts law immunising local governments from tort liability violates minimum standards of treatment under NAFTA.</td>
<td>US$50 million</td>
<td>In October 2002, the tribunal dismissed the investor’s claims. The tribunal ruled that Mondev’s claims were time-barred because the underlying dispute pre-dated NAFTA.</td>
</tr>
<tr>
<td>15 June 1999</td>
<td>Methanex Corp³</td>
<td>Canadian chemical company challenges California’s phase-out of MTBE, a gasoline additive which has contaminated ground and surface water throughout California.</td>
<td>US$970 million</td>
<td>On 9 August 2005, the tribunal dismissed the investor’s claims. The tribunal ordered Methanex to pay the US government legal costs of $3 million and the full cost of the arbitration.</td>
</tr>
<tr>
<td>19 February 2000</td>
<td>ADF Group Inc⁴</td>
<td>Canadian steel contractor challenges US ‘Buy-America’ preferences requiring that US steel be used in federally funded state highway projects.</td>
<td>US$90 million</td>
<td>In January 2003, the tribunal dismissed the investor’s claim. The tribunal concluded that the measures in question were procurement measures exempted under Article 1108.</td>
</tr>
<tr>
<td>23 July 2003</td>
<td>Glamis Gold Ltd⁵</td>
<td>Canadian mining company alleges that regulations intended to limit the environmental impacts of open-pit mining and to protect indigenous peoples’ religious sites made its proposed gold mine in California unprofitable, thereby expropriating its investment and denying it ‘fair and equitable’ treatment as required under NAFTA Article 1105.</td>
<td>US$50 million+</td>
<td>On 8 June 2009 the tribunal issued its award, dismissing Glamis’s claims. The tribunal found that the economic impact of the environmental regulations on the company’s investment was not substantial enough to be deemed an expropriation. It also rejected the investor’s claim that a range of state and federal government measures related to the mining project violated minimum standards of treatment. The tribunal ordered the company to pay two-thirds of the costs of the proceeding.</td>
</tr>
<tr>
<td>15 September 2003</td>
<td>Grand River Enterprises Six Nations Ltd et al⁶</td>
<td>Canadian indigenous-owned manufacturer of tobacco products based in Ontario and a Canadian indigenous-owned tobacco wholesaler operating in the United States allege that their 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.</td>
<td>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. The tribunal ruled that the costs of arbitration be split equally between the parties.</td>
</tr>
<tr>
<td>Date</td>
<td>Investor</td>
<td>Issue</td>
<td>Amount Claimed</td>
<td>Status</td>
</tr>
<tr>
<td>------------</td>
<td>----------</td>
<td>----------------------------------------------------------------------</td>
<td>----------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>12 August 2004</td>
<td>Canadian Cattlemen for Fair Trade</td>
<td>Canadian cattle producers challenge the US ban on imports of Canadian live cattle following the discovery in 2003 of a cow infected with bovine spongiform encephalopathy (or BSE) from an Alberta herd.</td>
<td>US$235 million</td>
<td>In January 2008, the tribunal dismissed the claims on jurisdictional grounds. It ruled that the Canadian cattle producers did not have standing to bring the claim because they are not making and have not made any investments in the territory of the US.</td>
</tr>
<tr>
<td>21 September 2003</td>
<td>Apotex Inc</td>
<td>Apotex Inc is a Canadian pharmaceutical company that develops and manufactures generic drugs. In 2003, Apotex sought US Food and Drug approval to develop a generic version of Pfizer's anti-depressant medication once Pfizer's patent expired in 2006. Apotex later went to court to dispel uncertainty regarding the status of the Pfizer patents, thereby avoiding the possibility of a patent infringement lawsuit by Pfizer. The US courts dismissed Apotex's suit for a declaratory judgment clarifying the patent situation. Apotex alleges that the US court judgments discriminated against it, denied it minimum standard of treatment, and expropriated its investment in sertraline.</td>
<td>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>
</tr>
<tr>
<td>4 June 2009</td>
<td>Apotex Inc</td>
<td>Apotex sought US Food and Drug Administration (FDA) approval to develop a generic version of a heart medication marketed by Bristol Myers Squibb (BSM) once BSM's patent expired in 2006. Apotex alleges that certain US court judgments and FDA decisions discriminated against it, denied it minimum standard of treatment, and expropriated its investment in pravastatin.</td>
<td>US$8 million</td>
<td>On 14 June 2013, the tribunal dismissed the claims 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>
</tr>
<tr>
<td>23 November 2011</td>
<td>Apotex Holdings Inc and Apotex Inc</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. The alert, which was in place from August 2009 to July 2011, prevented Apotex's US distributor from importing the majority of its products from Canada. Apotex claims that the import alert resulted in substantial lost sales. Apotex claims that similar measures were not taken by the FDA against Apotex's competitors and therefore the measures were discriminatory and violated minimum standards of treatment.</td>
<td>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>
</tr>
</tbody>
</table>

Notes
1. Loewen Grp Inc v. United States of America, ICSID Case No. ARB (AF)98/3 Award (6 June 2003).
2. Mondev International Ltd v. United States of America, ICSID Case No. ARB (AF) /99/2.
5. Glamis Gold Ltd v. United States, UNCITRAL Award (8 June 2009).
10. Apotex Holdings Inc v. United States, ICSID Case No. ARB (AF) /12/1 (25 August 2014).
### iii Claims against Mexico

<table>
<thead>
<tr>
<th>Date Complaint Filed</th>
<th>Investor</th>
<th>Issue</th>
<th>Amount Claimed (US)</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 October 1996¹</td>
<td>Metalclad Corp¹</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.</td>
<td>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 were 'tantamount to expropriation' without compensation and breached the 'minimum standard of standard of treatment' in NAFTA 1105. Mexico was ordered to pay $16.7 million in compensation. Mexico applied for statutory review of the tribunal award before the BC Supreme Court on the grounds that the tribunal had exceeded its jurisdiction. The court set aside part of the award dealing minimum standards of treatment, but allowed $15.6 million of the tribunal's original award to stand.</td>
</tr>
<tr>
<td>16 February 1998</td>
<td>Marvin Roy Feldman Karpa³</td>
<td>US cigarette exporter challenges Mexican government decision not to rebate taxes on its cigarette exports.</td>
<td>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 $0.9 million plus $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>
</tr>
<tr>
<td>30 June 1998</td>
<td>USA Waste Management Inc³</td>
<td>US waste management company challenges state and local government actions in contract dispute with a Mexican subsidiary over waste disposal services in Acapulco.</td>
<td>US$60 million</td>
<td>In June 2000, the tribunal ruled that it lacked jurisdiction because Waste Management Inc had not properly waived domestic legal claims as required by NAFTA. The investor resubmitted its notice of intent. The tribunal subsequently confirmed its jurisdiction. In April 2004 the tribunal dismissed the investor's claims.</td>
</tr>
<tr>
<td>15 November 1999</td>
<td>Fireman's Fund Insurance Co³</td>
<td>US insurance company alleges that the Mexican government discriminates against it by facilitating the sale by Mexican financial institutions of peso-dominated debentures, but not the sale of US dollar-denominated debentures by Fireman's Fund.</td>
<td>US$50 million</td>
<td>On 17 July 2006 tribunal dismissed the investor's claim. The tribunal 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. The tribunal ruled that Mexico's treatment of the investor did not rise to the level of expropriation.</td>
</tr>
<tr>
<td>Date Complaint Filed</td>
<td>Investor</td>
<td>Issue</td>
<td>Amount Claimed (US)</td>
<td>Status</td>
</tr>
<tr>
<td>----------------------</td>
<td>---------</td>
<td>----------------------------------------------------------------------</td>
<td>---------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>1 October 2001</td>
<td>Gami Investments Inc³</td>
<td>US shareholders in a Mexican sugar company claim 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 failing sugar refineries.</td>
<td>US$55 million</td>
<td>On 15 November 2004, the tribunal ruled that it had no jurisdiction and dismissed the investor's claim.</td>
</tr>
<tr>
<td>21 March 2002</td>
<td>International Thunderbird Gaming Corp⁷</td>
<td>Canadian gambling company challenges the regulation and closure of its gambling facilities by the Mexican government.</td>
<td>US$100 million</td>
<td>On 26 January 2005 the tribunal dismissed the investor's claim. Thunderbird Gaming was ordered to pay Mexico's legal costs of approximately $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.</td>
</tr>
<tr>
<td>28 January 2003</td>
<td>Corn Products International⁴</td>
<td>US company challenges 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 high-fructose corn syrup. Mexico argues 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.</td>
<td>US$325 million</td>
<td>In January 2008, the tribunal ruled that Mexico had violated NAFTA's national treatment obligation. The tribunal dismissed the investor's claims that the tax was a prohibited performance requirement and tantamount to expropriation. Mexico was ordered to pay the investor $58.4 million.</td>
</tr>
<tr>
<td>14 October 2003</td>
<td>Archer Daniels Midland⁸</td>
<td>A US subsidiary of a British multinational company challenge a range of Mexican government measures that allegedly discouraged the import, production and sale of high-fructose corn syrup, including a tax on soft drinks sweetened with high-fructose corn syrup.</td>
<td>US$100 million</td>
<td>In November 2007 the tribunal ruled that Mexico had violated NAFTA's national treatment obligation. The tribunal ruled that the tax on HFCS constituted a prohibited performance requirement. Mexico was ordered to pay the investors $33.5 million.</td>
</tr>
<tr>
<td>27 August 2004</td>
<td>Bayview Irrigation District et al¹⁰</td>
<td>Seventeen Texas irrigation districts claim 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.</td>
<td>US$554 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 United States, did not qualify as foreign investors entitled to protection under NAFTA.</td>
</tr>
<tr>
<td>30 September 2004</td>
<td>Cargill Inc¹¹</td>
<td>A large US agri-business challenges a range of Mexican government measures that allegedly discouraged the import, production and sale of high-fructose corn syrup, including a tax on soft drinks sweetened with high-fructose corn syrup.</td>
<td>US$100 million+</td>
<td>The tribunal found against Mexico in an award rendered on 18 September 2009. The award has not yet been publicly released. Mexico was ordered to pay the investor $77.3 million plus $13.4 million in interest for a total award of $90.7 million. The decision was upheld by the Supreme Court of Canada.</td>
</tr>
<tr>
<td>Date Complaint Filed</td>
<td>Investor</td>
<td>Issue</td>
<td>Amount Claimed (US)</td>
<td>Status</td>
</tr>
<tr>
<td>----------------------</td>
<td>----------</td>
<td>-------</td>
<td>---------------------</td>
<td>--------</td>
</tr>
<tr>
<td>19 February 2013</td>
<td>Kellogg, Brown and Root (KBR)(^1)(^2)</td>
<td>A US energy services company is seeking damages against the government of Mexico related to a 2011 decision by the Mexican courts to annul a $320 million arbitration award issued by the International Chamber of Commerce in December of 2009. The original arbitration related to a contract dispute between Pemex, the Mexican state energy company, and COMMISSA, a KBR subsidiary.</td>
<td>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 United States and Luxembourg. The dispute between Pemex and COMMISSA was settled.</td>
</tr>
</tbody>
</table>

Notes

1. *Metalclad Corp v. United Mexican States*, ICSID Case No. ARB (AF) 97/1 Award (30 August 2000).
5. *Fireman’s Fund Insurance v. United Mexican States*, ICSID Case No. ARB (AF) /02/1.
8. *Corn Products International v. United Mexican States*, ICSID Case No. ARB (AF) /04/1.
9. *Archer Daniels Midland v. United Mexican States*, ICSID Case No. ARB (AF) /04/1 (NAFTA).
10. *Bayview Irrigation District v. United Mexican States*, ICSID Case No. ARB (AF) /05/1.
11. *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF) 05/2, Award, 18 September 2009.
12. *KBR Inc v. United Mexican States*, ICSID Case No. UNCT /14/1.
Chapter 21

EUROPEAN LAW AND INVESTMENT TREATIES

Virginia Allan and David Ingle

There are currently over 1,000 bilateral investment treaties (BITs) in force where at least one of the signatories is a Member State of the European Union. There are 181 BITs in force where both state parties are Member States of the EU. In addition to this, every EU Member State and the EU itself is a contracting party to the Energy Charter Treaty (ECT) – a sector-specific Multilateral Investment Treaty. As a result, intra-EU cases (i.e., proceedings initiated by an investor from one EU Member State against another EU Member State) account for approximately 19 per cent of all known cases globally.

Against this backdrop, it is inevitable that EU law has a bearing on a number of disputes brought under investment treaties. This chapter seeks to address three areas in which issues relating to EU law may arise. First, EU law may be cited when challenging the jurisdiction of the arbitral tribunal. Second, European law may be part of the factual matrix relevant to the dispute. Third, EU law may come into play during the enforcement process of an award. Each of these potential intersections between investment treaty arbitration and EU law is considered in the sections below.

When considering these matters it must be borne in mind that, even if the parties to the arbitration do not consider EU law to be relevant to a particular matter in dispute, the European Commission may seek to intervene as a non-disputing party to make submissions concerning EU law. In the experience of the authors, tribunals have tended to limit such interventions to the filing of a short written submission given that at least one of the parties, most typically the claimant, objects to the attendance of the Commission at the hearing.

1 Virginia Allan is counsel in the Madrid litigation and arbitration department, and David Ingle is a senior associate in the International Arbitration Group, of Allen & Overy.
2 According to data compiled by UNCTAD. See http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBIT.
4 While this chapter refers to arbitral tribunals, it should be noted that the EU has proposed the creation of a single permanent investment court with tenured judges to hear disputes arising under investment treaties (see 5 May 2016 EU concept paper: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF). This proposal is reflected in the EU–Canada Comprehensive Economic and Trade Agreement and the EU–Vietnam Free Trade Agreement.
5 Rule 32(2) of the ICSID Arbitration Rules provides that: ‘[u]nless either party objects, the Tribunal . . . may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings’, thus enabling a party to object to the EC’s attendance at hearings. Neither the 1976 nor the 2010 UNCITRAL Rules envisage the intervention of non-disputing parties (see Caron, D and Caplan, L, The UNCITRAL Arbitration Rules, Oxford University Press, 2013, page 40). Article 28(3) of the Rules states that ‘[h]earings
We have also seen a growing tendency for tribunals to allow this limited intervention on the condition that the Commission provides an undertaking to bear the costs arising from its intervention. Given the superior financial resources of the Commission and the notorious cost of investor–state arbitration, it is submitted that this is the correct approach.6

I JURISDICTION – THE ‘INTRA-EU’ OBJECTION

The primary jurisdictional issue that has arisen from the interplay between EU law and investment treaties is whether arbitral tribunals are competent to hear so-called ‘intra-EU’ disputes brought by an investor who is a national of an EU Member State against an EU Member State.7 This is a significant issue given that the total number of known intra-EU investment cases came to 130 by the end of 2015.8 In the words of the RREEF tribunal ‘in all published or known investment treaty cases in which the intra-EU objection has been invoked by the Respondent, it has been rejected’.9 In addition to the various decisions directly addressing (and rejecting) the intra-EU objection, there have been numerous other
investor–state arbitrations involving disputes between EU Member States and EU investors where no intra-EU objection was raised by the respondent state. For example, the respondent state did not raise an intra-EU objection in *AES Summit Generation Limited v. Hungary*,\(^\text{10}\) *Electrabel v. Hungary*\(^\text{11}\) or *Micula v. Romania*.\(^\text{12}\)

The conduct of EU Member States has also suggested that they consider BITs to be valid as between EU Member States. As noted by the tribunal in *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, citing a 2007 Report by the EU Economic and Financial Committee, ‘most Member States have not shared the Commission’s concern in respect of arbitration risks and discriminatory treatment of investors and have preferred maintaining the existing agreements without either terminating or re-negotiating them.’\(^\text{13}\) The view that intra-EU BITS remain valid and in force was expressly stated by the Netherlands in *Eureko BV v. The Slovak Republic*.\(^\text{14}\)

In line with the interpretive requirements of the Vienna Convention, arbitral tribunals have generally been able to dismiss the intra-EU objection based on a plain reading of the treaty pursuant to which they have been constituted. For example, the ordinary meaning of Article 26 of the ECT is clear: it applies to disputes between any contracting party to the ECT and an investor of any other contracting party. There is no indication in the text of the ECT that the contracting parties have limited their consent to arbitration on the basis that some of the contracting parties belong to the same regional economic integration organisation (REIO), such as the EU. On the contrary, Article 26(3) of the ECT specifically provides that the contracting parties’ ‘unconditional consent’ to arbitration is ‘subject only to subparagraphs (b) and (c)’. Those subparagraphs in turn refer to Annexes ID and IA of the ECT, pursuant to which certain contracting parties have specifically narrowed their consent in respect of disputes previously submitted to another forum and to the umbrella clause contained in Article 10(1) of the ECT. The ECT provides no further exception to the contracting parties’ ‘unconditional’ consent. In the absence of any provision to the contrary...

\(^{10}\) *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, section 6.


\(^{12}\) Ioan Micula, Viorel Micula and others v. The Republic Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013.

\(^{13}\) *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, paragraph 108.

\(^{14}\) See *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paragraph 161, quoting the Written Observations of the Netherlands Government in response to the invitation by the Arbitral Tribunal: ‘The Netherlands affirms again that the BIT in question in this dispute continues to be fully in force. Consequently, there is also no reason to doubt the jurisdiction of the Arbitral Tribunal in this dispute. Accordingly, Article 8 of the BIT, which prescribes international arbitration as a dispute settlement tool for disputes between an investor and a Contracting Party, is fully applicable. In the view of The Netherlands, European Union law aspects cannot and do not affect in a way the existing jurisdiction of this Arbitral Tribunal. Thus, this Arbitral Tribunal should fully exercise its jurisdiction and adjudicate this dispute.’
in the ECT, the dispute-settlement mechanism under Article 26 applies to ‘disputes between a Contracting Party and an Investor of another Contracting Party’, irrespective of whether the investor is an EU national and the ECT contracting party is also an EU Member State.

Respondent states raising the intra-EU objection have argued that investors’ rights under intra-EU BITs are superseded by the investment protection provisions of the EU legal framework, which address the same subject matter. On this reading, the intra-EU BIT is rendered invalid by EU law. This argument is unconvincing given that investment treaties grant investors rights that are additional to any other rights provided by the EU internal market. Investment protection under EU law is primarily focused on ensuring access to the market of another Member State.15 Once an investment is made, EU law provides only limited protection, compared with the broad protection afforded by an investment treaty. For example, there is no obligation on the EU Member States to ensure that foreign investors or their investments receive fair and equitable treatment.

EU law also does not enable an investor to bring claims in international arbitration proceedings for illegal governmental actions taken against foreign investment. While it is possible for a private investor to claim damages from a Member State concerning a breach of the rights afforded to it under the rules of the internal market, for example, on free movement of capital or freedom of establishment, such claims need to be brought before the domestic courts of the state where the investment is located. Investment treaties, however, are different in that they allow investors direct recourse against the contracting states through international arbitration.16

---

15 See, for example, C Barnard, The Substantive Law of the EU: The Four Freedoms (2nd ed, Oxford University Press, 2007), page 19.

16 See Eureko BV v. The Slovak Republic, PCA Case No. 2008-13, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paragraph 245. In that case, the tribunal stated that ‘the BIT establishes extensive legal rights and duties that are neither duplicated in EU law nor incompatible with EU law. The protections afforded to investors by the BIT are, at least potentially, broader than those available under EU law (or, indeed, under the laws of any EU Member State). Those rights and duties are central to the purpose of the BIT’. The tribunal then went on to analyse whether EU law provides the same protections and guarantees as the BIT and concluded that this is not the case regarding, for example, fair and equitable treatment (paragraph 250), full protection and security (paragraph 260), protection from unlawful expropriation (paragraph 261), and the right to bring a claim before an UNCITRAL tribunal (paragraph 264). In the latter context, the tribunal noted that ‘[a]n essential characteristic of an investor’s rights under the BIT is the right to initiate UNCITRAL arbitration proceedings against a State party (as the host State) under Article 8 of the BIT. Such a consensual arbitration under well-established arbitration rules adopted by the United Nations, in a neutral place and with a neutral appointing authority, cannot be equated simply with the legal right to bring legal proceedings before the national courts of the host state’. See also Eastern Sugar BV v. The Czech Republic, SCC Case No. 088/2004, Partial Award, 27 March 2007, paragraphs 159 et seq; Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL, Decision on Jurisdiction, 30 April 2010, paragraphs 75 et seq; and A Reinisch, ‘Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations’ (2012) 39 Legal Issues of Economic Integration 159, pages 167–170, specifically page 167: ‘[a] BIT contains very specific protection standards for admitted investments, which may ultimately be enforced through direct investor-state arbitration. EU law, however, aims at liberalizing trade and investment between Member States in order to create a comprehensive economic union. The liberalization guarantees of EU law comprised in the so-called four freedoms (of goods, persons, services and capital) primarily aim at access to other Member State markets, which is, in investment law, called the
It has also been posited that intra-EU disputes contravene Article 344 of the Treaty on the Functioning of the European Union (TFEU). However, Article 344 of the TFEU applies only to disputes involving two or more EU Member States ‘regarding the interpretation of EU law’, and does not prohibit Member States from submitting disputes that are not related to EU law to other ‘fora’, nor does it prohibit the submission of disputes between other actors to a different method of settlement not contemplated in the EU treaties.

Given that there is no provision in the EU treaties dealing with investor–state arbitration, the principle set out in Article 344 of the TFEU cannot be applicable to such a mechanism. Thus, Article 344 cannot affect intra-EU disputes. This was confirmed by the tribunal in *Electrabel*, which held that Article 344 of the TFEU was not applicable in the context of investor–state arbitration.

A further argument raised with respect to the ECT is that it contains an implicit disconnection clause providing that it does not apply to intra-EU disputes. Disconnection clauses are a well-known mechanism of public international law. Their purpose is to ensure that, as between those parties to a multilateral treaty that are also parties to a regional organisation, the rules of the regional organisation instead of the treaty apply. The ECT contains no express disconnection clause or declaration of competencies that would allow a tribunal to disregard its provisions in an intra-EU dispute.

17 See, e.g., *RREEF Infrastructure (GP) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v. The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paragraphs 46 et seq.

18 See Treaty on the Functioning of the European Union, Articles 343–347. Article 344 states the following: ‘Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein’.

19 *Electrabel SA v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, 30 November 2012, paragraph 4.151. See also C Söderlund, ‘Intra-EU BIT Investment Protection and the EC Treaty’ (2007), 24 Journal of International Arbitration 455, page 458: ‘[t]he investor-state dispute resolution mechanism contained in a BIT does not call into question the competence of the ECJ. The EC Treaty only imposes obligations on Member States in their dealings with each other, *inter alia*, by instituting an obligation to refer disputes within the exclusive remit of the EC Treaty to the ECJ for adjudication to the exclusion of any other procedural remedy. It does not commit any non-signatory – such as a private investor – to submit to ECJ jurisdiction. Hence, provisions of the EC Treaty cannot intrude on the BIT-based investor-state dispute resolution facility’.

20 See, e.g., *RREEF Infrastructure (GP) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v. The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paragraph 81.

21 This is also the purpose the European Commission ascribes to these clauses; namely, to: ‘... clarify relations between Community or EU rules, on the one hand, and the provisions of each of the conventions on the other hand’ and ‘to ensure the coexistence of this Convention with other (including existing) international legal instruments dealing with matters which are also dealt with in this Convention. If Member States would be obliged to among themselves apply the law of a convention or a treaty instead of Community law these would, “jeopardise the integrity and development of Community law in the area covered by the Convention, unless they are countered by a disconnection clause in the Convention itself.”’ See M Smrkolj, ‘The Use of the “Disconnection Clause” in International Treaties: what does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?’ (2008), presented at the GARNET Conference, ‘The EU in International Affairs’, Brussels, 24–26 April 2008, pages 5–6. See also 1988 Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, Article 27, quoted in
In the absence of such a disconnection clause, a multilateral treaty applies between all of its contracting parties. The submission that the ECT has an implicit disconnection clause is flawed given that: (1) prior to the conclusion of the ECT, the EU had used disconnection clauses where they were intended to apply, and (2) the ECT contains disconnection clauses where they are intended to apply. Reading an implicit intra-EU disconnection clause into the ECT is, therefore, irreconcilable with the ordinary meaning of the ECT.

II MERITS

Arbitral tribunals constituted pursuant to investment treaties have been required to consider a variety of issues relating to EU law when determining the substantive dispute before them. For example, the *Maffezini v. Spain* tribunal had to consider the provisions of the EEC Council Directive on the assessment of the effects of certain public and private projects on the environment and the *Servier v. Poland* tribunal had to consider, *inter alia*, the EC pharmaceutical Directive 2001/83/EC. It is the issue of state aid where EU law has been most prominent of late. EU law arose in this context in *Micula v. Romania* and in various claims brought by investors against Hungary.

In determining the merits of the dispute before them, tribunals have had to consider the status of EU law. The *Electrabel* tribunal considered EU law to have a ‘multiple nature’. In its view, EU law was ‘a *sui generis* legal order, presenting different facets depending on the perspective from where it is analysed’. The tribunal found that ‘on the one hand, it is an international legal regime; but on the other hand, once introduced in the national legal orders of EU Member States, it becomes also part of these national legal orders.’ It therefore found that EU law was both international and national law.

The *AES v. Hungary* tribunal also found that EU law was international and national in nature. It nevertheless held that EU law should be considered domestic law and thus as a fact in the dispute:

---

22 See, e.g., *RREEF Infrastructure (GP) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v. The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paragraphs 78–87.
23 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000), paragraph 67.
27 Ibid., paragraph 4.118.
Regarding the Community competition law regime, it has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders. It is common ground that in an international arbitration, national laws are to be considered as facts. Both parties having pleading that the Community competition law regime should be considered as a fact, it will be considered by this Tribunal as a fact, always taking into account that a state may not invoke its domestic law as an excuse for alleged breaches of its international obligations.\(^{28}\)

The RREEF tribunal also considered EU law to be a part of international law, albeit as part of its ruling on jurisdiction.\(^{29}\) The RREEF tribunal found that there was no inconsistency between the ECT and EU law in the case before it.\(^{30}\) The Electrabel tribunal reached the same conclusion.\(^{31}\) Unlike Electrabel, however, the RREEF tribunal found that, in the event of an inconsistency with EU law and the ECT, it would have to apply the ECT:

> should it ever be determined that there existed an inconsistency between the ECT and EU law – quod non in the present case – and absent any possibility to reconcile both rules through interpretation, the unqualified obligation in public international law of any arbitration tribunal constituted under the ECT would be to apply the former. This would be the case even were this to be the source of possible detriment to EU law. EU law does not and cannot ‘trump’ public international law.\(^{32}\)

It is the case of Micula v. Romania where EU law has been most relevant to the substantive dispute between the parties. Micula was an ICSID case brought by two Micula brothers, Ioan and Viorel Micula, and affiliated companies against Romania under the Sweden–Romania BIT. The claim by the Micula investors concerned certain investment incentives (known as the EGO 24 incentives) established by Romania to attract investment to some of its disadvantaged regions. The EGO 24 incentives were to be available for 10 years.\(^{33}\) In order to benefit from the EGO 24 incentives, the investors had to obtain permanent investor certificates (referred to as PICs). As part of Romania’s EU accession process, Romania abolished the scheme in 2005, four years prior to its scheduled expiry, in order to align its domestic law with EU state aid rules as required by the EU. The Micula investors argued that this was in breach of Romania’s obligations under the Sweden–Romania BIT since they had made their investments and duly obtained the required PICs on the basis that these incentives would be maintained for a 10-year period.

\(^{28}\) AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22, Award (23 September 2010), paragraph 7.6.6.

\(^{29}\) RREEF Infrastructure (GP) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v. The Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paragraph 73.

\(^{30}\) RREEF Infrastructure (GP) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v. The Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paragraphs 76 and 87.

\(^{31}\) Electrabel SA v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), paragraph 4.133.

\(^{32}\) RREEF Infrastructure (GP) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v. The Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paragraph 87. See also Electrabel SA v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), paragraph 4.191.

\(^{33}\) Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v. Romania, ICSID Case No. ARB/05/20, Final Award (11 December 2013), paragraph 152.
The tribunal found that Romania had breached the BIT and ordered damages of approximately €184 million. It found that:

through an interplay of the purpose behind the EGO 24 regime, the legal norms, the PICs, and Romania’s conduct, Romania made a representation that created a legitimate expectation that the EGO 24 incentives would be available substantially in the same form as they were initially offered.34

In reaching this decision the tribunal had to determine the significance of EU law, which, as noted above, had required the abolition of the incentive scheme upon which the investors had relied. The tribunal assessed ‘whether EU law plays a role in the interpretation of the BIT’.35 It first recalled that (1) the Sweden–Romania BIT did not contain any reference to EU accession or to the EU; and (2) the Treaty providing for Romania’s accession to the EU did not contain any references to the BIT or seek to modify any of the BIT’s provisions. The tribunal found that it:

could not therefore assume that by virtue of entering into the Accession Treaty or by virtue of Romania’s accession to the EU, either Romania, or Sweden, or the EU sought to amend, modify or otherwise detract from the application of the BIT.36

The tribunal further found that the ‘BIT was part of Romania’s strategy to develop economically in order to obtain accession’ and it ‘assum[ed] that the parties entered into each of those treaties in full awareness of their legal obligations under all of them’.37

Having made these findings, the Micula tribunal held that:

factual, the general context of EU accession must be taken into account when interpreting the BIT.
In particular, the overall circumstances of EU accession may play a role in determining whether the Respondent has breached some of its obligations under the BIT.38

Having thus established the relevance of EU law to the determination of the dispute, the tribunal set out the requirements for establishing a breach of the legitimate expectations element of the fair and equitable treatment obligation contained in the Sweden–Romania BIT. The tribunal found that the claimants had to ‘establish that (a) Romania made a promise or assurance, (b) the Claimants relied on that promise or assurance as a matter of fact, and (c) such reliance (and expectation) was reasonable’.39

The tribunal assessed EU law in the context of the third limb: whether the claimants’ expectation to receive the incentives was reasonable in the context of Romania’s accession to the EU.40 It found that the expectations were legitimate, since it was reasonable to consider that the incentives were compatible with EU state aid law:

34 Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v. Romania, ICSID Case No. ARB/05/20, Final Award (11 December 2013), paragraph 677.
35 Ibid., paragraph 320.
36 Ibid., paragraph 321.
37 Ibid., paragraph 325–326.
38 Ibid., paragraphs 327–328.
39 Ibid., paragraph 668. See also paragraphs 327–328.
40 Ibid., paragraph 690 et seq.
The Tribunal concludes that the EGO 24 incentives could have reasonably been thought (both by the Romanian government and the Claimants) to be valid regional operating aid under EU law. Indeed, Romania itself appears to have believed that, at the time EGO 24 was enacted, the incentives were compatible with EU state aid requirements.\(^{41}\)

Thus, the test was not whether the incentives were compatible with EU law but whether it was reasonable for the investors to have considered them to be valid. It was reasonable to consider the incentives valid since this had also been Romania's view. The tribunal held that it 'did not believe that investors should be held to a higher standard than the government. Investors are entitled to believe that the government is acting legally'.\(^{42}\)

Consequently, the conclusion was that where an investor has relied on an assurance of the host state, EU law cannot render the investor's expectation illegitimate. The investor is entitled to believe that the government is acting legally, and the foreign investor cannot be held to a higher standard than the government of the host state in this regard.\(^{43}\)

### III RECOGNITION AND ENFORCEMENT OF AWARDS

The interaction between European law and investment treaties is potentially significant when a successful claimant seeks to enforce an award. In particular, the respondent host state may seek to avoid payment of the award by relying on the intra-EU or state aid matters that have been addressed above, and the Commission may also seek to make submissions in enforcement proceedings. The \textit{Micula} case once again demonstrates how this might occur.

In its intervention in the \textit{Micula} arbitral proceedings, the Commission argued that 'an award that is contrary to obligations binding on Romania as an EU Member State . . . could not be implemented in Romania by virtue of the supremacy of EC law, and in particular State aid rules'.\(^{44}\) The tribunal dismissed this submission, considering it inappropriate to make its decision based on matters that might occur after it issued its award.\(^{45}\) As noted above, the tribunal determined that there had been a breach of the Romania–Sweden BIT and awarded damages to the \textit{Micula} investors in an award dated 11 December 2013.\(^{46}\) Romania partially sought to implement the award in January 2014 by offsetting a portion of the compensation awarded to the claimants against taxes owed by one of the claimants.\(^{47}\)

---

\(^{41}\) Ibid., paragraph 703.

\(^{42}\) \textit{Micula} award, paragraph 706.

\(^{43}\) It has similarly been held that it is reasonable to expect state organs and officials to be aware of and act in accordance with their national law, and that a state is estopped from claiming that its own actions were illegal under its own laws. See \textit{Ioannis Kardasopolous v. Georgia}, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007.

\(^{44}\) \textit{Micula} award, paragraph 334.

\(^{45}\) \textit{Micula} award, paragraph 340: 'The Tribunal finds that it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters. It is thus inappropriate for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered. It will thus not address the Parties' and the Commission's arguments on enforceability of the Award.'

\(^{46}\) Romania requested the annulment of the award on 9 April 2014. This request was rejected by an ICSID ad hoc committee on 26 February 2016.

\(^{47}\) \textit{Micula v. Romania} enforcement proceedings ([2017] EWHC 31 (Comm)), paragraph 176.
The Commission then became involved in the implementation of the *Micula* award. On 31 January 2014 the Commission informed the Romanian authorities that any implementation or execution of the *Micula* award would constitute new state aid and would have to be notified to the Commission. The Commission then issued a suspension injunction on 26 May 2014 to restrain Romania from taking any action to execute or implement the *Micula* award.

On 1 October 2014, the EC informed Romania that it had decided to open a state aid investigation in respect of both Romania’s partial implementation and any further implementation of the *Micula* award. On 30 March 2015, the EC held that ‘payment of the compensation awarded by the arbitral tribunal . . . constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market’. Romania was thus prohibited from paying the arbitral award and was required to recover any damages payments already made. The *Micula* investors have commenced proceedings before the General Court of the European Union to annul the decision. At the time of writing, that decision was still pending.

Against this backdrop, the *Micula* claimants have brought proceedings in various jurisdictions seeking the recognition and enforcement of the award. In the US, they brought recognition proceedings before the US District Court for the Southern District of New York and the US District Court for the District of Columbia. For procedural reasons, the *Micula* investors were unsuccessful before the DC District Court. They were, however, successful before the SDNY District Court.

The process in the SDNY District Court was the following. On 21 April 2014, the *Micula* investors filed an *ex parte* petition to recognise the ICSID award. On the same day, the District Court converted the ICSID award into a judgment. Subsequently, Romania filed a motion to vacate the judgment on the ground that the method of its entry violated the Foreign Sovereign Immunities Act of 1976. In support of Romania’s motion, the Commission filed an amicus brief. In its amicus brief, the Commission argued that, even if the judgment were not vacated for failure to comply with the Foreign Sovereign Immunities Act of 1976, the District Court should abstain from exercising jurisdiction. The Commission made three principal arguments: (1) because the underlying arbitration concerned issues of EU law, the District Court should defer to the judgment of a competent European forum, such as the Court of Justice of the European Union or national courts of EU Member States; (2) if the ICSID award were enforced, it would render ineffective the prohibition imposed by the Commission on payment of the award; and (3) if the ICSID award were enforced, Romania would be compelled to act in violation of EU law and face the risk of sanctions.

In an opinion issued on 5 August 2015, the District Court denied Romania’s motion and rejected the arguments advanced by the Commission. Specifically, the District Court

---

49 Ibid., Article 2.
51 In an *ex parte* proceeding, there is no need to serve process on the respondent.
52 This was pursuant to 22 USC Section 1650a, which is the US statute implementing the ICSID Convention.
54 Id. at 7.
found that it should defer to the judgment of a foreign court only where there is a ‘parallel proceeding’ pending before that court. For two matters to be considered parallel, they must involve substantially the same issues and litigating parties. The District Court found that these criteria were not met and thus the two proceedings could not be considered parallel. The Court also found that the enforcement of the ICSID award would not compel Romania to act in violation of EU law because: (1) Romania voluntarily submitted to the ICSID process; and (2) in any event, the prohibition only applied to payment of the award, which was ‘not at issue in this proceeding and should be raised during proceedings to enforce the Award’. Romania has subsequently filed an appeal against the District Court’s decision to the US Court of Appeals for the Second Circuit. At the time of writing, that appeal was still pending.

The Micula investors also brought proceedings in the UK. The ICSID Convention was implemented in the UK by the Arbitration (International Investment Disputes) Act 1966 (the 1966 Act). Section 1(2) of the 1966 Act provides that a person seeking recognition or enforcement of an ICSID award ‘shall be entitled to have the award registered in the High Court’. Section 2(1) of the 1966 Act provides that the effects of registration are that the award is of the ‘same force and effect for the purposes of execution as if it had been a judgment of the High Court’ as regards pecuniary obligations. The Micula award was registered by the English High Court on 17 October 2014.

In subsequent enforcement proceedings following the award’s registration, the Micula claimants argued that the award should be enforced notwithstanding the Commission’s March 2015 Decision prohibiting Romania from paying the award. This was on the basis that there is no right of derogation under the 1966 Act for public policy. The Micula investors argued that enforcement of the award would lead to no incompatibility with the UK’s obligations under the TFEU, inter alia, because Article 351 of the TFEU provided that obligations under pre-accession treaties (such as the ICSID Convention) take precedence over EU law obligations.

Romania and the Commission, on the other hand, argued that if the High Court were to enforce the Micula award, it would be acting in contradiction to the Commission’s March 2015 Decision, which would be contrary to the UK court’s duty of sincere cooperation under Article 4(3) of TFEU. Romania and the Commission further suggested that the registration of the Micula award should be set aside since it had been registered in violation of the Commission’s May 2014 injunction.

The English High Court refused to set aside the registration of the Micula award on the basis that registration did not lead to any payment under the award and there was thus no risk of undermining the Commission’s Decision. There was also no violation of the Commission’s May 2014 injunction since the award had been registered by the Micula investors, whereas the injunction served only to restrict the actions of Romania.

---

55 Id. at 8.
57 This is in contrast to the position with respect to the recognition or enforcement of a New York Convention award. Section 103 of the English Arbitration Act of 1996 incorporates the grounds for the refusal for the recognition or enforcement of a New York Convention award set out in Article V of the Convention.
58 Micula v. Romania enforcement proceedings ([2017] EWHC 31 (Comm)), paragraph 126.
59 Ibid., paragraph 123.
The Court nevertheless agreed with Romania and the Commission that, if it were to grant the enforcement of the Micula award, it would be taking a decision that was in conflict with a decision of the Commission, which it could not do as a result of Article 4(3) of the TFEU. It therefore issued a stay of the enforcement proceedings pending the decision of the General Court of the European Union on the Micula investors’ challenge to the Commission’s decision. The Court held that there was no conflict with the UK’s international obligations under the ICSID Convention in taking this position, since all that was required under the ICSID Convention (and the 1966 Act) was that an ICSID award be treated like a judgment, and a domestic judgment would also not be enforced in the same circumstances. Since there was no conflict between the ICSID Convention and the TFEU, the Micula claimants’ arguments regarding Article 351 of the TFEU were irrelevant. The Court also held that it would be appropriate to stay the proceedings since, if it were to render to a decision, it would be at risk of making a ruling that was inconsistent with an already anticipated ruling of the GCEU.

As a result, the Micula claimants must await the ruling of the GCEU before the UK enforcement proceedings may continue. They are understood to have also pursued enforcement proceedings in France, Belgium, Luxembourg and Sweden. To date, none of these proceedings has yielded any recovery and the Micula claimants considered there to be approximately £173 million outstanding as at January 2017.60

Issues of EU law also arose in the enforcement proceedings concerning the award issued in the EDF v. Hungary arbitration. EDF v. Hungary was a UNCITRAL arbitration seated in Zurich. In the arbitration proceedings, EDF claimed that the premature termination of certain long-term power purchasing agreements between EDF’s local subsidiary and a Hungarian state enterprise violated Hungary’s obligations under the ECT. The tribunal’s final award – issued in December 2014 – reportedly found in favour of EDF and ordered Hungary to pay €107 million plus interest in compensation.61

In January 2015, Hungary filed a set-aside petition against the EDF award in the Swiss Federal Court. Hungary contested the award on three main grounds under the Swiss Private International Law Act 1989.62 One of the grounds for set aside raised by Hungary was that the award violated public policy because, by requiring Hungary to pay compensation to EDF, it allegedly forced Hungary to breach EU law. The Swiss Federal Court rejected Hungary’s argument. It held that the arbitration tribunal had already explained why it could uphold EDF’s claims without violating EU law. The Court noted in particular the tribunal’s finding that there was no contradiction between the ECT and EU law, and that the compensation ordered was less than the maximum amount fixed by the EC for stranded costs payments, suggesting that payment of the compensation would not breach EU law.

The ruling of the Swiss Federal Court in EDF v. Hungary and the US District Court for the Southern District of New York in Micula v. Romania indicate, perhaps unsurprisingly, that the prospects for enforcing a ISDS award are more favourable in courts outside of the EU where the underlying dispute is an ‘intra-EU’ claim or where it touches on potential issues of EU state aid.

60 Ibid., paragraphs 2 and 43. This equates to approximately US $215 million at the time of writing.
The position may be different for investors seeking to enforce an award issued pursuant to the ECT. Article 26 of the ECT provides for investor–state dispute resolution. Article 26(8) states the following with respect to arbitral awards by arbitral tribunals:

The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute... Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.’

Consequently, as a contracting party to the ECT, the EU is under an obligation to ‘make provision for the effective enforcement in its Area’ of an arbitral award issued by a tribunal convened pursuant to Article 26 of the ECT.
Chapter 22

THE TRANS-PACIFIC PARTNERSHIP: LESSONS LEARNED FOR ISDS

Andrew Stephenson and Lee Carroll

I 2017 UPDATE – ISDS AFTER TPP

Following the United States’ presidential election in 2016, the prospects of the Trans-Pacific Partnership (TPP) entering into force have faded. The trade deal already faced fierce resistance from a divided US Congress and, although largely symbolic, on 23 January 2017 President Trump signed an executive order withdrawing the United States from the trade deal following his inauguration. The implications of the stalled trade deal are yet to be realised, but there are significant lessons to take away from the investor–state dispute settlement (ISDS) chapter with respect to both the enforcement mechanism and the substantive rights granted to foreign investors under the ISDS provisions. The full text of this original chapter, addressing both these issues, is reproduced below.

In its simplest form, foreign investment refers to a long-term investment by a resident entity in one economy into an enterprise located in a host economy. Foreign investment provides foreign capital to local economies while encouraging international cooperation towards economic development. As a vehicle to encourage foreign investment, bilateral investment treaties (BITs) were primarily designed to favour corporations investing in developing countries by enabling those investors to enforce their private claims against the host government. A perceived advantage of this dispute settlement method was the belief that the foreign investment mitigated the political risk that might otherwise arise when investing in developing countries.

For those countries that are capital exporters, the clear advantage of BITs is the protection they provide to foreign investments made by corporations from those countries. Therefore, as originally conceived, BITs were designed to benefit corporations from capital exporting countries and did not anticipate a situation where a state government from a capital exporting country would become a defendant to proceedings (as was the case, for example, for Australia in the Philip Morris proceedings). Of course, Australia is not the only country that entered into BITs with the expectation that corporations from its jurisdiction would be the beneficiary of the rights created, only to find itself the target of a claim based on the BIT. The likelihood of this occurring increases as what were once capital importing countries develop a capacity to export capital. Accordingly, the tables have, to some extent, turned, with the result that capital exporting countries have become more wary about the

---

1 Andrew Stephenson is a partner and Lee Carroll is a special counsel at Corrs Chambers Westgarth. The authors would like to thank Raeesa Rawal for her research assistance in the preparation of this chapter.
capacity of foreign investors to make claims against them pursuant to a BIT. This has led to a reconsideration of the rights granted pursuant to a BIT and a closer consideration of the ISDS provisions.

The TPP, while unlikely ever to come into force, sets out a recent consensus in respect of both the rights that states are prepared to afford foreign investors and the extent to which those rights can be enforced through ISDS.

The authors contend that future treaties will likely look to the agreed text of the TPP for a balanced view on entitlements and a template mechanism of enforcement. Attention is set to move towards other multilateral agreements such as the Regional Comprehensive Economic Partnership (RCEP). RCEP is a China-led trade agreement, which will likely include ISDS provisions. It is likely that the substantive rights and ISDS provisions included in the TPP will be a touchstone, for better or worse, for the latest thinking on ISDS. In this context, the analysis of the ISDS chapter in the TPP remains an important and pertinent exercise.

The balance of the paper considers the terms of the TPP that demonstrate a change in thinking about the rights created and the methods of enforcement.

II THE TRANS-PACIFIC PARTNERSHIP: DOES IT ACHIEVE THE NECESSARY BALANCE BETWEEN INVESTMENT PROTECTION AND REGULATORY DISCRETION?

i Introduction

The inclusion of investor-state dispute settlement provisions in international investment agreements, including the recently disclosed Trans-Pacific Partnership, has become contentious around the world. In Australia, at least, the concern intensified after Philip Morris Asia sued the Australian government in 2011 under the Hong Kong–Australia BIT challenging Australia’s tobacco plain-packaging legislation. Critics believe the inclusion of ISDS in international investment agreements compromises a government’s sovereignty by enabling foreign corporations to sue a government for passing new laws or implementing new policies – effectively, domestic regulation in the public interest.

The authors consider that there is a real issue to be addressed, but, properly understood, it is not ISDS clauses that give rise to this issue, but rather the vague nature of the substantive rights created by treaties that contain ISDS clauses. Those rights are intended to promote investment and, therefore, growth for the states entering into the treaties. If the advantage of growth through investment is real and the price of that investment is the creation of substantive rights stipulated in the treaties, then there must be a way for an investor to enforce those rights. In the absence of a proper mechanism for enforcement, the rights granted are hollow and will be unlikely to promote the investment sought.

The vague nature of the rights created by old treaties has been directly considered in the TPP. The TPP is part of a new generation of international investment agreements that, by its terms, better achieves the balance between investment protection and regulatory discretion. In our view, the TPP is unlikely to restrict a government of a member state from legitimately regulating in the public interest. We discuss below the key provisions of the TPP’s ‘Investment Chapter’ (Chapter 9), which, we say, supports our argument. We concentrate on the expropriation protection in Article 9.8 primarily because it is this standard that has engendered particular concern about the potential to limit a state’s right to regulate in pursuit of non-investment policy objectives.
The protections afforded to investors in the Investment Chapter are typical protections (such as fair and equitable treatment), which, as drafted, appear to be derived from US investment treaty practice, and can be found in similar terms in many of Australia’s modern free trade agreements. However, the TPP incorporates language that clarifies the protections, particularly the protection against expropriation. It thereby instructs the arbitrators to conduct a balancing exercise between investment protection and regulatory discretion, rather than leaving the protections open to different interpretations by different arbitrators. The TPP also enlarges the ambit of the exceptions to the protections. That is, it allows a state to be exempt from the obligations of the treaty in certain listed situations in which compliance would be incompatible with key policy objectives.

With one exception, the investment protections can be enforced directly by TPP investors through ISDS. The one exception is that ISDS will not apply between Australia and New Zealand (by side letter). This is not a new scenario. There was a similar bilateral carveout under the ASEAN-Australia-New Zealand Free Trade Agreement; a recognition that each country has strong mutual trust and understanding of each other’s court system, demonstrated also by the trans-Tasman treaty on enforcing court judgments.

The ISDS mechanism in the TPP is also fairly typical of modern international investment agreements, but it includes additional procedural safeguards that protect governments from unmeritorious claims, ensure transparency and allow TPP member states (rather than the arbitral tribunal) to maintain control over the TPP’s interpretation.

Critics who argue that there should be no ISDS at all in the TPP and other international investment agreements risk rendering investment protections virtually unenforceable. By relying solely on interstate dispute resolution measures, the affected investor must persuade its state to pursue a claim. It is also important to remember the historical justification for ISDS, which was to protect businesses that invested in foreign jurisdictions where there may not have been robust democracies, rule of law or effective enforcement systems. Although most of the TPP member countries are developed nations, concerns continue, because even in developed countries, states can, consistent with their own laws, breach the acceptable standards enshrined in treaties. Given that the treaties are designed to promote investment by providing clear statements of principle, it is appropriate that the final determination of whether that principle has been violated should be truly independent of the state that is the defendant. It would also be unsaleable for a treaty to stipulate that an investor from a developing country can only have recourse to the host state’s courts, while an investor from a developed country can prosecute its claim by independent arbitration. The agreement evidenced by the TPP is most unlikely, unless it is enforceable by investors from all countries in the same manner. That is, there must be reciprocity.

A blanket exclusion of ISDS in all international investment agreements is not the answer to concerns about a government’s right to regulate in the public interest. The answer

---

2 In fact, it is interesting that there were not more exclusions of ISDS by side letter particularly as between the United States and Australia, who excluded ISDS from the Australia–US FTA (2005) reportedly on the basis that the countries had strong trust in each other’s legal systems.

3 Australia and New Zealand have agreed to recognise and enforce judgments of the other’s courts in its territory pursuant to the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (2008).
lies in the drafting of the investment protections themselves and, we submit, the text of the TPP goes some way to achieving the necessary balance between investment protection and regulatory discretion.

III THE TRANS-PACIFIC PARTNERSHIP

i Introduction

The TPP is the world’s largest regional free trade agreement, between 12 countries who represent approximately 40 per cent of the global economy – Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. The text of the TPP, negotiated for about seven years, was agreed on 5 October 2015.

It is not known how soon it will enter into force (or if at all, being at the whim of each country’s domestic politics). It will enter into force when (or if) at least six of the original signatories, who must account for at least 85 per cent of the combined GDP of the original signatories in 2013, have ratified the agreement. This means that the TPP cannot enter into force unless both Japan and the United States ratify it.

There are many extant agreements between TPP member countries. Australia, for example, already has an investment agreement with every TPP member country except Canada. Although Australia’s existing agreements with Mexico, Peru and Vietnam will terminate on entry into force of the TPP, by side letter, the remainder of Australia’s investment agreements (and indeed, it seems all of the extant agreements between other TPP member countries) will remain in effect. This may mean that a foreign investor has a choice between suing under an existing investment agreement and suing under the TPP and, if it has that choice, will no doubt choose the agreement that provides to it the best protection. However, as discussed below, the curtailed scope of the application of the most favoured nation (MFN) clause in the TPP means that an investor is unlikely to be able to sue under the TPP and rely on better terms in an existing agreement (or the absence of carveouts from investment protection in that existing agreement as found in the TPP). This is because the MFN clause in the TPP is limited in its application to future international investment agreements only.

ii The TPP – its terms

Preamble

Non-investment policy objectives rarely appear in the preamble of older international investment agreements (such as the Hong Kong–Australia BIT). As a result, tribunals

---

4 The TPP is open to accession by other countries: Article 30.4 of the TPP. Indonesia’s president, for example, has declared that Indonesia intends to join the TPP.
5 Australia formally signed the TPP in New Zealand on 4 February 2016.
6 TPP, Article 30.5.
resolving disputes under those agreements have interpreted the standards therein (and any exceptions) in light of the narrow stated object and purpose of the treaty (i.e., investment protection and promotion). The preamble is an aid to the interpretation of a treaty and is commonly used by arbitral tribunals to identify the treaty’s object and purpose and to construe its terms.

By contrast, some modern agreements contain language in the preamble that lists other non-investment policy objectives (such as the promotion of sustainable development). The preamble to the TPP does this; it expressly recognises a state’s ‘inherent right to regulate’. It also states that the TPP member countries resolve to:

preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.

This preamble should go some way to identifying areas that will be legitimate areas of regulation, even if that regulation adversely affects an investment of an entity from another TPP member state. However, it is unlikely that the preamble amounts to carte blanche for regulation in the specified areas. Presumably regulation must otherwise be consistent with the terms of the TPP; for example, it must not be discriminatory (i.e., discriminate in favour of domestic investments) and it must be reasonable (interpreted widely) to meet a legitimate policy.

**Investor and investment**

The definitions of ‘investor’ and ‘investment’ are important to the scope of application of the rights and obligations of an international investment agreement. This is subject to the terms of the ‘denial of benefits’ clause, which permits the exclusion of certain investors from protection.

Other than a state party, there are two types of investors under the TPP: a national or an enterprise of a party.

A national is a natural person who has the nationality of a party according to Annex 1-A or a permanent resident of a party. Annex 1-A provides for party-specific definitions of nationality. As with most investment treaties, the TPP bases nationality exclusively on the laws of the state of the claimed national. In Australia, a natural person who is an Australian citizen, as defined in the Australian Citizenship Act 2007, has Australian nationality.

An enterprise of a party is an enterprise constituted or organised under the law of a party or a branch located in the territory of a party that also carries out business activities there. In respect of the inclusion of a branch, an enterprise of a party need not be an enterprise constituted or organised under the law of a party. It may be constituted and organised under the law of any state (including a non-state party). However, in that case what is critical is that the entity carries out ‘business activities’ in a state that is a party to the TPP.

---

9 See, e.g., Siemens AG v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, [81].
10 TPP, Article 9.1.
11 TPP, Article 1.3.
12 TPP, Article 9.1.
However, this definition needs to be read with Article 9.14, a denial of benefits clause, which permits the exclusion of certain investors. Such a clause is not uncommon in modern treaties. It enables a TPP member country to deny the protections in the Investment Chapter to:

a an investor, who is owned or controlled\(^{13}\) by a (natural or legal) person of a non-state party or the denying state party, who has no substantial business activities in the territory of any state party other than the denying state party;

b an investor, who is owned or controlled by a (natural or legal) person of a non-party and the denying state party has in place measures with respect to that non-party (or a person of the non-party) that prohibits transactions with the investor or that would be breached if the benefits of the Investment Chapter were accorded to the investor.

The first carveout gives TPP member countries the authority to carve out from the definition of ‘investor’ shell companies owned by persons of a third country that do not have substantial business activities in the territory of a state party. Its purpose is to stop treaty shopping. Unlike earlier treaties, it will not be possible for investors from non-party states to structure their investment to take advantage of the treaty. While the principle of ‘abuse of right’ prevented the late adoption of a nationality for the purpose of a treaty, that general principle of international law is much narrower than the denial of benefits clause in the TPP.

The second carveout relates to an entity that has a substantial business in a TPP member state but the state, which might otherwise have been the subject of a claim, has regulations in place that prohibit transactions with the investor. An example of such a regulation is the long-standing US embargo\(^{14}\) on almost all trade and investment involving Iran, prohibiting US persons\(^{15}\) from engaging in transactions or dealings with Iran. On 16 January 2016, the United States lifted the nuclear-related ‘secondary sanctions’ (directed towards non-US persons for conduct involving Iran that occurs outside the United States) but the domestic trade embargo remains in place.

Article 9.14 will not operate automatically. The right to deny will need to be exercised through positive action by the TPP member country in question (such as an exchange of letters with the relevant investor).\(^{16}\)

‘Investment’ is defined widely and is again based on US investment treaties (including the Australia–US FTA).\(^{17}\) The definition sets out numerous specific (but non-exhaustive) examples of an investment including intellectual property rights, equity participation in an enterprise and construction contracts and other similar contracts. The definition of ‘investment’ expressly excludes ‘an order or judgment in a judicial or administrative action’. In addition, the TPP also requires that the asset has the ‘characteristics of an investment’

\(^{13}\) Some agreements, such as the Agreement between Australia and Japan for an Economic Partnership (2014), give definition to ‘owned’ and ‘controlled’. The TPP does not do so expressly.

\(^{14}\) Governed by the US Treasury Department’s Iranian Transactions and Sanctions Regulations.

\(^{15}\) Defined broadly to include citizens, permanent residents, US entities and their foreign branches, and foreign persons while in the United States.

\(^{16}\) Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

\(^{17}\) TPP, Article 9.1.
such as the commitment of capital, the expectation of gain or profit, or the assumption of risk. This is not a new test.\(^{18}\) It is, however, an additional hurdle for an investor to meet when bringing a claim.

**Article 9.8: expropriation and compensation**

The obligation on TPP member countries not to expropriate is described in terms with which we are already familiar. The language used is almost identical to that used in each of the existing investment treaties Australia has with TPP member countries.

Under Article 9.8, a party must not expropriate or nationalise a covered investment, directly or indirectly though measures equivalent to expropriation or nationalisation, except:

\(a\) for a public purpose – which is said to be a reference to a concept in customary international law;\(^{19}\)

\(b\) in a non-discriminatory manner;

\(c\) on payment of prompt, adequate and effective compensation; and

\(d\) in accordance with due process of law.

As discussed below, Article 9.8 is to be interpreted in accordance with Annex 9-B.

By Article 9.8(6), the concept of ‘expropriation’ is clarified and narrowed. A state’s decision not to issue, renew or maintain a subsidy or grant, or to modify a subsidy or grant, in the absence of a legal or contractual commitment to do so, or in accordance with the terms of the subsidy or grant, does not of itself constitute expropriation.

It is worth mentioning that the Hong Kong–Australia BIT, on which Philip Morris Asia relied, uses ‘deprivation’ language only in its expropriation clause, which is atypical of investment agreements.\(^{20}\) Article 6(1) of that treaty requires that investors ‘shall not be deprived of their investments nor subjected to measures having effect equivalent to such deprivation’. This language, which prohibits the ‘deprivation’ of an investment, is significantly wider than the language in the TPP, which prohibits expropriation. The term ‘expropriation’ carries with it the connotation of a ‘taking’ of a person’s property with a view to transferring ownership of that property to another person (such as the state).\(^{21}\) By contrast, a ‘deprivation’ can occur without a ‘taking’.\(^{22}\)

---

\(^{18}\) It appears, for example, in the Australia–US FTA, the Australia–Chile FTA and the Agreement between Australia and Japan.

\(^{19}\) Footnote 17.

\(^{20}\) Although see also Article 5 of the Netherlands–Czech Republic BIT; Article 4 of the Czech and Slovak Federal Republic–Sweden BIT; Article 4 of the Sweden–Republic of South Africa BIT.


\(^{22}\) The tribunal in *CME (Netherlands) v. Czech Republic* (Partial Award, 13 September 2001) considered the meaning of ‘deprivation’ in Article 5 of the Netherlands–Czech Republic BIT and said (at [150] and [151]):

*The Treaty’s provision regarding ‘deprivation’ tracks the broadest expropriation provisions in bilateral investment treaties . . . A ‘deprivation’ . . . occurs . . . whenever a State takes steps ‘that effectively neutralize the benefit of the property for the foreign owner’. Such expropriations may be deemed to have occurred regardless of whether the state ‘takes’ or transfers legal title to the investment . . . The Treaty avoids any*
The meaning and scope of ‘public purpose’ under customary international law is obviously important. The tribunal in *ADC Affiliate Ltd v. The Republic of Hungary* stated that the treaty requirement of ‘public interest’ requires some ‘genuine interest of the public’. Andrew Newcombe and Lluis Paradell state that, at the very least, there must be some demonstrable public interest or genuine public need and the expropriation must be made in ‘good faith’. It seems clear that the public purpose requirement would be breached if property were seized for the personal use of a dictator or third party, or as a reprisal for another state’s conduct. It is theoretically possible that the termination of a contract by a state because of a financial crisis may be a termination for a public purpose (although this has not been established on the facts in cases to date).

Two cases in which the state taking was said not to be in the public interest are *ADC Affiliate Ltd v. The Republic of Hungary* and *Siemens AG v. The Argentine Republic*.

In the former, a 2001 Hungarian decree voided investors’ contracts for the operation and management of the Budapest airport. The airport was subsequently taken over by the state in 2002 but then privatised in 2005. The Hungarian government argued its measures were part of the process for Hungary’s access to the EU and served the strategic interests of the state. However, the tribunal concluded that the taking was not in the public interest. It said the subsequent privatisation of the airport, which earned Hungary US$2.26 billion, rendered any public interest argument unsustainable.

In the latter case, the tribunal found there was no evidence of a public purpose because the measures in question, which had the effect of terminating a contract for the provision of national identity cards, were taken to reduce the costs to Argentina of the contract, which had been awarded through public competitive bidding, as part of a change of policy by a new government.

Neither decision should fuel a concern that a state’s right to regulate for a public purpose is being curtailed.

Indeed, according to Newcombe and Paradell, the jurisprudence suggests that states are afforded a wide margin of appreciation in determining whether an expropriation serves a public purpose. To this extent, the concern that the obligation not to expropriate may curtail a state’s right to regulate in the public interest is overstated. However, provided that the relevant state action falls within the more constrained definition of ‘expropriation’ in the TPP (as a consequence of Annex 9-B – discussed below), an expropriation that is legal, for a public purpose, and non-discriminatory must still be subject to prompt, adequate and effective compensation.

The narrow definition of expropriation in part by avoiding the use of that word altogether. The Treaty focuses on the interference in the investor’s ownership, rather than any transfer of the investment to the State, by prohibiting ‘deprivations’ rather than ‘takings’.

23 ICSID Case No. ARB/03/16.
24 The claim was brought under the Cyprus–Hungary BIT.
26 Ibid.
27 *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8 at [273] (the context being Argentina’s fiscal crisis).
28 ICSID Case No. ARB/03/16.
29 ICSID Case No. ARB/02/8.
Annex 9-B

Annex 9-B circumscribes the meaning of ‘expropriation’. The form of this Annex originates from the US and Canadian Model BITs, which were revised in 2004.

Annex 9-B expressly provides that whether an action by a party constitutes indirect expropriation requires a case-by-case, fact-based inquiry that includes consideration of the following factors:

a. the economic impact of the government action (although an adverse effect on the economic value of an investment is not sufficient of itself – a clear move away from the oft-criticised ‘sole effects’ doctrine);

b. the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

c. the character of the government action.

In respect of the second factor, the TPP expressly clarifies, by footnote, that whether an investor’s investment-backed expectations are reasonable depends on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or potential regulation in the relevant sector. We have suggested previously that rights inherent in an investment should be construed to be flexible rights having regard to the natural evolution of the legal framework that existed at the time of the investment. The nature and course of that evolution will obviously differ between countries for cultural reasons. Accordingly, the concept of expropriation should only arise where the change in regulation falls outside the evolution of the law that could reasonably have been contemplated at the time of the investment.

The third factor above – the ‘character’ of the government action – is not further explained in the TPP. The ASEAN–Australia–New Zealand FTA and the Malaysia–Australia FTA state that the character of government action includes its objective and whether the action is disproportionate to the public purpose. A test of ‘proportionality’ was endorsed by the tribunal in Tecmed v. Mexico. The tribunal said ‘there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.’

The above gives some clarity to the meaning of ‘indirect expropriation’ under the TPP. Further, Paragraph 3(b) of Annex 9-B states:

30 The Annex is said to constitute ‘an integral part’ of the TPP: Article 30.1.
31 See Treaty between the Government of the United States of America and the Government of [Country] Concerning the Reciprocal Protection of Investment (US Model BIT), Art 6(1) and Annex B(4), (2004); Agreement between Canada and [Country] for the Promotion and Protection of Investments (Canada Model BIT), Art 13 and Annex B.13(1) (2004). Very similar annexes can also be found in the Australia–United States FTA, the ASEAN–Australia–New Zealand FTA, the Australia–Chile FTA, the Malaysia–Australia FTA and the Korea–Australia FTA.
32 Accepted by the ICSID Tribunal in Compania del Desarrollo de Santa Elena v. Costa Rica, ICSID Case No. ARB/96/1 (17 February 2000).
33 TPP, Annex 9-B, footnote 36.
35 Tecnicas Medioambientales Tecmed SA v. The United Mexican States, Case No. ARB(AF)/00/2, Award 29 May 2003.
36 At [122].
Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriation, except in rare circumstances.

Regulatory actions to protect public health are said to include measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances, and blood and blood-related products.

While some suggest the language ‘except in rare circumstances’ should be removed from Paragraph 3(b), so that non-discriminatory regulation can never be indirect expropriation, to do so would unduly favour the host state and disadvantage the investor, to the detriment of the whole purpose of international investment agreements.

In addition, Article 9.15, entitled ‘Investment and Environmental, Health and other Regulatory Objectives’, states:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

This language is also found in the Australia–United States FTA; however, in that agreement it is limited to environmental objectives. The TPP is broader in its reach in relation to ‘health or other regulatory objectives’. Article 9.15 requires the state to show that it determined that the measure was appropriate with respect to the objective sought. Presumably this requirement will require proof that, prior to the action that is the subject of complaint, the state actually turned its mind to the issue and made the determination. In addition, it seems reasonably arguable that the state must show the decision was made in good faith (i.e., not for a collateral purpose, such as avoiding the operation of the TPP).

**Investment schedules**

The TPP also contains schedules to the Investment Chapter in which each country has listed country-specific measures or sectors that are exempt from particular provisions of the Investment Chapter. The exemptions are not insignificant. But, they do not apply to the expropriation protection in the Investment Chapter. Australia, for example, has listed foreign investment policy decisions including decisions made pursuant to recommendations of the Foreign Investment Review Board, which regulates significant investments into the country. Australia has also reserved the right to adopt or maintain any measure (for example):

- a according preferences to indigenous persons;
- b with respect to the provision of law enforcement and correctional services;
- c with respect to social services established or maintained for a public purpose such as social welfare, public education, childcare, public utilities, public transport or public housing;
- d with respect to the creative arts, indigenous cultural expressions and other cultural heritage; and
- e with respect to gambling and betting.

---

37 TPP, Annex 9-B, footnote 37.
iii Does the MFN clause undo all of the work of the TPP protections?

Some commentators have suggested the most favoured nation clause in the TPP undermines the protections therein to the extent that it allows an investor from a TPP member country to (for example) import substantive protections or more favourable definitions or to bypass procedural preconditions to arbitration from another BIT. In our view, it does not do so.

First, although it is unsettled as to whether an investor can use a MFN clause to bypass preconditions to arbitration (such as the requirement to litigate a dispute in the local courts for a certain period before submitting the dispute to arbitration), this issue does not arise under the TPP because the MFN clause (at Article 9.5(3)) expressly excludes dispute resolution from its scope. In any event, the procedural preconditions to arbitration in the TPP are competitive, as discussed below.

Secondly, Australia’s Schedule to Annex II to the Investment Chapter expressly excludes past treaties from its scope. It says:

\[ Australia \text{ reserves the right to adopt or maintain any measure that accords more favourable treatment to any service supplier or investor under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement. } \]

Indeed, all of the TPP countries appear to have expressed in some form that the MFN clause will not extend to legal protections in treaties that are currently in force; they will extend only to protections in those treaties a host country signs in the future.

This means, for example, an investor cannot argue that Australia should be liable for actions taken under conditions that are exempt from liability that are not exempt under other BITs (for example, a decision of the Australian government not to renew a subsidy or grant that is protected under Article 9.8(6) of the TPP).

iv ISDS mechanism

The TPP permits arbitration not only of claims for breach of the treaty’s substantive investment protections, but also for breach of an investment authorisation or investment agreement. It provides for arbitration under the UNCITRAL, ICSID and ICSID Additional Facility rules, as well as under other rules agreed by both parties.

However, the TPP shows some deference to certain forum-selection clauses that might be contained in investment agreements. Annex 9-L prohibits arbitration of claims for breach of an investment agreement’s obligations pursuant to the TPP’s ISDS mechanism if the investment agreement already provides for arbitration under one of the following

---

38 For example, the Australian claimant in *White Industries Australia Ltd v. India* (UNCITRAL Award, 30 November 2011) used the MFN clause in the Australia–India clause to import substantive protections from another Indian BIT (the Kuwait–India BIT), guaranteeing the claimant ‘effective means of asserting claims and enforcing rights’.

39 For example, in *CME Czech Republic BV v. Czech Republic* (UNCITRAL Award, 14 March 2003) the tribunal allowed the claimant to use the MFN clause in the Czech Republic–Netherlands BIT to import a more favourable definition of ‘just compensation’ from another Czech BIT (the US–Czech BIT).

40 For example, in *Maffezini v. Spain* (ICSID Case No. ARB/97/7), the claimant sought to avoid submitting the dispute to the Spanish courts for 18 months as mandated by the Argentina–Spain BIT before resorting to international arbitration by importing the dispute settlement provision from the Chile–Spain BIT, which only required the claimant to observe a six-month negotiation period before filing for arbitration.
prominent arbitral rules – UNCITRAL, ICSID, ICC or LCIA – and the arbitration would take place outside the territory of the respondent and in that of a signatory to the New York Convention. Interestingly, this carveout would not cover investment agreements that provide for arbitration under other, equally recognisable, arbitral rules, such as the rules of SIAC, AAA, HKIAC and ACICA.

**Article 29.5 (tobacco control measures)**

Against the backdrop of threatened and actual ISDS following the introduction of tobacco plain-packaging legislation in Australia, the TPP has introduced a special (and unprecedented) clause preventing tobacco companies making use of the TPP’s ISDS provisions. This is the first product-specific exclusion of its kind. Under Article 29.5, a party can elect to deny the use of ISDS for claims challenging a tobacco control measure. A tobacco control measure is defined very broadly.\(^{41}\) The time at which such an election is to be made is effectively at large. If a party has not elected to deny the use of ISDS with respect to such claims by the time a claim to arbitration is made (e.g., by domestic legislation), the party can still elect to do so during the proceedings (even, it seems, after the hearing). By so doing, the claim will be automatically dismissed.

It is important to note that the carveout is limited to ISDS only; the rights and obligations in the TPP still apply to tobacco. However, a tobacco company would have to rely on the host state’s courts to bring proceedings under Chapter 28 for any alleged breach of the TPP in relation to tobacco. Chapter 28 allows one state to pursue a dispute with another. Although this mechanism remains, it will be much harder for a tobacco company to initiate a claim. It is unlikely that a government (including the governments of the TPP member countries) would agree to bring such an action.

**Procedural safeguards**

Importantly, the ISDS provisions in the TPP offer ‘procedural safeguards’, some of which are common to investment agreements, some of which are new. These are summarised below.

Prior to initiating proceedings, the investor must first endeavour to resolve its dispute with the state through consultations and negotiations for at least six months, a period that is typical of consultation periods in investment agreements.\(^{42}\) The investor must initiate

---

41 A tobacco control measure is defined as a measure related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, record-keeping and reporting requirements. A measure with respect to tobacco leaf that is not in the possession of a manufacturer of tobacco products or that is not part of a manufactured tobacco product is not a tobacco control measure.

proceedings within three-and-a-half years from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach.\textsuperscript{43} This limitation period is also typical.\textsuperscript{44}

The notice of arbitration must be accompanied by a waiver, by the investor, of any right to initiate the claim before any other domestic or international court or tribunal. This requirement is intended to prevent the investor forum shopping.\textsuperscript{45} There is also scope for the tribunal to decide as a preliminary question, on an expedited basis, an objection that a claim is manifestly without legal merit.\textsuperscript{46} This provides a mechanism to strike out frivolous or baseless claims. A related mechanism to discourage frivolous claims is the tribunal’s ability to award costs against the investor if the tribunal finds in favour of the respondent’s objection.\textsuperscript{47}

The investor is also expressed to have the burden of proving all elements of its claim.\textsuperscript{48} This is unlikely to constitute a change from the position that would have prevailed in the absence of such a provision.

The TPP has improved provisions that ensure both transparency of the arbitral proceedings and that its interpretation is within the control of member states. In respect of the former, the host state is required to provide all of the arbitral documents (including the notice of arbitration, pleadings, transcripts and the award) to the other non-disputing TPP members and to the public,\textsuperscript{49} and hearings are open to the public. These requirements are subject to provisions for the protection of appropriate confidential information.

The provisions of the TPP enable parties to maintain some control over its interpretation. A TPP party who is a party to an arbitration can have the question of whether a measure falls within one of its exceptions to the TPP (under Annex I or II to Chapter 9) determined jointly by the TPP parties\textsuperscript{50} rather than the tribunal, and these interpretations are binding on the tribunal.\textsuperscript{51}

Finally, there is a commitment by TPP member states to consider, at a later date, both a code of conduct for arbitrators in ISDS\textsuperscript{52} and an appellate review mechanism to correct errors of law.\textsuperscript{53}

\textsuperscript{43} TPP, Article 9.20(1).
\textsuperscript{44} Under Australia’s existing investment agreements with the TPP member countries, the limitation period ranges from three to four years.
\textsuperscript{45} TPP, Article 9.20(2). Such a waiver is also required under the ASEAN-Australia-New Zealand Free Trade Agreement (2009); the Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (2007); and the Singapore-Australia Free Trade Agreement (2003).
\textsuperscript{46} TPP, Article 9.22(4).
\textsuperscript{47} TPP, Article 9.22(6).
\textsuperscript{48} TPP, Article 9.22(7).
\textsuperscript{49} Compare the provisions in the ASEAN-Australia-New Zealand Free Trade Agreement (2009) in which transparency is optional only.
\textsuperscript{50} Specifically, the Trans-Pacific Partnership Commission, which is composed of government representatives of each party.
\textsuperscript{51} TPP, Article 9.25.
\textsuperscript{52} TPP, Article 9.21.6.
\textsuperscript{53} TPP, Article 9.22.11.
IV CONCLUSION

The worldwide concern that ISDS provisions allow foreign companies to sue governments in respect of laws and policies aimed at safeguarding the environment, health and other sensitive areas, is misdirected. It is not the ISDS mechanism that should be critiqued. Rather, attention should be directed to the substantive investment protections themselves – the nature of the rights that are created and the consequences of those rights.

The TPP aims to protect public welfare by ensuring that the investment protections, such as the protection against expropriation discussed in this chapter, build in those public welfare considerations. They are relevant to the content of the investment protection itself and not just as a possible exception to its application. To this end, the TPP goes some way to balancing the interests of governments and investors by promoting foreign investment while recognising the inherent right of governments to regulate in the public interest.

It remains the case that unless investment protections are backed by ISDS, the alternative, which would allow an investor to seek redress, is litigation in the courts of the state alleged to have breached the treaty. This would severely reduce the value of the protections on offer, particularly for those states with developing economies who have not yet developed a strong rule of law or institutions capable of applying it, particularly against the state. Accordingly, a blanket exclusion of ISDS in international investment agreements is not the answer to the above-mentioned concern.
Appendix 1

ABOUT THE AUTHORS

TAEJOON AHN
_Yulchon LLC_
Taejoon Ahn primarily practises in international arbitration and cross-border litigation, drawing on his experiences as a judge for three years and working for the Permanent Court of Arbitration (PCA) in The Hague for one year. As a judge, Mr Ahn dealt with a wide range of matters, such as civil, criminal, injunction, mediation and bankruptcy cases. In addition, he acquired extensive knowledge and practical experience in international dispute resolution while studying at the London School of Economics and Political Science and working for the PCA. This led to his expertise in diverse areas of dispute resolution practice and legal theory including domestic and foreign court proceedings and international arbitration proceedings. In particular, he is well versed in investment arbitration.

CEYDA AKBAL SCHWIMANN
_Wolf Theiss Rechtsanwälte GmbH & Co KG_
Ceyda Akbal Schwimann is a consultant at Wolf Theiss and a member of Wolf Theiss’ international arbitration group. She specialises in international investment law and international investment disputes. She advises major international groups and private clients in their investment disputes against private parties and states. Before joining Wolf Theiss as consultant, she worked in the dispute resolution teams at leading Austrian and international law firms. She has experience working under the major arbitration rules, for example, advising clients in proceedings under the ICC Rules and in connection with ICSID proceedings.

Ceyda completed her master of laws at the University of Cambridge in the field of international law in 2005. She wrote her dissertation, under the supervision of Judge James Crawford, on the issue of competing jurisdiction of investment treaty tribunals with national courts.

Ceyda is a member of the Istanbul Bar and a solicitor of England and Wales. Ceyda is proficient in English, Turkish, German and French. She is based in Vienna.

VIRGINIA ALLAN
_Allen & Overy_
Virginia Allan is counsel in Allen & Overy’s International Arbitration Group, based in the Madrid office. She has acted as counsel in numerous international arbitral proceedings, pursuant to a variety of institutional rules and applying legal rules of both civil and common
law systems. She has experience of disputes related to a wide range of contractual arrangements and in a variety of sectors, as well as protection of foreign investment. She has participated in proceedings with their seats in Paris, Geneva, Zurich, Budapest, Lisbon, London, Madrid, Mexico City, Tokyo and Washington, DC. She has been named sole arbitrator by the ICC, by the Corte Española de Arbitraje and by the Corte de Arbitraje de Madrid, and previously served as secretary to ICC and ICDR tribunals.

Virginia was chosen by Best Lawyers in 2013 and 2014 as one of the best international arbitration lawyers in Spain, and she is listed in Who’s Who Legal: Arbitration 2015, 2016 and 2017. She regularly participates in proceedings in both English and Spanish. She is a New York qualified attorney and began her legal career as law clerk to the Hon. Roger J Miner of the US Court of Appeals for the Second Circuit.

AYHAM N M AL-MASHNI
Aljazy & Co
Ayham N M Al-Mashni is a young arbitration practitioner admitted to practise law in Jordan. He received his LLB from the University of Bristol and draws from a diverse educational background to help clients navigate their international disputes. He currently works side by side with Dr Omar M H Aljazy in Aljazy & Co’s Amman office. Mr Al-Mashni currently represents a number of Arab governments in a number of investment arbitrations before ICSID, UNCITRAL and ICC tribunals. He also represents a number of international and regional conglomerates in arbitrations seated in the Middle East region and abroad.

ULYANA BARDYN
Dentons
Ulyana Bardyn is a managing associate in the Dentons New York office. Ms Bardyn is a member of the firm’s global international arbitration practice group. Ms Bardyn’s experience spans international commercial and investment treaty arbitration, as well as complex commercial litigation with an international component. 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. Ms Bardyn serves as an adjunct professor at Brooklyn Law School teaching a class on advocacy in international law.

SIMON N BATIFORT
Curtis, Mallet-Prevost, Colt & Mosle LLP
Simon Batifort is an associate in the international arbitration group of Curtis, Mallet-Prevost, Colt & Mosle LLP, based in the New York office. He is dual-qualified to practise in France and in New York, and holds advanced degrees in civil law, common law, and public and private international law. His practice focuses on investor–state and international commercial arbitration, with a particular emphasis on disputes arising out of bilateral investment treaties. He has acted as counsel in numerous arbitrations conducted under the ICSID, UNCITRAL and ICC rules, in cases involving various industries, including oil and gas, construction and telecommunications. Mr Batifort was named in Who’s Who Legal: Arbitration – Future Leaders 2017, a publication that selects attorneys who are considered to be the future leaders of the international arbitration community. He received an LLM in international legal studies from
New York University School of Law and master’s degrees in international business law and public international law from Panthéon-Assas University (Paris II). While completing his LLM, he served as a research assistant for Professor José E Alvarez and worked as a graduate editor for the *Journal of International Law and Politics*. He is fluent in English, French and Spanish.

**CYRUS BENSON**

*Gibson, Dunn & Crutcher LLP*

Cy Benson is a US and English-qualified partner in the London office of Gibson, Dunn & Crutcher. He is co-chair of the firm's international arbitration practice group.

Mr Benson focuses on international arbitration and represents clients from a wide variety of sectors before arbitral tribunals, including the ICC, LCIA and AAA/ICDR, with particular emphasis in telecoms, oil and gas, energy and infrastructure. He is experienced in complex litigation and has significant trial and appellate experience in US federal and state courts.

His recent representations include advising a major oil company in a $1.5 billion ICC arbitration arising from divestment of an Eastern European refinery, pipeline and export company; a European power generation company in a high-value ICC arbitration arising from the termination of a long-term contract for the supply of natural gas; and a major oil company in multibillion-dollar claims for expropriation under the Energy Charter Treaty.

Mr Benson has represented financial institutions in disputes concerning derivatives, alleged predatory mortgage lending practices, and the demise of Enron. He has also represented corporate clients in shareholder class action litigation.

Mr Benson is ranked as a leading lawyer for International Arbitration in the 2007–2015 *Chambers and Partners* UK Guides, in the 2010, 2014–2015 *Chambers and Partners* Global Guides, and in the 2009–2015 editions of *Best Lawyers International*. In addition, *The Legal 500 UK 2015* recognises Mr Benson for international arbitration. He has also been recommended for Dispute Resolution: International Arbitration in *Chambers Europe*.

Mr Benson is a frequent speaker and writer on arbitration topics, a member of the IBA Task Force on Party Representation in International Arbitration and also sits as an arbitrator.

**IVAN W BILANIUK**

*Dentons*

Ivan W Bilaniuk is counsel in the Washington, DC office of Dentons and a member of the firm’s global international arbitration group. He focuses on international arbitration and litigation in complex commercial and international government contracts disputes. Mr Bilaniuk has extensive experience arbitrating cases under various institutional rules as well as enforcing international arbitral awards. Mr Bilaniuk received his JD from the University of Virginia, and his BA and MA degrees from Harvard University. He served as law clerk to the Honorable F Bradford Stillman of the US District Court for the Eastern District of Virginia. Mr Bilaniuk regularly presents and writes on international arbitration and enforcement issues.
MICHELLE BRADFIELD
Dentons UKMEA LLP

Michelle Bradfield is a partner in the international arbitration group in the London office of Dentons UKMEA LLP. Michelle has significant expertise in public international law and she represents private entities, states and international organisations on a diverse array of both contentious and non-contentious matters. The key areas of her practice include investment treaty arbitration (ICSID, UNCITRAL), boundary disputes between states, maritime disputes and international commercial arbitrations (LCIA, ICC, UNCITRAL). Her diverse caseload includes arbitrations in Europe, Asia, the Middle East, Africa and the United States.

The Legal 500 has listed Michelle as a ‘Leading Individual’ and has stated that her public international law ‘pedigree is among the best in London’ and that she possesses ‘excellent knowledge’. In relation to commercial arbitration, she is ‘highly rated’ and her ‘persuasive’ advocacy has also been noted. Michelle has also been named as a ‘rising star’ by Legal Week. Michelle obtained her LLM from the University of Cambridge and lectures on investment treaty arbitration and boundary disputes at King’s College London in both master’s and undergraduate courses. She was a fellow at the Lauterpacht Centre for International Law at the University of Cambridge and she worked for Sir Elihu Lauterpacht CBE QC for several years.

LEE CARROLL
Corrs Chambers Westgarth

Lee Carroll is a special counsel in the international arbitration and construction groups at Corrs Chambers Westgarth, Melbourne. Lee’s expertise is in dispute resolution. She has experience in trial and appellate litigation and alternative dispute resolution processes, including domestic and international arbitration, mediation, statutory adjudication and dispute resolution boards. She regularly provides strategic legal advice as it relates to arbitration and complex dispute processes. She advises local and international clients on the drafting of arbitration agreements and dispute resolution clauses and provides contractual and extra-contractual advice during the life of a project. Lee also advises on the potential enforcement of bilateral investment treaties and free trade agreements.

Lee was associate to the Hon Justice Kenneth Hayne AC of the High Court of Australia from 2005 to 2006. She holds a BCL from the University of Oxford, and bachelors of laws (first-class honours) and arts from the University of Western Australia. She also has a Diploma in International Commercial Arbitration from the Chartered Institute of Arbitrators. Before coming to Melbourne, she practised at a leading global law firm in London and was a part-time lecturer in private international law at the University of Western Australia (2002–2005).

NICCOLÒ CASTAGNO
Dentons Europe LLP

Niccolò Castagno is an associate in the international arbitration group of the Dentons Europe LLP Paris office. His practice focuses on international investment arbitration and international commercial arbitration, in a wide array of business sectors. He is senior editor for the Yearbook on International Investment Law & Policy. He graduated cum laude from the University of Turin School of Law, Italy, and obtained an LLM in international and
comparative law from Columbia Law School. He is a member of the New York Bar and the Italian Bar.

ATHINA FOUCHARD PAPAEFSTRATIOU
Lazareff Le Bars
Athina Fouchard Papaefstratiou specialises in international arbitration, public international law and general contract law. She has acted as counsel, arbitrator and administrative secretary in commercial and investment arbitrations in the energy, banking and finance, mining, construction and telecommunication sectors. Her experience includes _ad hoc_ as well as institutional arbitrations under the ICSID, UNCITRAL, ICC, LCIA, CRCICA and CCJA arbitration rules.

Currently a counsel at Lazareff Le Bars, Athina previously held an associate position at the arbitration department of Freshfields Bruckhaus Deringer, and served for one year in the legal department of UNESCO.

Athina holds an LLB from the University of Athens, an LLM from Queen Mary College, University of London and a master’s degree from the University Paris II Panthéon-Assas.

She is registered with the Bar in Paris and in Athens and speaks English, French, Greek and Spanish.

Athina regularly publishes and speaks at conferences on issues of arbitration and international law. She is a member of ICC Hellas and several arbitration practitioners’ associations.

KOJIRO FUJII
Nishimura & Asahi
Mr Fujii has been very active in the field of international trade matters. He handles many Japanese and overseas cases on behalf of various industries with regard to anti-dumping (AD) and countervailing duties (CVD) proceedings. While he served as deputy director of the Ministry of Economy, Trade and Industry of Japan, he handled several important WTO disputes on behalf of Japanese government, such cases as _China–Rare Earth, Argentina–Import Restrictions, Russia–Recycling Fees on Automobiles_ and _Ukraine–Safeguards on Automobiles_. He continues to advise both public and private sectors with regard to various sorts of international trade law matters associated with WTO, investment treaties and regional trade agreements.

CATHERINE GILFEDDER
Dentons UKMEA LLP
Catherine Gilfedder is an associate in the international arbitration group of the Dentons UKMEA LLP London office. She specialises in international dispute resolution, including investment treaty and commercial arbitration, litigation and public international law. Catherine holds a first-class honours degree in law from the University of Cambridge and an LLM in international law from University College London. Catherine is admitted as a solicitor in England and Wales and has Higher Rights of Audience before the English courts.
SERGIY GRYSHKO

*Redcliffe Partners LLC*

Sergiy Gryshko is a partner and the Head of the Dispute Resolution practice at Redcliffe Partners. He is experienced in acting for clients at all stages of litigation and international arbitration proceedings, offering seamless pre-arbitration, arbitration, and post-arbitration advice. Sergiy has handled arbitrations under a variety of international institutional and *ad hoc* arbitration rules, including ICACU, LCIA, LMAA, SCC, ICC, UNCITRAL and ICSID.

Sergiy is listed as an arbitrator at the JSM Permanent Court of Arbitration in the Slovak Republic and at the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. He is the Head of the ICC Ukraine Commission on International Arbitration and is a member of the council of the Ukrainian Bar Association Committee on Procedural Law.

Sergiy is recommended for Dispute Resolution and International Arbitration in Ukraine by *Chambers Europe*. He is also named among the leading dispute resolution lawyers by all local professional rankings, including Ukrainian Law Firms: 50 Leading Law Firms in Ukraine by *Yuridicheskaya Practika* and Top 250 Lawyers by *Yurydychna Gazeta*.

MIRIAM K HARWOOD

*Curtis, Mallet-Prevost, Colt & Mosle LLP*

Miriam K Harwood is a partner in the international arbitration group of Curtis, Mallet-Prevost, Colt & Mosle LLP, based in the New York office, with over 25 years of experience in dispute resolution. Her practice focuses on arbitrations in both commercial disputes and investor–state treaty cases, particularly as counsel for states, state-owned entities and governmental agencies, including cases in the oil and gas and construction industries. She has acted as counsel in cases administered by the major international arbitral organisations, under the rules of ICC, ICSID and UNCITRAL, as well as *ad hoc* cases. In addition to international arbitration, Ms Harwood has practised commercial litigation in the US courts, including contract disputes, bankruptcy proceedings and matters involving international law. Ms Harwood frequently lectures on international arbitration at professional and academic conferences around the world. She received her Juris Doctor degree at Fordham University Law School in New York, where she was an editor of the *International Law Journal*, and is admitted to practise in New York and Washington, DC.

DAVID INGLE

*Allen & Overy*

David Ingle is a senior associate in Allen & Overy’s International Arbitration Group. He has acted for a range of banking and corporate clients, as well as state entities, in international commercial and investment treaty arbitrations under ICC, ICSID, LCIA and UNCITRAL Rules. He has provided advice to clients on a broad range of contentious issues and with respect to a multitude of jurisdictions.

David has experience of disputes in the following industries: energy, finance, construction and pharmaceuticals. He has also assisted in the publication of articles in relation to international arbitration.
David has been on a long-term assignment in Allen & Overy’s Madrid office since March 2014. He also spent six months on secondment in Allen & Overy’s Prague office (2011–2012).

**RASMUS JOSEFSSON**
*Sandart & Partners Advokatbyrå KB*

Rasmus Josefsson is an associate at Sandart & Partners law firm who specialises in complex and international dispute resolution. He has experience as counsel for international and Swedish clients in *ad hoc* and institutional arbitrations.

**GORDON E KAISER**
*JAMS*

Gordon Kaiser is an arbitrator practising at JAMS in Toronto and Washington, DC. His practice involves domestic and international disputes in energy and technology. He served as vice chairman of the Ontario Energy Board for six years. Prior to that he was a partner in a national law firm where he appeared in the courts and regulatory agencies across the country as well as the Federal Court of Appeal and the Supreme Court of Canada.

He has advised the Ontario Energy Board, the Alberta Utilities Commission, the Commissioner of Competition, the Ontario Independent Electricity System Operator, and the Competition Tribunal.

Mr Kaiser has mediated disputes on multi-year rate plans between public utilities and their major customers and long-term contracts for the pricing of gas, electricity and wireless data. He has advised the Alberta’s Utility Commission and the Ontario IESO on settlements under the Market Rules and the Attorney General Canada on settlements under the Competition Act. He has arbitrated disputes dealing with the construction of transmission and pipeline facilities, power purchase agreements, gas supply contracts, the construction of power plants, and wind and solar interconnection.

Mr Kaiser is an adjunct professor at the Osgoode Hall Law School, editor along with Bill Rowley and Doak Bishop of *The Guide to Energy Arbitration*, co-chair of the Canadian Energy Law Forum, and editor of the *Energy Regulation Quarterly*. He is recognised as one of Canada’s leading arbitrators by *Chambers Global*.

**YUTARO KAWABATA**
*Nishimura & Asahi*

Yutaro Kawabata frequently acts as counsel in international arbitrations under the UNCITRAL, ICC, JCAA and other institutional rules, and court litigation at all levels of the Japanese judicial system. During his career at Nishimura & Asahi, he has represented numerous multinational companies in various industries, such as the automobile, pharmaceutical, food and beverage, apparel and franchise industries. Mr Kawabata’s ambition is to provide efficient and practical services to clients in relation to disputes with international aspects, using his experience of many years spent living outside Japan. He also focuses on providing advice on the resolution of commercial disputes, in particular, termination of capital and business alliances, and termination of continuous long-term contracts under Japanese law.
SAE YOUN KIM

Yulchon LLC

Sae Youn Kim chairs the International Dispute Resolution Practice at Yulchon. Ms Kim practises primarily in the areas of litigation and arbitration with an emphasis on commercial and international law. Before joining Yulchon, she served as a judge at various Korean district courts including the Seoul District Court, the Daejeon District Court and the Suwon District Court.

Ms Kim is currently an arbitrator at the KCAB and SIAC and is licensed to practise in Korea and New York. She is regularly selected as a leading lawyer by publications such as *Chambers Global* and *Asialaw*.

CEYDA KNOEBEL

Gibson, Dunn & Crutcher LLP

Ceyda Knoebel is an English and Turkish-qualified senior associate 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 also admitted to the Bar in Turkey in 2007.

KOH SWEE YEN

WongPartnership LLP

Ms Koh Swee Yen is a Partner in the Commercial & Corporate Disputes Practice at WongPartnership LLP.

She has an active practice in complex litigation and international arbitrations under the major institutional rules, including ICSID, ICC, ICDR, SIAC and UNCITRAL. Her practice covers a wide spectrum of cross-border matters, including corporate, commercial, energy, international sales, trade and investment disputes.

Swee Yen is recommended in various legal publications, including *The Legal 500 Asia Pacific* for dispute resolution and *Chambers Asia-Pacific* for arbitration, with one source declaring ‘she’s in a league of her own, she’s very impressive and she’ll go very far.’ She is the only Singapore law firm lawyer to make the *Chambers Outstanding Young Partners* list for Singapore (2017) and is described as a ‘marvel’ in *Global Arbitration Review* (GAR) 100 – ninth edition (2016).

Ms Koh graduated with First Class Honours from the National University of Singapore, and previously served as a Justices’ Law Clerk to the Chief Justice of Singapore. She is currently the co-chair of IBA Arb40, a sub-committee of IBA Arbitration Committee, and
is also the co-chair of YSIAC Committee. She is also a member of the editorial board of the ICC Dispute Resolution Bulletin and the ICCA-ASIL Task Force on Damages.

BENOIT LE BARS

*Lazareff Le Bars*

Benoit Le Bars, co-founder and managing partner of Lazareff Le Bars, represents clients in international arbitration, mediation and alternative dispute resolution, and has specialist expertise in corporate law, international trade law, international contracts and OHADA law.

Benoit Le Bars’ practice focuses principally on commercial and investment arbitration involving complex trade relationships between businesses, investors and states, and spans a broad range of jurisdictions and arbitral institutions.

In addition to his work as counsel, he is often appointed as arbitrator and has extensive experience in arbitral forums worldwide.

Benoit Le Bars is also known for his strong engagement in business and law in Africa, and is a recognised specialist in OHADA law. As evidence of his commitment to the continent, he launched a quarterly magazine focused on corporate law in Africa (MIDAA) and hosts an annual conference for lawyers and business players across Africa (RIDAA). In 2016 he was appointed by the IGAD and the Djibouti Chamber of Commerce to co-head the legal task force to establish the rules and practices for the new IGAD Arbitration Centre in Djibouti.

His international arbitration expertise is recognised in the leading international legal directories, including *Chambers* and *The Legal 500*.

In 2016, he published an exhaustive treatise of French law judgments in international commercial arbitration. He is also a professor of law in the United States and in France.

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 $2 billion in claims submitted to arbitration under the investment chapter of the North American Free Trade Agreement (NAFTA). 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 ed. 2014; 1st ed. 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.
CHANG LIU
Zhong Lun Law Firm
Chang Liu is an associate in the Beijing office and specialises in international commercial and investment treaty arbitration. She has experience with HKIAC, LCIA, SIAC, ICSID and CIETAC arbitration. She is a PRC-registered lawyer and received a master’s degree in international law from China University of Political Science and Law.

PENNY MADDEN
Gibson, Dunn & Crutcher LLP
Penny Madden QC is an English-qualified partner in the London office of Gibson, Dunn & Crutcher. She is co-chair of the international arbitration practice group, and a member of the firm’s transnational dispute resolution practice. She was appointed as Queen’s Counsel in 2016.

She has a wide range of experience in all key aspects of international arbitration with particular expertise in shareholder, telecommunications, energy, international trade and insurance disputes. She represents clients across the globe in a wide variety of arbitration proceedings, including those under the auspices of the LCIA, ICC, PCA, UNCITRAL, ICSID and LMAA, as well as in ad hoc proceedings. In addition to representing clients as counsel and advocate, she regularly sits as an arbitrator.

Her recent cases include representing an Egyptian telecommunications corporate in its US$17 billion investment treaty arbitration against a North African state; representing a major mining corporate in a $1.4 billion LCIA arbitration dispute; representing a North African sovereign wealth fund in its bet-the-company ICC arbitration claim against a global corporate; and representing a major oil company in multibillion-dollar claims for expropriation under the Energy Charter Treaty. She is a member of the LCIA, the Financial Sector Arbitration Group and the editorial board of Commercial Dispute Resolution. She writes and lectures on a wide variety of arbitration issues and is the international arbitration specialist for The Diplomatic Book and its website for foreign embassies and high commissions.

Ms Madden also has significant experience in high court litigation and regulatory investigations, and frequently advises European companies registered in the United Kingdom and the United States on complex multi-jurisdictional regulatory enforcement issues.

OLEXANDER MARTINENKO
CMS Cameron McKenna LLC
Olexander is senior partner of, and head of the Commercial, Regulatory and Disputes Practice Group in, the Kyiv office of CMS Cameron McKenna. His experience includes advising multi-national and local companies, institutions and organisations on their business activities in Ukraine for almost three decades. Olexander is a highly acclaimed and recommended expert in competition, corporate and commercial law, as well as mergers and acquisitions, and a number of sector practices.

Olexander has over 25 years’ experience in representing clients in the Ukrainian systems of general and commercial courts, up to and including the level of the Supreme Court of Ukraine and over 20 years of experience representing clients in international commercial and/or investment arbitration proceedings, both within and outside Ukraine (he was involved in more than a dozen international commercial and/or investment arbitration
proceedings). He is on lists of recommended arbitrators with International Arbitral Centre of the Austrian Federal Economic Chamber, Singapore International Arbitration Centre, Hong Kong International Arbitration Centre and South China International Economic, Trade Arbitration Commission/Shenzhen Court of International Arbitration, Kuala Lumpur Regional Centre for Arbitration and International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC).

Olexander frequently acts as an expert on matters of Ukrainian law in international commercial and investment arbitration proceedings, and foreign dispute resolution proceedings, submitting Ukrainian expert witness reports, legal opinions and affidavits.

Olexander is recognised as a leading lawyer for Corporate/M&A and Antitrust/Competition by Chambers Europe 2008–2016, as well as recommended in Dispute Resolution by The Legal 500, 2013–2016.

LUCY MARTINEZ
Three Crowns LLP
Lucy Martinez is counsel at Three Crowns LLP. She has extensive experience advising and representing both investors and states in complex, high-value international arbitrations and litigations, including before AAA, ICC, ICSID, LCIA and UNCITRAL tribunals, pursuant to investment treaties and contracts. Lucy has worked on cases involving oil and gas, electricity, highway construction, telecommunications, satellite technology, waste processing and rock concerts, in various regions of the world including Africa, Asia, Europe, Latin America and North America. Lucy has been recognised in the 2017 Who’s Who Legal: Arbitration and Future Leaders directories, and in The Legal 500 UK for expertise in public international law.

CARMEN MARTINEZ LOPEZ
Three Crowns LLP
Carmen is a partner at Three Crowns LLP. She has appeared as advocate in numerous investment treaty and commercial arbitrations, both under the rules of the major arbitral institutions and ad hoc, and involving a variety of jurisdictions, with a particular focus on Latin America and Spain. Carmen is dual-qualified in civil law and common law, and regularly handles contentious work in English, Spanish and French. She is admitted to the New York and Madrid Bars, in addition to being a Registered European Lawyer of the Law Society of England and Wales. Carmen holds law degrees from Columbia Law School, the College of Europe and the University of Murcia.

PATRICIA NACIMIENTO
Herbert Smith Freehills Germany 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, Swiss Chamber of Commerce, Indian Council of Arbitration and the Danish Institution of Arbitration, as well as ad hoc proceedings. She is also regularly appointed as an arbitrator and has led numerous international ICC, DIS and ad hoc arbitration proceedings as a chairperson, sole arbitrator or party-appointed arbitrator.

For years Patricia has been listed as a leading disputes expert in the renowned rankings. She publishes regularly on disputes-related subjects and is co-editor of the leading arbitration manuals *Arbitration in Germany – The Model Law in Practice* (Kluwer 2015) and *The New York Convention – a Global Commentary* (Kluwer 2008).

Patricia gives lectures on arbitration at the universities of Heidelberg, Frankfurt and Saarbrücken. A native German speaker, Patricia is also fluent in English, Spanish, Italian and French.

**MICHAEL NOLAN**  
*Milbank, Tweed, Hadley & McCloy*

Michael Nolan is a partner in the Washington, DC office of Milbank, Tweed, Hadley & McCloy 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, act 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 and co-edited a collection of determinations in political risk insurance disputes (Oxford University Press). Michael is an adjunct professor of law at Georgetown University and general counsel of the Intellectual Property Owners Association. He is a member of the board of directors and international advisory committee of the American Arbitration Association, the Users Council of the Singapore International Arbitration Centre and the ICSID panel of arbitrators; and a fellow of the Chartered Institute of Arbitrators.

**COLIN Y ONG QC**  
*Dr Colin Ong Legal Services*

Dr Colin Ong QC is a member of the Brunei, English and Singapore Bars. He has acted as arbitrator or as counsel in over 220 commercial and investment arbitrations under most major rules of arbitration governed under civil and common law. His arbitrations generally involve cases concerning banking and finance, construction and infrastructure projects, insurance, mining and minerals disputes, energy disputes and general commercial trade-related matters. He has been listed as one of the Global Arbitration Review ‘45 under 45’. He is listed as a ‘Thought Leader’ by Who’s Who Legal: Arbitration and among the top 30 arbitration practitioners worldwide by Euromoney’s Expert Guides: Best of the Best 2017.

He is a chartered arbitrator and a Master of the Bench of the Inner Temple; president of the Arbitration Association Brunei Darussalam; adviser to the governing board, BANI (Indonesia), to the appointments board, Cambodia National Commercial Arbitration Centre, to the China-ASEAN Law Research Center, to the ICC Commission on Arbitration and the ICCA-Queen Mary Task Force (Costs and Security for Costs); former principal legal consultant, ASEAN Centre for Energy; panel member (Brunei Darussalam nominee) of
About the Authors

ASEAN Protocol on Enhanced Dispute Settlement Mechanism; and former vice president of the LCIA (Asia-Pacific Users’ Council).

He is or has been a visiting professor at various universities, including the University of Hong Kong, the University of Indonesia (UI), King’s College London, Queen Mary University of London, the University of Malaya, the National University of Malaysia, Padjadjaran University, Indonesia and the National University of Singapore. Dr Ong is an editorial board member of a number of legal journals, including Arbitration (CIarb), Butterworths Journal of International Banking and Financial Law, Dispute Resolution International and Maritime Risk International, and he is recognised as a leading arbitrator and arbitration counsel in all other main international legal directories.

ELITZA POPOVA-TALTY

Milbank, Tweed, Hadley & McCloy

Elitza Popova-Talty is an associate in the Washington, DC office of Milbank, Tweed, Hadley & McCloy and a member of the firm’s litigation and arbitration group. Ms Talty represents clients in international arbitration and federal and state litigation in complex disputes, including investment treaty and commercial arbitration, and general commercial and insolvency cases. Ms Talty represents clients in AAA, ICC, ICSID and UNCITRAL international arbitrations. Ms Talty has substantial experience with the US Foreign Corrupt Practices Act, other anti-bribery laws and sanctions programmes. She has advised clients in developing and implementing anti-corruption programmes for companies and financial services firms. Ms Talty holds both US and Bulgarian law degrees. Ms Talty is a graduate of University of Pennsylvania Law School and Sofia University St Kliment Ohridski Law School (Bulgaria).

LUCIA RAIMANOVA

Allen & Overy Bratislava, s.r.o.

Lucia is a solicitor-advocate (England and Wales) specialising in commercial and investment treaty arbitration.

Lucia has substantial experience in public international law and investment treaty arbitration. She has represented both claimants and respondent states in a number of bilateral investment treaty and Energy Charter Treaty arbitrations under the ICSID and UNCITRAL arbitration rules. Lucia has also acted on a number of international commercial arbitrations under the CIarb, ICC, LCIA, UNCITRAL, SRIA and VIAC arbitration rules. She also regularly advises governments and corporates on a range of arbitration-related issues and aspects of sovereign immunity.

Lucia regularly speaks at conferences and contributes to publications on the subject of international arbitration. She has been named as named by Who’s Who Legal as a Future Leader in International Arbitration (2017).

SUNDRA RAJOO

Kuala Lumpur Regional Centre for Arbitration (KLRCA)

Datuk Professor Sundra Rajoo is the director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) and the global President of the Chartered Institute of Arbitrators (2016). His roll of honour includes being founding president of the Society of Construction
Law, Malaysia and past president of the Asia Pacific Regional Arbitration Grouping (APRAG), which is a federation of nearly 40 arbitral institutions in the Asia-Pacific region.

Datuk Professor Sundra Rajoo is a chartered arbitrator and an advocate and solicitor of the High Court of Malaya (non-practising). He is a professional architect, registered town planner and a Fellow of the Royal Institution of Chartered Surveyors. He has had numerous appointments as chairman, co-arbitrator of three-man panels and sole arbitrator in international and domestic arbitrations. He serves on the panel of numerous international arbitral institutions and organisations.

He is a visiting professor at the Faculty of Built Environment, University of Technology Malaysia and a past visiting professor at the Faculty of Law, National University of Malaysia. He is a member in the Monetary Penalty Review Committee set up under the Malaysian Financial Services Act 2013.


In July 2015, Datuk Professor Sundra Rajoo was conferred an Honorary Doctorate in Laws from the Leeds Beckett University in England.

**ERIC M RUNESSON**

*Sandart & Partners Advokatbyrå KB*

Eric M Runesson is an attorney-at-law and the managing partner of Sandart & Partners law firm. He specialises in international and domestic arbitration, both as counsel and as an arbitrator, mainly within the fields of construction law, distribution, licensing, IT and M&A. He is one of the most frequently appointed arbitrators in Sweden and has extensive experience acting as chairperson as well as co-arbitrator. Eric M Runesson is also active in mediation. He is appointed by the Swedish government as one of its three mediators at the International Centre for Settlement of Investment Disputes (ICSID). Eric M Runesson spends part of his time as adjunct professor of law at Stockholm University. He has published numerous books and articles, mainly within the fields of contract law, arbitration and other forms of ADR. Current research regards, *inter alia*, investment arbitration, contract interpretation and the application of *jura novit curia*.

**ANDREW STEPHENSON**

*Corrs Chambers Westgarth*

Andrew Stephenson is a partner in the projects and arbitration group of Corrs Chambers Westgarth Melbourne. Andrew has over 30 years’ experience in contentious and non-contentious matters relating to all types of energy and resources projects. Andrew’s practice relates to both national and international projects. He has given advice or otherwise acted in respect of projects situated in all Australian states and territories, Bangladesh, the Central African Republic, the People’s Republic of China, Dubai, India, Iran, Ireland, Kuwait, Malaysia, New Zealand, Papua New Guinea, Singapore, Thailand and the United Kingdom.
Andrew is a senior fellow of Melbourne Law School, University of Melbourne, lecturing in project risk and dispute resolution. He has also lectured at Monash University, Queensland University of Technology and Queensland University, and regularly presents at industry conferences. He is a past co-chair of the Project Execution subcommittee of the International Construction Projects Committee of the International Bar Association. Andrew is the Australian correspondent for the International Construction Law Review, published in London, a board member of ACICA and a foundation fellow of the International Academy of Construction Lawyers.

MARIE STOYANOV  
*Allen & Overy LLP*  
Marie is a French *avocat* specialising in international arbitration. She has a broad range of expertise with a particular focus on treaty and other investment disputes, particularly in the energy, power and resources sectors. She has advised and represented clients in numerous bilateral investment treaty and ECT claims under the ICSID and UNCITRAL arbitration rules, as well as in ICSID annulment proceedings.  
Marie also sits as an arbitrator and has spoken regularly on arbitration.

JEFFREY SULLIVAN  
*Allen & Overy LLP*  
Jeff is a US-qualified and trained lawyer specialising in public international law and international arbitration, and is head of Allen & Overy LLP’s public international law practice.  
He has been counsel in numerous investment treaty arbitrations under ICSID and UNCITRAL arbitration rules, in ICSID annulment proceedings, and is recognised as one of the world’s leading authorities on arbitrations under the Energy Charter Treaty. He has also advised states on the negotiation and drafting of trade investment treaties.  
Jeff is the author of numerous academic articles and chapters on international investment law and arbitration, and he is frequently invited to speak at international conferences on investment law issues.  
Jeff is a member of the Energy Charter Treaty Secretariat’s Legal Advisory Task Force, an executive board member of the European Federation for Investment Law and Arbitration, a member of UNCTAD’s investment experts group, an assistant editor of *World Arbitration and Mediation Review*, and an advisory board member of the Institute for Transnational Arbitration.

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 ICC, UNCITRAL, LCIA, SIAC, HKIAC, CIETAC and ICSID arbitration rules. She has nearly 20 years’ experience working on arbitration matters involving cross-border joint ventures, energy and resources projects, financial products, intellectual property and construction projects.  
Prior to Zhong Lun, Huawei worked for more than seven years at the Beijing and Hong Kong offices of a leading international law firm. She is one of the few mainland lawyers
who have extensive experience arguing China-related cases before international tribunals. Huawei has also advised MOFCOM on various investment treaty issues and handled the first arbitral claim brought against China under an investment treaty.

Huawei is listed on the CIETAC and HKIAC Panels of Arbitrators and has acted as arbitrator for a wide range of cases including international sale of goods and cross-border investments. Before joining private practice, she worked at the Secretariat of CIETAC for five years.

Huawei has a JD degree and is qualified in the State of New York. She is fluent in English and is a native Chinese speaker.

CHRISTINA TRAHANAS
Curtis, Mallet-Prevost, Colt & Mosle LLP
Christina Trahanas is an associate in the international arbitration group of Curtis, Mallet-Prevost, Colt & Mosle. Her practice focuses on investor–state arbitration and international commercial arbitration. She has been involved in proceedings conducted under the rules of ICSID, UNCITRAL and the ICC, including proceedings related to the energy resources sector and construction sector. Ms Trahanas is admitted to practise in New York and Australia. She received an LLM from New York University School of Law and her Bachelor of Laws from the University of New South Wales, Australia. Her prior experience includes working at the Office of International Law within the Australian Attorney-General’s Department, where she provided international law advice to the Australian government. She speaks English, French, Greek and Spanish.

DANNI WANG
Zhong Lun Law Firm
Danni Wang is an associate in the Beijing office and specialises in international commercial and investment treaty arbitration. She has experience with LCIA, ICC, ICSID, HKIAC and CIETAC arbitration.

She is admitted to practise in Victoria, Australia and received a JD from the University of Melbourne.

ALVIN YEO
WongPartnership LLP
Mr Alvin Yeo is a preeminent arbitration and litigation counsel who has acted for and advised international clients in complex, cross-border disputes and multi-jurisdictional enforcement proceedings.

His extensive experience covers investor–state treaty disputes, banking and corporate disputes, contentious investigations, insolvency and restructuring, construction and civil engineering matters and financial services regulatory matters, including corporate fraud, anti-money laundering and insider trading.

Chambers Global describes Mr Yeo as ‘the most impressive, as an advocate, out of all the Singapore firms’. Chambers Asia-Pacific 2017 has said that Mr Yeo ‘provides leadership on SIAC and ICC proceedings’. Who’s Who Legal: Arbitration 2017 lauded Mr Yeo as ‘a leading light in the market who possesses strong arbitration credentials and experience’.
He is recognised as a leading litigation and arbitration counsel in international legal directories such as *Chambers Asia-Pacific*, *Chambers Global*, *IFLR1000*, and *The Legal 500 Asia Pacific*.

Mr Yeo is vice president of the LCIA Asia Pacific’s Users’ Council, sits on the Panel of Arbitrators in HKIAC, ICDR, KCAB, KLRCA and SCIA, fellow of SIArb and member of the Court of the SIAC, SIArb’s Panel for Sports in Singapore and the ICC Commission.
Appendix 2

CONTRIBUTING LAW FIRMS’ CONTACT DETAILS

**ALJAZY & CO**
Al Maani Building, First Floor
No. 4 Abdullah Al-Asbah Street
Shmeisani
Amman 11192
Jordan
Tel: +962 6 5654477
Fax: +962 6 5653100
ayham.almashni@aljazylaw.com

**ALLEN & OVERY LLP**
52 avenue Hoche
75008 Paris
Cedex 08
France
Tel: +33 1 40 06 5131
Fax: +33 1 40 06 5454
marie.stoyanov@allenovery.com

**CMS CAMERON MCKENNA LLC**
38 Volodymyrska Street, 6 floor
01030 Kiev
Ukraine
Tel: +380 44 391 33 77
Fax: +380 44 391 33 88
olexander.martinenko@cms-cmck.com
https://cms.law
CORRS CHAMBERS WESTGARTH
Level 25
567 Collins Street
Melbourne Victoria 3000
Australia
Tel: +61 3 9672 3358 / +61 3 9672 3142
Fax: +61 3 9672 3010
andrew.stephenson@corrs.com.au
lee.carroll@corrs.com.au
www.corrs.com.au

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 Park Avenue
New York
NY 10178-0061
United States
Tel: +1 212 696 6000
Fax: +1 212 697 1559
www.curtis.com

DENTONS
Dentons Europe LLP
5 boulevard Malesherbes
75008 Paris
France
Tel: +33 1 42 68 48 70
Tel: +33 1 42 68 44 72
Fax: +33 1 4268 71 55
Fax: +33 1 42 68 15 45
barton.legum@dentons.com
www.dentons.com

Dentons US LLP
1900 K Street, NW
Washington, DC 20006
United States
Tel: +1 202 496 7500
Fax: +1 202 496 7756
ivan.bilaniuk@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
Brunei
Tel: +673 2 420 913
Fax: +673 2 420 911
contacts@onglegal.com

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
cbenson@gibsondunn.com
pmadden@gibsondunn.com
cknoebel@gibsondunn.com
www.gibsondunn.com

HERBERT SMITH FREEHILLS
GERMANY LLP
Neu Mainzer Straße 75
60311 Frankfurt am Main
Germany
Tel: + 49 69 2222 82530
Fax: +49 69 2222 82499
patricia.nacimiento@hsf.com
www.herbertsmithfreehills.com
Contributing Law Firms' Contact Details

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION (KLRCA)
Bangunan Sulaiman
Jalan Sultan Hishamuddin
50000 Kuala Lumpur
Malaysia
Tel: +603 2271 1000
Fax: +603 2271 1010
sundra@klrca.org
www.klrca.org

MILBANK, TWEED, HADLEY & MCCLOY
1850 K Street NW
Suite 1100
Washington, DC 20006
United States
Tel: +1 202 835 7500
Fax: +1 202 263 7586
mnolan@milbank.com
etalty@milbank.com
www.milbank.com

JAMS
77 King Street West
Suite 2020
Toronto M5K 1A1
Canada
Tel: +1 416 861 1084
Fax: +1 416 861 2465

555 13th Street, NW
Suite 400 West
Washington, DC 20004
United States
Tel: +1 202 942 9180
Fax: +1 202 942 9186
gordon.kaiser0@gmail.com
www.jamsadr.com
www.energyarbitration.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
y_kawabata@jurists.co.jp
www.jurists.co.jp/en

REDCLIFFE PARTNERS LLC
75 Zhylyanska Street, 13th floor
01032 Kiev
Ukraine
Tel: +380 44 390 58 85
Fax: +380 44 390 58 86
sergiy.gryshko@redcliffe-partners.com
www.redcliffe-partners.com

LAZAREFF LE BARS
22 rue Général Foy
75008 Paris
France
Tel: +33 1 40 01 10 10
Fax: +33 1 40 01 10 11
lebars@l-lb.com
fouchard@l-lb.com
http://lazareff-lebars.com
http://internationalarbitrationlaw.com

SANDART & PARTNERS ADVOKATBYRÅ KB
Norrlandsrgatan 20
103 87 Stockholm
Sweden
Tel: +46 8 440 68 00
Fax: +46 8 440 68 10
eric.runesson@sandart.se
rasmus.josefsson@sandart.se
www.sandart.se/

"Contributing Law Firms' Contact Details"
THREE CROWNS LLP
New Fetter Place, 8–10 New Fetter Lane
London, EC4A 1AZ
United Kingdom
Tel: +44 20 3530 7999
Fax: +44 20 3530 0997
carmen.martinezlopez@threecrownsllp.com
lucy.martinez@threecrownsllp.com
www.threecrownsllp.com

WOLF THEISS RECHTSANWÄLTE GMBH & CO KG
Schubertring 6
1010 Vienna
Austria
Tel: +43 1 51510 5752
Fax: +43 1 51519 665750
ceyda.akbalschwimann@wolftheiss.com
www.wolftheiss.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

YULCHON LLC
Textile Center 12F
518 Teheran-ro, Gangnam-gu
Seoul 06180
Korea
Tel: +82 2 528 5200
Fax: +82 2 528 5228
kimsy@yulchon.com
tjahn@yulchon.com
www.yulchon.com

ZHONG LUN LAW FIRM
Levels 31, 33, 36 & 37, SK Tower
6A Jianguomenwai Avenue
Chaoyang District
Beijing 100022
China
Tel: +86 10 5957 2288
Fax: +86 10 6568 1022
sunh@zhonglun.com
danniwang@zhonglun.com
liuchang@zhonglun.com