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Catharine Titi *Editor*

Special Issue:

Public Actors in International Investment Law

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Public Actors in International Investment Law

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Preface

This edited volume brings together a selection of peer-reviewed chapters that were presented and discussed at the *Colloquium* on “Actors in International Investment Law: Beyond Claimants, Respondents and Arbitrators”. The *Colloquium* was jointly organised by the CERSA, research centre of the French National Centre for Scientific Research (CNRS) and of the University Paris II Panthéon-Assas, the Law Faculty of the University of Zaragoza, and the Athens Public International Law Center (Athens PIL) of the National and Kapodistrian University of Athens, and was held at the University Paris II Panthéon-Assas on 26 and 27 September 2019.

Traditional studies of actors in international investment law have tended to focus on arbitrators, claimant investors, and respondent states. There is nothing surprising about this choice. As the disputing parties, the claimant investor and the respondent host state are a natural focus for studies in the field. As for arbitrators, one need only recall William Park’s much-cited apophthegm: “Just as in real estate the three key elements are ‘location, location, location’, so in arbitration the applicable trinity is ‘arbitrator, arbitrator, arbitrator’” (William W. Park (2002) Income Tax Treaty Arbitration’ 10 George Mason Law Review 803, 813). Yet this focus on investment dispute settlement’s “principal” actors has left a number of other seminal actors outside the main scope of study in this field of law, a view that was duly reaffirmed as the *Colloquium* unfolded.

This book’s purpose is to contribute to redressing this imbalance by critically reviewing some public actors in international investment law that sometimes remain outside the spotlight. Although the title of the book no longer reflects the intention to exclude from its scope “claimants, respondents, and arbitrators”, these actors are not covered. The book is also related to two other volumes simultaneously published by Springer: *Private Actors in International Investment Law* (edited by Katia Fach Gómez) and *Transnational Actors in International Investment Law* (edited by Anastasios Gourgourinis). Collectively, these three books aim to not only make a relevant academic contribution but also promote a scholarly discussion that lays the foundations for future debates on international investment law.

The book opens with a chapter co-authored by Chrysoula Mavromati and Sarah Spottiswood on "Voices That Shape Investment Treaties: Inside, Outside and Among States". The chapter argues that despite the habitual perception of investment treaties as instruments that reflect the interests of states and investors, in reality they are shaped by manifold actors or "voices". The authors describe IIAs as multifaceted texts influenced by a variety of voices inside, outside, and among states. The executive and the legislative branches of government, the judiciary, national courts, business, civil society, academia, intergovernmental organisations, and international courts and tribunals are part of "a rich tapestry of influences" that treaty negotiators take to the negotiating table.

In the second chapter entitled "Beyond Protection: The Role of the Home State in Modern Foreign Investment Law", Tarcisio Gazzini canvasses the home state in international investment law. The chapter reviews three stages in the evolution of the position of the home state. First, it considers the home state's normative focus on the protection of its investors abroad. Second, it assesses its "marginalisation" with the emancipation of foreign investors through investment arbitration. Third, it probes into the new role of the home state reaching beyond the protection of its national investors abroad and covering novel areas, such as by imposing obligations on these investors. The chapter closes with an evaluation of the sustainability of this new model and role of the host state.

In the following chapter, "National Courts as Actors in Investment Arbitration", Aniruddha Rajput focuses on national courts as actors in investment arbitration. National courts both influence and are influenced by investment arbitration. The interactions between national courts and arbitral tribunals are numerous and varied. The fact that municipal law is sometimes part of the applicable law in investment disputes allows national courts, the interpreters of municipal law, to influence investment arbitration. National courts may compete for jurisdiction with arbitral tribunals. They can facilitate investment arbitration by enforcing awards and they can disrupt it by issuing anti-arbitration injunctions or by refusing enforcement. Arbitral tribunals too can issue anti-suit injunctions, and especially they can review national court decisions for violations of investment standards, such as for denial of justice. The chapter delves into this complex two-way relationship that ultimately allows investment tribunals to "have the last word".

In "State Immunity and the Execution of Investment Arbitration Awards", Phoebe D. Winch addresses state immunity and the execution of investment awards from the viewpoint of the forum state. The author canvasses the plea of state immunity from the execution of investment awards in light of recent attempts by award-creditors to attach their awards against assets located in jurisdictions considered to be favourable to enforcement, notably France and Belgium. In particular, the author delves into substantive and procedural amendments to French and Belgian laws on state immunity and suggests a way forward for investors that seek to execute their investment awards in these jurisdictions.

The two ensuing chapters turn to an increasingly topical issue: the participation of the home state in investment dispute settlement. In a chapter entitled "Trends and ISDS Backlash Related to Non-Disputing Treaty Party Submissions", Kendra

Magraw addresses non-disputing treaty party submissions on issues of treaty interpretation. Focusing on the non-disputing treaty party mechanisms of the North American Free Trade Agreement (NAFTA), the author searches potential links between tribunals' failure to pay due regard to treaty parties' interpretations and the current "backlash" against investor-state dispute settlement (ISDS). The chapter explores this topic in light of the increasing popularity of non-disputing treaty party provisions in new treaties and arbitration rules, such as in the amendments to the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) and the Mauritius Convention on Transparency in ISDS of the United Nations Commission on International Trade Law (UNCITRAL).

In "Not a Third Party: Home State Participation as a Matter of Right in Investment Treaty Arbitration", Rebecca E. Khan makes an argument in favour of non-disputing treaty party participation in investment arbitration "as a matter of right". The author points to the fact that non-disputing state parties tend to be treated no differently than other *amici curiae* and posits that non-disputing treaty parties should be accorded a special status. According to the author, this should allow them, for instance, to be notified if one of their national investors files a dispute and grant them the right to access documents related to the arbitration and make written submissions. The chapter probes the state of play of home state participation as a non-disputing party in investment arbitrations and discusses the attendant risks, seeing that such participation may essentially amount to diplomatic protection.

In the next chapter on "Investor-State Dispute Prevention: The Perspective of Peru", Carlos José Valderrama draws on his experience as former head of Peru's legal defence team to discuss state perspectives on investment dispute prevention and suggests tried-and-tested methods to prevent disputes. The author canvasses risks that states face when confronted with a potential investor-state dispute and argues that every dispute is a dispute too many. He analyses Peru's dispute prevention approach and studies some general considerations that must be taken into account in order to prevent disputes. He concludes with a set of recommendations for dispute prevention.

In the next chapter, entitled "The Role of Sub-Regional Systems in Shaping International Investment Law-Making: The Case of the Visegrád Group", Federica Cristani addresses a rarely discussed sub-regional system, the V4 group, comprising Slovakia, Hungary, Poland, and the Czech Republic. The author commences with an overview of the V4 group, before turning to the regulation of foreign direct investment (FDI) within V4 states and at the EU level. She examines the termination of intra-EU bilateral investment treaties (BITs) and the relationship of the V4 group with non-EU states. Moreover, the author emphasises the role the V4 group has played in investment matters, including the encouragement and protection of foreign investment, and argues in favour of the "soft power" that the group may exercise in the field.

In "The Implications of Political Risk Insurance in the Governance of Energy Projects: The Case of Japan's Public Insurance Agencies", Thomas Nektarios Papanastasiou discusses political risk insurance (PRI) in energy projects, with a special focus on Japan's public insurance agencies. PRI is provided by international

organisations, such as the World Bank's Multilateral Investment Guarantee Agency (MIGA) and by state-sponsored insurance agencies, known as export credit agencies (ECAs). The chapter pays close attention to the PRI schemes of NEXI, Japan's state-sponsored ECA. PRI plays an important role in investments in energy projects, owing to the complexity of the energy sector. PRI benefits are not limited to cash payments. At the same time, these insurance schemes include various policy requirements and performance standards that, in addition to influencing insured investors, can affect the regulatory authority of host states and local communities. For this reason, some ECAs, including NEXI, adopt measures to encourage sustainable investment projects, such as by imposing social and environmental obligations and setting up ombudsmen, measures whose effectiveness is yet to be tested.

The book's final chapter, written by Pascale Accaoui Lorfing, closes with the "Screening of Foreign Direct Investment and the States' Security Interests in Light of the OECD, UNCTAD and Other International Guidelines". The chapter enquires into the scope and limits of the state's right to take measures that it considers essential to its national security, in light of guidelines and recommendations issued notably by the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD). The author argues that, while non-mandatory, such guidelines can help states determine the limits to their national screening mechanisms. The chapter further assesses the impact of IIAs and customary law on regulatory measures geared towards the protection of states' essential security interests.

Paris, France Catharine Titi

Contents

Voices That Shape Investment Treaties: Inside, Outside and Among States 1
Chrysoula Mavromati and Sarah Spottiswood

Beyond Protection: The Role of the Home State in Modern Foreign Investment Law 19
Tarcisio Gazzini

National Courts as Actors in Investment Arbitration 37
Aniruddha Rajput

State Immunity and the Execution of Investment Arbitration Awards 57
Phoebe D. Winch

Trends and ISDS Backlash Related to Non-Disputing Treaty Party Submissions 79
Kendra Magraw

Not a Third Party: Home State Participation As a Matter of Right in Investment Treaty Arbitration 97
Rebecca E. Khan

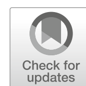
Investor-State Dispute Prevention: The Perspective of Peru 117
Carlos José Valderrama

The Role of Sub-Regional Systems in Shaping International Investment Law-Making: The Case of the Visegrád Group 135
Federica Cristani

The Implications of Political Risk Insurance in the Governance of Energy Projects: The Case of Japan's Public Insurance Agencies . . . 155
Thomas-Nektarios Papanastasiou

Screening of Foreign Direct Investment and the States' Security Interests in Light of the OECD, UNCTAD and Other International Guidelines . . . 179
Pascale Accaoui Lorfing

Voices That Shape Investment Treaties: Inside, Outside and Among States



Chrysoula Mavromati and Sarah Spottiswood

Contents

1 Introduction ... 2
2 Three Categories of Voices That Influence Investment Treaties ... 2
3 Voices from Inside the State ... 3
3.1 The Executive ... 4
3.2 The Legislature ... 5
3.3 The Judiciary ... 6
3.4 Sub-national Governments ... 7
4 Voices Outside the State ... 8
4.1 Business, Civil Society, Legal Community and Others ... 8
4.2 Media ... 9
4.3 Academia ... 10
5 Voices Among States ... 11
5.1 International Organisations ... 11
5.2 Multilateral Fora ... 12
5.3 Bilateral Discussions ... 13
5.4 Arbitral Awards and International Judgments ... 13
5.5 Other Investment Treaties and International Agreements ... 14
6 Voices Over Time ... 14
7 Balancing Voices in Treaty Making ... 15
8 Conclusion ... 15
References ... 16

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Abstract Investment arbitration awards often give the impression that investment treaties are designed to reflect the interests of two actors: "investors" and "states". There are in fact a myriad of actors, or "voices", behind each word in an investment agreement. This chapter identifies three broad categories of voices: voices inside, outside and among states. It explores the range of voices that influence investment treaty text by reference to those three categories. The chapter argues that modern investment treaties are multifaceted texts that are influenced by a range of voices from within and outside of government.

1 Introduction

Investment arbitration awards often give the impression that investment treaties are designed to reflect the interests of two actors: "investors" and "states". There are in fact a myriad of actors, or "voices", behind each word in an investment agreement. This chapter identifies three broad categories of voices that influence investment treaty text and explores the range of voices within those categories that lead to the final treaty text. It argues that modern investment treaties are multifaceted texts that are influenced by a range of voices from within and outside of states.

To begin with, this chapter identifies three categories of voices as a tool to categorise the range of voices that feed into investment treaty making. It explores the rationale for identifying these categories and possible limitations of this categorisation. Against this background, it analyses the first category of voices that influence investment treaty text: voices from inside the state. The chapter then goes on to consider the second category of voices that shape investment treaties: voices originating outside the state. It then turns to the third category of voices: voices among states. It also touches on the role of voices as expressed in past treaties. The chapter concludes with some preliminary remarks on complexities arising from balancing and prioritising of different voices in the negotiation of an investment treaty and identifies areas for further research.

2 Three Categories of Voices That Influence Investment Treaties

Three broad categories of voices that influence investment treaties can be identified: voices inside, outside and among states. The first category, "voices inside the state" refers to the various actors within the different branches and levels of a government. Second, "voices outside the state" includes non-state actors such as businesses, civil society and academics. Third, "voices among states" refers to multilateral and bilateral interactions among states and the role of international institutions in

investment treaty making. The chapter draws on case studies from different countries and different negotiation processes that led to, or failed to lead to, existing treaties to show how voices in each of these categories influence the negotiation of investment treaties. The examples used are ascertained from publicly available sources.

The three categories of voices that influence investment treaties are not a perfect categorisation. They are a helpful lens through which to view the range of voices that are reflected in modern investment treaties. Some actors may not comfortably fit entirely within any one category, and some may fit into more than one. The aim of this categorisation is simply to draw attention to the diversity of voices that are amalgamated into investment treaty text and show that voices within each category influence the process in different ways.

It is also important to note that within each category and even within each kind of "voice" that is identified there is unlikely to be one homogenous viewpoint. This applies to ministers, officials and judges inside the state as much as it does to businesses, civil society or even international institutions. It may be argued that the pluralist nature of voices that influence investment treaties undermines the usefulness of a study that seeks to provide an overview of the range of voices that influence investment treaty making. However, there is a large benefit in identifying, explaining and categorising the multitude of voices both for promoting a greater understanding of the treaty-making process and as a starting point for further research into the role of different voices in more detail. This chapter seeks to address the current absence of research that outlines, on a detailed actor-by-actor basis, how different voices influence the development of model treaty text and the negotiation of investment treaties.

3 Voices from Inside the State

It is well-known that investment arbitration awards have involved challenges to actions by different branches of government: the legislature,[1] the executive[2] and the judiciary.[3] Each branch of government also influences what wording appears in an investment treaty. This part explains how actors within the different branches of government, and in different levels of government, contribute to the contents of investment treaties.

[1]See, e.g., *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016.

[2]See, e.g., *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.

[3]See, e.g., *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017.

3.1 The Executive

It is well known that investment treaties, like all treaties, are largely negotiated by officials working in ministries in the executive branch of government, with the direction and agreement of ministers. Treaty negotiation often occurs over a number of "rounds" interspersed by periods that officials spend in capitals developing policy and seeking instructions on the approach to take in the next negotiating round.

The process often formally starts with the creation, and sometimes also the publication, of a negotiating mandate by both sides, although informal meetings between ministers and officials from each party may precede this. The mandate will be developed in ministries and agreed by ministers across government.

Policy officials, economists and lawyers within ministries first inform themselves by consulting the myriad of voices from outside the State and among States discussed below. This process involves collecting, analysing, considering, discussing, presenting, refining and clarifying the range of policy and legal options available. The result of this process is fed into national positions that are expressed in the negotiating mandate and refined throughout negotiations by officials inside and outside of the negotiating room.

Different ministers and ministries may have competing policy positions that need to be reconciled. Investment treaties may raise issues that touch on the policy priorities of numerous departments including, for example, those with responsibility for the treasury, foreign relations, trade, environment, energy, business, agriculture, tax, health and different levels of government. Governments ordinarily have a process in place for making decisions which affect many policy areas and for resolving competing policy positions. For instance, the decision making within the UK Government is often based on the "collective agreement process", also known as "write-round", which allows ministers with responsibility for different departments to express their views frankly in discussion and reach agreement on policy proposals.[4]

Negotiators may need to make reactive decisions or turn to fallback positions during discussions with their counterparts. Moreover, there may be situations where officials from either negotiating party cannot resolve an issue after many rounds of negotiations, despite engaging in discussions about the range of policy and legal options available. Difficult issues that are unable to be resolved at official level are elevated to discussions between ministers and their counterparts in other governments.

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[4] See Cabinet Office, Collective Government Agreement Process Guidance, March 2013, https://civilservicelearning.civilservice.gov.uk/sites/default/files/cabinet_office_collective_agreement_process_guidance_0.pdf.

3.2 The Legislature

The legislature in many countries may shape the standards that are negotiated by officials in the executive branch.[5] Depending on the state's constitutional arrangements, the legislature may exert influence either before negotiations begin or once a signed version of the treaty is taken to the legislature as part of ratification procedures.

The most obvious way that the legislature may shape investment treaties is by passing legislation to set out negotiating directives and, more broadly, prescribe the limits of the negotiating mandate. US negotiators, for example, are guided by negotiation objectives on foreign investment set out in the Bipartisan Congressional Trade Priorities and Accountability Act 2015.[6] If the negotiating objectives set out in that legislation are advanced in a trade agreement and other requirements in the legislation are met, the agreements are likely to benefit from advantageous congressional procedures at the ratification stage, including a prohibition on amendments to the legislation implementing the agreement. The US Congress decides whether the requirements of the legislation are met so that the ratification process for a particular trade agreement may be expedited.[7]

Parliamentary committees, such as Australia's Joint and Senate Standing Committees on Foreign Affairs, Defence and Trade and on Treaties, may conduct inquiries before or during negotiations[8] or once a treaty has been signed.[9] Committees inform themselves with written and oral evidence provided by witnesses who may be from businesses, academia or civil society. Members of parliamentary committees, and the research staff who assist them, then prepare reports that make recommendations to the government. These reports are in turn considered by the government and interested civil society organisations and business who may refer to the reports to bolster their positions.

Depending on the ratification process in each country, legislatures may be able to shape investment treaties by refusing to ratify agreements due to concerns with specific content, or to amend the negotiating mandate in the course of the negotiations. This may force the executive back to the negotiating table. For instance, the non-ratification of bilateral investment treaties (BITs) by Brazil has also been, in

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[5]There is extensive academic debate about the role of Parliament in treaty making. See, e.g., Schütze (2017), p. 7.

[6]19 USC § 3802.

[7]See Congressional Research Service, Trade Promotion Authority (TPA): Frequently Asked Questions, 21 June 2019, https://crsreports.congress.gov/product/pdf/R/R43491.

[8]See, e.g., Joint Standing Committee on Foreign Affairs, Defence and Trade, Australia's trade and investment relationship with Japan and the Republic of Korea, 3 June 2013, https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadt/japanandkoreatrade/report.htm.

[9]See, e.g., Senate Standing Committee on Foreign Affairs, Defence and Trade, Proposed Trans-Pacific Partnership (TPP) Agreement, 7 February 2017, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP/Report.

part, attributed to resistance by the National Congress of Brazil.[10] Another example is when the European Parliament passed a resolution requesting the European Commission "to replace investor-state arbitration with a new system for resolving disputes between investors and states" in the Transatlantic Trade and Investment Partnership (TTIP).[11] This bolstered the European Commission's decision to pursue the Investment Court System in its future negotiations, including to renegotiate the relevant provisions of the Comprehensive Economic and Trade Agreement (CETA) which initially contained a traditional investor-state arbitration mechanism.[12]

The voices of individual members of parliament may also influence the policy positions taken by ministers. Opposition ministers and members of parliament may meet with ministers privately or ask them questions in parliament. In this way, voices from outside states that have lobbied members of parliament can inform and be funnelled into a voice inside the state to influence investment treaties.

3.3 *The Judiciary*

Courts supervise investment arbitration proceedings and preside over enforcement and execution of arbitral awards, but they also influence the existence and content of investment provisions. For example, Colombia's Constitutional Court has recently ruled that certain provisions of the BIT between Colombia and France were "conditionally constitutional" ("*condicionalmente exequible*") subject to a joint interpretative note being issued to clarify the meaning of certain standards of treatment.[13]

Opinion 1/17 of the Court of Justice the European Union (CJEU) provides another illustration of how the judiciary may shape the content of investment treaties.[14] In that case, the CJEU was asked whether the Investment Court System in CETA was compatible with EU law and the Court found that it was. This case shows two ways in which courts influence investment treaties. First, the arguments put by the European Commission and some member states show how EU treaty negotiators sought to include "safeguards" in the investment chapter of CETA that

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[10]Titi (2016) and Campello and Lemos (2015).

[11]European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)).

[12]Puccio and Harte (2017).

[13]Sentencia C-252, Control de constitucionalidad del Acuerdo entre el Gobierno de la República de Colombia y el Gobierno de la República Francesa sobre el Fomento y Protección Recíprocos de Inversiones, suscrito en la ciudad de Bogotá, el 10 de julio de 2014, y de la Ley 1840 de 12 de julio de 2017, por medio de la cual se aprobó este tratado internacional, http://www.corteconstitucional.gov.co/relatoria/2019/c-252-19.htm#_ftn233 cited in Prieto (2019).

[14]Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341.

respected previous jurisprudence on setting up international courts by the EU.[15] Second, the opinion could also be read as setting minimum standards for investor-state dispute settlement provisions in EU agreements.[16]

Another example of influence by courts on investment treaties can be seen in the expression of investment protections in US investment treaties, which often closely mirror equivalent standards set in domestic law by US courts. For instance, the factors set out in Annex B of the US Model BIT of 2012 for the determination of whether an action or series of actions by a party has an effect equivalent to direct expropriation, that is, formal transfer of title or outright seizure, are drawn from US Supreme Court jurisprudence on compensable takings under the Fifth Amendment to the US Constitution.[17] In this way, US judicial decisions have indirectly influenced or inspired the standards negotiated by the executive branch of the US government.

3.4 Sub-national Governments

The influence of sub-national governments on the text of investment treaties may also be important. Sub-national governments may be seen as a "microcosm" containing, at a regional level, all the voices discussed in this chapter that influence treaties from inside and outside the state. In most countries, it is the national government that has constitutional power for treaty making which may affect the influence of voices from sub-national governments in investment treaties. The degree of influence and involvement of sub-national governments in the negotiations of an agreement may vary depending on the constitutional division of competences between the central, regional and local governments. For example, Canadian provinces played a major role and were invited into the negotiation room in CETA negotiations due to the comprehensive nature of the agreement which covered aspects, such as government procurement and agriculture, which fell within the competence of the provinces.[18] Even in those countries where central governments have exclusive power for treaty making on all subject matters, for example in India and Australia,[19] coordination may still occur between the central government and regional or local governments, even if this may not be constitutionally required. For example, Australian states and territories were consulted before, during and after the negotiation of the Australia-United States Free Trade Agreement even though it is

[15]Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, [70]-[78].

[16]Bungenberg and Titi (2019).

[17]*Penn Central Transportation Co v New York City, 438 US 104 (1978)*. See Caplan and Sharpe (2013), p. 755, 790.

[18]Paquin (2013).

[19]See Article 253 of the Constitution of India. See also, in relation to Australia, section 51(xxix) of the Constitution of Australia.

the central government that has exclusive constitutional power to negotiate treaties.[20]

4 Voices Outside the State

Outside of the state, there are a wide range of voices, namely business organisations, investors, non-governmental organisations, the media, academia and the legal profession, that play their own role in informing policies and thus influencing the text of a treaty. These voices may use different channels, including contacting members of the legislature or government departments, formal public consultations, official or unofficial stakeholder engagements, interaction through social media, public campaigns, publications and other methods of influencing those inside the state.

4.1 Business, Civil Society, Legal Community and Others

Different stakeholder groups, such as business, civil society and the legal community in each state, may provide their views on investment treaties through the process of stakeholder engagement run by governments.[21] Stakeholder engagement mechanisms act as "knowledge platforms", which are intended to ensure sustained and up-to-date information on the stances of the different stakeholder groups.[22] Stakeholder engagement can take various forms and may range from unofficial, ad hoc meetings to dedicated formal events.[23] Exchanges may occur between relevant government departments and business associations, trade unions, academics, non-government organisations (NGOs), the legal community and others. Although stakeholder engagement is normally an ongoing activity built into everyday work of government departments, enabling an inclusive and continuous dialogue, it is often intensified when a government is in the process of reviewing existing policies and preparing new proposals.

[20] See Parliament of Australia, Report 61: The Australia-United States Free Trade Agreement, June 2004, https://www.aph.gov.au/~/media/wopapub/house/committee/jsct/usafta/report/fullreport_pdf.ashx, pp. 36–42.

[21] See, e.g. public consultation on the US investment model agreement https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Stakeholder-Consultations-Investment-and-the-TTIP; public consultation on Canada's foreign investment promotion and protection agreements https://www.international.gc.ca/trade-commerce/consultations/fipa-apie/index.aspx?lang=eng.

[22] British Chamber of Commerce, UK Trade Policy—Institutions and Procedures for the 21st Century https://www.britishchambers.org.uk/media/get/Trade%20Policy%20and%20Stakeholder%20Engagement%20-%20full%20report.pdf, p. 8.

[23] Ibid.

In this regard, public consultations are a common tool in the investment treaty-making process not least because they enable reaching out to a wide range of stakeholders. Governments use public consultations to seek views, evidence and opinions from interested parties with a view to collecting empirical information for analytical purposes, measuring expectations and identifying non-evident policy alternatives when making a policy decision.[24]

An illustrative example of how public consultations have shaped the content of investment agreements is in relation to the EU's approach to investor-state dispute settlement, the Investment Court System. Public consultation in 2014 on investment protection and investor-state dispute settlement (ISDS) in the proposed TTIP between the EU and the United States recorded an unprecedented mobilisation by civil society in Europe. The consultation responses raised concerns around the establishment and functioning of arbitral tribunals and the lack of appellate review of ISDS awards. The public consultation and ensuing debate, that involved the European Parliament, EU member states and civil society, led the European Commission to develop the Investment Court System as its preferred mechanism for resolving disputes between investors and states rather than ad hoc investor-state arbitration.[25]

Lobbying activity between interest groups and members of the legislature is also common. Feedback received from such meetings, together with input from other sources, may form part of the evidence base on which investment policies are designed and the content of model investment agreements is ultimately shaped.

4.2 Media

The news media can also be influential in shaping policies and, by extension, in shaping a treaty's content. It can serve both as a separate actor that carries its own views, or as a vehicle that gives floor to voices that otherwise may not have found their way to a broader audience. This is particularly the case with digital and social media which have facilitated dissemination of information and dialogue among interested parties on all possible issues, including investment policies and arbitration. For example, social media played a pivotal role in the development of the movement opposing TTIP negotiations and in the backlash against ISDS. An analysis of European online media shows that anti-TTIP groups dominated 60% of online media coverage from June to November 2014.[26] ISDS by far occupied the

[24] Organisation for Economic Cooperation and Development, Background Document on Public Consultation https://www.oecd.org/mena/governance/36785341.pdf, p. 1.

[25] See European Commission, A Multilateral Investment Court, September 2017, http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf.

[26] Bauer (2015).

largest share in total online media coverage (roughly 40%), followed by genetically modified organisms (13%), transparency (10%) and culture (10%).[27]

Social media is used by academics, NGOs and other groups to express views on different matters, including investment policies. At the same time, in response to demands for more transparency and with a view to receiving direct feedback from the public, social media is being increasingly used by governments to communicate different actions including legislative proposals, initiatives and updates on the progress of trade and investment negotiations and thus serves as a platform for direct feedback from the public.[28]

4.3 Academia

Academia also plays a key role in shaping developments in the field of investment law and policy, and thus inevitably in informing the content of investment treaties. For instance, Roberts argues that the rise of public law and public international law paradigms in investment legal scholarship has both reflected and reinforced concerns about the lack of transparency in investment treaty arbitration, with states responding to legitimacy critiques by adopting various reforms aimed at increasing transparency.[29] Broadly speaking, governments interact with academia directly and indirectly. Academics may participate directly in advisory committees of experts which are consulted by policymakers or may be commissioned to conduct evidence reviews. Academics may also be seconded to government departments to support policymaking.[30]

Aside from the direct involvement of academics in policymaking, the product of their independent academic work also plays an influential role in shaping investment treaties. There is indeed an increasing number of publications, including titles, journals and blogposts dedicated to international investment law, offering views and evidence from scholars and practitioners on investment law and policy matters. Quite often dedicated government departments will have access to databases that host such articles whereas, in other cases, such material may find its way to government through direct exchanges between academics and government officials.

Conferences, colloquia and workshops hosted by research institutes, universities, law firms and government departments enable government officials to engage with scholars and practitioners and bring any key take-away points back to their ministries to inform decision-making and eventually the content of an investment treaty.

[27] Ibid.

[28] For instance, the UK government and individual UK government departments maintain twitter accounts on which they publish information on their services, initiatives, actions etc.

[29] Roberts (2013).

[30] Sasse and Haddon (2018).

Finally, there have also been instances of academics seeking to influence investment treaty making through different forms of activism. For example, on 31 August 2010, approximately 50 academics signed a statement strongly criticising the existing investment treaty regime.[31] The statement was produced against the backdrop of several ongoing processes at the time, such as the EU's development of a common investment policy, the Trans-Pacific Partnership negotiations and regional initiatives in Latin America to reform investment law and arbitration. It called on states to review their investment treaties with a view to withdrawing from or renegotiating them and urged states to take steps to replace or curtail the use of investment treaty arbitration while strengthening their domestic justice system.[32]

5 Voices Among States

Third, voices among states play a distinct role in shaping and informing national positions, which are ultimately reflected in the content of investment treaties. These voices include international organisations, multilateral fora, bilateral discussions, the jurisprudence of international courts and tribunals and international agreements.

5.1 International Organisations

Policymakers and treaty negotiators heavily draw on research carried out by international organisations such as the Organisation for Economic Co-operation and Development (OECD) or the United Nations Conference on Trade and Development (UNCTAD).[33] International organisations observe trends across the world and select, classify and analyse data in relation to, for example, investment policies, existing regulatory, legal and institutional frameworks, investment agreements and arbitral awards. UNCTAD's Investment Policy Hub, for instance, offers a wealth of tools and information on investment policies and investment agreements, including possible policy options which may be considered by policymakers and treaty negotiators when drawing up investment policies and model treaties.[34]

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[31] Public Statement on the International Investment Regime, Aug. 31, 2010.

[32] Ibid.

[33] OECD, Investment Policy, https://www.oecd.org/investment/investment-policy/; UNCTAD, International Investment Policies for Development, https://unctad.org/en/pages/publications/Intl-Investment-Policies-for-Development-(Issue-Series).aspx.

[34] For further information on UNCTAD's Investment Policy Hub, see https://investmentpolicy.unctad.org/.

5.2 Multilateral Fora

At the same time, many international organisations host regular fora which bring together government representatives from around the world to exchange information and experiences on investment law and policies with a view to developing good practices. These allow treaty negotiators to remain up to date on different trends, discuss concerns and explore points of convergence or divergence with other countries, which can further facilitate discussions on a bilateral level when negotiating an investment treaty. One such forum is the OECD Freedom of Investment Roundtables which bring together governments from around the world to discuss investment issues.[35]

Aside from the existing institutionalised fora, a great deal of work is carried out by ad hoc intergovernmental working groups which are set up to address specific issues. These working groups may develop rules which may then be adopted or incorporated into investment treaties. A recent example of an intergovernmental forum that delivered successfully on its mandate in the investment field is the United Nations Commission on International Trade Law (UNCITRAL) Working Group II which produced the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.[36] There are also a number of working groups that are currently shaping developments in the investment treaty field, including UNCITRAL Working Group III on the reform of investor-state dispute settlement and the ICSID Rules Amendments State Consultations.[37] The discussions that are being held in these working groups are informative for treaty negotiators as they bring together an unprecedented number of governments which are jointly trying to address shared concerns around the future of investor-state dispute settlement drawing on their investment treaty experience. Discussions in these working groups are supported by extensive academic work and empirical research by the UNCITRAL and ICSID Secretariats but also by other participants, including academics, practitioners and civil society organisations. Other than assisting with the specific discussions around multilateral reform, these contributions serve as a source of information and evidence for governments when reviewing their investment policies and model investment agreements.

[35]For further information on the OECD Freedom of Investment Roundtables, see https://www.oecd.org/daf/inv/investment-policy/foi.htm.

[36]See United Nations Convention on Transparency in Treaty-based Investor State Arbitration, https://uncitral.un.org/en/texts/arbitration/conventions/transparency.

[37]UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, https://uncitral.un.org/en/working_groups/3/investor-state; ICSID Rules and Regulations Amendment Process, https://icsid.worldbank.org/en/amendments.

5.3 Bilateral Discussions

Additionally, government officials regularly meet in the margins of international meetings, and also during dedicated bilateral meetings between governments (for example, at ministerial or diplomatic visits), which provide an opportunity for policy ideas and textual solutions to be developed between states. These meetings may be ad hoc or in the context of special bilateral working groups set up to facilitate discussions and negotiations between countries.

5.4 Arbitral Awards and International Judgments

Arbitral awards are arguably among the "loudest" voices in the treaty-making process. Depending on the approach taken, arbitral awards could be considered to fall either into the category of "voices among states" or "voices outside the state". If arbitral awards are viewed as a product of tribunals that are set up by states to perform an adjudicatory function, they can be seen to fall within the realm of "voices among states". However, if emphasis is placed on the fact that arbitral awards are issued by an independent tribunal outside the state, then it may be more intuitive to classify them as "voices outside the state". As noted earlier, the categorisation of voices in this chapter primarily serves presentational purposes.

Arbitral awards encompass tribunals' interpretation of treaty provisions, which enables treaty negotiators to test the boundaries of treaty language, identify any gaps or imperfections in existing treaties and fix those in future treaties. One recent example can be seen in additions of carve-outs for tobacco control measures in various investment chapters following the investment treaty disputes brought by tobacco companies against Australia and Uruguay.[38]

However, it is not just arbitral awards that may influence the words and content of a treaty; the decisions of international courts could be highly influential too. The jurisprudence of the International Court of Justice (ICJ), the World Trade Organisation (WTO) and other international courts and tribunals may be drawn on by investment treaty negotiators as a comparative device. One can discern, for instance, the influence of the ICJ's *Barcelona Traction* judgment[39] in the inclusion of indirect investments, most notably in the form of shareholdings, in investment treaties, as a

[38] See, e.g., Article 29.5 of the Comprehensive and Progressive Transpacific Partnership and Article 22 of the Singapore – Australia Free Trade Agreement. These provisions were added following Philip Morris Asia Limited v. Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015 and Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA. v. Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016.

[39] *Barcelona Traction, Light and Power Company Limited (New Application, 1962), Belgium v. Spain*, Judgment, Merits, Second Phase, (1970) 9 ILM 227.

result of the finding in that judgement about the limited standing of shareholders under customary international law.[40]

5.5 *Other Investment Treaties and International Agreements*

Finally, investment treaties may carry influence from investment treaties between other states which respectively reflect a myriad of other voices. This is demonstrated by the way that similar provisions can be seen in a number of different treaties between unrelated parties. It has been observed to this effect that most investment treaties were negotiated from a relatively small set of similar model BITs, which makes them "bilateral in form but somewhat multilateral in substance."[41] For example, although there may be slight differences in the definition of "investment" between treaties and over time, there are ascertainable common features that show the capacity for "cross-fertilisation" between investment agreements.[42]

Moreover, quite often investment treaties incorporate disciplines found in other international agreements, thus broadening considerably the scope of voices that shape the content of an investment treaty. Investment agreements, for instance, increasingly import language from the general exceptions and security exception clauses found in the WTO Agreements.[43]

6 Voices Over Time

Past investment treaties concluded by the state or model investment agreements that incorporate voices from these three categories are also heard by governments when negotiating newer treaties or in the process of developing a model investment agreement. Past treaties may often serve as a starting point, but as they reflect the prevailing political and socio-economic conditions at a particular time, some content may prove outdated or imperfect over time, particularly in light of subsequent arbitral awards, in which case their viability and contemporariness may need to be reviewed.

As with all voices that feed into the words on the page of a treaty, the weight to be given to these past voices is one question that must be considered in the treaty-making process. There is value in treaty provisions that relate to investors and cross-border commerce remaining constant where it creates certainty and predictability in

[40] Baumgartner (2016), pp. 261–262.

[41] Roberts (2013).

[42] See, e.g., UNCTAD, Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking, February 2007, https://unctad.org/en/Docs/iteiia20065_en.pdf, pp. 7–10.

[43] Mitchell et al. (2018).

business transactions and government decision making. However, the need for certainty must be weighed against the inevitable need to modernise a treaty to reflect social, legal, political or economic developments and the desire for treaties to reflect the policies of different administrations.

7 Balancing Voices in Treaty Making

Voices in each of the three categories (inside, outside and among states) in one state may influence its model treaty, which is a document that contains that state's preferred treaty provisions. However, treaties must have more than one party and as investment treaties represent a negotiated outcome, the influence that different voices from each state party exert on the final text varies. It may be difficult to discern from the final text how each voice that influences each state party has been reflected in the text and ultimately shaped the final outcome.

There are questions about how these voices are considered, weighed, filtered and prioritised by treaty negotiators in the process of negotiating and drafting an investment agreement. It may be that certain voices are "louder" or given priority due to the preponderance of evidence or viewpoints, ministerial or legislative preference or social or economic significance, but there is scope for further work to analyse these influences.

There are also questions around the effectiveness and legitimacy of any balancing exercise conducted by states which are ripe for further research. Balancing the range of voices feeding into the process of treaty making is a complex task, particularly where voices conflict with other voices both from one state and from different negotiating parties. Further complexities also arise in the case of large multi-party modern treaties with investment provisions, such as the Comprehensive and Progressive Trans-Pacific Partnership, where a multitude of voices must be combined and distilled into one single agreement.

8 Conclusion

The text of investment treaties is an amalgamation of different voices from inside, outside and among states. Legislatures, ministers, courts, officials, businesses, civil society, academics, other states, intergovernmental organisations, international tribunals and other treaties are all part of a rich tapestry of influences that treaty negotiators from each state take into the negotiating room. What emerges in the text of a treaty must necessarily weigh and distil this collection of voices heard by each party and between the parties to the treaty. By giving a comprehensive overview of the range of voices that feed into the investment treaty-making process, it is hoped that this study will shed further light on the process of investment

treaty making whilst serving as fertile ground for further research on how these voices are balanced in the text of an investment treaty.

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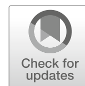
Beyond Protection: The Role of the Home State in Modern Foreign Investment Law



Tarcisio Gazzini

Contents

1 Introduction 20
2 Role of the Home State Before the Development of Foreign Investment Law 20
3 Role of the Home State in Foreign Investment Law 22
  3.1 Normative Function 22
  3.2 Adjudication 23
  3.3 Enforcement 26
4 Towards a New Role for the Home State 29
5 Conclusions 33
References 34

Abstract The chapter examines the evolution of the role of the home state in foreign investment law. Traditionally, such a role was essentially limited to norm-setting and protecting nationals and national companies abroad. Protection was typically offered through diplomatic protection, which was based on the legal fiction that the state was vindicating its own right. The conclusion of modern investment treaties, the progressive emancipation of foreign investors and the development of investor-state arbitration meant a marginalisation of the home state. Some recent treaties, however, have paved the way for a new role for the home state that goes well beyond protection of its nationals and national companies. Innovative provisions have introduced obligations and responsibilities for the home state, especially with regard to the fight against corruption and the liability of its own investors. It remains to be seen to which extent these provisions will spread across the international community of states.

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1 Introduction

The aim of the chapter is to reflect on the role the home state plays in foreign investment law in the light of some recent developments and in particular some innovative provisions contained in investment treaties or model treaties. The chapter is divided in three parts that follow a chronological order: the role traditionally played by the home state; the role played by the home state in modern foreign investment law; and the role the home state may play in the future.[1]

2 Role of the Home State Before the Development of Foreign Investment Law

Before the full development of international investment law as we know it today, the role of the home state was essentially limited to protecting its subjects at the international level. As pointed out by the Permanent Court of International Justice (PCIJ) in 1924, it was—and still is—"an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels".[2]

In protecting its subjects, the home state performed three main functions. First, it contributed to the setting of normative standards for what was essentially the protection of aliens and their properties abroad. This occurred at the level of customary international law through legal claims and counterclaims put forward—and often fiercely resisted—in official documents, such as diplomatic correspondence in the context of international disputes.[3]

At the same time, states concluded increasingly sophisticated agreements, inter alia, for the promotion and protection of foreign investment. These agreements took typically the form of friendship, commerce and navigation (FCN) treaties and similar instruments. Initially dealing with a rather heterogeneous range of issues, these treaties progressively focused on economic matters. The most sophisticated of

[1]Unless otherwise indicated, treaties and investment decisions referred to in this paper are available, respectively, at https://investmentpolicy.unctad.org/international-investment-agreements, and https://www.italaw.com.

[2]*Mavrommatis Palestine Concessions (Greece v. UK)*, 1924 PCIJ (ser. B) No. 3, 30 August 1924, p. 12. In literature, see in particular Salacuse (2015), esp. Ch. 4; Miles (2013); Polanco (2018). See also Dumberry (2016), esp. Ch 2.

[3]For the famous diplomatic correspondence between Mexico and the United States in the 1930s in relation to the rules governing expropriation in the context of the Mexican economic reforms, see e.g. the documents reproduced in Hackworth (1942) vol. III, 228. Less known, but equally interesting is the contemporaneous correspondence between the British and the Mexican governments, see *Correspondence with the Mexican Government regarding the Expropriation of Oil Properties in Mexico*, 8 to 20 May 1938, *Cmd*. 5758.

these treaties can be considered as the precursors of modern bilateral investment treaties (BITs).[4]

Secondly, the home state played an important role in the adjudication of disputes concerning alleged violations of the international rules on the treatment of aliens and their properties. The typical mechanisms were claims commissions, mixed arbitral tribunals, and occasionally resort to the Permanent Court of Permanent Justice and later the International Court of Justice (ICJ).[5] These disputes were clearly interstate disputes in which the home state asserted its own rights or, more precisely, "its right to ensure, in the person of its subjects, respect for the rules of international law".[6]

This is evidenced by the fact that the home state was the claimant,[7] and therefore was in control of the presentation of the claim and the submission of evidence, although the affected nationals could marginally be involved in the proceedings. That the claim belonged to the home state was further confirmed by the calculation of compensation. As pointed out by the PCIJ, "the damage suffered by an individual is never [. . .] identical in kind with that which will be suffered by a state; it can only afford a convenient scale for the calculation of the reparation due to the State".[8]

Thirdly, with regard to the enforcement of the rules on the protection of nationals and their properties, the home state characteristically acted in diplomatic protection, which was based on the legal fiction that "an injury to the national was an injury to the State".[9] The home state did not hesitate to intervene militarily in a period in which, "from the nature of things and the absence of any common superior tribunal, nations [were] compelled to have recourse [to go to war], in order to assert and vindicate their rights".[10] The action of the home state typically took the form of what was elegantly—but by no means less brutally—called gunboat diplomacy.[11] Significantly, the first treaty limitation on the use of military force related precisely to the

[4]For two interesting examples, compare the Treaty of Peace, Friendship, Commerce, and Navigation between the United States and Bolivia (1858) at https://avalon.law.yale.edu/19th_century/bolivia01.asp, and the much more sophisticated Treaty of Amity and Economic Relations between the United States and Ethiopia (1951), 206 *UNTS* 41. In the second agreement the parties committed themselves to accord "at all times fair and equitable treatment" to the respective nationals and companies, and to expropriate their properties only for public purposes and against "prompt payment of just and effective compensation" (Article VIII).

[5]See Parlett (2011), esp. Ch. 2.

[6]*Mavrommatis Palestine Concessions*, *Mavrommatis Palestine Concessions (Greece v. UK)*, 1924 PCIJ (ser. B) No. 3, 30 August 1924, p. 12.

[7]As expressly held by the Germany-United States Mixed Claims Commission in *Administrative Decision II*, 1 November 1923, VII UNRIIA 23, p. 26.

[8]*Case Concerning the Factory at Chorzów*, PCIJ, Series A, No. 17 (1928), p. 28.

[9]International Law Commission, Draft Articles on Diplomatic Protection (2006), Commentary to Article 1, para 4.

[10]Phillimore (1885), vol. III, p. 77.

[11]Borchard (1929), p. 121; Tomz (2007).

recovery of contract debt claims claimed by one government from another government as due to the former's nationals.[12]

The exercise of diplomatic protection was opposed by several Latin American states, which developed the so-called Calvo doctrine.[13] According to the doctrine, foreigners were entitled to the same protection as nationals and could not lay claim to more extensive protection.[14] An important corollary of the doctrine was that states could not intervene in diplomatic protection. Latin American states sought to exclude diplomatic protection through the inclusion in contracts with foreigners of the so-called Calvo clause.[15]

3 Role of the Home State in Foreign Investment Law

3.1 Normative Function

The first function sketched in the previous section, namely norm-setting, is still firmly in the hands of states. The legal protection of foreign investment has changed radically with the conclusion since 1959 of more than 3000 bilateral investment agreements or economic integration agreements containing provisions on investment.[16] The conclusion of these agreements recorded a spectacular increase in the 1990s and 2000s.

States remain the masters of these agreements. They negotiate, amend, interpret and terminate them (unilaterally or by mutual consent) in accordance with the terms of the agreements themselves and the law of treaties. Contrary to FCN treaties, modern BITs focus exclusively on the promotion and protection of foreign investment. They contain increasingly sophisticated definitions and substantive and procedural rules.[17]

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[12]Convention Respecting the Limitation of Employment of Force for Recovery of Contract Debts (The Hague Convention II), concluded on 18 October 1907, at https://avalon.law.yale.edu/20th_century/hague072.asp.

[13]The doctrine was originally elaborated by Andrés Bello, see Montt (2009), pp. 41–44. It was proclaimed in Article 9 of the 1933 Convention on the Duties and Rights of States, 26 December 1933, 165 LNTS 19.

[14]Calvo (1896), p. 231. See also Hershey (1907), p. 1; Shea (1955); Orrego Vicuña (2003), p. 19; Schreuer (2005).

[15]See Summers (1933), p. 459; Lipstein (1945), p. 130.

[16]According to UNCTAD's website, 3291 investment agreements have been concluded and 2649 of them have entered into force, https://investmentpolicy.unctad.org/international-investment-agreements.

[17]To appreciate the evolution of BITs, it is sufficient to compare a BIT concluded by the United States in the 1990s with the BIT concluded with Uruguay on 4 November 2004. In literature, see in particular Dolzer and Stevens (1995); Sacerdoti (1997), p. 251; Vandevelde (2010); Van Harten (2010); Salacuse (2015); Brown (2013).

3.2 Adjudication

The real breakthrough, however, has occurred with regard to the second function, namely adjudication of disputes. Modern investment agreements systematically provide for two categories of disputes: interstate disputes and disputes between investors and the host state. While interstate disputes remain rather exceptional, according to UNCTAD, the number of known investor-state disputes is approaching 1000.[18] Virtually all investment treaties[19] give the concerned foreign investors access to international arbitration tribunals, normally without any obligation to exhaust domestic remedies beforehand.[20] The rationale behind these provisions is precisely to remove the dispute from the domestic arena and insulate it from any kind of pressure, including political pressure.[21]

These provisions propel foreign investors into the realm of international dispute settlement, a development that can be explained in two ways.[22] According to the first explanation, the agreement creates a legal relationship between the host state and the investor, the latter being the holder of substantive rights. Violations of these rights can be vindicated directly by the investor. As held by a tribunal, investment arbitration is "a remedy exercisable by an investor by itself and in its own right against the host state".[23] It is worth noting that some investment treaties, such as the BIT between Peru and the Belgium-Luxembourg Economic Union (BLEU), expressly recognise "that investors of one of the Contracting Parties are entitled to prevail directly their rights against the other Contracting Party through the arbitration."[24]

[18]At https://investmentpolicy.unctad.org/investment-dispute-settlement. On the current discussion on the reform of investment arbitration within UNCITRAL, see https://uncitral.un.org/en/working_groups/3/investor-state. On asymmetries of investment arbitration, see in particular Toral and Schultz (2010). See also Laborde (2010) and Van Harten (2012).

[19]For two exeptions, see the BIT between Bulgaria and Cyprus, concluded on 17 November 1987 and entered into force on 18 May 1988, and the free trade agreement (FTA) between the United States and Australia, concluded on 18 May 2004 and entered into force on 1 January 2005.

[20]See Paulsson (1995), Sornarajah (2000), McLachlan et al. (2007) and De Brabandere (2015).

[21]See, for instance, *Gas Natural SDG* v *Argentina*, ICSID ARB/03/10, Decision on Jurisdiction, 17 June 2005, paras 29 ff.

[22]Douglas (2003), especially pp. 181–184; De Brabandere (2015), Ch. 2.

[23]*Plama v. Bulgaria*, ICSID ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 150. In *Gas Natural SDG* v *Argentina*, ICSID ARB/03/10, Decision on Jurisdiction, 17 June 2005, para. 34, the tribunal held that "the foreign investor acquires rights" under the treaty. In *Corn Products International, Inc.* v. Mexico, ICSID ARB (AF)/04/1, Decision on Responsibility, 15 January 2008, para. 168, the tribunal held that NAFTA contracting parties intended "to confer substantive rights directly upon investors". In *Case No. A/18*, 5 Iran-U.S.C.T.R. (1984-I) 251, p. 261, the Iran-United States Claims Tribunal emphasised that "it is the rights of the claimant, not of his nation, that are to be determined by the Tribunal". See also, UK Court of Appeal (Civil Division), *Occidental Exploration & Production Company and Ecuador*, 9 September 2005, [2005] EWCA Civ 1116, para. 18.

[24]Article 11.2, second sentence, of the BLEU-Peru BIT, concluded on 12 October 2005 and entered into force on 12 September 2008.

Alternatively, a second and more conservative explanation splits substantive and procedural provisions. From this perspective, substantive rules continue to be binding exclusively upon states, while investors are permitted to file requests for arbitration in case of violation.[25] From this perspective, the right of investors is derivative as states have transferred the right to seek the enforcement of the obligations contained in the treaty to their respective foreign investors. According to a North America Free Trade Agreement (NAFTA) tribunal, foreign investors "are permitted for convenience to enforce what are in origin the rights of Party states".[26]

In spite of the different theoretical foundations, however, the ultimate result is in good substance the same. In sharp contrast with disputes described in the previous section, in investment arbitration the claim is put forward and managed by the investor itself. The investor first attempts to reach a friendly settlement, makes a selection between the possible fora (if more than one are available), is involved in the appointment of the members of the tribunal, is in charge of all litigation strategies, submits all written documents, participates in the hearings, and ultimately is the recipient of compensation, if any is due.[27] As pointed out by a tribunal, "[t]he State of nationality of the Claimant does not control the conduct of the case. No compensation which is recovered will be paid to the State".[28] Quite the contrary, the idea of investment arbitration is precisely to keep the state as much as possible away from the proceedings.

The emancipation of investors as fully independent actors allowing them to bring and manage their own claims before arbitral tribunals means that claims brought against the host state by a foreign investor and by the home state are independent, even if they refer to the same measures or conduct. In *Plama v. Bulgaria*, the tribunal convincingly held that even if the investor cannot invoke the relevant provision on the settlement of investor-state disputes (Article 26 of the Energy Charter Treaty (ECT)),[29] the right of the home state to invoke the state-state dispute settlement provision (Article 27 of the ECT) remains intact.[30]

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[25]This seems to be the preferred position of Canada, *Methanex* v. *United States*, Second Submission of Canada Pursuant to NAFTA Article 1128, 30 April 2001, para. 9, at https://www.investorstatelawguide.com/documents/documents/UN-0015-29%20-%20Methanex%20v.%20US%20-%20Canada%201128%20Subm%202.pdf.

[26]*Loewen Group, Inc* v. *United States*, ICSID ARB (AF)/98/3 (NAFTA), Award, 26 June 2003, para. 233. NAFTA was concluded on 17 December 1992 and entered into force on 1 January 1994.

[27]This is without prejudice to the possibility of negotiations between the host and the home state, or the institution of proceedings by the latter against the former.

[28]As pointed out in *Corn Products International, Inc.* v. Mexico, ICSID ARB (AF)/04/1, Decision on Responsibility, 15 January 2008, para. 173 and footnote 70, only exceptionally is the investor not fully in control of the claim. This is the case of Article 2103(6) of NAFTA, according to which the home state and the host state can effectively preclude a putative claim of expropriation based upon a taxation measure by determining that the measure in question was not an expropriation.

[29]Concluded on 17 December 1994 and entered into force on 16 April 1998.

[30]*Plama* v. *Bulgaria*, ICSID ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 150.

Furthermore, the home state cannot prevent its own investors from filing a request for arbitration, not even if it has started state-state proceedings. In *Empresas Lucchetti v. Peru*, the host state asked for the suspension of the investor-state proceedings since the claimant's allegations at the heart of the dispute were the object of a *concurrent* state-state arbitration. The tribunal held that the conditions for a suspension of the proceedings were not met and rejected the request without further discussion.[31]

The independence of each claim is further demonstrated by the fact that some treaties expressly preclude the possibility of international claims brought by the home state if the investor has started arbitration proceedings, unless the host state has failed to abide by and comply with the award rendered in the dispute. Article 27(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) offers an excellent example. It provides that "[n]o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute".[32] Finally, in investor-state disputes, the home state can make—and has indeed made—non-disputing party submissions expressing disagreement with the position of its own investors, an issue that will be discussed below.[33]

Yet, in spite of the developments concerning the settlement of disputes through arbitration, diplomatic protection retains its importance, especially before resort to arbitration. Diplomatic action continues to be used for the purpose of facilitating the settlement of the dispute,[34] and even of pushing the host state to consent to arbitration.[35] From this perspective, diplomatic protection has not been disposed of by arbitration, but rather plays a complementary role.[36]

Furthermore, it is worth noting that diplomatic protection has undergone a profound evolution. The International Law Commission has considered the legal

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[31] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A.* v. *Peru*, ICSID ARB/03/4, Award, 7 February 2005, paras 7 and 9.

[32] For other examples, Article 34.3 of the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement; Article 14.13(i) of the Indian Model BIT; Article 30.1 of the Belarus-India BIT, signed on 24 September 2018 (not in force yet). See also Appendix III, Article 4 of the Arbitration Rules of the Stockholm Chamber Commerce.

[33] See, for instance, United States Submission in *GAMI Investment Inc*. v. *Mexico*, 30 January 2003, at https://jusmundi.com/en/document/pdf/Other/IDS-87-4041955868-2425331503/en/en-gami-investments-inc-v-united-mexican-states-submission-of-the-united-states-of-america-monday-30th-june-2003.

[34] This is fully consistent with Article 27 of the ICSID Convention. See the action of the German Government in relation to the claim brought by Fraport against the Philippines in Polanco (2018), p. 226.

[35] See *Compañia del Desarrollo de Santa Elena S.A.* v. *Costa Rica*, ICSID ARB/96/1, Final Award, 17 February 2000, paras 24–26.

[36] See Polanco (2018), p. 230.

fiction behind the traditional exercise of diplomatic protection as unnecessary in contemporary international law and recognised that states may exercise it in their own right, that of their nationals, or both.[37] From this perspective, in *CSM v. Argentina*, the tribunal did not hesitate to hold that "the State of nationality is no longer considered to be protecting its own interest in the claim but that of the individual affected".[38]

3.3 Enforcement

With regard to the third function, namely enforcement, the introduction of investment arbitration has also meant a significant retreat of the home state once the investor has instituted arbitral proceedings and possibly the relegation of diplomatic protection to the hypothesis of failure by the host state to comply with the award rendered by the arbitral tribunal. A minority of investment treaties (around 12%) expressly preclude resort to diplomatic protection during arbitral proceedings, apart from informal diplomatic exchanges genuinely meant to facilitate the settlement of the dispute.[39]

It remains to be seen whether diplomatic protection is still available during arbitral proceedings when the relevant treaties are silent on the issue. In *Italy v. Cuba*, the ad hoc arbitral tribunal held by majority that "*tant que l'investisseur ne s'est pas soumis à l'arbitrage international contre l'Etat d'accueil, son droit à la protection diplomatique subsiste*".[40] The statement hints *a contrario* to the fact that diplomatic protection is not available once arbitral proceedings have been instituted. This position seems to be shared by some scholars. According to one view, investment arbitration is based on a trade-off since "the potential respondent State accepts to arbitrate with a private entity and [. . .] is relieved from the risk of being exposed to diplomatic protection by the investor's Home State".[41]

Yet, other authors are sceptical about the exclusion of diplomatic protection during arbitration proceedings in the absence of a specific treaty provision in this

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[37] Draft Articles on Diplomatic Protection with Commentaries (2006), Article 1, Commentary, para. 5, *Yearbook of the International Law Commission* (2006) Vol. II, Part II, 27.

[38] *CMS Gas Transmission Company* v. *Argentina*, ICSID ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 45 (relying on Bederman (2002), pp. 253–256). Quoted with approval in *Italy v. Cuba*, Interim Award, 15 March 2005, para. 65. In the Final Award, 1 January 2008, para. 141, the Tribunal seems more hesitant when holding that the home state acting in diplomatic protection still makes the claims its own ("*s'approprie*").

[39] Paparinskis (2008), pp. 281–297.

[40] *Italy v. Cuba*, Interim Award, 15 March 2005,para 65; Final Award, 1 January 2008, para. 141.

[41] Kaufmann-Kohler (2013), pp. 324–325. See also Kokott (2002), esp. p. 31; Juratowitch (2008), pp. 21–22.

sense.[42] They have insisted on the absence of sufficient evidence on the emergence of customary rules preventing states from exercising diplomatic protection once arbitral proceedings have been instituted. According to this view, the very fact that some treaty provisions—such as Article 27 of the ICSID Convention—preclude diplomatic protection during arbitral proceeding proves that the two remedies are autonomous and may well coexist as long as the concerned states have not agreed otherwise.

The delicate relationship between diplomatic protection and investment arbitration has resurfaced in the context of the 2014 Rules on Transparency of the United Nations Commission on International Trade Law (UNCITRAL), whose Article 5 (2) *in fine* directs the tribunal to take into account, when allowing non-disputing party submissions, "the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection".[43]

It is well known that several investment treaties, such as NAFTA,[44] the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada,[45] or the BIT between Peru and Japan,[46] offer the non-disputing state parties the possibility of presenting formal written submissions on the interpretation of the relevant treaty provisions with a view to assisting the tribunal in its search of the common intention of the parties as recorded in the treaty.[47] Obviously, the interpretation put forward in the non-disputing party submission may influence the decision of the tribunal since interpretation "[i]nvolves understanding the intention" of the parties to the treaty.[48] Indeed, this is precisely the purpose of the submissions, namely to safeguard the "legitimate"[49] or "systemic"[50] interest of the treaty parties to the treaty in the correct interpretation of the treaty.

Non-disputing party submissions relate to the interpretation of certain treaty provisions and as such must be abstract and detached from the merits of the dispute.

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[42] Polanco (2018), p. 222, notes that "in the absence of a specific provision in an investment treaty or the applicable arbitral rules, there should be no limitation on having both [Investor-State Arbitration] and diplomatic protection claims in parallel". See also Paparinskis (2008), pp. 281–300.

[43] See https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

[44] Article 1128 of NAFTA.

[45] Article 8.38(2) of CETA, concluded on 30 October 2016 and entered into provisional application on 21 September 2017, with the exclusion of the chapter on investment.

[46] Article 18(17) of the Japan-Peru BIT, concluded on 21 November 2008 and entered into force on 10 December 2009.

[47] In 2015, the estimation was that well under 1% of investment treaties provide explicitly for submissions by non-disputing parties, see Gordon and Pohl (2015), p. 26.

[48] *Mobil Investments Inc. & Murphy Oil Corporation* v. Canada, ICSID ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 254, quoted with approval in *Mesa Power Group LLC* v. *Canada*, PCA Case No. 2012-17 (NAFTA and UNCITRAL), Award, 24 March 2016, para. 405.

[49] Kinnear (2006).

[50] Paparinskis and Howley (2015), p. 196.

If they are not, the tribunal should simply discard them. Whether a submission is in favour of the investor should be incidental. The reference to "tantamount to diplomatic protection" in Article 5(2) of the 2014 UNCITRAL Rules on Transparency[51] can indeed be read as excluding submissions intended to advance the cause of the investor by taking position on the specific circumstances of the pending dispute instead of clarifying the non-disputing party's position on certain points of treaty interpretation. Otherwise the state would unduly interfere with the proceedings and affect their independence and fairness.

The risk is however more apparent than real. According to an arbitrator, the respondent state and the non-disputing state(s) inevitably "club together" to share the same interpretation at the expense of the investor.[52] Whatever the merits of this view and the negative connotation attached to it, the statement demonstrates that the home state does not necessarily share the position of its own nationals and has moved away from its role as protector. Indeed, the attitude of the home state must be seen through the lens of mutual interest and reciprocity, the engines of the development of international law. From this perspective, the home state is more interested in the proper interpretation of the treaty rather than in the outcome of the specific dispute before the tribunal. In other words, what really matters to the home state is ensuring that all investors falling within the scope of the treaty enjoy exactly the protection the contracting parties had agreed to grant them, nothing less and nothing more.

Ultimately, in addition to diplomatic protection, the home state may adopt the measures permitted under general international law to induce compliance by the host state with its investment obligations or final and binding investment awards.[53] Such measures may typically take the form of acts of retorsion, which consist in unfriendly measures always available to states—since they are not inconsistent with any relevant international obligations—possibly including withdrawal from the World Trade Organization's (WTO) Generalized Systems of Preferences.[54] Alternatively, the home state may resort to countermeasures. This presupposes a prior breach of international law—in this case non-compliance with investment obligations or investment awards—, it implies a conduct otherwise contrary to international law and must respect all conditions required under the rules on state responsibility.[55]

It remains however doubtful whether, in the case of a plurilateral investment treaty, the right to adopt countermeasures may be extended also to what the International Law Commission has qualified under Article 54 of the Articles on

[51] See https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

[52] C. N. Brower, Concurring and Dissenting Opinion in *Mesa Power Group LLC* v. *Canada*, PCA Case No. 2012-17 (NAFTA and UNCITRAL), Award, 24 March 2016, para. 30.

[53] See Schreuer et al. (2009), p. 1109; Echandi (2012).

[54] See Alford (2014); Titi (2014); Polanco (2018), pp. 205–209.

[55] See International Law Commission, Articles on State Responsibility (2001), especially Articles 49 to 53, *Yearbook of the International Law Commission* (2001) Vol. II, Part II, 20. Countermeasures have normally been discussed as circumstances precluding wrongfulness see, in particular, Paparinskis (2008).

the Responsibility of States as "States other than the injured State"—or, for the purpose of this chapter "states other than the home state". Since the obligations imposed by the treaty are clearly based on reciprocity and not "established for the protection of a collective interest of the group",[56] the right to adopt countermeasures clearly only concerns the home state. Indeed, these obligations are divisible, in the sense that a state may breach them with regard to one but not necessarily all other states parties to the treaty.[57]

4 Towards a New Role for the Home State

The role the home state is going to play in the future, and indeed the role it has already started to play, must be appreciated in the context of the reform that the entire investment treaty regime is currently undergoing.[58] After the golden period between 1990 and the 2000s, the popularity of investment treaties has significantly dropped. States are now rather reluctant to conclude investment agreements, although regionalism is still on the rise.[59] A significant number of BITs have been terminated and their global number has started to decline. States have responded differently to the three main concerns raised with regard to investment treaties: their manifestly unbalanced content;[60] the safeguard of regulatory powers, which many states perceive as inadequate;[61] and the lack of legitimacy and other shortcomings of investment arbitration.[62]

[56]Article 48(1)(a) of the Articles on State Responsibility, *Yearbook of the International Law Commission* (2001) Vol. II, Part II, p. 20.

[57]*Contra* Echandi (2012), p. 122.

[58]See UNCTAD, *Reforming Investment Dispute Settlement: A Stocktaking*, IIA Issues Note No 3 (May 2019) https://investmentpolicy.unctad.org/news/hub/1608/20190329-reforming-investment-dispute-settlement-a-stocktaking. See also UNCTAD, *Reform Package for the International Investment Regime* (2018 edition) https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf.

[59]See UNCTAD, *The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?*, IIA Issues Note No 3 (June 2013) http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=532. On investment agreements concluded by the European Union or under negotiation, see the Commission's website https://ec.europa.eu/trade/policy/accessing-markets/investment/index_en.htm. On African regional agreements, see Special Issue, 18 *Journal of World Investment & Trade* (2017).

[60]In *Spyridon v. Romania*, ICSID ARB/06/1, Award, 7 December 2011, para. 871, the tribunal conceded that the relevant BIT "imposes no obligation on investors, only on contracting States".

[61]As pointed out by the Commonwealth Investment Experts Group Meeting for the African Region, "[o]ne common issue is the need to clarify the interaction between international investment instruments and domestic investment policy as well as policy in other areas – for e.g., sustainable development and environmental regulation. Governments must always be concerned about ensuring that there is sufficient policy space for them to engage in reconciling competing interests", Kampala, Uganda, 20-21 October 2011, on file with author.

[62]See, in particular, Waibel et al. (2010); Kalicki and Joubin-Bret (2015).

Some states have modernized their BITs with a view to bringing them in line with the development of international law, rebalancing and better defining their substantive provisions, and recalibrating the host state's exposure to arbitration.[63] States have also adopted new and more sophisticated model BITs, as the Model Text for the Indian Bilateral Investment Treaty adopted in 2015 (hereinafter Indian Model BIT), which will be used in the negotiations of BITs between India and other states and can also be expected to inspire other governments.[64] Other states have reconsidered their investment treaty policy and eventually decided to switch to domestic legislation. The adoption of the South African Protection of Investment Act (2015), which is largely pegged to the South African Constitution, is a good example.[65]

The concerns under discussion are real and have been addressed primarily by striking a better balance between, on the one hand, the rights and obligations of the host state and, on the other hand, those of investors. Moreover, a few legal instruments have introduced provisions imposing obligations upon the home state and enhancing the collaboration between the host and home states, most prominently in the promotion of sustainable development, the fight against corruption and the liability of foreign investors.

From this perspective, the Economic Community of West African States' (ECOWAS) Supplementary Act of 2008 can be considered as having pioneered a new approach.[66] Several of its innovative provisions have subsequently made their way into other African treaties as well as treaties outside that continent. The ECOWAS Supplementary Act includes an entire section on the rights and obligations of the home state, dealing with four issues, namely facilitation of foreign investment, disclosure of information, liability of investors, and the fight against corruption.[67]

In accordance with the ECOWAS Supplementary Act, first, the home state *may* facilitate cross border investment and is obliged to inform the host state of the measures adopted in this regard.[68] Second, and more incisively, the home states shall, on request and subject to a confidentiality caveat, promptly provide a potential host state with the information expected to enable the latter to comply with its

[63] See, for instance, the Morocco-Nigeria BIT, concluded on 3 December 2016 (not entered into force yet).

[64] See https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf. For the agreements concluded since the adoption of the Model BIT or under negotiation see https://www.dea.gov.in/bipa?page=10.

[65] See https://www.thedti.gov.za/gazzettes/39514.pdf. For a much more pro-investor piece of legislation, see the Law Relating to Investment Promotion and Facilitation adopted by Rwanda in 2015 (N° 06/2015) https://investmentpolicy.unctad.org/investment-laws/laws/82/rwanda-investment-law.

[66] Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (hereinafter ECOWAS Supplementary Act), concluded on 28 December 2008 and entered into force on 19 January 2009.

[67] Section VI of the ECOWAS Supplementary Act.

[68] Article 27 of the ECOWAS Supplementary Act.

obligations under the treaty and domestic legislation. The home states shall also, on request, promptly provide information on standards that may apply to investors, and most prominently, those related to social and environmental impact assessments.[69] On the latter point, it is worth stressing that the home state may contribute to standard-setting and to the review of standards applicable to the authorisation and management of investments made by its own investors in the host state. The main aim of these provisions is to optimise the impact of investment projects as well as to enhance compliance by the host state with its international commitments.

With regard to the liability of its own investors, the ECOWAS Supplementary Act imposes upon the home state the obligation to ensure that its legal system allows for, or does not prevent or unduly restrict, civil action before its courts in relation to liability for damages resulting from alleged acts or decisions made by investors in the territory of the host state. The host state laws on liability shall apply to such civil proceedings.[70]

The above provision on liability has been reproduced in the Southern African Development Community (SADC) Model BIT Template (2012),[71] in the BIT between Morocco and Nigeria,[72] and more importantly the 2015 Indian Model BIT.[73] However, and quite significantly, the provision has not been included neither in the BIT concluded between India and Belarus on 24 September 2018,[74] nor in the Investment Cooperation and Facilitation Treaty concluded between India and Brazil on 25 January 2020.[75] This is a clear reminder that states may be reluctant to accept international obligations in this respect.

As pointed out by the Indian Law Commission in its analysis of the 2015 Indian Model BIT, the provision aims at removing or minimising jurisdictional constraints that could prevent civil action before the tribunals of the home state, most prominently under the *forum non conveniens* doctrine on grounds that there is a more appropriate forum to hear the case.[76] This would be typically the case of a dispute

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[69] Article 28 of the ECOWAS Supplementary Act. Article 5 of the Morocco-Nigeria BIT provides that "[t]he Parties shall exchange information concerning investment, particularly through the Joint Committee. Whenever possible, the information shall, reveal, in advance, useful data on procedures and special requirements for investment, business opportunities and expectations for major parties projects".

[70] Article 29 of the ECOWAS Supplementary Act.

[71] See https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf, Article 17.

[72] Article 20 reads: "Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state".

[73] Article 13, entitled *Home State Obligations*.

[74] Not entered into force yet.

[75] Not entered into force yet.

[76] Law Commission of India, Report 260 http://lawcommissionofindia.nic.in/reports/Report260.pdf, p. 37. On the doctrine, see amongst many, Brand and Jablonski (2007) and Gardner (2017). On the resilience of the doctrine, see Holly (2019).

such as the one related to the infamous Bophal incident,[77] which was expressly mentioned by the Indian Law Commission.[78]

Enhancing the liability of the home state has found the support of Nobel Prize economist Joseph Stiglitz, who emphasised, with regard to the liability of multinational companies under the United States Alien Tort Act,[79] that civil claims "will not harm economic development of least developed countries, United States businesses operating abroad, or investment in the United States".[80]

Coming back to the ECOWAS Supplementary Investment Act, investors must refrain from engaging in practices of corruption.[81] Connivance in corruption certified by a court of the host state would deprive the investor of the right under the treaty to bring a claim against the host state.[82] Interestingly, not only the host but also the home state may object, on grounds of violations of the above provision, to the jurisdiction of any tribunal before which the investor has brought a case under the treaty.[83]

Moreover, the host state must make corrupt practices criminal offences and investigate, prosecute and punish them with appropriate sanctions.[84] The home state, in turn, must ensure that any money or other benefits obtained through these practices is not recoverable or deductible through any fiscal or tax policies. The home state must also provide all available information that might assist a tribunal dealing with a claim brought under the treaty in determining whether there has been a breach of an anti-corruption obligation.[85]

Furthermore, both the host and the home state may initiate proceedings against the investor in case of breaches of the prohibition to become involved in corruption, or in case of persistent failure to comply with domestic obligations related to hygiene, security, health and social welfare, human rights and fundamental labour standards, as well as corporate governance and practices.[86] The dispute will fall within the jurisdiction of a tribunal established in accordance with the

[77]For a recent discussion of the complex litigation in the United States that followed the Bophal incident, see Krishna (2020). See also, Muchlinski (1987), p. 545; Baxi (1986).

[78]Law Commission of India, Report 260 http://lawcommissionofindia.nic.in/reports/Report260.pdf, pp. 36–37.

[79]28 USC § 1350. See in particular *Kiobel* v. *Royal Dutch Petroleum Co*., 569 US 10, 17 April 2013. In *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386 (2018), 24 April 2018, the United States Supreme Court held by a five-four Justice majority that foreign corporations cannot be sued under the Act https://www.supremecourt.gov/opinions/17pdf/16-499_1a7d.pdf.

[80]Brief of Joseph E. Stiglitz as *amicus curiae*, *Kiobel* v. *Royal Dutch Petroleum CO* et al, 11 December 2011 https://harvardhumanrights.files.wordpress.com/2012/01/brief-of-joseph-e-stiglitz.pdf.

[81]Article 13 of the ECOWAS Supplementary Act. See also Article 17 of the Morocco-Nigeria BIT.

[82]Article 18.1 of the ECOWAS Supplementary Act.

[83]Article 18.1 of the ECOWAS Supplementary Act.

[84]Article 30.1 of the ECOWAS Supplementary Act.

[85]Article 30.3 of the ECOWAS Supplementary Act.

[86]Article 18. 3 of the ECOWAS Supplementary Act.

Supplementary Act. This part of the provision remains obscure as the Supplementary Act expressly provides only for the judicial settlement of a dispute between the host state and investors.[87] This serious shortcoming notwithstanding, the provision shows that states can go as far as envisaging a role for the home state in the judicial enforcement of the obligations of its own nationals under the treaty.

The above provisions design a role for the home state that is much more complex than the traditional norm-setting and protection of national investors and investments. They have introduced new responsibilities for the home state that, at least potentially, enhance the collaboration with the host state, increase the standard of liability for foreign investors, and ultimately may improve the legitimacy of foreign investment law.

5 Conclusions

Traditionally, the home state acted as the protector of national investors and could make investors' claims its own for the purpose of diplomatic protection. The establishment and development of increasingly sophisticated and efficient international mechanisms for the settlement of disputes between investors and the host state have profoundly modified the situation. On the one hand, foreign investors have been fully emancipated and can normally bring their own claims before international arbitral tribunals. They are in control of the entire process of adjudication, although they may need the support of their own state in case of non-compliance with the arbitral award. On the other hand, the home state has been relegated to a rather marginal role as demonstrated, inter alia, by the scarcity of state-state investment disputes. During the proceedings, the presence of the home state has become much more discrete and it is not necessarily supportive of the national investors' claims, as in the case of non-disputing party submissions.

Recently, however, a few investment treaties provide for a more active role of the home state. Although such treaties still remain rather isolated, it is possible to detect a relatively clear trend. Home states are progressively called to play a role that goes well beyond the traditional protection and may contribute to the reform of the investment treaty regime. Such a role is emerging in areas where the public interest is of paramount importance, such as the protection of the environment, the fight against corruption, and the liability of multinational companies. Yet, borrowing from the nomenclature of Hollywood's Oscar awards, the home state will probably never be nominated for a leading role. This will remain the domain of the host state and foreign investors. But in due time the home state may receive a nomination for a supporting role.

[87] Article 33.6 of the ECOWAS Supplementary Act.

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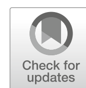
National Courts as Actors in Investment Arbitration



Aniruddha Rajput

Contents

1 Introduction 38
2 Framework of the Relationship Between National Courts and Investment Tribunals 39
3 Overlap of Jurisdictions 41
4 Anti-arbitration and Anti-suit Injunctions 44
5 Enforcement of Investment Arbitration Awards 47
6 Actions of National Courts Challenged Before Investment Tribunals 52
7 Conclusions 54
References 55

Abstract National courts are actors in investment arbitration since they influence the functioning of investment arbitration and are themselves in turn influenced by investment arbitration. The influence of national courts on investment arbitration is larger than the influence of other international courts and tribunals, since national law is part of the applicable law in investment arbitration and national courts are authorised to interpret and apply national law. National courts influence investment arbitration by competing for jurisdiction through the exhaustion of local remedies, umbrella clauses, and the fork-in-the-road rule. National courts facilitate investment arbitration by enforcing awards and at the same time disrupt it when rejecting enforcement or issuing anti-arbitration injunctions. Investment tribunals can restrain national courts by issuing anti-suit injunctions. Above all, they can review the decisions of national courts on grounds of denial of justice, fair and equitable treatment, the effective means test, and indirect expropriation. The the relationship between national courts and investment tribunals is such that the later have the last word, although the role of national courts as actors is certainly noteworthy.

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1 Introduction

Legal dictionaries define the term “actor” in diverse ways. An actor is a “person who instigates or is involved in a legal action”.[1] The actor may be involved in the legal proceedings as a party[2] or may be someone whose conduct is in question in the legal proceedings.[3] Broadly seen, an actor is someone involved in legal proceedings in one way or another.[4] National courts are actors in investment arbitration. They may be involved directly when their decisions form the basis of a cause of action in investment arbitration proceedings. The activities of national courts may also affect the functioning of investment arbitration. National courts function as actors in investment arbitration by performing distinct roles. They may compete for jurisdiction, act as facilitators of the process and outcome of investment arbitration proceedings, or obstruct the arbitration process and its outcome. It is, therefore, necessary to investigate their role as actors in investment arbitration.

National courts can influence investment arbitration in specific situations or have a systemic influence on the overall functioning of investment arbitration. They can potentially interfere with investment arbitration both at the pre-award stage and at the post-award stage. In the pre-award phase, national courts may issue anti-arbitration injunctions or compete for jurisdiction with investment tribunals. In the post-award phase, the award delivered could be enforced or challenged before national courts, except for awards issued under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

After this introduction, the second section deals with the influence of national courts on the system of investment arbitration by setting out the general framework of the relationship between national courts and investment arbitration. The following sections discuss specific aspects of this influence. The third section discusses the situations and ways in which national courts compete for jurisdiction with investment tribunals. The fourth section shows the actions of national courts as a disruptive force, in the form of anti-arbitration injunctions and counteraction by investment tribunals through anti-suit injunctions. The fifth section presents the ways in which, through recognition and enforcement of investment awards, national courts can either facilitate or destroy the outcome of investment arbitration proceedings. The sixth section elaborates on the situations where actions of national courts form the

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[1] Oxford English Dictionary Online (2019) Oxford University Press. https://www.oed.com/view/Entry/1963?redirectedFrom=actors; Bouvier’s Law Dictionary, (1856). https://www.constitution.org/bouv/bouvier_a.htm.

[2] Sheppard SM (ed) (2011) The Wolters Kluwer Bouvier Law Dictionary, Compact Edition, p. 32.

[3] Garner BA (ed) (2009) Black’s Law Dictionary 10th edition, p. 42; Collins Online English Dictionary (2019) Actor, n. HarperCollins Publishing. https://www.collinsdictionary.com/dictionary/english/actor.

[4] Burton WC (ed) (1992), Legal Thesaurus, 2nd edition, p. 9.

basis of the subject-matter of a dispute before an investment tribunal. The last section concludes.

2 Framework of the Relationship Between National Courts and Investment Tribunals

Traditionally, an international tribunal will treat a decision of a national court as a question of fact.[5] In practice, this relationship has changed because ever-larger issues of national law are coming before international courts and tribunals and more issues of international law are adjudicated in national courts.[6]

National court decisions contribute towards the formation of customary international law. They may serve as evidence of state practice[7] or *opinio juris*[8] or, in appropriate cases, as proof of the "existence and content of rules of customary international law, as a subsidiary means for the determination of such rules."[9] They are an obvious basis for general principles of law, as a source of international law.[10] If called upon to determine the existence of a rule of customary international law or general principle of law, an investment tribunal would have to take into account decisions of national courts. Additionally, legal principles contained in the decisions of national courts can be adapted and applied in international adjudication once they go through the process of "abstraction, generalization and adjustment".[11]

National courts have a larger influence in investment arbitration proceedings due to the peculiar status of national law as part of the applicable law in investment arbitration proceedings.[12] Bilateral investment treaties (BITs) do not offer a

[5] *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Decision on the Merits, (1926) PCIJ Series A.- No. 7, p. 19; Brownlie (2003), pp. 38–40.

[6] Nollkaemper (2006), pp. 301–303, 312–321.

[7] Draft Conclusion 6 (2), Draft conclusions on identification of customary international law. International Law Commission, A/73/10, http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf.

[8] Draft Conclusion 10 (2), Draft conclusions on identification of customary international law. International Law Commission, A/73/10, http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf.

[9] Draft Conclusion 13, Draft conclusions on identification of customary international law. International Law Commission, A/73/10, http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf.

[10] *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1927, PCIJ Rep. Series A.- No. 9, p. 31; Yotova (2017), p. 298.

[11] Weil (1992), pp. 146–147.

[12] See Article 42 of the ICSID Convention; Canada-Argentina BIT (1993); Argentina-Spain BIT (1991); Canada-Costa Rica BIT (1999). For the role and relevance of national law, see generally Kjos (2013) and Sasson (2017).

hierarchy between national and international law. However, in situations where there is a direct conflict, national law will have to give way. The decisions of national courts are authoritative pronouncements on matters of national law and an investment tribunal will take these decisions into account when interpreting and applying the appropriate national law.[13]

Article 8.31 (2) of the Canada-EU Comprehensive Economic and Trade Agreement (CETA) acknowledges the relevance of decisions of national courts in the following terms:

> For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

The provision treats national law as a matter of fact, but in other cases, where such interpretation is not adopted by the parties, national law would continue to operate as 'applicable law', rather than a mere 'matter of fact'. In any event, this provision makes it necessary for an investment tribunal to follow the interpretation of national law as given by national courts. For other treaties, decisions of national courts would be applicable as authoritative pronouncements alongside international law, particularly in common law jurisdictions where the rule of precedent applies.

The role and influence of national courts in investment arbitration is different when compared to commercial arbitration. National courts are an influential actor in commercial arbitration since these proceedings—even if international in nature—are conducted within the context of the national legislation on arbitration. National courts can issue interim orders prior to or even in pending arbitration proceedings, and they can even be involved in the appointment of arbitrators. A commercial arbitral tribunal can seek the support of the national court in relation to the presence of witnesses or procurement of evidence, or other related matters. National courts perform a general supervisory function. They cannot and do not have the same relationship with investment tribunals. Investment arbitration is "delocalised". It draws its authority from a BIT, which is an international treaty, unlike commercial arbitration which is based on a contract between the parties and national arbitration legislation recognising the arbitration proceedings and their outcome. Analogies with the relationship of national courts with international commercial arbitration for the purpose of investment arbitration is unhelpful.

[13] *Malicorp Limited v. Egypt*, ICSID Case No. ARB/08/18, para. 103 (c).

3 Overlap of Jurisdictions

National courts function as actors in investment arbitration through competition for jurisdiction. The outcome of this competition may fully or partially deprive, either the national court or the investment tribunal of its jurisdiction. The overlap of jurisdiction may arise in the application of the following rules: exhaustion of local remedies, contractual versus treaty claims, umbrella clauses, and fork-in-the-road clauses.

The jurisdiction of national courts is preserved through the exhaustion of local remedies rule in the BIT. Some treaties provide for an absolute exhaustion of the local remedies rule, whereby an investor cannot commence investment arbitration until a final decision is rendered by national courts.[14] Some other BITs require local remedies to be pursued for a certain duration before initiating arbitration proceedings.[15] Some investment tribunals have ignored the exhaustion of local remedies rule, where local remedies would be futile.[16] If an investment tribunal upholds the exhaustion of the local remedies rule, the jurisdiction of national courts would run its full course, even dispensing with the need of an investment arbitration proceeding. But if an investment tribunal does not uphold the exhaustion of local remedies rule, the tribunal would be depriving national courts of their jurisdiction.

Investment disputes are complex and involve several issues. Some of these issues may overlap with the jurisdiction of national courts or a contractually chosen forum, thereby creating the overlap between contractual and treaty claims. Strictly speaking, disputes arising from contractual relationships can be distinguished from disputes arising from the breach of the BIT. The contractual disputes could be decided by a national court or a contractually chosen forum, which would normally seek support and protection from a national court. Whereas, the disputes arising from the breach of the BIT could be decided by an investment tribunal. The dichotomy of this jurisdiction was recognised by the ad hoc annulment committee in *Vivendi v. Argentina* in the following words:

> whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the [contract], by the proper law of the contract, in other words, the [national law].[17]

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[14] Article 10(5) of the Gemany-Israel BIT; Article 7(2) of the Romania-Sri Lanka BIT.

[15] Article 8(2) of the Albania-Lithuania BIT; Article 10 of the France-Morocco BIT; Article 8(3)-(4) of the Jordan- Romania BIT; Article 9(3) of the China-Côte d'Ivoire BIT; Article 15 (2) of the Indian Model BIT of 2015.

[16] *Lowen Group v. United States*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 169; *Urbaiser v. Argentina*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, paras 194, 202–3; *Ambiente Ufficio v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction, 8 February 2013, paras 597, 601–11, 615–21; *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, para. 260.

[17] *Vivendi v. Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 96.

The presence of a contractual clause does not exclude the jurisdiction of an investment tribunal to decide investment disputes.[18] However, the reverse is not always true. There is a disparity between the jurisdiction exercised by national courts and investment tribunals with the latter having the upper hand—not only do they have broader jurisdiction but they can also decide which aspects of the dispute to retain.

Despite the possibility of parallel proceedings before national courts and investment tribunals deciding different aspects of the same dispute, investment tribunals take over the entire dispute. Investment tribunals have achieved this through an expansive interpretation of 'umbrella clauses'. The debate about the precise scope and interpretation of umbrella clauses and the possibility of investment tribunals having jurisdiction over contractual disputes played out in the *SGS v. Pakistan* and *SGS v. Philippines* cases. In *SGS v. Pakistan*, the tribunal distinguished between contractual and treaty rights and declared that it would not entertain contractual disputes, leaving these to be decided by the arbitral tribunal chosen by contract.[19] Additionally, the contractual disputes would not be converted into investment disputes through the umbrella clause.[20] The tribunal in *SGS v. Philippines* disagreed and criticised the conclusions in *SGS v. Pakistan*.[21] The tribunal recognised the distinction between contractual obligations and treaty obligations and did not agree that contractual obligations are converted into treaty obligations through an umbrella clause.[22] The tribunal in *SGS v. Philippines* found that the institution of arbitration was premature and the investor ought first to approach the local courts to adjudicate the contractual disputes.[23] If such an approach is adopted, then the jurisdiction of national courts is conserved. But the debate is far from over and all depends on the approach a particular tribunal takes.

Some tribunals have decided that umbrella clauses can transform contractual disputes into treaty disputes.[24] Several others have interpreted umbrella clauses in

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[18] *Vivendi v. Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 98.

[19] *SGS Société Générale de Surveillance SA v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, paras 156–62.

[20] *SGS Société Générale de Surveillance SA v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, paras 163–74.

[21] *SGS Société Générale de Surveillance SA v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, paras 121–7.

[22] *SGS Société Générale de Surveillance SA v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 128; Joy *Mining Mach., Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, 13 ICSID Rep. 123 (2008), para. 81.

[23] *SGS Société Générale de Surveillance SA v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 155.

[24] *Bosh International v. Ukraine*, ICSID Case No. ARB/08/I 1, Award, 25 October 2012, para. 252; *BIVAC BV v. Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, para. 142; *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 171.

a manner that does not include violation of contractual provisions, unless there was a breach of treaty provisions.[25] If the breach of a contractual clause is proved to amount to a treaty breach then the investment tribunal will have jurisdiction. In situations where tribunals have taken one these approaches; the jurisdiction of national courts is excluded.

Some tribunals have adopted a narrow interpretation of umbrella clauses. They have declined jurisdiction over contractual disputes through expansive interpretation of umbrella clauses.[26] In these situations, the jurisdiction of national courts remains intact.

The nature of the cause of action before a national court or investment tribunal differs since the right to bring a claim would be based either on a contract or a BIT, although, the underlying transaction in many cases is the same. Yet, investment tribunals normally decide which aspects of the dispute they wish to retain and leave the rest for national courts or a contractually chosen forum. Umbrella clauses are losing their lustre since recent treaty practice shows the reluctance of states to include them in their BITs. This reduces the prospect of investment tribunals taking over contractual disputes that would fall within the jurisdiction of national courts.

Fork-in-the-road provisions, if applied, exclude the jurisdiction of an investment tribunal if the governmental action that forms the basis of an investment claim is litigated before national courts. Fork-in-the-road provisions allow the investor to choose whether to sue the host state before national courts or initiate investment arbitration. Once an investor decides to sue the host state before national courts, investment arbitration can no longer be commenced. Fork-in-the-road provisions can be invoked only if the parties to the dispute, the cause of action and the relief sought are the same.[27] These requirements are often not met, since the party sued in national courts under a contract may be a state entity and the host state may not be a party to these proceedings. Likewise, the cause of action in national courts would arise from a contract whereas in investment arbitration from a BIT.

A foreign investor has to establish itself in a host state and function in accordance with its laws. National courts are the default judicial institutions with jurisdiction

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[25] *Eureko BV v. Poland*, Partial Award, 19 August 2005), 12 ICSID Rep. 335 (2007), para. 260; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 310; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 82.

[26] *Impregilo SpA v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 216; *Toto Costruzioni Generali v. Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, para. 202; *Joy Mining Mach., Ltd. v. Egypt*, ICSID Case No. ARB/03/1 1, Award on Jurisdiction, 6 August 2004, 13 ICSID Rep. 123 (2008); *Vivendi v. Argentina*, Case No. ARB/97/3, Decision on Annulment, 3 July 2002, 8 ICSID Rep. 490 (2005), para. 101.

[27] *Pantechniki SA Contractors & Engineers (Greece) v. Albania*, ICSID Case No. ARB/07/21, Award, July 29, 2009; *Total SA v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 1443; *Toto Costruzioni Generali v. Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, para. 203; *H&H Enters. Invs., Inc. v. Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014.

over investment activity within the host state. In the absence of an investment treaty, a foreign investor would have to approach national courts in the event of a dispute. The compulsory dispute resolution clause in an investment treaty excludes the otherwise default jurisdiction of national courts. There is thus an overlap as well as a close relation between national courts and investment tribunals. The ultimate winner of the contest for jurisdiction depends on the language of the BIT and, ultimately, on the approach that an investment tribunal will adopt.

A national court may assert jurisdiction through the principles discussed above. However, the outcome of this contest for jurisdiction is mostly decided by investment tribunals, since these issues tend to be raised before them. The only opportunity national courts have is to review the decisions of investment tribunals at the enforcement stage. National courts could then examine whether the assumption of jurisdiction was proper. In most cases, the national court where enforcement of an investment award is sought would not be the same court that was deprived of its jurisdiction. It could very well be a national court of another state, which may or may not be sympathetic to another national court on account of its loss of jurisdiction. Additionally, the national court where enforcement proceedings take place would have its own standards to apply, which may or may not take into account the fact that the jurisdiction of another national court was taken over by the investment tribunal.

National courts could hardly be said to be an organised force, like investment tribunals. Arbitrations conducted within the framework of the International Centre for Settlement of Investment Disputes (ICSID) function in a certain environment and culture. Although they do not have any formal relation to each other, they are said to have a common public policy objective.[28] There are several connecting factors between investment tribunals, such as repeat arbitrator appointments and reliance by tribunals on each other's decisions. National courts rarely deal with issues arising from international investment law and have no occasion or interest to function in an organised manner. This inevitably puts arbitral tribunals ahead in the race with little or no prospects for the national courts to assert jurisdiction. In addition, national courts have a heavy caseload of their own and have little incentive to enter such a competition.

4 Anti-arbitration and Anti-suit Injunctions

National courts can act as a disruptive force for pending or ongoing investment arbitration proceedings by issuing anti-arbitration injunctions. Likewise, an investment tribunal can issue an anti-suit injunction. An anti-arbitration injunction is an order issued by the national court directing an investment tribunal to halt the arbitration proceeding or the parties to not pursue the arbitration. An anti-suit injunction is an order by an investment tribunal almost always addressed to the

[28] Schreuer (2009), pp. 4–5.

parties and directing them not to commence or not to pursue proceedings parallel to the arbitration before national courts. An anti-suit or anti-arbitration injunction is issued on the premise that a decision-maker has an "inherent power to protect its own jurisdiction in cases where the risk of inconsistent decisions in parallel or duplicate proceedings instituted in other fora have rendered this necessary."[29]

Whether national courts are able to act in relation to investment arbitration proceedings depends on whether they follow the practice of issuing anti-arbitration injunctions and on what grounds. Anti-arbitration injunctions are not governed by international law and there is no standard provided by international law. The latter is developed within the domestic legal system. Thus, the practice on issuance of anti-arbitration injunctions differs between national jurisdictions. Even national legislations on arbitration normally do not contain provisions on anti-arbitration injunctions. National courts that issue anti-arbitration injunctions have considered the authority to issue them to emanate from their inherent powers.[30]

If national laws, expressly or impliedly, allow the issuance of anti-arbitration injunctions, a discussion on their appropriateness remains of theoretical value. A practical approach would be to identify and scrutinise the grounds for issuing an anti-arbitration injunction. The grounds, scope of their interpretation (whether broad or narrow), and the frequency of their issuance would determine the extent to which a certain national court can affect investment arbitration proceedings. Even where anti-arbitration injunctions are issued, the extent of influence national courts may exert on arbitration proceedings will depend on the depth and persuasiveness of their reasoning and that of the reasoning of an investment tribunal declining to follow that anti-arbitration injunction. Some national courts do not issue anti-arbitration injunctions.[31] Others issue them on the basis of narrow grounds.[32]

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[29] *Paul Donin de Rosiere v. Iran*, Award No. ITM 64-498-1, (1986) 13 Iran-US Claims Tribunal 193, 194.

[30] *Sana Hassib Sabbagh v. Wael Said Khoury*, [2019] EWCA Civ 1219 (United Kingdom); *South Carolina Insurance Co v. Assurantie Maatshappij De Zeven Provincien NV* [1987] AC 24 (United Kingdom); *Union of India v. Vodafone Plc. and Anr.*, 2018 SCC Online Del 8842 (India).

[31] Switzerland does not permit anti-arbitration injunctions being issued by national courts, *Air (PTY) Ltd v. International Air Transport Association*, Tribunal de Première Instance 2 May 2005, Case No. c/1043/2005-15 SP, translated in (2005) 23 ASA Bulletin 739, 739.

[32] In India, the courts have "the jurisdiction to restrain international treaty arbitrations which are oppressive, vexatious, inequitable or constitute an abuse of the legal process", *Vodafone International Holdings BV v. Government of India [I]*, PCA Case No. 2016-35, Judgment of the High Court of Delhi Vacating Order of 22 August 2017, 7 May 2018, para. 104; In the United Kingdom, the criteria to be met are: (1) the court has jurisdiction; (2) the discretion can be exercised if (a) the injunction does not cause injustice, (b) the continuation of arbitration would be oppressive, vexatious, unconscionable or an abuse of process; (3) the discretion should be used sparingly and (4) delay would be material, if not fatal to the application, *J Jarvis & Sons Ltd. v. Blue Circle Dartford Estates Ltd*, [2007] EWHC (TCC) 1262, para. 40. US courts apply the so-called "China Trading Test": (1) the court must have jurisdiction, (2) parties must be the same and (3) the decision in the action before the court issuing the injunction must dispose of the foreign court or tribunal proceedings, *China Trade and Dev Corp. v. Yong* 837 F.2d 33, 36-7. In France, an anti-arbitration injunction may be issued only if the arbitration agreement is manifestly null and void and this is

A national court's potential to influence investment arbitration proceedings depends not only on whether it can issue an anti-arbitration injunction, but also on whether that injunction will be respected. Some investment tribunals have proceeded with the dispute without being perturbed by an anti-arbitration injunction.[33] In such cases, national courts may be ineffective actors.

An arbitral tribunal may issue an anti-suit injunction preventing a party from commencing proceedings before national courts.[34] These are interim orders aimed at preserving the jurisdiction of the arbitral tribunal.[35] Like investment tribunals disregarding anti-arbitration injunctions, a national court may disregard an anti-suit injunction. In *Chevron v. Ecuador,* the tribunal issued an interim order directing the state to ensure that the national court did not proceed with the case.[36] The national court proceeded despite the interim order and concluded the case. The tribunal found that to be a violation of its order and directed the state to compensate the investor.[37] The tribunal reasoned that the proceedings were unjust, although the parties to the proceedings in the national court were not the same as the disputing parties before the tribunal.[38]

National courts may also issue anti-suit injunctions restraining a party from approaching national courts and directing it to participate in arbitration proceedings. Such examples are probably absent but are nevertheless a possibility.[39] On such occasions, the concerned national court would be a facilitator of investment arbitration.

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raised by one of the parties, Article 1458 of the French New Code of Civil Procedure. In Sweden, an anti-arbitration injunction may be issued only if the validity of the arbitration agreement is in question. See New Arbitration Regime in Sweden (1999), World Arbitration & Mediation Report 154 (10), pp. 154–155.

[33] *Southern Pacific Properties (Middle East) Limited v. Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction II, 14 April 1988, para. 60; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, para. 55; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 July 2007, paras 59, 78; *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Interim Measures, 21 March 2007, paras 31, 68; *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, *SGS Société Générale de Surveillance SA v. Pakistan*, Procedural Order No. 2, 16 October 2002, 8 ICSID Reports 293, pp. 298, 305.

[34] *SGS Société Générale de Surveillance SA v. Pakistan*, Procedural Order No. 2, 16 October 2002, 8 ICSID Reports 293, p. 305.

[35] Articles 17(2)(b), 17H & 17I of the UNCITRAL Model Law on International Commercial Arbitration, UN doc A/61/17, Annex 1. For a review of decisions of ICSID tribunals, see Gill (2009), pp. 553–564.

[36] *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, UNCITRAL, Order for Interim Measures, 9 February 2011.

[37] *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, UNCITRAL, Second Partial Award on Track II, 30 August 2018, para. 9.17.

[38] *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, UNCITRAL, Second Partial Award on Track II, 30 August 2018, para. 9.16.

[39] See Rozas (2005), pp. 79–80.

There is a difference in attitudes towards anti-arbitration and anti-suit injunctions. An anti-arbitration injunction is frowned upon and seen as unnecessary interference with the arbitration proceedings, whereas an anti-suit injunction is looked upon favourably in academic discourse.[40] This asymmetry expects national courts to perform a limited role in comparison with investment tribunals, while exercising similar powers. In practice, the situation is divergent and context-specific.

5 Enforcement of Investment Arbitration Awards

National courts have the most critical role at the stage of enforcement of investment awards. While they can facilitate investment arbitration by enforcing awards, they can also defeat arbitration by declining enforcement. A non-ICSID Convention award would have to be enforced in a national jurisdiction. There are three aspects of enforcement that are discussed in this section: recognition, enforcement, and challenge. In the process of recognition, a national court is approached by the winning party to seek endorsement of the award; enforcement involves undertaking actual steps to enforce the award; and in the case of a challenge, the losing party seeks the set-aside of the award.[41] In all three instances (collectively referred to as 'enforcement' for convenience), national courts influence investment arbitration since they determine the fate of the outcome of the arbitration proceedings. National courts may uphold or set aside the award. An award may be challenged by a host state or a foreign investor, where the investment tribunal has dismissed a claim.[42]

An ICSID Convention award is self-executing since it is treated as the decision of the highest court of each state party to the Convention.[43] Arguments have been advanced that the grounds applicable to review and set-aside of a judgment of the highest court will apply to an ICSID award.[44] This opens the possibility of a challenge of an ICSID arbitration award before a national court, albeit on limited

[40] Schwebel (2005), p. 13; Lew (2008), p. 287.

[41] Harisankar (2015).

[42] See *Petrobart Ltd v. Kyrgyz Republic*, Judgment of the Supreme Court of 28 March 2008, Case No. 2113-06; *Bayview Irrigation District # 11 and others v. Mexico*, Ontario Superior Court, Judicial Review 07-CV-340139-PD2, Judgment of 5 May 2008.

[43] Article 54 (1) of the ICSID Convention.

[44] Letter of Argentina, dated 7 April 2008 cited in: Letter from United States Department of State to Ms Claudia Frutos-Peterson, Secretary of the ad hoc Committee (*Siemens*), 1 May 2008, https://www.italaw.com/documents/Siemens-USsubmission.pdf. In the reply to the letter of the United States, Argentina acknowledged that the ICSID setup was different from that of other arbitration rules and it did not allow the award to be refused enforcement on the grounds mentioned in the New York Convention. However, Argentina argued that "the State i.e. the award debtor is to subject compliance with ICSID awards to the same or substantially the same procedures that are applicable to compliance with final judgments of local courts against the States". Argentina also referred to a US District Court decision which had "altered" the award rendered by the tribunal by granting post-award interest. https://www.italaw.com/sites/default/files/case-documents/ita0793.pdf.

grounds. Additionally, in the light of sovereign immunity, there may be occasions when national courts decline enforcement of an ICSID award.[45] In non-ICSID Convention arbitrations, recognition and enforcement take place according to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), thereby making national courts prominent actors.

National courts have preserved their jurisdiction to entertain enforcement proceedings of investment arbitration awards under the New York Convention. They have treated investment arbitration awards as arising out of a commercial relationship to allow them to exercise jurisdiction.[46] The New York Convention does not specify which national court will have jurisdiction to recognise or enforce an award. It is normally presumed that it will be the national court of the seat of arbitration. This is because Article V(1)(a) of the New York Convention stipulates that an award could be set aside if the arbitration agreement is not valid "under the law where the award was made". The same provision also states that an award would not be enforced if the arbitration agreement were "not valid under the law to which the parties have subjected it". Therefore, even the national court whose laws apply to the substance of the dispute is a relevant jurisdiction. Since the national law of the host state is applicable, the recognition or enforcement of an investment arbitration award can be challenged before its national courts.[47] Additionally, all those jurisdictions where the assets of the losing party (normally the host state) are located are relevant jurisdictions for enforcement, thereby making multiple national courts potential actors.

The enforcement proceedings are brought under the relevant national legislation on arbitration, which incorporates and implements the New York Convention. In *Ecuador v. Occidental*, the UK courts rejected the investor's argument of "non-justiciability", according to which the investor had objected to the institution of proceedings in the UK courts on the ground that it would involve interpretation of laws and actions of another sovereign.[48] The investor had alleged that since the challenge would involve interpretation of international law, the proceedings were non-justiciable. The court rejected the argument on the basis that although the interpretation of international law was non-justiciable, these proceedings related to the rights of a municipal entity, i.e. a foreign investor, and would therefore be subject

[45]*Blue Ridge Investments, L.L.C. v. Argentina*, 902 F. Supp. 2d 367 (SDNY 2012) (United States); *Benvenuti & Bonfant Ltd. v. Banque Commerciale Congolaise and others*, Judgment of July 21, 1987, Cour de Cassation, 115 Journal du Droit Interational 108 (1988) (France); *AIG Capital Partners v. Kazakhastan*, [2005] EWHC 2239 (Comm.) (United Kingdom).

[46]*Mexico v. Metaclad*, Judgment of the Supreme Court of British Columbia, 2 May 2001, para. 44; *Mexico v. Feldman Karpa*, Canada, Ontario Court of Appeal, 11 January 2005, para. 41; *Czech Republic v. CME Czech Republic BV*, Sweden, Seva Court of Appeal, 15 May 2003, 9 ICSID Reports 439, 493; *BG Group PLC v. Argentina*, US Supreme Court, CASE No. US 12-138 (2014), pp. 6–8.

[47]Blackaby et al. (2015), p. 614.

[48]*Ecuador v. Occidental Exploration and Production Company*, Judgment, 29 April 2005, EWHC 774, para. 30.

to control under the municipal arbitration laws of the seat of arbitration.[49] National courts have accepted the jurisdiction to entertain a challenge to an investment arbitration award under their domestic law if the seat of the arbitration was in their country. The presence of a sovereign state and the fact that international law was the law applicable to the dispute would not amount to a sufficient ground to decline jurisdiction.[50] Presence of a foreign investor, i.e. an entity subject to national laws, has been considered to be a sufficient basis to review an investment award under national arbitration laws.[51] To tackle objections to jurisdiction, national courts have applied doctrines peculiar to their national system. The Stockholm District Court used its national procedural law doctrine of assertion to affirm that the statements made by the claimant fell within the scope of the arbitral tribunal.[52] Reliance on national laws and particularly national procedural laws and enforcement regimes under the New York Convention expand the role of national courts.

The enforcement proceedings are like any other national proceedings even though they have an international element in the subject-matter of the dispute. The extent of involvement of a national court depends on the grounds for interference with enforcement, as contained in the domestic law. Prominent grounds for declining enforcement of an award are the invalidity of the arbitration agreement,[53] excess of jurisdiction,[54] non-arbitrability,[55] and public policy.[56] National courts retain the discretion to interpret and apply such grounds.

Host states challenge awards on the ground that the tribunal lacked jurisdiction to decide the dispute or that it exceeded its jurisdiction.[57] National courts make their own assessment of correctness of the finding of an investment tribunal on jurisdiction.[58] National courts would interfere and set aside an award fully or partially, if

[49] *Ecuador v. Occidental Exploration and Production Company*, Judgment, 29 April 2005, EWHC 774, paras 73–76. The decision was upheld by the Court of Appeal, Judgment of Court of Appeal, 4 July 2007, EWCA Civ 656.

[50] *Russian Federation v. Sedelmayer*, Judgment of Stockholm District Court, 12 December 2002, Case No. T6-583-98, (English translation in 2 Stockholm International Arbitration Review (2005)), p. 16.

[51] *Russian Federation v. Sedelmayer*, Judgment of Stockholm District Court, 12 December 2002, Case No. T6-583-98, (English translation in 2 Stockholm International Arbitration Review (2005)), p. 16.

[52] *Russian Federation v. Sedelmayer*, Judgment of Stockholm District Court, 12 December 2002, Case No. T6-583-98, (English translation in 2 Stockholm International Arbitration Review (2005)), p. 17.

[53] Article V(1)(a) of the New York Convention.

[54] Article V(1)(c) of the New York Convention.

[55] Article V(2)(a) of the New York Convention.

[56] Article V(2)(b) of the New York Convention.

[57] *Czech Republic v. Saluka Investments BV*, Judgment of the Federal Court of Switzerland, 7 September 2006.

[58] *Poland v. Saar Papier Vertriebs GmbH*, Swiss Federal Court, 20 September 2000, para. 4.b (paraphrased translation in Hobér and Eliasson (2010), p. 640).

there is excess of jurisdiction.[59] In *Mexico v. Metaclad*, the Supreme Court of British Columbia found the tribunal to have exceeded its jurisdiction since "transparency" was not part of customary international law and the award was consequently partially set aside.[60] National courts can investigate the reasoning and basis of a conclusion arrived at in an award even when the issue relates to international law.

Awards whose subject-matter cannot be resolved through arbitration, will not be enforced by the national court on the ground of non-arbitrability. Normally, disputes regarding the grant of intellectual property rights or competition are non-arbitrable.[61] The determination of arbitrability is made by national courts based on national legislation and jurisprudence. In investment arbitration, disputes involve a mix of public and private interests. This raises the possibility of invoking non-arbitrability.[62] The inevitable consequence is a larger role for national courts.

Public policy is that plain expansive ground leaving extensive discretion to the national court enforcing the award.[63] All depends upon the approach the national court in question takes. An investment award could be challenged on the ground of violation of public policy of the state where enforcement proceedings are underway.[64] Even where another court has enforced an award, a national court can consider the validity of the award under its own national laws.[65]

National courts have shown a high degree of deference to the conclusions of investment tribunals but do not generally decline jurisdiction to entertain the challenge.[66] National courts have undertaken broad assessments of awards at the stage of enforcement. Although theirs is not an appellate review, they have adopted liberal standards of review.[67] A national court may review whether the interpretation of an investment tribunal accords with international law or with the national law of another state that is relevant to the dispute. In the *Yukos case*, The Hague District Court found that the conclusions of the arbitral tribunal on the provisional application of the Energy Charter Treaty (ECT) was incorrect. The court found the investment tribunal to have committed an error regarding the "context" in which the ECT was to

[59] *Attorney General of Canada v. SD Myers*, Federal Court of Canada, 13 January 2004, p. 21.

[60] *Mexico v. Metaclad*, Judgment of the Supreme Court of British Columbia, 2 May 2001, paras 70, 76, 79.

[61] Blackaby et al. (2015), p. 19.

[62] Reinisch (2010), pp. 678–679.

[63] *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010, Judgment of the UK Commercial Court on the Enforcement of the Award, 6 June 2017, para. 87.

[64] *Poland v. Saar Papier Vertriebs GmbH*, Swiss Federal Court, 20 September 2000, para. 3.b (paraphrased translation in Hobér and Eliasson (2010), p. 641).

[65] *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010, Judgment of the UK Commercial Court on the Enforcement of the Award, 6 June 2017, paras 92–93.

[66] Hobér and Eliasson (2010), pp. 668–669.

[67] *Poland v. Saar Papier Vertriebs GmbH*, Swiss Federal Court, 20 September 2000, para. 4.a (araphrased translation in Hobér and Eliasson (2010), p. 640).

be interpreted[68] and the object and purpose of the ECT and the nature of international law.[69] Additionally, since the Russian Federation had not yet ratified the Energy Charter Treaty and the Russian laws and Constitution do not consider a treaty as binding unless ratified, it did not have any effect. The court embarked upon an interpretation of Russian law to find that the investment tribunal was in error. The court reasoned that Article 45 of the ECT allowed provisional application to the extent that the treaty is not contrary to national law. Russian national law did not permit arbitration of investment disputes.[70] Hence, the dispute resolution provisions of the ECT would not be applicable and the investment tribunal did not have jurisdiction.[71] In situations where the error goes to the determination of whether the dispute falls within the jurisdiction of an investment tribunal, the national court can arrive at a different conclusion than the tribunal and set aside an award.

The practice of national courts is diverse and, in some cases, they have exercised broad discretion while reviewing investment arbitration awards. The level of interference with substantive issues of law will be based on the position of the national law and the approach of the national court. In the Dutch legal system, as in many other jurisdictions, foreign law is treated as a question of law[72] rather than as a question of fact. This inevitably gives greater latitude to the court to interpret foreign law. Even in jurisdictions where national law is treated as a question of fact, the national court could receive expert evidence and interpret and apply foreign law.[73]

Presence of an additional layer of regional courts could impede enforcement.[74] Though not strictly national courts, they are regional in nature and do impact investment arbitration as actors. In the *Achmea* case,[75] the Court of Justice of the European Union (CJEU) concluded that disputes arising from bilateral investment treaties between EU member states (intra-EU BITs) cannot be decided in investment arbitration since they involve interpretation of EU law, a function that is the monopoly of the CJEU.[76] The case presents the possibility of arbitrability and

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[68]*Russian Federation v. Veteran Petroleum Ltd*, The Hague District Court, Judgment, 20 April 2016, paras 5.12–5.13.

[69]*Russian Federation v. Veteran Petroleum Ltd*, The Hague District Court, Judgment, 20 April 2016, paras 5.19–5.20.

[70]*Russian Federation v. Veteran Petroleum Ltd*, The Hague District Court, Judgment, 20 April 2016, paras 5.33–5.34.

[71]*Russian Federation v. Veteran Petroleum Ltd*, The Hague District Court, Judgment, 20 April 2016, para. 5.96.

[72]*Russian Federation v. Veteran Petroleum Ltd*, The Hague District Court, Judgment, 20 April 2016, para. 5.34.

[73]See *Lazard Bros. v. Midland Bank* [1933] A. C. 289, 297 (H. L. 1932) (United Kingdom); *Gold v. Reinblatt*, [1929] S.C.R. 74, [1939] I (United States); *Re Low* [1933] 2 DLR 6o8 (C.A.) (United States); Indian Evidence Act, 1872, s. 45.

[74]Reinisch (2010), p. 681.

[75]CJEU, *Slovakia v. Achmea*, Case C-284/16, ECLI:EU:C:2018:1.

[76]CJEU, *Slovakia v. Achmea*, Case C-284/16, ECLI:EU:C:2018:1, paras 53–59.

mutual trust posing a challenge to enforcement of investment awards and reveals the role regional courts can play as actors in investment arbitration.

Involvement of multiple national courts and regional courts with their diverse jurisprudence allows them to affect investment arbitration in multiple and distinct ways. Even where actions of different national courts are not coordinated, they may influence arbitration proceedings and their outcome. In the *Stati case*, the investor succeeded in seeking enforcement in Sweden, the seat of arbitration, and in pursuing assets of the state in Belgium, Italy, Luxembourg, the Netherlands and the United States.[77] The investor however had to withdraw from the proceedings in UK courts, where it was pursuing assets for enforcement, due to the fear of allegations of fraud being investigated by the UK Courts and the prospect of the award being set aside.[78]

6 Actions of National Courts Challenged Before Investment Tribunals

National courts are also actors in light of the fact that their conduct can be challenged before an investment tribunal. State responsibility for actions of national courts is attracted if national courts have violated a rule of international law. A host state may be responsible for failure to apply the New York Convention in good faith and thereby decline to enforce a commercial arbitration award.[79] Actions of a national court may also result in denial of justice, a breach of fair and equitable treatment (FET), effective means, or indirect expropriation.

Even if within the internal constitutional structure of a state national courts are independent, their actions are attributable to the state and the state is responsible for the conduct of its national courts.[80] Hitherto dormant, the customary rule of denial of justice has been invoked in investment arbitrations.[81] It is inadequate for national courts to provide formal justice, i.e. avenues for redress but no real justice. The

[77] See Stati v. Kazakhstan: The winner takes it all?, Global Arbitration Review, 11 July 2018, https://globalarbitrationreview.com/article/1171805/stati-v-kazakhstan-the-winner-takes-it-all.

[78] Charlotin D, Stati and Ascom v. Kazakstan: UK Appeals Court allows claimants to avoid fraud trial, after they decide to abandon enforcement efforts in that jurisdiction, available at: https://www.iareporter.com/articles/stati-and-ascom-v-kazakhstan-uk-appeals-court-allows-claimants-to-avoid-fraud-trial-after-they-decide-to-abandon-enforcement-efforts-in-that-jurisdiction/.

[79] *Romak SA (Switzerland) v. Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009; *Frontier Petroleum Services Ltd v. Czech Republic*, PCA, Final Award, 12 November 2010; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011; *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009; *White Industries Australia Limited v. India*, UNCITRAL, Award, 30 November 2011; *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008.

[80] Rajput (2018), pp. 148–149, 157–158.

[81] Paulsson (2005), pp. 38–56.

standard of denial of justice requires the presence of a fair and functional judicial system.[82]

Denial of justice will have to arise from the specific facts of the case in question and not from general perceptions about the functioning of the judiciary.[83] The responsibility of a state for denial of justice for a decision of its national courts would not arise if a reader can follow its reasoning.[84] Conversely, if the decision of a national court does not contain a reasoning that is logical and coherent, the decision may result in denial of justice. National courts are thus required to be careful in their reasoning and ensure that the proceedings are fair and so reflected in the record. The obligation of national courts is not to render a correct decision but only to adhere to fair procedures.[85]

Denial of justice is considered to be a part of fair and equitable treatment. Fair and equitable treatment functions as an independent standard for judging the actions of national courts. Legitimate expectations is a core element of FET, as developed in the jurisprudence of investment tribunals. In *White Industries v. India*, the tribunal rejected the investor's argument that there is a legitimate expectation of a certain judicial outcome. That case involved a certain desired interpretation of the New York Convention.[86] In *Tatneft v. Ukraine*, the tribunal remarked in passing (*obiter*) that it would be a part of legitimate expectations that the legal framework in the host state is predictable and its organs, including the judiciary, function in a consistent manner.[87] Consistency in decision-making is expected from national courts as a part of legitimate expectations.

A state is said to have violated the effective means standard if it fails to guarantee access to justice.[88] National courts are expected to manage their caseload in a manner that prevents undue delays. Congestions in the court system resulting in undue delays could be treated as a breach of effective means.[89] Interference from other branches, such as the executive, in judicial activity would be a breach of effective

[82] Paulsson (2005), pp. 60–61.

[83] *Vannessa Ventures Ltd. v. Venezuela*, ICSID Case No. ARB(AF)04/6, Award, 16 January 2013, para. 228; *Swisslion DOO Skopje v. North Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, para 26.8; *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, para 8.1.10.

[84] *Mr Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paras. 481–482; *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para 80.452-4.

[85] Paulsson (2005), pp. 81–82.

[86] *White Industries Australia Limited v. India*, UNCITRAL, Award, 30 November 2011, paras 10.3.13, 10.3.15.

[87] *OAO Tatneft v. Ukraine*, UNCITRAL, Award on Merits, 29 July 2014, para. 407.

[88] *Duke Energy Electroquil Partners & Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para 391.

[89] *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, UNCITRAL, PCA Case No. 2009-23, Partial Award on Merits, 30 March 2010, paras 264–265; *White Industries Australia Limited v. India*, UNCITRAL, Award, 30 November 2011, paras 11.3.2, 11.4.14-15.

means.[90] The effective means test is seen as an effort by tribunals to expand treaty protection to cover judicial activity that would not be covered by denial of justice. Despite the concerns regarding the standard's scope, appropriateness and impact of effective means on the judicial activity of national courts,[91] it remains a tool in the hands of investment tribunals to control the actions of national courts.

Situations where decisions of national courts result in loss of value of the investment have been treated as indirect expropriation.[92] In *Saipem v. Bangladesh*, the tribunal considered that a decision of national courts not to enforce a commercial arbitration award is an expropriation of the right to arbitrate and of the outcome of that arbitration proceeding, that is, of "residual contractual rights under the investment as crystallized in the [commercial arbitration] award".[93] Tribunals have announced that they would not be reviewing decisions of national courts. But in effect, in cases involving non-enforcement of commercial arbitration awards by national courts, the tribunals have reviewed the decisions of national courts.[94]

In the absence of a BIT, actions of national courts could be challenged before an international court or tribunal on the ground of denial of justice, provided local remedies were exhausted and the home and host states expressed their agreement to refer the dispute to an international court or tribunal. BITs allow the foreign investor to raise the ground of denial of justice without the involvement of its home state. Denial of justice is a difficult standard to meet. Other standards, especially effective means and indirect expropriation, are less stringent and can be met relatively easily. The possibility of a potential challenge before an investment tribunal imposes restrictions on how national courts exercise jurisdiction.

7 Conclusions

Investment arbitration has contributed to the expansion of national courts' participation in matters of international law. National courts face issues relating to international investment law when it comes to facilitating arbitration, the enforcement of awards, or when their actions are challenged before investment tribunals. National courts and investment tribunals mutually influence each other.

National courts compete for jurisdiction with investment tribunals. Experience shows that they rarely manage to take over the jurisdiction of investment tribunals.

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[90] *Petrobart Limited v. Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award, 29 March 2005, p. 77.

[91] Demirkol (2019), pp. 46–48.

[92] For a discussion of relevant cases, see Demirkol (2019), pp. 50–55.

[93] *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, paras 128, 130, 133.

[94] *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, para. 155; *White Industries Australia Limited v. India*, UNCITRAL, Award, 30 November 2011, paras. 10-4.17-10.4.22.

The ultimate word is with investment tribunals and they may leave some aspects of the investment dispute for national courts or they may take it over entirely. Even when some aspects of the dispute are left for national courts, those proceedings tend to be of nominal relevance only, since an investment award would comprehensively settle the dispute. National courts influence investment arbitration in various ways. As facilitators, national courts can be responsible for enforcing an investment arbitration award, they can even issue anti-suit injunctions, restraining a party from commencing proceedings before other national courts, or they can issue a pro-arbitration order. As a disruptive force, national courts can affect the commencement and continuation of proceedings through anti-arbitration injunctions or by setting aside an investment arbitration award.

The above discussion shows that the influence of national courts is rising since one of the parties, and especially states, frequently approach national courts. National courts have not shied away from exercising jurisdiction, although the standards they apply depend on the national law and legal culture of the state concerned. The growing involvement of national courts has increased the possibility of them influencing the functioning and outcome of investment arbitration.

The presence of national courts as an actor entails complications and uncertainties. Each national court functions differently and applies different rules and standards. It becomes difficult to conceptualise a unified framework of the involvement of national courts as actors. This is also an outcome of the discretion implicit in how national courts act in relation to investment arbitration. The involvement of national courts, due to the legal and cultural divergences of those jurisdictions, represents a plurality of approaches rather than a uniform overarching framework.

Finally, the role of national courts as actors in investment arbitration depends on the language of the BIT in question, but also on its interpretation and the general ideological orientation that a certain investment tribunal takes. There are no straitjacket-defined ways for national courts to become actors in investment arbitration. The extent of their intervention is conditioned on the interplay between the application of national and international law.

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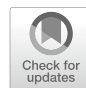
State Immunity and the Execution of Investment Arbitration Awards



A Review of the Plea of State Immunity and the Execution of Investment Arbitration Awards from the Viewpoint of the Forum State

Phoebe D. Winch

Contents

1 Introduction 58
2 State Immunity from Jurisdiction and Execution 59
  2.1 From Absolute to Restrictive 59
  2.2 Lack of an International Regime 60
  2.3 Enforcement 63
3 Legislative Amendments in France and Belgium 65
  3.1 First Requirement: Express and Specific Waiver 66
  3.2 Second Requirement: Preliminary Judicial Authorisation 70
  3.3 Legislative Developments in Russia 73
4 Alternatives to Enforcement and Looking Forward 73
  4.1 Alternatives to Enforcement 74
  4.2 Looking Forward 75
5 Concluding Remarks 75
References 76

Abstract The doctrine of state immunity occupies a fundamental place in international law. The application of the doctrine, largely left to the national laws of states, is not consistent. One particular area of inconsistency is the treatment of the plea of state immunity from execution of arbitral awards resulting from investor-state disputes. The issue of state immunity from execution has come to the fore in light of a number of recent attempts by award-creditors to attach their awards against the assets of a foreign state located in jurisdictions considered to be

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"pro-enforcement", such as France and Belgium. This chapter considers the plea of state immunity and the execution of investment arbitration awards from the perspective of the forum state. In particular, it addresses the introduction of procedural and substantive amendments to French and Belgian laws on state immunity following these attempts by award-creditors to seize foreign state assets located in their respective jurisdictions. The chapter posits a way forward for investors seeking to navigate the landscape governing state immunity from execution.

1 Introduction

The doctrine of state immunity occupies a fundamental place in international law and international relations, enabling the state and its representatives to fulfil essential public functions.[1] The character of state immunity as an established rule of international law has been recognised by both civil and common law jurisdictions, and "adopted as a general rule of customary international law solidly rooted" in state practice.[2] As will be explored in this chapter, the application of the doctrine is largely left to each state's national laws, as there is no single international regime in force governing state immunity. In practice, this has resulted in a lack of uniformity in the application of the rules of state immunity as between states, as well as in the internal jurisprudence of states.

One particular area of inconsistency, which is the focus of this chapter, is in the treatment of the plea of state immunity from execution of arbitral awards resulting from investor-state disputes. This inconsistency in approach tends to motivate award-creditors to be selective in their choice of forum in which to commence enforcement proceedings and ultimately execute an award. The issue of state immunity from execution has come to the fore in light of a number of recent attempts by award-creditors to attach their awards against the assets of a foreign state located in jurisdictions considered to be "pro-enforcement", such as France and Belgium. The success of these attempts in seizing foreign state assets has often strained diplomatic relations between states, prompting legislative intervention in these jurisdictions in order to clarify the rules on state immunity from execution, often in a way that safeguards foreign state property against attachment.

This chapter will briefly consider the reasons underlying the inconsistency in approaches to the application of the rules of state immunity from execution, as well

[1] Crawford (2019), p. 470; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* Judgment [2012] ICJ Rep 99, para. 57.

[2] Fox and Webb (2013), p. 13 citing *Al-Adsani v. UK* (2002) 24 EHRR 11; *Jones v. Minister of Interior of Saudi Arabia & Ors* [2006] UKHL 26; see also *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* Judgment [2012] ICJ Rep 99, para. 56; Report of the International Law Commission on the work of its Thirty-second session, UN GAOR, 35th sess, Supp No 10, UN Doc A/35/10 (5 May-25 July 1980) p. 147, para. 26.

as the recent attempts by award-creditors to execute awards against foreign state property located in France and Belgium (Sect. 2). Section 3 outlines the legislative responses in France and Belgium to these proceedings and the introduction of procedural and substantive amendments to their respective laws on state immunity. The focus of this section is on the plea of state immunity from the execution of investment arbitration awards, from the perspective of the forum state. Section 4 of the chapter proposes possible alternatives for investors to enforcement and posits a way forward for investors seeking to navigate the landscape governing state immunity from execution.

2 State Immunity from Jurisdiction and Execution

State immunity acts as a procedural bar, ensuring that states and their representatives remain immune from the jurisdiction of foreign states' courts.[3] The state may claim immunity at two stages of the proceedings: first, from the jurisdiction of the forum (which is known as "immunity from jurisdiction"), and secondly, from the execution of any resulting judgment (which is known as "immunity from execution"). The question of immunity from execution does not arise until jurisdiction has been established and the plaintiff (in this context, the investor) has received a judgment or arbitral award in its favour which it is seeking to enforce.[4]

2.1 From Absolute to Restrictive

At its inception, state immunity was absolute, meaning that a state would be immune from any foreign proceedings unless it provided its consent. Over time, this absolute approach was eroded in many jurisdictions to apply in a more restrictive fashion, only affording immunity to the state's sovereign acts. While this is true insofar as immunity from jurisdiction is concerned, the erosion of absolute immunity has been slower in the context of immunity from execution. National courts generally treat a state's immunity from execution as absolute, subject only to limited exceptions.[5] While some consider this to be an "understandable" approach, owing to the fact that measures of constraint are far more intrusive than the exercise of declaratory

[3]Crawford (2019), p. 470; Fox and Webb (2013), p. 11.

[4]Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries, adopted by the International Law Commission in Report of the International Law Commission on the work of its forty-third session, UN GOAR, 49th sess, Supp No 10, UN Doc A/46/10 (29 April-19 July 1991), p. 56.

[5]Van den Berg (1989), p. 13.

jurisdiction by a foreign court,[6] others have described the plea of immunity from execution as the "last bastion" of state immunity.[7]

2.2 Lack of an International Regime

There have been attempts to address the lack of consistency in the application of the rules of state immunity, with a small number of conventions dealing with state immunity.[8] However, to date, there is no single international regime in force governing state immunity.

2.2.1 United Nations Convention on Jurisdictional Immunities of States and Their Property

Described as the "only sustained effort" to create a universal codification of international norms regarding state immunity, the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI)[9] provides a "comprehensive code for the immunity of a State and its property".[10] The relevant provision for the purposes of this chapter is Article 19, which deals with state immunity from post-judgment measures of constraint (such as attachment, arrest or execution).[11] Article 19 provides for three exceptions to the general immunity afforded to foreign state property, which have been recognised by the International Court of Justice (ICJ)[12]—where the state has expressly consented to the taking of such measures, where the state has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding, or where it has been

[6]Crawford (2019), pp. 488–489.

[7]Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries, adopted by the International Law Commission in Report of the International Law Commission on the work of its forty-third session, UN GOAR, 49th sess, Supp No 10, UN Doc A/46/10 (29 April-19 July 1991), p. 56.

[8]For example, International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, opened for signature 10 April 1926, (1937) 179 LNTS 199 (entered into force 8 January 1936), dealing with the immunity and liability of state ships in commercial use; European Convention on State Immunity, opened for signature 16 May 1972, (1972) 74 ETS 16 (entered into force 11 June 1976), a regional treaty in force between eight European states (Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland, United Kingdom), which adopts a restrictive approach to state immunity.

[9]United Nations Convention on Jurisdictional Immunities of States and Their Property, opened for signature 2 December 2004 (not yet in force).

[10]Fox and Webb (2013), p. 284.

[11]The equivalent provision for pre-judgment measures of constraint is Article 18 of the UNCSI.

[12]*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* Judgment [2012] ICJ Rep 99, para. 118.

established that the property is in use or intended for use by the state for other than government non-commercial purposes.[13] However, the UNCSI, while an influential instrument, has not yet entered into force. At the date of writing, the UNCSI has 22 ratifications, acceptances, approvals and accessions collectively, eight short of the required amount.[14] This includes ratification by France (noting that it has only incorporated Articles 18, 19 and 21 into domestic law), but not Belgium.

2.2.2 New York Convention and ICSID Convention

The two key international conventions governing enforcement of arbitral awards are not forthcoming with any guidance as they only make scant provision for issues of state immunity. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[15] does not expressly mention state immunity, leaving this question to national laws. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[16] which governs the recognition and enforcement of investor-state dispute awards issued under the auspices of the delocalised ICSID Convention regime, does not contain any rules on state immunity. Article 54(3) provides that the execution of ICSID awards is governed by local laws, and Article 55 (an "interpretation" of Article 54)[17] states that the ICSID Convention does not seek to modify the laws of contracting states with respect to immunity from execution. Together, the two provisions have created enormous difficulties for investors attempting to enforce awards, earning their title as the "Achilles' heel" of the ICSID regime.[18]

2.2.3 Divergence in National Approaches

As a result of the comparative void left by international conventions, questions of state immunity are largely left to be resolved by national laws and interpretation by national courts.[19] However, the divergence in the application of the doctrine of state immunity is "conspicuous not only as between various States but also in the internal

[13]The so-called "commercial property" exception was considered by the High Court of Australia in *Firebird Global Master Fund II Ltd v. Republic of Nauru* (2015) 258 CLR 31.

[14]Article 30 of the UNCSI.

[15]Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958 (1959) 330 UNTS 38 (entered into force 7 June 1959).

[16]Convention on the Settlement of Investment Disputes between States and National of Other States, opened for signature 18 March 1965 (1966) 575 UNTS 159 (entered into force 14 October 1966).

[17]Schreuer et al. (2009), p. 1142.

[18]Schreuer et al. (2009), p. 1144.

[19]Juratowitch (2016), p. 200.

jurisprudence of States"[20] and as between civil and common law countries. Codification of state immunity started with the adoption of the Foreign Sovereign Immunities Act in the United States,[21] followed by the introduction of similar legislation in the United Kingdom, Australia and other common law jurisdictions.[22] Although these regimes are broadly similar, adopting the restrictive doctrine of immunity, they have subtle and important differences. The "unusual situation" resulting from this trend is that many common law regimes now have legislation in force dealing with state immunity, whereas in civil law countries, the question of state immunity has traditionally been left to the judiciary.[23]

The approaches adopted by different states to the application of the doctrine of state immunity will not be explored in this chapter. It suffices to note for the purposes of this contribution one practical consequence resulting from this divergence in approach—a sort of "forum shopping" by award-holders in determining the optimal forum in which to seek the enforcement and, ultimately, the execution of an award.[24] Seeking the enforcement and execution of an arbitral award through the domestic courts of a foreign state in which assets belonging to the debtor state are located tends not to be a straightforward matter. For investors who have obtained awards under the ICSID regime, the process is slightly more streamlined, as all parties to the ICSID Convention have an obligation to recognise an award as binding and enforce the pecuniary obligations arising under such an award as if it were a final judgment of a domestic court.[25] Thus, such investors are able to obtain recognition and enforcement of ICSID awards before the courts of contracting states to the ICSID Convention (akin to a process of "*exequatur*"), and the courts do not have the ability to decline recognition and enforcement of the award for reasons of, for example, public policy. As for those investors who have obtained an award under the auspices of any other arbitral rules, it is necessary to first seek recognition and enforcement of

[20]Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the International Law Commission—Memorandum submitted by the Secretary-General (1949), UN Doc A/CN.4/1/Rev.1, para. 52.

[21]Foreign Sovereign Immunities Act, 28 USC 97 §§1602-11 (1976).

[22]State Immunity Act 1978 (UK), c 33; Foreign States Immunities Act 1985 (Cth); State Immunity Act, RSC 1985, c. S-18 (Canada); State Immunity Act (Singapore, c 313, 1979 rev ed); Foreign States Immunities Act 1981 (South Africa).

[23]Bjorklund (2009), pp. 309–310.

[24]Matute C (2016), "Forum Shopping in the Execution of ICSID Awards: Is it Time to Revive the UN Convention on State Immunity?" Kluwer Arbitration Blog, 24 June 2016. While there are some evident difficulties in terminology by the seemingly inconsistent and interchangeable use of the terms "enforcement" and "execution", it is the author's view that the two terms should be understood as referring to different concepts. At a high level, "recognition and enforcement" means domesticating the award (akin to exequatur in civil law jurisdictions), whereas "execution" refers to the actual attachment or seizure of foreign state property. See Juratowitch (2016), pp. 216–219; see discussion in *Eiser Infrastructure Ltd v. Spain* [2020] FCA 157, [89]-[176] per Stewart J.

[25]Article 54(1) of the ICSID Convention.

the award by the national courts of the jurisdiction in which the investor is seeking to execute its award. While such recognition is facilitated by the widely ratified New York Convention,[26] it is not automatic and there are clear grounds on which the debtor state might seek to have the recognition and enforcement of the award refused.[27] Recognition and enforcement will not, however, be the final step for the investor, who must also seek execution of the award by identifying non-immune assets of the debtor state which can be attached or seized in satisfaction of the debt arising under the award.

2.3 *Enforcement*

In the context of investor-state dispute settlement, the incentive of protecting reputation encourages host states subject to investment treaty claims to comply voluntarily with arbitral awards.[28] Indeed, it should be noted that for the most part, states are compliant with such awards. Notwithstanding this incentive, a handful of states have refused to comply with awards, prompting a spate of enforcement proceedings by award-creditors.[29] Examples of two of these proceedings commenced by NML Capital Ltd (NML), an affiliate of a New York based hedge fund of a type sometimes described as a "vulture fund",[30] and the three controlling shareholders of Yukos Oil Company (Yukos) respectively, seeking the attachment of Russian assets located in France and Belgium, are introduced below.

2.3.1 NML and Republic of Argentina

After Argentina defaulted on its sovereign debt in 2001, affiliates of NML purchased, at a little over half their face value, bonds issued by the Government of Argentina. On 11 May 2006, NML, as beneficial owner, obtained a summary judgment on the bonds in the order of US$284 million from a Federal Court in

[26] Article III of the New York Convention.

[27] Article V of the New York Convention.

[28] Bonnitcha et al. (2017), p. 78.

[29] For example, the enforcement proceedings pursued by Mr Franz Sedelmayer and Société NOGA against the Russian Federation. Mr Sedelmayer successfully executed his award against Russian property located in Germany and Sweden (Oberlandesgericht Frankfurt am Main, 26 W 101/02, 26 September 2002; Oberlandesgericht Köln, 22 U 98/07, 18 March 2008; *Russian Federation v. Sedelmayer*, Sweden Sup Ct, No Ö 170-10, 1 July 2011). In contrast, the enforcement proceedings commenced by Société Noga in France, the US and Switzerland, were not as successful.

[30] "Vulture funds feed on the debts of sovereign states that are in acute financial difficulty by purchasing sovereign debt at a discount to face value and then seeking to enforce it": *NML Capital Limited (Appellant) v. Argentina (Respondent)* [2011] UKSC 31, para. 1, per Lord Phillips.

New York.[31] Relying on an express waiver of immunity from enforcement contained in the governing bond agreement, NML commenced enforcement proceedings in Belgium and France (among other jurisdictions) in an attempt to garnish Argentina's assets. NML was unsuccessful in attaching Argentinian diplomatic goods located in Belgium, as a Belgian Court held that the general waiver of immunity in question did not include diplomatic assets unless it specifically mentioned those goods.[32] The French courts arrived at a similar conclusion, lifting a provisional attachment of the bank accounts of the Argentine Embassy and Permanent Delegation of Argentina to the United Nations Educational, Scientific and Cultural Organisation (UNESCO) on the basis that the waiver was not express and specific.[33] This line of reasoning is explored in greater detail below.[34]

2.3.2 Yukos and the Russian Federation

Perhaps the best-known example of enforcement proceedings is the attempt by the three controlling shareholders of Yukos to execute their respective arbitral awards, totalling over US$50 billion,[35] against assets of the Russian Federation located in the United States, the United Kingdom, France, Belgium, Germany, and India. All enforcement proceedings had been either terminated or suspended, following the decision of The Hague District Court to set aside the largest ever award issued by the Permanent Court of Arbitration on jurisdictional grounds.[36] However, the District Court's decision has recently been reversed by The Hague Court of Appeal,[37] and the arbitral awards have been reinstated. The Russian Federation has appealed this decision. It will be interesting to observe the approach of the award creditors to their enforcement proceedings. This section discusses the efforts of the shareholders to execute their awards against Russian assets located in France and Belgium to date.

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[31] *NML Capital Ltd v. Argentina*, No 05 Civ 2434 (SDNY, 2006).

[32] *NML Capital Ltd v. Republique d'Argentine*, Cour de cassation de Belgique, 22 November 2012, C.11.0688.F, p. 18.

[33] Cour de cassation, civile, Chambre civile 1, 28 September 2011, 09-72.057.

[34] See Sects. 3.1.1 and 3.1.2.

[35] *Hulley Enterprises Limited, Yukos Universal Limited, and Veteran Petroleum Limited. Hulley Enterprises Ltd (Cyprus) v. Russian Federation*, PCA Case No. AA 226, Award, 18 July 2014; *Yukos Universal Ltd (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Award, 18 July 2014; *Veteran Petroleum Ltd (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Award, 18 July 2014.

[36] The Court found that the Permanent Court of Arbitration had no jurisdiction to hear the case, as the Russian Federation had not ratified the Energy Charter Treaty (under which the case was brought). The former Yukos shareholders appealed this decision in The Hague Court of Appeal. In September 2019, the Court conducted oral hearings in relation to the appeal.

[37] The Hague Court of Appeal upheld the arbitral tribunal's jurisdiction based on an "alternative interpretation" of the Energy Charter Treaty's provisional application clause submitted by the investors on appeal.

At the time, France enjoyed a reputation as a pro-enforcement jurisdiction, with French courts promoting recognition and allowing the enforcement of arbitral awards that had been set aside in their country of origin.[38] The shareholders enjoyed initial success, with the granting of an *exequatur* by the *Tribunal de grande instance de Paris* in December 2014. Following this decision however, a number of attachments were made but subsequently lifted. For example, the *Tribunal de grande instance de Paris* upheld Russia's immunity from execution in respect of land near the Eiffel Tower on which Russia was constructing a cathedral.[39] The award-creditors were similarly met with mixed success in Belgium. In June 2015, Belgian courts froze the bank accounts of Russia's EU, Belgian and North Atlantic Treaty Organization (NATO) missions and ordered a number of Russian and international organisations to present any information regarding Russian owned assets.[40] Russia declared this to be an "openly unfriendly act" and threatened retaliatory measures,[41] and Belgium unfroze the assets after only a few days.[42]

Even if the Yukos shareholders were to revive their enforcement proceedings in France and Belgium following the recent decision of The Hague Court of Appeal, it is likely that they would face challenges going forward. The enforcement landscape in France and Belgium has undergone legislative change, introducing procedural and substantive amendments which may have the effect of deterring, or at least rendering more difficult, enforcement proceedings going forward.

3 Legislative Amendments in France and Belgium

In the wake of the Yukos enforcement proceedings, new legislation was introduced in France and Belgium codifying national law on state immunity from the execution of judgments and arbitral awards in December 2016 and September 2015 respectively. The relevant legislation in France was introduced as a rider to the "*Loi Sapin II*" on transparency, anti-corruption and the modernisation of the economic life,

[38]For example, Cour de cassation, *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV)*, 92-15.137, 23 March 1994; Cour de cassation, *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices*, 05-18.053, 29 June 2007.

[39]*Hulley Enterprises v. Russia and Société Bouygues Batiment Ile de France*, Tribunal de grande instance de Paris, No RG 15/00323, 28 April 2016.

[40]Dilevka S, Attachment of Russia owned assets in Belgium (22 June 2015) Russian Arbitration Association http://arbitrations.ru/en/press-centr/news/attachment-of-russian-owned-assets-in-belgium/.

[41]The Economist, The Yukos Affair: A ghost bites back (27 June 2015) http://www.economist.com/news/business/21656191-shareholders-what-was-once-russias-biggest-oil-company-scent-victory-ghost-bites-back.

[42]Gololobov (2015), p. 9 citing Brussels Says Blocked Russian Accounts Being Unfrozen (21 June 2015) Reuters (UK) http://uk.reuters.com/article/uk-russia-yukos-brussels-idUKKBN0P10DW20150621.

introduced by the Minister of Finance, Michel Sapin.[43] The law introduced a raft of reforms targeted towards French anti-corruption laws and also contained some important changes to the treatment of measures of constraint available over foreign state assets. The Belgian law, Article 1412*quinquies* of the Belgian *Code Judiciaire*, introduced a general principle that assets located in Belgium belonging to a foreign state are immune from execution. Both laws were accorded urgent treatment,[44] were the subject of highly contested debates, and were motivated by the desire to protect diplomatic relations by avoiding diplomatic incidents at all costs.[45]

The French and Belgian laws have a similar structure, conferring a general state immunity,[46] subject to three exceptions: waiver, allocated or earmarked assets, and commercial property.[47] It is worth noting two substantive and procedural requirements introduced by each law—an "express and specific" waiver (Sect. 3.1) and preliminary judicial authorisation (Sect. 3.2).

3.1 First Requirement: Express and Specific Waiver

First, the laws introduce a requirement that any waiver be "express and specific".[48] This applies in respect of all foreign state property in Belgium,[49] and in respect of diplomatic property in France (an "express" waiver is sufficient for other state property in France). The requirement had been introduced in the jurisprudence of the French and Belgian courts, which is explored below.

3.1.1 Development of Case Law in France

In France, the task of developing and applying the relevant rules of state immunity was left to the courts, owing to the lack of comprehensive statutory rules governing

[43]Loi no 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.

[44]The Belgian law entered into force on 13 September 2015, 73 days after its proposal.

[45]Projet de loi—Étude d'impact (France) (30 March 2016), p. 91; Proposition de loi—Rapport (Belgium) (23 July 2015) Doc 54-1241/005, p. 3.

[46]Article 1412*quinquies* §1er of the Code Judiciaire (Belgium); Article 59 L. 111-1-1 of the Loi Sapin II (France).

[47]Article 1412*quinquies* §2, 1°-3° of the Code Judiciaire (Belgium); Article L111-1-2, 1°-3° and Article L111-1-3 of the Loi Sapin II (France).

[48]The French law requires that any waiver be "*expresse et spéciale*" (Article L. 111-1-3); the Belgian law requires that a foreign state has "*expressément et spécifiquement*" consented (Article 1412*quinquies* § 2, 1°).

[49]Note, however, that the Belgian *Cour constitutionnelle* has since annulled the requirement of the word "specifically" in Article 1412*quinquies* insofar as it applies to non-diplomatic assets (see Sect. 3.1.2 below).

the matter (prior to *Loi Sapin II*, the legislature had only introduced two articles dealing with state immunity).[50] The French courts have not approached the question of immunity from execution in a consistent manner.

At one end of the spectrum is the decision of the highest court in the French judiciary, the *Cour de cassation*, in *Creighton v. Qatar*.[51] The *Cour de cassation* held that an arbitration clause containing a submission to the Rules of the International Chamber of Commerce constituted a valid waiver of immunity from jurisdiction and execution. The decision represented a departure from prior reasoning of the judiciary—that immunity from jurisdiction and execution were "not interconnected"[52] and the waiver of one did not remove the right to invoke the other.[53] The decision has been criticised as taking a "very far-reaching step" in the development of French law.[54]

Following this decision, the French courts developed a line of reasoning with respect to state immunity from execution against diplomatic property. In *Ambassade de la fédération de Russie en France v. Société NOGA*,[55] the *Cour d'appel de Paris* refused execution against diplomatic assets. The foreign state, the Russian Federation, had signed an arbitration clause and an explicitly drafted waiver of "*tout droit d'immunité*".[56] The Swiss company sought to execute its award against, inter alia, certain bank accounts located in France in the name of the Russian embassy, the Russian commercial delegation, and its permanent delegation to UNESCO.[57] The *Cour d'appel de Paris* refused execution as the waiver was too general. It held that diplomatic immunity was governed by the distinct legal regime of the 1961 Vienna Convention on Diplomatic Relations (VCDR),[58] which cannot be presumed to come within the general waiver of immunity from execution.[59] This approach was later

[50] Article L. 153-1 of the French Monetary and Financial Code; Article L. 111 of the French Code of Civil Enforcement Procedures.

[51] Cour de cassation, Chambre civile 1, 6 July 2000, 98-19.068.

[52] *Socifros v. USSR*, Cour d'appel d'Aix, 23 November 1938 reported in (1938) 9 Ann Dig 236, 237.

[53] *République Islamique d'Iran et consorts v. Sociétés Eurodif et Sofidif*, Cour d'appel de Paris, 21 April 1982 reported in (1982) 65 International Law reports 93, 97; *Socialist Federal Republic of Yugoslavia v. Société Europeenne d'Etudes et d'Entreprises*, Tribunal de grande instance de Paris, 6 July 1970 reported in (1971) Journal de Droit International 98.

[54] Gaillard (2002), p. 250.

[55] *Ambassade de la fédération de Russie en France v. Société NOGA*, Cour d'appel de Paris, No 2000/14157, 10 August 2000, reported in (2001) Rev Arb 114.

[56] This phrase translates as "any right of immunity".

[57] Miles (2009), pp. 67–68; Blane (2009), p. 471; Caroit et al. (2015), p. 237.

[58] Vienna Convention on Diplomatic Relations, opened for signature 18 April 1961, (1962) 500 UNTS 95 (entered into force 24 April 1964).

[59] Gaillard (2002), p. 251.

affirmed, in a case involving an even more broadly drafted waiver.[60] One can be sympathetic to the justification for the more stringent standard by according recognition of the special status of diplomatic activities as being at the heart of sovereign activity.

The *Cour de cassation* confirmed in the first of four cases relating to the immunity of Argentina from execution of awards in favour of NML that, pursuant to customary international law, diplomatic missions of foreign states enjoy an autonomous immunity which can only be waived in an express and specific manner.[61] In three cases decided on the same day in 2013, the *Cour de cassation* extended this reasoning by finding that, pursuant to customary international law as reflected in the UNCSI, a waiver in respect of property or categories of property used or intended to be used for governmental purposes must be express and specific. The *Cour de cassation*'s reading of the UNCSI has been criticised.[62]

In an unexpected turn, the *Cour de cassation* "loosened up" this requirement in *République du Congo v. Commisimpex* (*Commisimpex*);[63] a case concerning a dispute between the Republic of the Congo (Congo) and a Congolese company (Commisimpex) regarding the performance of a contract to construct a women's hospital in the Qatari capital, Doha. In 2011, Commisimpex sought to enforce an award issued in its favour. Commisimpex was initially successful in obtaining attachment of Congolese assets in Paris, including numerous accounts held in the name of the Congo's diplomatic mission and its UNESCO delegation.[64] Commisimpex relied on a general waiver in a letter of undertaking from the Congo, waiving its right to "invoke, in the context of the settlement of a dispute [. . .] any immunity of jurisdiction as well as any immunity of execution".[65] The

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[60] *République du Cameroun v. Winslow Bank & Trust*, Cour d'appel de Paris, 26 September 2001, reported in (2001) Dalloz IR 3017; the waiver included all immunities that the Republic "would be entitled [. . .] to invoke for itself or for its assets [. . .] or any other immunity it may have," specifying that "the borrower consents [. . .] to [. . .] the execution against any assets (no matter what they are used for or designated to be used for)."

[61] Cour de cassation, civile, Chambre civile 1, 28 September 2011, 09-72.057.

[62] Franc-Menget (2013), p. 997; Cour de cassation, civile, Chambre civile 1, 13 May 2015, 13-17.751.

[63] Langlois and Ioannou (2016).

[64] Franc-Menget (2015), p. 507; Franc-Menget Land Archer P, "French Supreme Court decision in Commisimpex dispute heralds significant change in approach to sovereign immunity" on Herbert Smith Freehills Public International Law Notes (4 June 2015) http://hsfnotes.com/publicinternationallaw/2015/06/04/french-supreme-court-decision-in-commisimpex-dispute-heralds-significant-change-in-approach-to-sovereign-immunity/.

[65] The terms of the general waiver in French were as follows: "*à invoquer dans le cadre du règlement d'un litige [. . .] toute immunité de juridiction ainsi que toute immunité d'exécution*" (Cour de cassation, civile, Chambre civile 1, 13 May 2015, 13-17.751); Franc-Menget L and Archer P, "French Supreme Court decision in Commisimpex dispute heralds significant change in approach to sovereign immunity" on Herbert Smith Freehills Public International Law Notes (4 June 2015) http://hsfnotes.com/publicinternationallaw/2015/06/04/french-supreme-court-decision-in-commisimpex-dispute-heralds-significant-change-in-approach-to-sovereign-immunity/.

discharge of the assets was ordered at first instance and affirmed on appeal. The *Cour d'appel de Versailles* adopted the words of the *Cour de cassation* in *NML Capital Ltd v. Argentina*,[66] noting that diplomatic missions of foreign states benefit from an absolute immunity from execution which can only be waived in an "expresse et spéciale" manner.[67] The Congo's general waiver did not meet this requirement.

On appeal to the *Cour de cassation*, Commisimpex was successful. Commisimpex's primary argument was that the *Cour d'appel* had misunderstood the nature of customary international law by finding that diplomatic assets enjoy an absolute immunity, the waiver of which must be express and specific. Rather, Commisimpex submitted that no such general consensus existed, as required by Article 38(1)(b) of the Statute of the International Court of Justice. The *Cour de cassation* accepted this argument. It held, reversing its 2013 decision and abandoning the "specific" requirement, that the rules of customary international law "*n'exigent pas une renonciation autre qu'expresse à cette immunité*."[68]

By introducing the *Loi Sapin II*, the French Government substantially reinstated the position that existed prior to *Commisimpex*. That is, affording an almost absolute immunity to diplomatic assets by requiring an express and property-specific waiver. Following the introduction of this law, the Congo challenged the decision of the *Cour de cassation*, on the grounds that the new rules expressly provide that a creditor is prohibited from attaching diplomatic assets in the absence of an express and specific waiver. The *Cour de cassation* departed from its previous jurisprudence, abandoning what it described as an "isolated doctrine",[69] and held that an express waiver was not sufficient without specificity for the purpose of seizing diplomatic assets.[70] In doing so, the *Cour de cassation* was cautious to justify its position by reference to older jurisprudence (most likely referring to the NML decision discussed above) and to the need for consistency and legal certainty, as opposed to the new *Loi Sapin II*, which it acknowledged could not apply retroactively to the dispute.[71] As such, the *Cour de cassation* confirmed that the seizure of the Congolese bank accounts should be lifted.

[66]Cour de cassation, civile, Chambre civile 1, 28 March 2013, 10-25.938; Cour de cassation, civile, Chambre civile 1, 28 March 2018, 11-10.450; Cour de cassation, civile, Chambre civile 1, 28 March 2013, 11-13.323.

[67]Cour d'appel de Versailles, 15 November 2012, 11-09.073; see also, Franc-Menget (2015), n 8.

[68]This phrase translates as "do not require a waiver from this immunity [that is anything] other than express." Cour de cassation, civile, Chambre civile 1, 13 May 2015, 13-17.751. The Cour de cassation ultimately referred the case to the Cour d'appel to rule on the merits of the legality of the seizure.

[69]The language used by the *Cour de cassation* was as follows: "*la doctrine isolée résultant de l'arrêt du 13 mai 2015*" (Cour de cassation, 1er chambre civile, 10 January 2018, 16-22.494).

[70]Cour de cassation, 1ère chambre civile, 10 January 2018, 16-22.494.

[71]See discussion in Malet-Deraedt (2018), pp. 337–338.

3.1.2 Development of Case Law in Belgium

The justification underpinning the application of the requirement that a state consent "expressément et spécifiquement" to the attachment of all of its assets (not just diplomatic property) located in Belgium is less clear. The *Chambre des représentants* introduced this requirement into parliament, explaining that it removed all ambiguity around the word "express".[72] By way of authority, it cited a judgment of the Belgian *Cour de cassation* of 22 November 2012, concerning the dispute between NML and the Republic of Argentina referred to above.[73] NML commenced enforcement proceedings in Belgium and sought to attach Argentinian diplomatic goods. The court noted the argument that neither the VCDR, nor any other convention in force, nor customary international law provides for a "specific" waiver for the bank accounts of diplomatic missions.[74] However, the court held, disagreeing with the lower court's decision, that a general waiver of immunity did not include diplomatic assets unless it specifically mentioned those goods.[75]

Article 1412*quinquies* codifies the reasoning of the Belgian *Cour de cassation*, and extends the express and specific waiver requirement to all property. The Belgian *Cour constitutionnelle* has, however, since annulled the requirement of the word "specifically" in Article 1412*quinquies* insofar as it applies to non-diplomatic assets.[76] In light of the difficulty of meeting the requirements introduced by Article 1412*quinquies*, Yukos and NML commenced proceedings to set aside the new law on the ground that it was unconstitutional.[77] The *Cour constitutionnelle* noted that the reference to the word "specifically" was problematic as it was not contained in the UNCSI, nor had it been referred to by the ICJ in this context. On this basis, the word "specifically" had to be annulled in respect of property that was not used for diplomatic purposes. The *Cour constitutionnelle* confirmed the validity of the balance of Article 1412*quinquies*.

3.2 Second Requirement: Preliminary Judicial Authorisation

The second aspect of the laws worth noting is the introduction of a requirement that a creditor obtain prior authorisation from a judge (*judge des saisies*) before taking any

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[72]Proposition de loi—Amendements (Belgium) (22 July 2015) Doc 54-1241/004.

[73]See Sect. 2.3.1; *NML Capital Ltd v. Republique d'Argentine*, Cour de cassation de Belgique, 22 November 2012, C.11.0688.F.

[74]*NML Capital Ltd v. Republique d'Argentine*, Cour de cassation de Belgique, 22 November 2012, C.11.0688.F, p. 9.

[75]*NML Capital Ltd v. Republique d'Argentine*, Cour de cassation de Belgique, 22 November 2012, C.11.0688.F, p. 18.

[76]Belgian Constitutional Court, Rolnummers 6372 en 6373, Arrest nr. 48/2017, 27 April 2017, p 30 [B.21].

[77]Belgian Constitutional Court, Rolnummers 6372 en 6373, Arrest nr. 48/2017, 27 April 2017.

measures of constraint. This obliges a creditor with an enforceable title (*exequatur*) to request authorisation from the attachment judge in France or Belgium by demonstrating in ex parte proceedings that the property is suitable for seizure. This requirement already existed for provisional measures in France.

The motivation behind the introduction of this requirement was primarily to offer greater judicial security to foreign states,[78] and to ensure that creditors cannot seize foreign state property, including immune property, before a plea of state immunity from execution is considered. This also ensures that the interests of the foreign state, including any immunity claims it may make, are adequately protected. The Belgian drafters opined that seizures of property could be done in such a short period of time and sometimes without intervention by a judge that one could not presume a perfect knowledge of international law on the part of those who were participating in the seizure.[79] The French drafters were concerned with certain creditors who, knowing that their request is not entirely legitimate, apply for execution to bailiffs who do not necessarily know the subtleties of international law. Although these creditors are generally unsuccessful, in the interim period, the creditors are in a position of power to engage in discussions with the foreign state.[80] The intention was for the preliminary judicial authorisation procedure to act as a "filter" against applications by creditors, limiting their "abusive" seizures.[81]

3.2.1 Compatibility with the European Convention on Human Rights

The requirement for preliminary judicial authorisation has been criticised as imposing an unduly onerous burden on award-creditors to prove that targeted property is non-governmental, particularly as states are under no obligation to assist with collating evidence. Its compatibility with the right to court access secured by Article 6 of the European Convention on Human Rights (ECHR)[82] has also been called into question. Critics of the law argue that it may preclude meaningful court access, as the execution of an award is considered as "forming an integral part of the 'process' at the heart of article 6".[83]

However, in their challenge in the *Cour constitutionnelle*,[84] Yukos and NML unsuccessfully argued that the requirements were disproportionate and violated the ECHR since they precluded a creditor from effectively enforcing a judgment or an

[78]Proposition de loi—Rapport (Belgium) (23 July 2015) Doc 54-1241/005, p. 7.

[79]Proposition de loi—Rapport (Belgium) (23 July 2015) Doc 54-1241/005, p. 9.

[80]Compte rendu intégral—Séance publique du jeudi 7 juillet 2016 (France) Sénat No 76 S (8 July 2016), 12540 (M. Sapin).

[81]Projet de loi—Rapport No 3785 (France) (26 May 2016), p. 278.

[82]European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, opened for signature 4 November 1950, [1950] COETS 1 (entered into force 3 September 1953).

[83]*Hornsby v. Greece* (1997) 24 EHRR 250.

[84]Discussed above in Sect. 3.1.2.

award rendered against the foreign state.[85] A similar claim brought against France was found by the European Court of Human Rights to be inadmissible for failure to exhaust domestic remedies.[86] To date, the European Court of Human Rights has held that the grant of state immunity in accordance with international practice does not infringe Article 6.[87] It has held that "the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty".[88]

3.2.2 Executive Authorisation

The requirement for some form of pre-attachment authorisation is not unique to France and Belgium. Indeed, some states require executive authorisation for enforcement measures against the property of foreign states.[89] Unlike the regime of pre-attachment judicial review in place in France and Belgium, the power to prevent the attachment of assets located in the Netherlands, or render an attachment null and void, is vested in the Dutch Ministry of Justice. Bailiffs in the Netherlands who assist with the attachment proceedings are statutorily obliged to report to the Dutch Ministry of Justice once a request for attachment of a foreign state's assets has been received which may be in violation of the state's international obligations.[90] Should the executive branch exercise its power to prevent, or render null and void, an attachment of assets, the award-creditor must demonstrate in court proceedings that the relevant assets are not covered by sovereign immunity, which shall be presumed by Dutch courts.[91] This approach has been criticised as it has been seen to politicise the decision to grant or deny an attachment of assets.[92] A similar requirement for executive authorisation has been successfully challenged as being contrary to the

[85] Belgian Constitutional Court, Rolnummers 6372 en 6373, Arrest nr. 48/2017, 27 April 2017.

[86] *NML Capital Ltd v. France*, ECHR, Decision, App no 23242/12, 13 January 2015.

[87] Crawford (2019), p. 490; *Kalogeropoulou and others v. Greece and Germany* (2002) 129 ILR 537; *Al-Adsani v. UK* (2001) 123 ILR 24.

[88] *Al-Adsani v. UK* (2001) 123 ILR 24 [54].

[89] E.g. Article 18 of the Execution Act (Official Gazette of the Republic of Croatia, No. 57/96) provides that "[a]n act of execution or an act of securing canot be issued against the property of a foreign State without previous consent of the Ministry of Justice of the Republic of Croatia, except when a foreign State agrees on execution or securing."

[90] Barten and Krestin (2017).

[91] In 2016, the Dutch Supreme Court confirmed a general presumption of immunity from enforcement of judgments and arbitral awards against a foreign state's assets: see *Morning Star International Corporation v. Republic of Gabon*, ECLI: NL: HR: 2016: 2236, 30 September 2016.

[92] Reinisch (2006), p. 813.

constitutional right of access to court enshrined in Article 24 of the Italian Constitution.[93]

3.3 Legislative Developments in Russia

It would be remiss not to mention in this context the legislative developments that have taken place in the Russian Federation, following the numerous attempts of execution against its property. On 1 January 2016, a new law came into force in Russia "On the jurisdictional immunities of foreign States and property of a foreign state in the Russian Federation".[94] The law implements a version of restrictive immunity from execution, despite the nation's traditional adherence to absolute immunity, subject to reciprocity. The law grants Russian courts the power to lower the level of protection afforded to foreign states based on the degree of immunity afforded to the Russian Federation in that foreign state.[95] The consistency between legislating in respect of state immunity on the basis of reciprocity and the forum state's obligation to afford immunity has been questioned.[96] Putting questions of validity to one side, the approach of the Russian Federation may work to reduce the protection enjoyed by foreign states in future enforcement proceedings.

4 Alternatives to Enforcement and Looking Forward

While the phenomenon of non-compliance with arbitral awards has the potential to undermine the utility of investor-state dispute settlement entirely, leaving award-creditors with a pyrrhic victory, the majority of debtor states do in fact comply with arbitral awards.[97] The practice of a few states should not be seen as representing the majority. Indeed, states tend to prefer to abide by decisions of tribunals to avoid the consequences of non-compliance for a state's reputation with private and public

[93]Decreto Legge, Article 1, 30 August 1925, No. 1621, becoming law by Statute of 15 July 1926, No. 1263. The law provided that "there shall be no attachment, seizure or, in general, measures of execution against the movable or immovable property, vessels, funds, securities and any other assets belonging to a foreign State, without the authorization of the Minister of Justice." See Reinisch (2006), p. 814.

[94]Federal Law No 297-FZ, "On the jurisdictional immunities of foreign States and property of a foreign state in the Russian Federation", entry into force 1 January 2016. In the joint "Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law" (25 June 2016), the Russian Federation confirmed the applicability of the doctrine of state immunity.

[95]Article 4 of the Federal Law No 297-FZ.

[96]Fox and Webb (2013), p. 14.

[97]Kehoe (2009), p. 265; Saunders and Salomon (2007), p. 469.

sources of international finance.[98] One cannot deny, however, the potential for non-compliance. This section considers the alternatives to execution available to award-creditors and posits a way forward for investors seeking to navigate the landscape governing state immunity from execution.

4.1 Alternatives to Enforcement

When faced with a state claiming immunity from execution, two broad alternatives to enforcement are available to an award-creditor.[99] First, the parties may reach a settlement agreement. While prompt payment may follow, this would usually be at the cost of a significantly lower amount, particularly given the leverage a claim of immunity provides a state in settlement discussions. In addition, states have a number of concerns when faced with the prospects of reaching a settlement agreement in circumstances necessarily lacking transparency (for example, through a mediated settlement agreement). Such concerns were canvassed by a 2017 Survey on Obstacles to Settlement of Investor-State Disputes conducted by the National University of Singapore's Centre for International Law. Ranking among the highest obstacles preventing states from settling a dispute included the desire to avoid or defer responsibility to an independent decision-maker and the fear of future prosecution for corruption.[100]

The second option is for the award-creditor to lobby its home state to exert political pressure on the debtor state, similar to a traditional diplomatic protection claim.[101] A claim of diplomatic protection is available as a state will still be under an obligation to abide by an award even though it has submitted a plea of immunity from execution, which operates as a procedural bar. Such a claim is contemplated by Article 27 of the ICSID Convention, which provides for the right of diplomatic protection in case of non-compliance by a respondent state with an award. In exercising diplomatic protection, a home state might also invoke the compulsory jurisdiction of the ICJ under Article 64 of the ICSID Convention, which provides for the referral to the ICJ of any dispute concerning the interpretation or application of the ICSID Convention. It has been noted that providing for diplomatic protection to

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[98] Schreuer (2007), p. 348.

[99] Bonnitcha et al. (2017), pp. 78–79.

[100] Brown and Winch (2019), p. 324, citing Centre for International Law, National University of Singapore, "Report: Survey on Obstacles to Settlement of Investor–State Disputes" (26 May 2017), pp. 11–13.

[101] For example, following the lobbying by Azurix Corp and Blue Ridge Investment, two investors with awards in their favour against Argentina, the US suspended trade benefits for Argentina: Bonnitcha et al. (2017), p. 81.

secure compliance with an award is designed to "counterbalance any State immunity that is preserved by Art. 55".[102] However, in practice, diplomatic protection has played little, if any, practical role.

4.2 Looking Forward

In light of the generally high rate of compliance by foreign states with investment arbitration awards, it is unlikely that any type of global reform of the rules of state immunity would be pursued. For now, it seems that it will be the responsibility of the investor to prudently navigate the different requirements under national laws necessary to ensure success in any enforcement proceedings. Many commentators have suggested that investors obtain an explicit waiver of immunity from execution from the state, such as the model clause proposed by ICSID.[103] It has been noted that a waiver of immunity from execution that covers only commercial property will have little, if any, effect as, under most domestic laws, commercial property will not enjoy immunity, whereas a waiver of immunity from execution for non-commercial property is particularly important.[104] It goes without saying that such a waiver will be difficult to obtain in practice, and is only likely to be relevant where the investor and the host state have entered into a contractual relationship, in which the negotiation of such a clause may be contemplated. The validity of such a waiver and the scope of property it captures will, once again, turn on the national law in force in the country where execution is sought.[105] Close attention should be given to the requirements contained in such laws, particularly in light of the shifting legislative landscape governing state immunity from execution.

5 Concluding Remarks

While the challenge posed by a plea of state immunity from execution is not unique to the investment arbitration context, it is a useful prism through which to consider the impact of such a plea on the execution of arbitral awards resulting from investor-state disputes. In determining where to commence enforcement proceedings, award-creditors have typically been attracted to pro-enforcement jurisdictions, which has led to a series of enforcement proceedings commenced by award-creditors, notably

[102]Schreuer (2007), p. 348.

[103]International Centre for Settlement of Investment Disputes, ICSID—Model Clauses, Section VII, "Waiver of Immunity from Execution of the Award", Clause 15 http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/model-clauses-en/15.htm.

[104]Schreuer et al. (2009), p. 1170.

[105]Schreuer et al. (2009), p. 1166.

in France and Belgium. The imposition of judicial measures of constraint on the assets of a foreign state has, however, had clear political consequences, prompting intervention by French and Belgian legislatures.

This chapter has considered the plea of state immunity and the execution of investment arbitration awards, and the introduction of the requirements for preliminary judicial authorisation and an express and specific waiver by *Loi Sapin II* and the equivalent Belgian law. A plea of state immunity from execution will continue to pose a significant hurdle for award-creditors in attachment proceedings. While the majority of states tend to comply with investment arbitration awards, in light of the experiences of award-creditors such as NML and Yukos, investors should be prudent in their approach to transacting with foreign states and remain cognisant of the national law in force in the country where execution may be sought, including any particular requirements which must be satisfied in order to successfully attach foreign state assets in satisfaction of a debt arising under an award.

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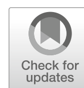
Trends and ISDS Backlash Related to Non-Disputing Treaty Party Submissions



Kendra Magraw

Contents

1 Introduction 80
2 NDTP Submissions: Inception and Issues in NAFTA Chapter Eleven Disputes 82
3 NDTP and ISDS Backlash 86
4 NDTP Submission Trends in International Investment Law 89
5 Conclusions 94
References 95

Abstract Some international investment agreements (IIAs) allow states that are parties to a treaty, but are not party to a specific dispute under that treaty, to intervene on a limited basis in order to make submissions on matters of treaty interpretation. Such mechanisms have proved to be highly valued by treaty parties, as evident by the many recently-concluded IIAs containing increasingly sophisticated non-disputing treaty party (NDTP) provisions. This chapter: (1) provides the background on NDTPs mechanisms, with a focus on the North American Free Trade Agreement (NAFTA) (the first-known IIA to contain such a provision); (2) examines the possible connection between tribunals failing to give due regard to treaty parties' interpretive positions (again focusing on NAFTA) and the current backlash against investor-state dispute settlement (ISDS); and (3) analyses trends in recently-concluded IIAs. It is argued that the apparent lack of deference given by tribunals to NDTP submissions may be contributing to the current backlash against ISDS, based on two discernible trends: (1) an increase in the number of IIAs containing NDTPs provisions; and (2) provisions that now state that not only are treaty interpretations made by treaty parties binding on tribunals (such provisions also have their genesis in NAFTA), but that, in addition, tribunals' decisions must be

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consistent with such agreed interpretations (the latter an innovation of a NAFTA party in 2003). Such trends are also visible at the institutional and multilateral levels, such as the revision of the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) and the Mauritius Convention on Transparency in ISDS of the United Nations Commission on International Trade Law (UNCITRAL), and show no sign of slowing down.

1 Introduction

One unusual aspect of international investment dispute settlement that has developed since its early days and has gained increasing momentum in recent years is that certain international investment agreements (IIAs) allow states that are parties to a treaty, but are not parties to a specific dispute under that treaty, to intervene in the dispute on a limited basis in order to make submissions on matters of treaty interpretation.[1] For example, Article 1128 of the North American Free Trade Agreement (NAFTA) permits its non-disputing treaty parties (NDTPs) to file submissions in ongoing cases regarding their interpretations of NAFTA.[2] This feature was probably employed due to the nature of investor-state dispute settlement (ISDS), in which treaty partners do not appear as opposing parties in a given dispute; instead, only one party to a treaty is typically a respondent in a dispute.

The submissions made by NDTPs are distinct from *amicus curiae* submissions, in that NDTP submissions are only available to *treaty parties* that are not party to the dispute-at-hand, and almost always only on matters of *treaty interpretation*.[3] NDTPs

[1] Other international adjudicative regimes provide for third party participation in disputes, but that can often be circumnavigated (for example, in the World Trade Organization (WTO), whether third parties may participate in a dispute depends on whether the dispute is brought pursuant to Article XXII of the General Agreement on Tariffs and Trade (GATT), Article XXII:1 of the General Agreement on Trade in Services (GATS), Article 4.11 of the Dispute Settlement Understanding (DSU) or other corresponding provisions in the covered agreements—all of which allow third party participation (so long as they are WTO Members)—versus Article XXII:1 of the GATT, under which the participation of a third party is subject to approval from the respondent) or are subject to obtaining leave to intervene (see, e.g. Palchetti 2002, p. 139).

[2] Article 1128 of the North American Free Trade Agreement (NAFTA) (adopted 17 December 1992), (1993) 32 *International Legal Materials* 612.

[3] Only the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Rules on Transparency) allow for the possibility of NDTP submissions on matters other than treaty interpretation (which is also permitted thereunder, see Article 5(1)), providing in this regard in Article 5(2) that:

> The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

are also distinct from intervening parties, whose scope of participation in the dispute is much broader. Many modern IIAs recognise these distinctions by, e.g. having separate provisions governing the participation of NDTPs and non-disputing parties (NDPs)—e.g. civil society—more generally.[4] As will also be discussed below, such distinction can further be seen in the situation that has arisen with respect to the participation in investor-state disputes of the European Union (EU), a regional economic union that only obtained treaty-making power in relation to foreign direct investment with the Lisbon Treaty's entry into force in 2009,[5] and which is not a party to many of its member states' treaties, meaning that it is an NDP as opposed to an NDTP in disputes arising under such treaties. The EU has had difficulty successfully petitioning to participate in ongoing disputes involving its member states, which may be contributing not only to the EU's current attempt post-*Achmea*[6] to enforce the termination of its member states' intra-EU treaties and create a standing international investment court with an appeals mechanism, but also its current treaty practice in concluding new IIAs, which contain NDTP mechanisms.[7]

The increasing value that states seem to be placing on the availability of NDTP submission mechanisms is evident in part by the many recently-concluded treaties that contain similar provisions to NAFTA Article 1128—for example, slightly over one third of the known IIAs concluded in 2018 contained such mechanisms.[8] This trend does not come as a complete surprise: since the explosion of investment disputes in the 1990s/2000s, states have frequently resorted to their ability to submit NDTP submissions, above all in the NAFTA context, in which NAFTA Article 1128 submissions have been made by the NDTPs in at least 33 known-NAFTA cases.[9]

However, as will also be discussed further below, while arbitral tribunals frequently cite NDTP submissions, they also have appeared reluctant to afford much interpretive weight to the agreements reached by the parties in their submissions, although a few tribunals have.[10] In the NAFTA context, which will be the main

[4]Compare e.g. Article 14.D.7(2) of the United States-Mexico-Canada Agreement (USMCA), which permits NDTP submissions, and Article 14.D.7(3) of the USMCA, which permits *amicus* submissions.

[5]Article 188L of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007.

[6]CJEU, *Slovakia v. Achmea,* Case C-284/16, EU:C:2018:158. For an explanation of *Achmea*, see Ankersmit L. (2018) Achmea: The Beginning of the End for ISDS in and with Europe?, IISD, https://www.iisd.org/itn/2018/04/24/achmea-the-beginning-of-the-end-for-isds-in-and-with-europe-laurens-ankersmit/#_edn1.

[7]See Article 3.51 of the EU-Vietnam investment protection agreement (IPA) (2019), Article 3.17 of the EU-Singapore IPA (2018) and Article 8.38 of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (2016).

[8]See Investment Policy Hub, IIA Navigator, https://investmentpolicy.unctad.org/international-investment-agreements; UNCTAD, Taking Stock of IIA Reform: Recent Developments, IIA Issues Note No. 3, June 2019, https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf.

[9]Furthermore, there are often multiple NDTP submissions made in a given case.

[10]See Magraw (2015), p. 142.

focus of this chapter, such reluctance on the part of tribunals eventually resulted in the NAFTA parties taking the next step and issuing binding interpretive statements (which are permitted under NAFTA),[11] in order to attempt to force the recognition of their agreements. Such reluctance on the part of tribunals, it is argued herein, may be contributing to the current backlash against ISDS by states and other stakeholders in the investment law regime.

This chapter addresses certain aspects of NDTP participation—especially submissions—in international investment law. Section 2 provides the background of NDTP mechanisms, as well as issues that have arisen with respect to them, especially in the NAFTA context. Section 3 examines the possible connection between failing to give due regard to the interpretive positions offered by treaty parties and the current backlash against ISDS. Finally, Sect. 4 analyses trends in a sample of recently-concluded IIAs and other related initiatives with respect to NDTP submissions.[12]

From a methodological perspective, it is important to note that the IIA data analysed in this chapter to identify, e.g., trends in IIA treaty-making, does not purport to be a comprehensive examination of every known IIA. Rather, analysis was carried out in two steps: the first being the identification of a base group of IIAs (via the UNCTAD IIA Mapping Project and other sources)[13] that are known to contain the provisions whose prevalence in IIAs is analysed herein; and second, once the base group of IIAs was identified by reference to the sources indicated, this base group was expanded upon by comprehensively examining the treaties of specific states whose treaties the author hypothesised might contain the analysed provisions (obviously for purposes of this chapter, the NAFTA parties' IIAs were all examined, for example). It is therefore possible that the underlying data upon which the discussion in this chapter is based on the available resources and/or skewed in favour of the informed fishing expedition undertaken by the author: this notwithstanding, it is argued that the available data supports the trends identified herein.

2 NDTP Submissions: Inception and Issues in NAFTA Chapter Eleven Disputes

When NAFTA came into force in 1994, it could probably be considered to have been the most comprehensive and sophisticated free trade agreement (FTA) that had ever been concluded: not only were FTAs relatively uncommon at that time, since international trade was governed almost exclusively by the multilateral General

[11] Articles 2001 (2) and 1131(2) of NAFTA.

[12] UNCTAD Mapping Project, https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping.

[13] For example, UNCTAD, *World Investment Report 2019*, UN, p. 108, Table III.3, https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf [hereinafter "UNCTAD 2019 WIR"]; Gordon and Pohl (2015) and Polanco (2019).

Agreement on Tariffs and Trade (GATT), but in addition, while subsequently it became common for countries to include investment chapters or provisions in their trade agreements, NAFTA was one of the first to do so. Further, NAFTA's investment chapter, Chapter Eleven, was much more detailed than the typical bilateral investment treaty (BIT) that was being concluded in hordes in the 1990s (the typical BIT at that time had between eleven and thirteen provisions, while NAFTA had thirty-nine).

One of NAFTA's innovative features is that it is the first-known IIA to introduce an NDTP provision, i.e. Article 1128, which provides that "[o]n written notice to the disputing parties, a [NAFTA] Party may make submissions to a Tribunal on a question of interpretation of this agreement." In practice, since the first disputes brought under NAFTA, the NAFTA parties have frequently exercised their right to file submissions on matters of treaty interpretation in ongoing disputes (to date, non-disputing NAFTA parties have filed NDTP submissions in at least 33 NAFTA cases),[14] which led to novel and controversial situations in international investment law.

For example, in several early NAFTA disputes, it was debated whether NAFTA's fair and equitable treatment (FET) provision (NAFTA Article 1105) was subsumed by the customary international law (CIL) minimum standard of treatment (MST) or whether it was a stand-alone obligation. The three NAFTA parties (Canada, Mexico and the United States) argued in multiple cases (e.g. in *Mondev v. United States,*[15] *Loewen v. United States*,[16] *Methanex v. United States*[17] and *Pope & Talbot v. Canada*[18]) that their pleadings (herein referred to as "state party pleadings" or

[14] See e.g. Halow.com.

[15] The United States argued that the SPPs of the parties—that is "formal, public submissions to various Chapter Eleven tribunals"—amounted to subsequent practice establishing an agreement under Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969 (VCLT) that was binding on the tribunal. *Mondev International Ltd v. United States*, ICSID Case No. ARB(AF)/99/2, Counter-Memorial on Competence and Liability of Respondent United States, 1 July 2001, pp. 33–34.

[16] The United States argued that its SPPs in *Loewen* and Mexico and Canada's SPPs from domestic proceedings amounted to subsequent practice establishing an agreement under VCLT Article 31(3)(b), and that this should be given considerable weight. *Loewen, Group, Inc and Raymond L Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Counter-Memorial, 30 March 2001, pp. 175–176.

[17] All three parties argued that they were in agreement: the United States in its pleadings as the respondent in *Methanex*, and Canada and Mexico via NAFTA Article 1128 mechanism in *Methanex*. See Methanex v. United States, UNCITRAL, Post-Hearing Submission of Respondent United States of America, 20 July 2001, pp. 2–4. See also *Methanex v. United States*, UNCITRAL, Response of Respondent United States of America to Methanex's Post-Hearing Submission, 27 July 2001, pp. 2–6.

[18] *Pope & Talbot v. Canada*, UNCITRAL, Canada's Submission respecting Post-Hearing Article 1128 Submission filed by Mexico and the US, 1 June 2000.

“SPPs”), including their NDTP submissions, established an agreement on the interpretation of NAFTA under Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT).[19]

Pope & Talbot played a starring role in this debate; therein, the respondent state, Canada, argued that all three NAFTA parties agreed in their SPPs—Canada in its memorials, and Mexico and the United States in their NAFTA Article 1128 NDTP submissions—that NAFTA Article 1105 reflected the CIL FET standard.[20] However, in an interim award, while the tribunal noted the parties’ agreement on the interpretation of NAFTA Article 1105 in their pleadings, it ultimately dismissed such agreement because of, inter alia, concerns that the interpretation did not reflect the parties’ true intentions at the time NAFTA was drafted.[21] Approximately three months later, while not only *Pope & Talbot* but also several cases on the matter remained pending, the NAFTA parties issued a binding joint interpretive statement, the 31 July 2001 Free Trade Commission (FTC) “Notes of Interpretation of Certain Chapter 11 Provisions” (FTC Notes), linking FET to CIL. As a result, the *Loewen*, *Mondev* and *Methanex* tribunals found that they did not have to determine the status of the parties’ interpretive agreements in their submissions; rather they applied the FTC Notes.[22]

However, the saga did not end there: the *Pope & Talbot* tribunal, which still had to issue its final Award, refused to apply the freshly-issued FTC Notes, determining instead that even though interpretations issued by the FTC are binding, tribunals have the power to determine whether an alleged interpretation is actually an interpretation or rather a disguised amendment.[23] Perhaps on no other occasion in the history of NAFTA Chapter Eleven has the outcry from the legal community been

[19]Vienna Convention on the Law of Treaties (adopted 23 May 1969), 155 *United Nations Treaty Series* 331. For an examination of SPPs in relation to subsequent agreement and subsequent practice in ISDS, see Magraw (2015), p. 142.

[20]Canada also argued the same with regard to NAFTA’s expropriation provision, Article 1110. Pope & Talbot v. Canada, UNCITRAL, Canada’s Submission respecting Post-Hearing Article 1128 Submissions filed by Mexico and the US, 1 June 2000.

[21]*Pope & Talbot v. Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 79, pp. 112–114.

[22]For example, the *Methanex* tribunal determined that the FTC Notes were a subsequent agreement under Article 31(3)(a) of the VCLT and stated that it was therefore unnecessary for it to decide whether the parties’ SPPs were an agreement. *Methanex v. United States of America*, UNCITRAL, Final Award, 3 August 2005, (2005) 44 *International Legal Materials* 1345, part II, ch B, para. 21. However, the *Pope & Talbot* tribunal defiantly refused to apply the FTC Notes in its subsequent award. See *Pope & Talbot v. Canada*, NAFTA, Decision in Respect to Damages, 31 May 2002, 41 *International Legal Materials* 347, paras 11–16.

[23]*Pope & Talbot v. Canada*, UNCITRAL, Decision in Respect to Damages, 31 May 2002, para. 47. The tribunal’s action also caused a backlash amongst the NAFTA parties and is the likely genesis of subsequent treaty practice that can be observed in certain of the treaties concluded thereafter by the NAFTA parties, which has also been taken up by other states. See Sect. 2 of this chapter.

more vocal, particularly since the FTC Notes affected ongoing arbitrations, raising issues of, inter alia, circumvention of due process and retroactivity.[24]

Furthermore, other arbitral tribunals found ways to sidestep the FTC Notes, even if they recognised that they were binding per the terms of NAFTA. For example, in the *Merrill & Ring Forestry v. Canada* case, which was initiated in 2006, the issue again arose concerning the meaning of the FET standard in relation to CIL. While the *Merrill & Ring* tribunal accepted that the 2001 FTC Notes were binding according to NAFTA's provisions, the tribunal noted that the interpretations in the FTC Notes may not reflect the current state of CIL, the "evolutionary nature" of which the tribunal was "mindful of" and "which provides scope for the interpretation of [NAFTA's FET article], even in the light of the FTC Commission's 2001 interpretation."[25]

The respondent, Canada, argued that if an evolutionary interpretation of FET was appropriate at all, such evolution must have occurred subsequent to the issuance of the FTC Notes, and that no such subsequent evolution of the standard had taken place. The tribunal disagreed, effectively sidestepping the contents of the FTC Notes,[26] and proceeded to re-analyse the CIL standard that the FTC Notes tied to FET[27] (which the tribunal even noted that Canada had adhered to as the relevant standard in its SPPs in other NAFTA disputes[28]), before instead concluding that there was a specialised FET standard in business, trade and investment.[29]

The FTC Notes and their *raison d'être* were not only influential in NAFTA disputes, but have also been taken into consideration in other ISDS cases. For example, in a separate opinion in one ISDS case, arbitrator Pedro Nikken relied on the FTC Notes as an indication as to why the majority's "disguised recourse to

[24]See *Pope & Talbot v. Canada*, UNCITRAL, Decision in Respect to Damages, 31 May 2002, paras 11–16; Alvarez and Park (2006), p. 347; Brower II (2001), pp. 43, 56 and fn 71; Brower II (2006), p. 347; Weiler (2002), pp. 45, 346–348; Matiation (2014), p. 451; *Methanex Corporation v. United States of America*, UNCITRAL, Decision on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter C, para. 22.

[25]*Merrill & Ring Forestry LP v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, paras 190 and 192.

[26]The tribunal stated that the FTC Notes "does not refer to the specific content of [CIL] at a given moment and it is not an interpretative note of such content. Accordingly, the matter needs to be examined in the light of the evolution of customary law over time"; *Merrill & Ring Forestry LP v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, para. 194.

[27]The *Neer* standard established by the Mexico-United States General Claims Commission. See *LFH Neer & Pauline Neer (USA) v. United Mexican States*, Decision, 15 October 1926 (1951) 4 *Reports of International Arbitral Awards* 60.

[28]*Merrill & Ring Forestry LP v. Canada,* ICSID Case No. UNCT/07/1, Award, 31 March 2010, para. 195.

[29]*Merrill & Ring Forestry LP v. Canada,* ICSID Case No. UNCT/07/1, Award, 31 March 2010, para. 200.

evolutionary interpretation" was inappropriate,[30] since the NAFTA parties issued the FTC Notes precisely "as a reaction to" ISDS tribunals' interpretations that the NAFTA parties considered to be incorrect and "which went beyond what those States had considered the extent of their obligations under the [NAFTA]."[31]

As will be discussed below, the NAFTA parties' experience with respect to NDTP submissions and whether the parties' interpretive agreements are binding on tribunals have had a significant effect both on their treaty practice, as well as the practice of third states. It is also clear that states were not satisfied with the lack of deference that tribunals seemed to give the interpretations put forth in NDTP submissions, and in some instances, have adopted policies designed to strengthen their control in the interpretive process or to change the system altogether.

3 NDTP and ISDS Backlash

Failures such as those described above to give due regard to the interpretive value of NDTP submissions may, in conjunction with other factors, be contributing to the current "backlash" against ISDS. In general, such backlash has been ongoing for the last several years and has manifested itself in a variety of ways, including: (1) states disengaging entirely from the ISDS regime, i.e. by terminating their IIAs or by leaving important multilateral conventions, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention); (2) states renegotiating the terms of their existing IIAs, for instance to provide for restricted access to ISDS or fewer substantive obligations; and (3) states or regional economic unions, such as the EU, calling for a shift from ad hoc tribunals in favour of the creation of a permanent investment law court.[32]

There are at least two discernible impacts—both of which fall under the second category of backlash identified above, i.e. changes to the content of IIA terms—that the NAFTA experience arguably has had on investment treaty making and policy, both at the NAFTA level and more broadly:[33] (1) the increased inclusion of NDTP provisions in treaties, often now as a matter of right, and (2) the specification in provisions on governing law that not only are the treaty interpretations offered by the

[30] Specifically, that the FET provision in the BIT in question (the Argentina-France BIT) should not be read to encompass legitimate expectations. See *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability – Separate Opinion of Pedro Nikken, 30 July 2010, para. 6.

[31] See *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability – Separate Opinion of Pedro Nikken, 30 July 2010, para. 6.

[32] See UNCTAD 2019 WIR, pp. 104 et seq. (describing various types of IIA reform) https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf.

[33] The author does not discount that NAFTA might be one of several factors that has shaped the IIA policy making of countries in recent years.

treaty parties binding on tribunals, but that decisions that the tribunals take must be consistent with such interpretations.[34]

In the NAFTA context, such backlash is visibly reflected in the text of the renegotiated NAFTA (renamed the United States–Mexico–Canada Agreement (USMCA)).[35] The USMCA has vastly reduced ISDS provisions, only granting access to ISDS for investors in certain circumstances.[36] However, despite this greatly reduced access to ISDS, and with respect to the first impact identified above, it is noteworthy that the NAFTA/USMCA parties not only preserved, but strengthened, NDTP participation provisions (USMCA adopts the nomenclature "Non-Disputing Annex Parties"), by granting the parties, e.g., the ability to attend hearings and make oral and written submissions on a matter of interpretation, indicating the value that the parties assign to the possibility of making such submissions.[37]

With respect to the second impact, and almost certainly as a response to the FTC Notes/*Pope & Talbot* situation, the USMCA provides in Article 14.D.9(2) that "a decision of the Commission on the interpretation of a provision on this Agreement under Article 30.2 (Functions of the Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision."[38] In contrast, NAFTA provided that "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."[39]

Canada, one of the NAFTA/USMCA parties, has gone even further in its 2016 treaty with the EU, the Canada-EU Comprehensive Economic and Trade Agreement (CETA). CETA contains new-generation NDTP provisions permitting, amongst other forms of NDTP participation, a provision allowing NDTPs to file submissions on interpretation and to attend hearings.[40] In addition, the CETA goes a step further, providing that on appeal, the appellate tribunal may modify or reverse a tribunal's award based on "errors in the application or interpretation of applicable law,"[41] which includes interpretations made by the treaty parties.[42]

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[34]This category—and the trends analysed herein—relate solely to provisions generally stating that parties' agreed interpretations are binding on the tribunals. It does not examine separate but similar provisions that provide for such in special circumstances, such as when there are implications for financial services or taxation. See e.g. Article XI(1) of the Canada-Croatia BIT (1997).

[35]For example, ISDS is eliminated entirely between Canada and Mexico in the USMCA.

[36]N Bernasconi-Osterwalder, USMCA curbs how much investors can sue countries—sort of, IISD, www.iisd.org/library/usmca-investors.

[37]Article 14.D.7 of the USMCA.

[38]The same provision has been present in the US Model BIT since 2004. Article 30(3) of the 2004 US BIT and Article 30(3) 2012 US Model BIT.

[39]Article 1131 of NAFTA.

[40]Article 8.38 of CETA.

[41]Article 3.28(2) of CETA.

[42]Article 8.31 of CETA. However, the European Court of Justice, perhaps anticipating a *Pope & Talbot*-esque scenario, has already stated that binding interpretations issued by the CETA Joint

The other CETA party, the EU, is leading one of the most aggressive campaigns to change the status quo of ISDS, principally via its attempts to eliminate ad hoc ISDS tribunals in favour of variations of standing international investment courts with appellate mechanisms (one such example is contained in the CETA), as well as through its dogged efforts to attempt to eradicate intra-EU member state IIAs. The EU member states are party to hundreds of treaties, both between themselves and with other states, and some are among the most active in ISDS disputes both historically and recently.[43] It is known that the EU has attempted to intervene in several ISDS cases[44]—and has been denied participation on several such occasions for various reasons, including its unwillingness to contribute to the arbitration costs[45]—and it is likely that it has attempted to intervene in many more disputes than can be identified publicly.[46] To this end, the EU's recent treaty practice seems to prioritise ensuring that it may participate as an NDTP in future disputes; three of its IIAs contain provisions allowing for NDTP submissions (and the EU-Mexico agreement is reported to contemplate such),[47] in addition to other provisions aimed at ensuring participation and safeguarding the treaty parties' ability to exert some form of interpretive regulation over arbitral tribunals.

It is notable that even while attempting to reform the IIA landscape amid the current backlash to ISDS, the EU in its treaties and the NAFTA parties in the USMCA retain NDTP provisions: in the latter case this is all the more striking given the limited scope of permissible ISDS disputes. This is reflective of a general trend that can be observed concerning the increasing inclusion of provisions ensuring and strengthening the participation of NDTPs in IIAs, which could be considered

Commission (i.e. the equivalent of the FTC) cannot have retroactive effect on pending or concluded ISDS proceedings. ECLI:EU:C:2019:341, Opinion 1:17 (Opinion Pursuant to Article 218 (11) TEFU), 30 April 2019, http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4976548. For further discussion, see Titi (forthcoming).

[43]For example, the Netherlands (which is currently the second most frequent home state of investors in ISDS disputes) and Spain (which is currently the second most frequent respondent state). See Fact Sheet on Investor-State Dispute Settlement Cases in 2018, UNCTAD, IIA Issues Note, (May 2019), pp. 2–3, Figure 2 and 3, https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf.

[44]See e.g. *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016; *Madsar Solar & Wind Cooperatief UA v. Spain*, ICSID Case No. ARB/14/1, Ruling on Application to Intervene as a Non-Disputing Party, 9 January 2015; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Estonia*, ICSID Case No. ARB/14/24, Decision on the Application for Leave to Intervene as a Non-Disputing Party, 2 October 2018.

[45]See *Eiser Infrastructure Limited and Energía Solar Luxembourg Sàrl v. Spain*, ICSID Case No. ARB/13/36, Procedural Order No. 7, 21 December 2015; *UP and CD Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Application for Leave to Intervene as a Non-Disputing Party, 17 December 2014.

[46]See ICSID, Decisions on Non-Disputing Treaty Party Participation, https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Non-Disputing-Party-Participation.aspx.

[47]Article 3.51 of the EU-Vietnam IPA (2019), Article 3.17 of the EU-Singapore IPA (2018) and Article 8.38 of CETA.

both part of the backlash and more generally part of IIA reform as countries update older-generation BITs that contained very few provisions to more comprehensive and detailed IIAs.

4 NDTP Submission Trends in International Investment Law

Turning back to NAFTA, the trends and backlash described above are reflected not only in the USMCA text, but also, to varying degrees, in the IIA practice of the individual NAFTA parties, which individually could be said to be on a sliding scale of conservative to progressive with respect to IIA liberalisation and innovation, with the United States falling on the conservative, protectionist end of the scale and Canada sitting on the other (although this has not always historically been the case).[48]

Starting at the conservative end of the spectrum, since 2008, the United States has stopped signing FTAs and BITs, and rather concludes Trade and Investment Framework Agreements (TIFAs), which establish basic institutional frameworks aimed at investment promotion and cooperation that contain no substantive obligations—it has concluded at least 13 such agreements since 2013.[49] This notwithstanding, the 2012 US Model BIT contains provisions providing for NDTP participation and NDTP binding interpretations,[50] and the United States had been involved in the negotiation of several so-called "mega-regional" agreements, such as the Trans-Pacific Partnership (TPP), which likewise has a NDTP provision.[51] (However, the United States withdrew from the TPP in 2017, causing the remaining Parties to enact the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which retains the NDTP submission provision.)[52] Of course, some of the FTAs to which the United States is party contain NDTP provisions, such as USMCA, showing the value that the US continues to place on the ability to make NDTP submissions.

In the middle of the spectrum of the NAFTA countries lies Mexico, which despite being a frequent ISDS respondent state, has concluded at least 22 BITs and 10 FTAs

[48]See Magraw (2019) (discussing the progression of the NAFTA parties' respective policies regarding international investment law in the twentieth and twenty-first centuries).

[49]The US signed its first TIFA in 1992 (with New Zealand) and concluded its most recent with Paraguay in 2016. UNCTAD, *World Investment Report 2017*, UN, p. 112, https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf. TIFAs typically contain less than 10 provisions, and their only firm commitment is the establishment of a joint council to monitor trade and FDI between the signatories.

[50]See Article 28(2) of the US 2012 Model BIT.

[51]Article 9.23 of the TPP.

[52]The CPTPP incorporates by reference much of the TPP, including the investment chapter, while suspending certain provisions that were included in the TPP at the behest of the US.

since 2000, as well as drafted its 2008 Model Investment Promotion and Protection Agreement.[53] Like Canada, it is a signatory to the CPTPP, which provides for NDTP participation. At least 10 of the IIAs to which Mexico is a party contain a provision allowing for NDTP submissions, and Mexico concluded the second known treaty providing for such.[54] Furthermore, the EU and Mexican Investment Protection Agreement, the draft of which contains a provision on NDTP submissions,[55] is reportedly even more progressive than the CETA.[56]

On the other side of the spectrum, all of Canada's recent treaties except for one have contained NDTP provisions,[57] possibly based on its NAFTA Article 1128 experience.[58] Canada did not sign any BITs between 1999 and 2005; in 2006, it began concluding them again—to date, at least 44 (approximately half of its 44 IIAs post-2006). Subsequent to NAFTA until 1999, it entered into several bilateral and regional "cooperation agreements" (which do not contain substantive obligations; rather they state the parties' intentions to cooperate to liberalise and promote FDI, and establish a joint committee). Starting in 2001, Canada concluded several bilateral and regional FTAs, including the CETA in 2016, which establishes a joint body with the power to issue binding interpretations and an NDTP provision.

Canada's approach could be considered reflective of a broader trend that can be generally discerned from the text of many recent IIAs, i.e. a growing number of treaties containing increasingly sophisticated NDTP provisions, which has been identified as one of the likely impacts of the NAFTA experience in the previous section (although arguably in conjunction with other factors as well). For instance, in addition to the increase of specific provisions addressing NDTPs as a separate category of submissions from *amicus curiae* and establishing joint bodies with mandates to issue binding interpretations of treaty provisions,[59] a rising number of IIAs and related instruments provide for NDTP submissions by right (i.e., such submissions must be allowed by tribunals) on matters of treaty interpretation. Globally, there are at least 82 IIAs that contain explicit NDTP provisions, not to mention treaties that incorporate the 2014 Rules on Transparency in Treaty-based

[53]Mexico has recently joined the ICSID Convention. ICSID News Release (11 January 2018) https://icsid.worldbank.org/en/Pages/News.aspx?CID=267.

[54]See Annex 5 of the Mexico-Venezuela-Bolivia FTA (1994).

[55]Article 23(3) of the EU-Mexico Agreement (2018), Section [X]: Resolution of Investment Disputes, https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156814.pdf.

[56]See Charlotin and Hepburn, Analysis: EU-Mexico investment text released, allowing for comparison with other agreements; permanent two-tier system of adjudication is envisioned, Investment Arbitration Reporter (2 May 2018) https://www.iareporter.com/articles/analysis-eu-mexico-investment-text-is-released-allowing-for-comparison-with-other-agreements-permanent-two-tier-system-of-adjudication-is-envisioned/.

[57]See UNCTAD Investment Policy Hub, IIA Navigator, https://investmentpolicy.unctad.org/international-investment-agreements.

[58]Newcombe (2005), p. 1.

[59]See Australia-Peru FTA (2018); Belarus-India BIT (2018); Central America-Republic of Korea FTA (2018); CPTPP (2018); EU-Singapore IPA (2018); EU-Vietnam IPA (2019); USMCA (2018); and the Netherlands Model BIT (2018).

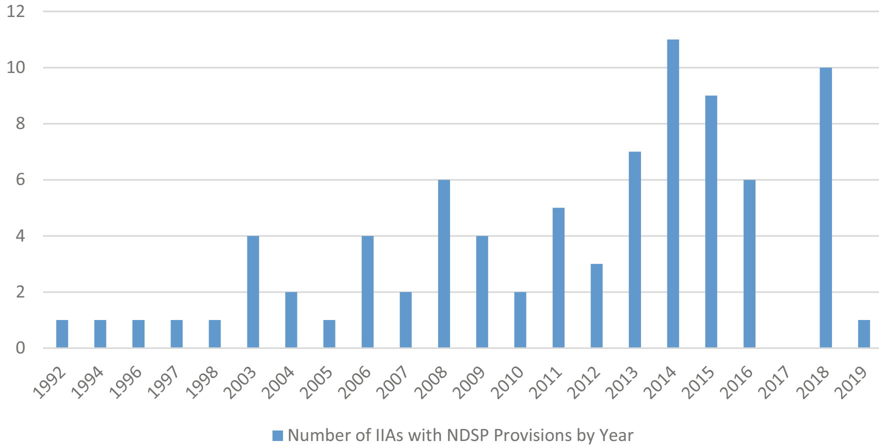

Fig. 1 Number of IIAs with NDSP provisions by year (Source: UNCTAD IIA Navigator)

Investor-State Dispute Settlement of the United Nations Commission on International Trade Law (UNCITRAL) (which provides for NDTP submissions):[60] notably, only five of the 82 known IIAs containing NDTP provisions—including NAFTA—were concluded prior to 2003, and all of those five were concluded by at least one NAFTA party; 2003 also appears to be the first year that non-NAFTA parties concluded a treaty with a NDTP provision.[61] Since then it has been off to the races, as is evident from Fig. 1: 55 of the 82 known treaties identified in the data analysis for this chapter that permit NDTP submission provisions were concluded since 2010, demonstrating the massive uptick in the conclusion of such treaties in recent years.[62]

This trend shows no sign of slowing down: approximately one-third of the treaties concluded in 2018 contained an NDTP submission provision.[63] As evident from Fig. 2, nearly 60% of the sample IIAs containing NDTP provisions have been concluded post-2010.

This is all the more noteworthy considering that the conclusion of IIAs has declined since 2010, as visible in Fig. 3, making the high occurrence of NDTP provisions in the 2018 treaties all the more significant.

The above trend could potentially be traced to the timeline of the very high-profile disputes surrounding the NDTP submission and FTC Notes controversy described above: the issue of the status of the states' SPPs was discussed in several cases

[60] See UNCTAD Investment Policy Hub, IIA Navigator, https://investmentpolicy.unctad.org/international-investment-agreements. IIAs incorporating the 2014 UNCITRAL Transparency Rules were not analysed for purposes of this chapter.

[61] Article 10.32 of the Chile-Republic of Korea FTA (2003).

[62] See UNCTAD Investment Policy Hub, IIA Navigator, https://investmentpolicy.unctad.org/international-investment-agreements.

[63] See UNCTAD Investment Policy Hub, IIA Navigator, https://investmentpolicy.unctad.org/international-investment-agreements.

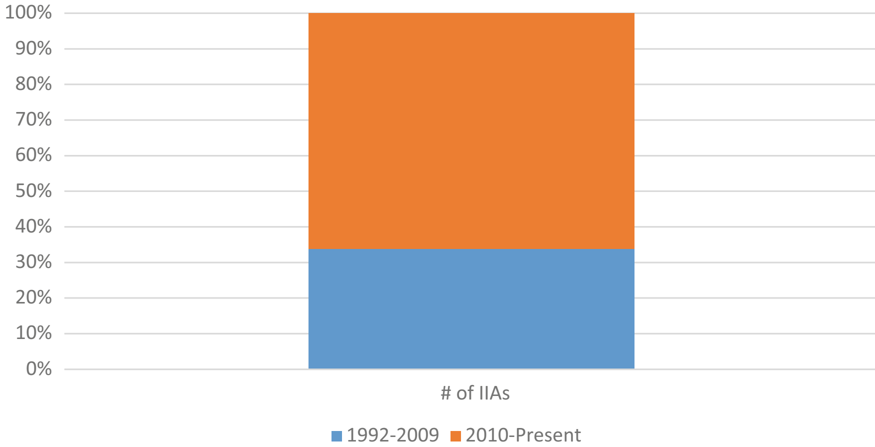

Fig. 2 IIAs with NDSP pre- and post-2010 (Source: UNCTAD IIA Navigator)

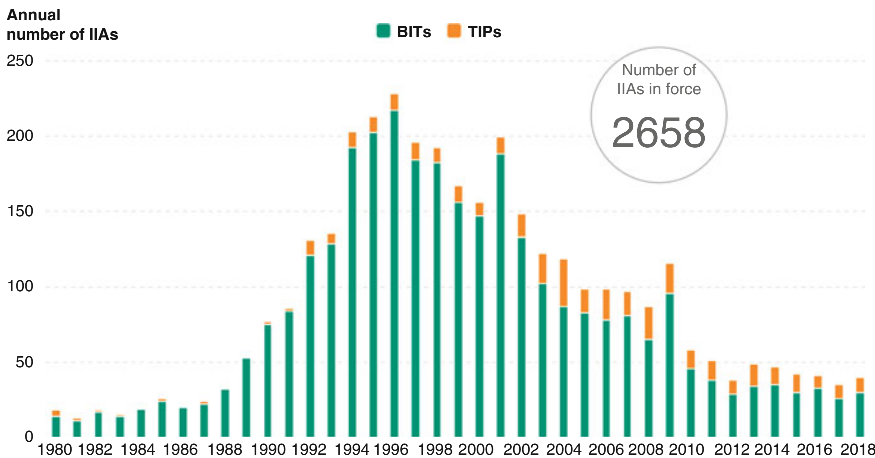

Fig. 3 Number of IIAs signed, 1980–2018 (Source: UNCTAD 2019 WIR Figure 111.7, p. 99; UNCTAD, IIA Navigator)

leading up to the 2001 issuance of the FTC Notes, and the binding nature of the FTC Notes continued to be debated by tribunals in decisions issued from between 2001 and 2010.[64] The subsequent reaction vis-à-vis increased inclusion of NDTP submissions in IIAs by not only the NAFTA parties but also other states was probably

[64]See Sect. 2 above.

affected by this ongoing debate. The above trends are also being seen at the institutional and multilateral level: for example, the 2018 proposed ICSID arbitration rule revisions contain such a provision for the first time[65] and the 2014 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration contains a provision on NDTPs.[66] States have very important and often primary roles in shaping the direction of such rules and conventions.[67]

Turning to the second trend that is arguably also linked to the NAFTA experience, i.e. the coupling of provisions providing for binding interpretations and consistent decisions, similar trends to the NDTP provisions can be identified from the available data. NAFTA was the first known-IIA to contain a provision that the parties' interpretations are binding on a tribunal. Subsequent to NAFTA, approximately 14 IIAs that were concluded between 1994 and 2002 contained such provisions, all of which were BITs concluded by a NAFTA party (predominantly Mexico) and a third party. In 2002, the *Pope & Talbot* final Award was rendered. In 2003, for the first time, two US IIAs contained the requirement that tribunals' decisions must be consistent with the treaty parties' binding interpretations.[68] In the sample of IIAs containing NDTP provisions concluded between 2003 and 2009, approximately 27 provided either for binding interpretations alone (16) or binding interpretations coupled with consistent decisions (11). Of these 11 providing also for consistent decisions, over half were concluded by a NAFTA party (namely Canada or the US). However, a handful of South American countries[69] started including them in their treaties during this period, and both were also provided for in the 2009 Comprehensive Investment Agreement of the Association of Southeast Asian Nations (ASEAN), demonstrating that non-NAFTA parties were beginning to pick

[65]See proposed Article 49 of the Rule Revisions (or Article 58 of the Additional Facility Rules). Proposals for Amendment of the ICSID Rules, ICSID, Working Paper Vol 3, August 2019, https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf.

[66]Furthermore, at least two treaties (both of which were concluded by Canada) specifically provide that the Rules on Transparency apply (Article 8.36 of CETA and Article 29 of the Canada-Hong Kong BIT (2016)); however, as the 2013 UNCITRAL Rules incorporate the Mauritius Convention, the number of arbitral proceedings that may have to be conducted in accordance with the Mauritius Convention (which entered into force in 2017), including the opportunity for NDTP to make submissions, is much higher.

[67]For example, states are invited to submit comments on the ICSID Rule revisions. Mexico, for example, has commented on the content of the proposed NDTP provision in the new ICSID rules. 'Comentarios de México al Proyecto de enmiendas a las reglas del CIADI', June 2019, https://icsid.worldbank.org/en/amendments/Documents/Mexico_CommentsWP2_06.24.2019.pdf. See generally https://icsid.worldbank.org/en/amendments.

[68]Article 15.21(2) of the Singapore-United States FTA (2003) and Article 10.21of the Chile-United States FTA (2003).

[69]Namely, Chile, Colombia and Peru: Peru concluded a BIT with Canada in 2006 providing for both binding interpretations and consistent decisions, and Chile did the same in the 2003 FTA with the United States. The Chile-Peru FTA (2006), Chile-Colombia FTA (2006) and the Colombia-Peru BIT (2007) then became the first three (known) non-NAFTA party IIAs to provide for both binding interpretations and consistent decisions.

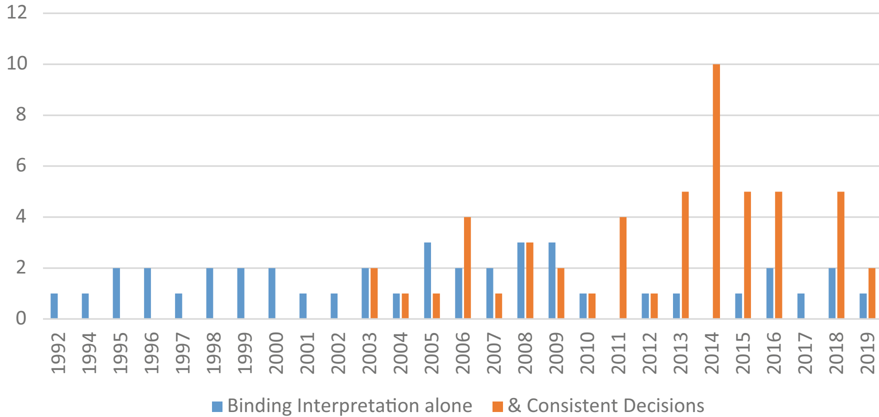

Fig. 4 IIAs with provisions on binding interpretations and consistent decisions (Source: UNCTAD IIA Navigator)

up this IIA practice. In 2010 the *Merrill & Ring* decision was handed down; from 2010 onward, the inclusion of such provisions in IIAs took off.

All in all, and as can be seen in Fig. 4, since the "binding interpretation" provision was first expanded upon to specify that tribunals' decisions needed to be consistent therewith in 2003, at least 38 treaties have been concluded that provide for both, and although the NAFTA parties—especially Canada—have continued to include them in their recent treaties, many of the most recent IIAs have been concluded by non-NAFTA parties, including the EU.[70]

The trends observable in recent IIAs indicate that states wish to strengthen their ability to participate in disputes, especially on matters of treaty interpretation, and to further ensure that tribunals take due account of such interpretations, as reflected in the numerous treaties concluded subsequent to this period that contain NDTP submissions and/or provisions providing for binding interpretations/consistent decisions.

5 Conclusions

The above tends to demonstrate that the lack of deference afforded by tribunals to the interpretations of states given during disputes—or even to the treaty parties' binding interpretations, such as the FTC Notes—may be contributing to the current backlash against the ISDS system, which has taken many forms. It is also evident that IIA reform is occurring within the context of this backlash, possibly as a reaction to the

[70] See UNCTAD Investment Policy Hub, IIA Navigator, https://investmentpolicy.unctad.org/international-investment-agreements.

prior stances taken by some tribunals concerning NDTP submissions, often with the states' intent being to enhance their ability to participate as NDTPs in disputes concerning treaties to which they are parties and to ensure that the decisions taken by tribunals are consistent with the treaty interpretations that states provide. Thus, even as some countries "disengage" from ISDS or modify their IIA and investment policy practice, states (and regional economic unions) appear to highly value the ability to submit NDTP submissions in on-going disputes, as is evident from recent IIAs and similar trends in the international investment regime (such as the proposed amendments to the ICSID Arbitration Rules), which shows no sign of slowing down anytime soon.

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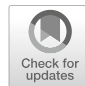
Not a Third Party: Home State Participation As a Matter of Right in Investment Treaty Arbitration



Rebecca E. Khan

Contents

1 Introduction 98
2 Diplomatic Protection: Why Non-disputing State Party Participation Is Problematic 99
3 Comparison of Transparency Issues in Relation to Sovereign Respondents and Non-disputing State Parties 101
4 Non-disputing State Party Participation As Part of the Transparency Movement in Investment Treaty Arbitration 103
4.1 NAFTA and Non-disputing State Party Participation 103
4.2 ICSID and Non-disputing State Party Participation 104
4.3 UNCITRAL Transparency Rules and Non-disputing State Party Participation 105
4.4 Survey of Investment Treaty Arbitration Cases with Non-disputing State Party Participation 107
5 A Matter of Right: Non-disputing State Party Participation with Respect to Investment Treaty Interpretation 113
References 114

Abstract Host states are not the only sovereign parties that an investment dispute can impact. The sovereign interests of an investor's home state are also potentially affected by an investment claim initiated by a national against an investment treaty partner, and more mechanisms should be put in place to ensure that the home state has access to the arbitration proceedings. This chapter argues for non-disputing state party participation as a matter of right in investment treaty arbitration cases. Whether or not the home state of the investor is informed of and allowed to participate in an investment dispute has largely been left to the discretion of arbitral tribunals; arbitration rules and jurisprudence have regarded the home state no differently than non-governmental third parties seeking to participate in the arbitration as *amici curiae*. From the perspective of increased transparency in the investor-state dispute settlement system, this chapter posits that non-disputing state parties must be accorded an elevated status in investor-state arbitration, with the following rights: first, to be formally notified at the outset about an investment treaty dispute; second,

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to have access to the documents of the arbitration case; and, third, to make written submissions with respect to the interpretation of the international investment agreement invoked in the claim. The analysis begins by identifying the sovereign interests of the home state that come into play in an investment treaty arbitration. The perils of diplomatic protection are examined in this chapter, to provide the perspective from which to delimit the parameters for non-disputing state party participation. A survey of arbitration rules and jurisprudence outlines the level of participation thus far accorded to home states in investment treaty arbitration.

1 Introduction

State parties in investment disputes have transparency concerns that differ from those of investors. The home state of the investor is involved in an investment dispute not as a party to the arbitration proceedings but rather as the investment treaty partner of the host state, which is the sovereign respondent. The transparency concerns of the home state mirror those of the disputing state party rather than those of non-governmental non-parties that seek to participate as *amici curiae* in investment disputes. It is important to distinguish non-disputing state parties from non-sovereign entities that seek to intervene in investment disputes, and highlight that distinct sets of rules should apply to these entirely separate categories of non-parties.

The participation of non-disputing state parties in the investor-state dispute resolution process is relevant for the following reasons: first, the proposals and observations of the investor's home state during the treaty negotiation process are reflected in the *travaux preparatoires* of the relevant investment agreement; second, submissions in the form of *amicus curiae* briefs may be allowed by the investment arbitration tribunal with respect to issues of treaty interpretation; and, third, involvement of the home state would facilitate the enforcement of arbitral awards rendered in favour of its investors.[1] This chapter focuses on the second type of participation. Issues regarding notification about ongoing investment treaty disputes will also be considered. Examining non-disputing state party participation from a transparency perspective, this chapter discusses diplomatic protection and its relationship to investor-state dispute settlement, then proceeds to canvass the existing parameters for non-disputing state party participation in investment treaty arbitration. Specifically, Sect. 2 considers why non-disputing state party participation was deemed problematic in the past, in view of the goal of the investor-state dispute settlement system to depoliticise investment arbitrations. Section 3 contrasts the transparency concerns of non-disputing state parties with those of sovereign respondents in investment disputes to demonstrate the need for participation by the investor's

[1] Malintoppi and Haeri (2016), p. 566.

home state even though it has neither claims nor liabilities in the dispute. Section 4 reviews provisions in Chapter 11 of the North American Free Trade Agreement (NAFTA), the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID), and the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules) to highlight the importance of non-disputing state party participation in the transparency movement in investor-state dispute settlement. That section also surveys investment treaty arbitration cases where the sovereign respondent's treaty partners sought to intervene, demonstrating different outcomes in the case of such participation. Finally, Sect. 5 argues that non-disputing state party participation should be granted as a matter of right, rather than be subject to a tribunal's discretion, with respect to issues of interpretation of the relevant investment treaty.

2 Diplomatic Protection: Why Non-disputing State Party Participation Is Problematic

Diplomatic protection is highlighted in the UNCITRAL Transparency Rules as a danger when allowing submissions by the non-disputing treaty party. Article 5 of the UNCITRAL Transparency Rules emphasises "the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection."[2] In a thought-provoking book chapter, Gabrielle Kaufmann-Kohler has cautioned that non-disputing state party submissions "pose risks that [non-governmental organisation] submissions do not raise."[3] She points out that written submissions by an investor's home state should address matters of treaty interpretation only, because a submission by a home state containing case-specific factual arguments in support of its own national might already be tantamount to diplomatic protection.[4] This sub-section explains why diplomatic protection is a concern in relation to submissions by the non-disputing state party.

Before the advent of investment treaty arbitration, diplomatic protection was the method by which a dispute between a state and a private party could be resolved.[5] As succinctly summarised by Rudolf Dolzer and Christoph Schreuer:

> Under traditional international law, investors did not have direct access to international remedies to pursue claims against foreign states for violation of their rights. They depended on diplomatic protection by their home states. A state exercising diplomatic protection espouses the claim of its national against another state and pursues it in its own name.[6]

[2]Article 5(2) of the UNCITRAL Transparency Rules.

[3]Kauffmann-Kohler (2013), p. 319.

[4]Kauffmann-Kohler (2013), p. 319.

[5]Reinisch and Malintoppi (2008), p. 712.

[6]Dolzer and Schreuer (2008), p. 211.

Diplomatic protection is considered by some observers as a predecessor of investor-state dispute settlement.[7] The creation of a mechanism giving investors direct recourse against host states without having to seek diplomatic protection from their home states was intended to *depoliticise* investment disputes,[8] by bringing these disputes “within the realm of law rather than of politics and diplomacy.”[9] With direct access to international arbitration against host states, investors have been freed from “the often politically motivated discretion of states whether or not to exercise diplomatic protection.”[10]

This objective of depoliticisation is embodied in an express prohibition on diplomatic protection contained in the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which established the International Centre for Settlement of Investment Disputes (ICSID Convention). Article 27 of the ICSID Convention provides as follows:

> (1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
> (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

The *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, decided by the International Court of Justice in 1970,[11] is often cited as a prime example of a state-to-state dispute that was initiated to resolve an investment claim. In that case, the Belgian Government stepped in to bring a claim on behalf of its nationals, who were shareholders in the Canadian company subject of the case, lodging a claim against Spain and seeking reparation for damage done to the Barcelona Traction, Light and Power Company by the Spanish government.[12]

The interests of a home state in espousing a claim of its nationals was viewed by the International Court of Justice as follows:

> [T]he Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law. The opinion has been expressed that a claim can accordingly be made when investments by a State’s nationals abroad are thus prejudicially affected, and that *since such investments are part of*

[7]Kauffmann-Kohler (2013), p. 305, citing inter alia Juratowitch (2008), p. 10.

[8]Malintoppi and Haeri (2016), p. 565; Kauffmann-Kohler (2013), pp. 305–306.

[9]Kauffmann-Kohler (2013), p. 306.

[10]Reinisch (2015), p. 259.

[11]*Barcelona Traction, Light and Power Company, Limited,* Judgment, 5 February 1970, ICJ Reports 1970, p. 3.

[12]*Barcelona Traction*, *Light and Power Company, Limited,* Judgment, 5 February 1970, ICJ Reports 1970, p. 3, paras 1 et seq.

a State's national economic resources, any prejudice to them directly involves the economic interest of the State.[13]

Bilateral (and multilateral) investment treaties now represent the protection extended by a home state over its nationals, achieved through the negotiation of these treaties to ensure that the rights of its citizens are protected abroad. States no longer have to espouse the claims of their nationals to seek redress from the state where the investment was made, since investors now have direct recourse against host states for investment treaty violations.

3 Comparison of Transparency Issues in Relation to Sovereign Respondents and Non-disputing State Parties

The transparency concerns of non-disputing state parties diverge to a certain degree from the concerns of sovereign respondents, and are generally limited to: first, the proper interpretation of the investment treaty pursuant to which the investment claim was filed and, second, the non-disputing state party's duties and obligations with respect to its nationals, claimants in the dispute.

Procedurally, the differences begin at the initiation of the investment claim. The requirements of due process dictate that host states named as respondents in investment claims are notified that a request for arbitration has been filed against them by an investor.[14] By contrast, whether the home state of the investor of a pending claim is notified depends on the existence of provisions in the applicable investment treaty or specific arbitration rules mandating such notification, or if one of the parties voluntarily informs the non-disputing state party about the ongoing dispute. Neither the ICSID Convention nor the ICSID Arbitration Rules contain a specific provision mandating that the investor's home state should be notified of the initiation of an investment claim. (However, when ICSID registers a case, the names of the parties, as well as the particular investment treaty being invoked, are among the basic case information that is made publicly available.)[15] Some treaties, however, provide for such notification, as well as the requirement to supply the non-disputing state party with the written submissions, transcripts, arbitral awards, and other documents produced during the arbitration proceedings. Notably, NAFTA and the Central American-Dominican Republic Free Trade Agreement (CAFTA-DR) contain provisions that direct the sovereign respondent to inform the non-disputing state parties that an investment claim has been filed, and to furnish the other state parties with

[13] *Barcelona Traction*, *Light and Power Company, Limited,* Judgment, 5 February 1970, ICJ Reports 1970, p.3, para. 86, emphasis added.

[14] Article 36(1) of the ICSID Convention.

[15] See https://icsid.worldbank.org/en/pages/cases/pendingCases.aspx?status=p.

copies of submissions and awards, among others.[16] The US model bilateral investment treaty (BIT) also contains a similar provision which has been adopted in some US BITs.[17]

The filing of an investment claim by one its nationals against one of its treaty partners can have a potential impact on the non-disputing state party, and more mechanisms should be put in place to ensure that the non-disputing state party has access to the proceedings and is informed about the case from the very beginning.

If the interpretation of provisions in the BITs is in issue, then the non-disputing state parties should be given every opportunity to present their views on interpretation, as the outcome of the arbitration proceeding with respect to these provisions has the potential to impact the interpretation of similar provisions in a state's BITs with other countries. An extended discussion in a separate section below argues that non-disputing state parties should be allowed—as a matter of right—to file written submissions on matters of treaty interpretation.[18]

Another aspect pointing to the necessity of providing information to the non-disputing party relates to allegations made in the course of the arbitral proceedings relating to the conduct of the home state's nationals in the host state. As will be discussed below, allegations of corruption in relation to the investment activity are becoming increasingly common in investment disputes (or, arguably, corruption has always been common, but is only now being highlighted as states use it as a jurisdictional defense). A non-disputing party may have an interest in monitoring the actions of its nationals abroad, especially if they involve criminal activity. One salient example embodying such a duty is the Foreign Corrupt Practices Act in the United States, which renders unlawful any bribery of foreign officials committed by US nationals abroad.[19]

[16]Article 1127 of NAFTA provides: "Notice – A disputing Party shall deliver to the other Parties: (a) written notice of a claim that has been submitted to arbitration no later than 30 days after the date that the claim is submitted; and (b) copies of all pleadings filed in the arbitration"; Article 10.21 ("Transparency of Arbitral Proceedings") of CAFTA-DR provides: "1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal."

[17]Article 29(1) ("Transparency of Arbitral Proceedings") of the 2012 US Model BIT, which replicates the 2004 version of this article, provides that "the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [Amicus Submissions] and Article 33 [Consolidation]; (d) minutes and transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal." This provision appears as Article 29 of the 2005 US- Uruguay BIT; and Article 29 of the 2008 US-Rwanda BIT.

[18]See below Sect. 5.

[19]15 USC § 78dd-1, et seq.

An ongoing investment dispute has potential implications for the home state of the claimant investor with respect to various aspects of governance, and the non-disputing state party should be given access to the proceedings as a matter of routine.

4 Non-disputing State Party Participation As Part of the Transparency Movement in Investment Treaty Arbitration

This chapter examines international legal instruments designed specifically for investment treaty arbitration. It focuses on NAFTA Chapter 11, the ICSID Convention and 2006 Arbitration Rules, and the 2014 UNCITRAL Transparency Rules. A comparison of these three instruments reveals that there is as yet no uniform approach to dealing with the participation of non-disputing state parties. NAFTA expressly allows the practice but provides no guidelines, ICSID makes no distinction between non-state third parties and non-disputing state parties, while the UNCITRAL Transparency Rules devote an entire article to the matter.

4.1 NAFTA and Non-disputing State Party Participation

Article 1128 of NAFTA Chapter 11 provides: "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement." The wording of this provision makes it clear that the non-disputing state parties have a *right* to be heard on an issue of NAFTA interpretation.[20] The scope of this provision notably does not extend towards addressing issues of fact.[21] This treaty provision is crafted in a way that limits the participation of non-disputing state parties to issues of treaty interpretation.

Commentators have noted that Article 1128 provides no guidance or procedure to operationalise this provision.[22] The rule does not mandate written submissions nor does it proscribe oral submissions.[23] While the provision does not specifically provide for the right of a non-disputing state party to attend the oral hearings in the case, tribunals have generally allowed the presence of non-disputing state parties in NAFTA hearings.[24] The right of non-disputing state parties is arguably implied in

[20]Kinnear (2005), p. 8.

[21]Bjorklund (2013), p. 517; Kinnear (2005), p. 8.

[22]Kinnear (2005), p. 8; Bjorklund (2013), p. 517.

[23]Kinnear (2005), p. 8; Bjorklund (2013), p. 518.

[24]Bjorklund (2013), pp. 517–518.

the provision because to deny them the ability to apprise themselves of issues raised during the hearings would effectively render their participation right nugatory.[25]

4.2 ICSID and Non-disputing State Party Participation

As mentioned above, diplomatic protection is explicitly prohibited in the ICSID context. However, the ICSID Arbitration Rules concerning third-party submissions fail to draw clear parameters regarding the content of written submissions by non-disputing state parties. Rule 37(2) of the ICSID Arbitration Rules, which allows tribunals to accept written submissions by third parties, does not distinguish between non-disputing state parties and non-governmental organisations. As such, sub-paragraph "(a)" of that rule mandates the tribunal to consider the extent to which "the non-disputing party submission would assist the Tribunal in the determination of a *factual* or legal issue related to the proceeding".[26] As already mentioned above, allowing a non-disputing state party to present arguments regarding the facts of a particular dispute, in support of its national investor, runs the risk of being de facto diplomatic protection.[27] However, it may be argued that tribunals will construe Rule 37(2) with deference to Article 27 of the ICSID Convention.[28]

During the rule amendment process that led to the 2006 version of the ICSID Arbitration Rules, the initial proposal for Rule 37(2) was worded as allowing a "person or state" to make a written submission.[29] However, some commentators considered this phrase too restrictive, so the current wording reads "person or entity".[30] As a result of having one rule applicable to non-parties, whether sovereign or not, the ICSID Arbitration Rules in their current form, i.e. the 2006 version of the Rules, have no specific provision limiting the submissions of non-disputing state parties to matters of interpretation of the investment treaty. This is likely to change, however, in light of the ICSID rule amendment process launched in October 2016.[31] As of February 2020, a draft provision entitled "Participation of Non-Disputing Treaty Party" appears as a proposed new provision of the ICSID Arbitration Rules. This draft rule provides:

> Rule 68
>
> Participation of Non-Disputing Treaty Party
>
> (1) The Tribunal shall permit a Party to a treaty that is not a party to the dispute ("nondisputing Treaty Party") to make a written or oral submission on the interpretation

[25] Bjorklund (2013), p. 518.

[26] Rule 37(2)(a) of the ICSID Arbitration Rules, emphasis added.

[27] Kauffmann-Kohler (2013), p. 319.

[28] Kauffmann-Kohler (2013), p. 319.

[29] Obadia (2007), p. 368.

[30] Obadia (2007), p. 368.

[31] See https://icsid.worldbank.org/en/amendments/Pages/About/about.aspx.

of the treaty at issue in the dispute and upon which consent to arbitration is based. The Tribunal may, after consulting with the parties, invite a non-disputing Treaty Party to make such a submission.

(2) The Tribunal shall ensure that non-disputing Treaty Party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the filing of a written submission by the non-disputing Treaty Party, including with respect to the format, length or publication of the written submission and the time limit to file the submission.

(3) The parties shall have the right to make observations on the submission of the nondisputing Treaty Party.[32]

This draft article sets out to create distinct rules for the non-disputing state party by expressly allowing submissions on treaty interpretation and impliedly limiting participation to this aspect.

In a previous iteration of this amendment, however, the proposed text would have granted an ICSID arbitration tribunal the discretion to "allow a non-disputing Treaty Party to make a written submission on any other matter within the scope of the dispute," following the rules for non-sovereign third parties.[33] This previous draft text, allowing submissions to matters beyond treaty interpretation, is similar to the provision in the 2014 UNCITRAL Transparency Rules, discussed below. However, this text was deleted in subsequent drafts.[34] Thus, the forthcoming amendment to the ICSID Arbitration Rules hews closely to the NAFTA text discussed above.

4.3 *UNCITRAL Transparency Rules and Non-disputing State Party Participation*

The imprecision of Rule 37(2) of the 2006 ICSID Arbitration Rules may have inspired the drafters of the UNCITRAL Transparency Rules to create separate rules for third-party participation by non-governmental entities and non-disputing state parties. Article 4 of the UNCITRAL Transparency Rules governs "Submission by a third person", referring to "a person that is not a disputing party, and not a non-disputing Party to the treaty."[35] Meanwhile, Article 5 governs "Submission by a non-disputing Party to the treaty". Accordingly:

[32] ICSID Secretariat (February 2020) https://icsid.worldbank.org/en/Documents/WP_4_Vol_1_En.pdf, p. 68.

[33] ICSID Secretariat (2 August 2018) https://icsid.worldbank.org/en/Documents/III.Amendments_Vol_3_AR.pdf, pp. 217–218.

[34] ICSID Secretariat (March 2019) https://icsid.worldbank.org/en/Documents/Vol_1.pdf, pp. 275–276.

[35] Article 4(1) of the UNCITRAL Transparency Rules.

1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.
2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.
3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.
4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.
5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.[36]

A reading of the above provision reveals that the UNCITRAL Transparency Rules contemplate two types of submissions by non-disputing state parties: first, submissions on issues of treaty interpretation and, second, submissions on matters within the scope of the dispute. The first type of submission is treated as a matter of right in Article 5(1), with the use of the word "shall". Acceptance of a submission by a non-disputing state party is required when requested by that non-disputing state party. The second part of Article 5(1) contemplates inviting the non-disputing state party to make a submission when it has not sought such participation *motu proprio*. In the latter scenario, the UNCITRAL Transparency Rules instruct the tribunal to consult the disputing parties before extending such an invitation.

The second type of submission, provided in Article 5(2), gives the tribunal the discretion to accept submissions relating to other issues. Using the language "matters within the scope of the dispute", this provision appears to be an attempt to place non-disputing state parties on an equal footing with the non-disputing parties covered by Article 4, and also makes a cross-reference to the factors listed in Article 4(3). Highlighting a significant difference between the non-parties contemplated in Articles 4 and 5, the provision also cautions tribunals about submissions by a non-disputing state party that may rise to the level of diplomatic protection.[37]

[36] Article 5 of the UNCITRAL Transparency Rules.

[37] Article 5(2) of the UNCITRAL Transparency Rules.

4.4 *Survey of Investment Treaty Arbitration Cases with Non-disputing State Party Participation*

NAFTA cases have seen relatively active participation of non-disputing state parties because of the express provision allowing their participation.[38] This level of participation by home states has not been as prevalent in the wider universe of investment disputes initiated pursuant to investment treaties.[39] Explicit clauses regarding non-disputing state party participation do exist in investment treaties,[40] primarily in the investment chapters of free trade agreements (FTAs) entered into by the United States,[41] but such provisions have yet to become standard features of BITs.[42] As will be discussed below, the lack of explicit guidance from treaty provisions led to different consequences with respect to non-disputing state party participation.

What follows are three examples where the non-disputing state party provided comments on the proper interpretation of the BIT invoked in the dispute. Each case presents a unique scenario as to the timing of the interventions, the party that initiated the involvement of the non-disputing state party, and the outcome of the non-disputing state party's participation.

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[38] Article 1128 of NAFTA.

[39] Two examples of non-disputing state party participation pursuant to express treaty provisions are: the written submission by the United States in *Adel A Hamadi Al Tamimi v. Oman* (ICSID Case No. ARB/11/33), pursuant to Article 10.19.2 of the 2006 US-Oman free trade agreement (FTA); and the written submission by Canada in *Bear Creek Mining Corporation v. Peru* (ICSID Case No. ARB/14/21), pursuant to Article 832.1 of the 2008 Canada-Peru FTA. Worthy of note is that these non-disputing state parties are also members of NAFTA.

[40] Ishikawa (2015), p. 147.

[41] A clause providing that "[t]he non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement" makes an appearance, inter alia, in the following treaties: Article 11.20.4 of the 2007 US-Korea FTA; Article 10.19.2 of the 2006 US-Oman FTA; Article 10.19.2 of the 2004 Morocco-US FTA; Article 10.19.2 of the 2003 US-Chile FTA.

[42] Aside from US FTAs, other examples include: Article 86 of the 2005 Agreement between Japan and the Mexico for the Strengthening of Economic Partnership, which provides: "On written notice to the disputing parties, the Party other than the disputing Party may make submissions to a Tribunal on a question of interpretation of this Agreement"; and Article 832.1 of the 2008 Canada-Peru FTA, which provides: "On written notice to the disputing parties, the non-disputing Party may make submissions to a Tribunal on a question of interpretation of this Agreement." Considering that the examples outside of NAFTA are treaties entered into by the United States of America, Mexico, and Canada, it can be reasonably inferred that the existence of these provisions is a direct influence of the NAFTA experience.

4.4.1 Aguas del Tunari v. Bolivia

Aguas del Tunari v. Bolivia was initiated in 2002 pursuant to the 1992 Netherlands-Bolivia BIT.[43] Aguas del Tunari identified itself as "a legal person constituted in accordance with the laws of Bolivia", that could bring a claim pursuant to the Netherlands-Bolivia BIT because it was "controlled directly or indirectly by nationals of the Netherlands".[44] Referring to two entities incorporated under Dutch law that owned shares in a Luxembourg corporation which directly owned 55% of the shares in Aguas del Tunari,[45] the claimant argued that the corporate structure of the Bolivian *sociedad anónima* made it a national of the Netherlands, in accordance with the BIT.[46] This was the basis for the claimant's assertions that the ICSID tribunal had jurisdiction over the dispute. For its part, Bolivia presented objections to the tribunal's jurisdiction, arguing primarily that Bolivia did not consent to the jurisdiction of ICSID.[47] The sovereign respondent also argued that Aguas del Tunari was not a national of the Netherlands within the meaning of the BIT, since it was not "controlled directly or indirectly" by Dutch nationals.[48]

The interpretation of the BIT was at the crux of all issues presented by the parties in the jurisdictional phase of the arbitration. The claimant introduced in the proceedings written exchanges between members of the legislative and executive branches of the Dutch government, with the former seeking a response from the latter on the question of whether multinational corporations could invoke the BIT.[49] On the one hand, the claimant's expert witness argued that the intragovernmental communications contradicted each other and indicated "confusion as to the facts."[50] The sovereign respondent, on the other hand, seized upon these documents introduced by the claimant to argue that the interpretation of the Government of the Netherlands about who can invoke the BIT was the same as its own interpretation,

[43] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 79.

[44] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 81, cf. para. 80. One of the provisions defining "nationals" that could bring a claim under the BIT enumerated "legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party."

[45] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, paras 70-72, cf. para. 81.

[46] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 82.

[47] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 84.

[48] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 85.

[49] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, paras 252–257.

[50] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 256.

such that both state parties to the treaty "are on record as saying that [the BIT] does not apply to this case."[51]

In its Decision on Respondent's Objections to Jurisdiction, the tribunal devoted a considerable part of the discussion to a "unique aspect of this proceeding, namely its consideration of the relevance of several statements of the Netherlands, the non-disputing state party to the BIT."[52] The tribunal decided to reach out to the non-disputing state party for further elucidation on the disputed intra-governmental communications. In a 2004 letter, described by the tribunal in its decision as "the first inquiry of a non-disputing State Party to a BIT", the tribunal addressed the Legal Advisor of the Foreign Ministry of the Netherlands "to secure the comments of the Netherlands as to specific documentary bases for written responses which the Dutch government provided to parliamentary questions."[53] Kaufmann-Kohler notes that the tribunal "was mindful not to trigger the Netherlands' diplomatic protection" by using specific language to that effect and highlighting Article 27 of the ICSID Convention.[54]

The tribunal also delineated the parameters of the reply sought from the Netherlands as a non-disputing state party. It wrote in its letter:

> Given that the Government of the Netherlands is not a party or otherwise present in this arbitration, the Tribunal concludes that information from the Government of the Netherlands would assist the work of the Tribunal. Given further the above quoted Article 27 of the ICSID Convention and the fact that the Netherlands is not a party to this arbitration, the Tribunal is also of the view that such questions must be *specific and narrowly tailored, aimed at obtaining information supporting interpretative positions of general application rather than ones related to a specific case*.[55]

The Netherlands replied through the Legal Advisor of the Foreign Ministry with a cover letter describing the intra-governmental communications as "based on information from the press" which "may not necessarily have been correct".[56] Attached

[51] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 249.

[52] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 248.

[53] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 258.

[54] Kauffmann-Kohler (2013), p. 314. The letter sent by the tribunal was quoted in its 2005 Decision on Jurisdiction, at para. 258. With respect to diplomatic protection, the tribunal wrote: "The Tribunal recognizes the obligation of the Netherlands under [Article 27 of] the ICSID Convention to not provide diplomatic protection to its nationals in the case of investment disputes covered by the Convention. In this sense, the Tribunal wishes to emphasize that it does not seek the view of the Netherlands as to the Tribunal's jurisdiction in this matter, rather it seeks only to secure the comments of the Netherlands as to specific documentary bases for written responses which the Dutch government provided to parliamentary questions."

[55] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 258, emphasis added.

[56] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 261.

was a 1992 document entitled "Interpretation of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia."[57] Ultimately, the tribunal concluded that the Dutch response provided no additional information that would be relevant to shed light on the "general interpretative position" of the Netherlands on the BIT provisions at issue.[58]

4.4.2 CME v. Czech Republic

CME Czech Republic v. the Czech Republic was an UNCITRAL arbitration initiated in 2000 by a Dutch corporation pursuant to the 1991 Netherlands-Czech Republic BIT.[59] In 2001, the tribunal issued a Partial Award finding the sovereign respondent liable for violations of the BIT.[60] After the issuance of this Partial Award, the Czech Republic called for consultations with the Netherlands, pursuant to Article 9 of the BIT.[61] This treaty provision allows either state party to "propose [to] the other Party to consult on any matter concerning the interpretation or application" of the BIT.[62] The Czech Government expressed "its concern over a number of aspects of the Partial Award which were in its view inconsistent with the Treaty."[63] Specifically, the Czech Republic sought to consult with the Netherlands regarding the correct interpretation of the BIT provision which specifies the applicable law for resolving an investment dispute;[64] the assignment of claims arising under the BIT;[65] and the application of the BIT to investment disputes which had previously been raised by an indirect holder of the same investment of a different nationality under a comparable BIT. [66]

[57] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 259.

[58] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 262.

[59] *CME v. Czech Republic*, Final Award, 14 March 2003, paras 1-3. In para. 3, state succession is clarified: "The Treaty entered into force in the Czech and Slovak Federal Republic on October 1, 1992 and, after the Czech and Slovak Federal Republic ceased to exist on December 31, 1992, the Czech Republic succeeded to the rights and obligations of the Czech and Slovak Federal Republic under the Treaty".

[60] *CME v. Czech Republic*, Partial Award, 13 September 2001, para. 624.

[61] *CME v. Czech Republic*, Final Award, 14 March 2003, para. 87.

[62] Article 9 of the Netherlands-Czech and Slovak Federal Republic BIT (1991).

[63] *CME v. Czech Republic*, Final Award, 14 March 2003, para. 87.

[64] *CME v. Czech Republic*, Final Award, 14 March 2003, paras. 88, 91, 218, 398.

[65] *CME v. Czech Republic*, Final Award, 14 March 2003, paras. 88, 92, 220–224.

[66] *CME v. Czech Republic*, Final Award, 14 March 2003, paras. 88, 93. On this third point, note that the *CME v. Czech Republic* case is often discussed in relation to parallel proceedings in investment arbitration, since the UNCITRAL case of *Ronald S. Lauder v. Czech Republic* was brought concerning the same investment but under the Czech Republic-US BIT.

After a series of meetings between representatives of the Czech and Dutch Governments, their "Common Positions" on these three issues were recorded in the Agreed Minutes, dated 1 July 2002.[67] In providing these minutes to the tribunal, the sovereign respondent put forward the view that the common positions of the contracting state parties to the BIT should bind the tribunal for the issues they covered. The tribunal summarised the Czech Republic's position as follows:

> The Respondent's position in respect to the agreed minutes on the Common Position of the delegates of The Netherlands and the Czech Republic is that the two contracting States reserved to themselves the exclusive competence to decide on how the Treaty should be interpreted and applied. *The Tribunal has not more competence to state how the Treaty shall be interpreted and applied than any one of the State parties unilaterally.* To the extent that a tribunal makes an incorrect interpretation or misapplies the Treaty, the States parties can overrule the tribunal's mistake. [...]
>
> The common positions, representing the interpretations and application of the Treaty agreed between its contracting parties, are conclusive and binding on the Tribunal.[68]

In the Final Award, however, the tribunal did not elucidate how much deference, if any, should be accorded to the common positions agreed upon by the state parties with respect to the interpretation of the treaty provisions at issue. Instead, the tribunal indicated that the common positions "support[ed] the Tribunal's view" with respect to one issue,[69] "confirm[ed]" the tribunal's analysis with respect to another,[70] and were contrary to the respondent's position on a third issue.[71] In refraining from using the common positions as a source of interpretation and in using it instead as a reference point to either support or confirm its reasoning, the tribunal appeared to assert its own analysis over that of the contracting parties to the BIT, without explaining to what extent it paid attention to the common positions.

4.4.3 SGS v. Pakistan

SGS Société Générale de Surveillance v. Pakistan was an ICSID case initiated in 2001 pursuant to the Switzerland-Pakistan BIT.[72] This case is significant because it is one of the first times that an investment arbitration tribunal had to consider an umbrella clause in a BIT.[73] In its Decision on Objections to Jurisdiction, the tribunal rejected the claimant's argument that Article 11 of the Switzerland-Pakistan BIT

[67] *CME v. Czech Republic*, Final Award, 14 March 2003, para. 89.

[68] *CME v. Czech Republic*, Final Award, 14 March 2003, paras 216–217, emphasis added.

[69] *CME v. Czech Republic*, Final Award, 14 March 2003, para. 437.

[70] *CME v. Czech Republic*, Final Award, 14 March 2003, para. 400.

[71] *CME v. Czech Republic*, Final Award, 14 March 2003, para. 504.

[72] *SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 2.

[73] *SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 164; Yannaca-Small (2006), pp. 15–16.

elevated breaches of a contract to the status of breaches of the investment treaty.[74] The tribunal ultimately ruled that, although it had jurisdiction over SGS's claims pursuant to the BIT, it did not have jurisdiction over claims based on breaches of contractual commitments in a "pre-shipment inspection agreement" signed between SGS and Pakistan.[75] In its analysis of the proper interpretation of Article 11 of the BIT, the tribunal noted that it had taken into account Pakistan's views and faulted the claimant for not submitting evidence about Switzerland's interpretation of the provision that would support its position:

> The Tribunal is not saying that States may not agree with each other in a BIT that henceforth, all breaches of each State's contracts with investors of the other State are forthwith converted into and to be treated as breaches of the BIT. What the Tribunal is stressing is that in this case, *there is no clear and persuasive evidence that such was in fact the intention of both Switzerland and Pakistan in adopting Article 11 of the BIT*. Pakistan for its part in effect denies that, in concluding the BIT, it had any such intention. SGS, of course, does not speak for Switzerland. But it has not submitted evidence of the necessary level of specificity and explicitness of text. We believe and so hold that, in the circumstances of this case, SGS's claim about Article 11 of the BIT must be rejected.[76]

After the publication of this decision, the Swiss Government sent a letter to ICSID to express its disagreement with the tribunal's "very narrow interpretation" of the umbrella clause provided in Article 11 of the Switzerland-Pakistan BIT, and explaining the state's intentions upon entering the treaty.[77] The letter from the Swiss authorities inquired as to "why the Tribunal has not found it necessary to enquire about their view on the meaning of Article 11 in spite of the fact that the Tribunal attributed considerable importance to the intent of the Contracting Parties in drafting this Article and indeed put this question to one of the Contracting Parties (Pakistan)."[78] The letter from the Swiss Government also strongly expressed its dismay at the tribunal's interpretation: "the Swiss authorities are alarmed about the very narrow interpretation given to the meaning of Article 11 by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions."[79]

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[74] *SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 166. Article 11 of the Switzerland–Pakistan BIT declares: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."

[75] *SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 190.

[76] *SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 173, emphasis added.

[77] Kauffmann-Kohler (2013), p. 315; Yannaca-Small (2006), pp. 15–16.

[78] Kauffmann-Kohler (2013), p. 315.

[79] Malintoppi and Haeri (2016), p. 576.

However, since this letter was a reaction to the already-rendered jurisdictional decision, it had no influence on the outcome of the case.[80]

5 A Matter of Right: Non-disputing State Party Participation with Respect to Investment Treaty Interpretation

Non-party participation is a key aspect of transparency. The cases discussed in the previous section demonstrate the different outcomes for non-disputing state parties. In *Aguas del Tunari v. Bolivia*, the tribunal initiated communication to the non-disputing state party to seek clarificatory comments regarding intragovernmental communications on treaty provisions. In *CME v. the Czech Republic*, the sovereign respondent sought consultations with its treaty partner, but it is unclear what deference, if any, the tribunal accorded to the common positions of the treaty parties. In *SGS v. Pakistan*, the non-disputing state party was effectively excluded from the proceedings by not being informed, and thus did not have the opportunity to participate. The inconsistent jurisprudence and arbitral practice reveal that there is a long way to go in order to establish non-disputing state party participation as a right of the sovereign respondent's investment treaty partner.

Meg Kinnear presents three key reasons why non-disputing state parties should be allowed to participate in investment treaty disputes. First, as parties to the treaty being interpreted, "these states have the experience of having negotiated the treaty and have a unique perspective on how the treaty should be interpreted."[81] Eloïse Obadia similarly points out that a non-disputing state party could file submissions "concerning the treaty's *travaux préparatoires* and the interpretation of the treaty's provisions in relation to jurisdictional matters."[82] A second reason is that non-disputing state parties, as parties to the investment treaty, are also potential respondents in future disputes under that treaty. "States thus may be subject to numerous challenges and will be living with and interpreting the treaty obligations at issue in numerous contexts for many years to come."[83] Finally, the interest of the non-disputing state party vis-à-vis the investment treaty invoked in the dispute is congruent with that of the sovereign respondent:

> [A] State Parties' interest in disputes is not just defensive. Rather, States have compelling interest to ensure that an investment treaty actually provides investor protection and promotes foreign investment in the host State. Investment protection and promotion is the *raison d'être* for States' entrance into such treaties and thus States have an interest in seeing that BITs are interpreted coherently, logically and consistently. Consistency in BIT

[80] Kauffmann-Kohler (2013), p. 315.

[81] Kinnear (2005), p. 8.

[82] Obadia (2007), p. 368.

[83] Kinnear (2005), p. 8.

> interpretation is especially key because there is no formal system of *stare decisis* or precedent within this treaty regime. The credibility of the entire investor-State dispute settlement system is undermined when irreconcilable decisions are issued. [. . .] State party participation is one way that States can ensure cohesive jurisprudence and the continued integrity of the arbitral system.[84]

Just as the doors have opened for non-governmental organisations to participate as *amici curiae* in investor-state disputes, so too must participation by non-disputing state parties have started to become an established norm in investment treaty cases. This can be further achieved by establishing investment arbitration rules that explicitly mandate notification of disputes to home states and allow non-disputing state party submissions, even when the applicable investment treaty does not contain an express provision regarding non-disputing state party participation. Transparency must be inclusive for all actors in the investor-state dispute settlement system, and there are cogent reasons to support the participation of non-disputing state parties as a matter of *right* with respect to issues of treaty interpretation, instead of regarding such participation as subject to the discretion of an investment arbitration tribunal.

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[84] Kinnear (2005), p. 8.

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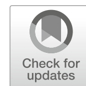
Investor-State Dispute Prevention: The Perspective of Peru



Carlos José Valderrama

Contents

1 Introduction 118
2 Facts and Risks to Take into Account 119
2.1 Prevention: The Aim Is No Disputes 119
2.2 The Risk Is Permanent 120
2.3 The Landscape Is Permanently Changing 122
2.4 ISDS in Light of Important Cultural and Practical Differences 124
2.5 States as Subjects of International Law 125
3 Model and Practices Developed by the Republic of Peru during 2011–2015 126
3.1 Model 126
3.2 Best Practices 129
4 Fundamental Considerations and Recommendations for the Prevention of Disputes 130
4.1 Some Further Considerations 130
4.2 Recommendations 131
References 132

Abstract This chapter examines state perspectives on investor-state dispute prevention drawing on the author's personal experience and practice in Peru's legal defence team. First, it focuses on identifying risks states experience when confronted with investor-state dispute settlement. Next, the chapter turns to particular experiences and general considerations regarding dispute prevention. Finally, it concludes with some recommendations for the implementation of certain dispute prevention practices.

This chapter draws on the author's experience as head of Peru's legal defence team between 2011 and 2015. The author would like to thank Maria Fernanda Bonilla Vargas and Yurica Ramos Montes for their generous assistance and research.

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1 Introduction

Between 2011 and 2015, Peru was ordered to pay compensation to foreign investors equal to just about 0.002% of the total sum claimed against it (50 US billion dollars). At the same time, the state received 140 times the amount paid to investors (110 US million dollars) by initiating claims and counterclaiming against investors, in a total of nine investor-state arbitration awards.[1] The record appears to be impressive, without any doubt, but it is still far from optimal. The optimal should be no disputes at all, with the international responsibility and reputation of the state never at risk.

Favourable awards are highly valuable, they emphasise how responsive and respectful a state is regarding certain standards of investment protection and can become evidence of its good performance in protecting foreign investors in its territory. Awards can (and should) be used, by states, as favourable "precedents" when facing new disputes. Nevertheless, not being challenged has, literally, no price. It may seem very improbable but that should always be the objective for states: *no disputes*.

In the real world, relations between state representatives and private investors entail, by definition, the overly complex and careful practice of communicating their mutual, but opposite, interest in the same businesses (or projects). For instance, it is frequent that investors' interests directly collide with public interests such as those of their workers, suppliers, and/or local communities, as they represent social costs that investors are usually inclined to argue should be carried by the state.

At the other end of the spectrum, state officials often seem to be more concerned about their own job stability and personal responsibility rather than the real long-term benefits their decisions represent for the state.[2] When engaging in projects with private investors intended to benefit the public interest, frequently, state representatives appear to be more centred on immediate personal success rather than on carefully assessing the overall longer-time effects of such projects.

Regarding public-private partnerships (PPPs) or concession contracts, when unfortunate events occur and action needs to be taken, terms seem to be differently interpreted by the parties. The ultimate question of whether it is the state or the investor that should assume the costs of undesired and unexpected events is hardly answered by the sole text of contract provisions. Sooner or later, one of the disputing parties tends to resort to dispute resolution. Let us not forget that investors are allowed to do whatever is not forbidden and state officials only what is expressly authorised by law.

Following a few notices of intent and arbitration requests, state officials would easily notice that many times counsel for the investors use these documents as lottery cards, since they tend to disaggregate every single state action related to the dispute

[1] See https://www.mef.gob.pe/es/acerca-de-las-asociaciones-publico-privadas-apps/sicreci.

[2] Chew et al. (2018).

and link it to the breach of a standard of protection in an investment treaty. For this reason, claims initiated under investment treaties become unnecessarily long and complex; the state usually needs to respond to each claim individually.

2 Facts and Risks to Take into Account

States need to use realistic and applied practices in order to prevent disagreements from escalating into full-blown disputes. This section proposes some fundamental issues states may wish to consider for the prevention of investor-state disputes.

2.1 Prevention: The Aim Is No Disputes

Disputes are better when avoided. The cost of a dispute is generally high, since it entails, not only the money and time spent litigating but, mostly, the costs involved in complying with the award, in case the state loses the dispute. Most probably, any of these costs could be lowered if the dispute is avoided or settled at an early stage; in other words, when it is still "potential".

The reputational cost, for the state, should also be taken into account. This is a variable the state should consider very carefully, because it always adds to other variables that the international community, multilateral and commercial banks, and other lenders, as well as foreign investors generally take into account. In the case of a government committed to managing an economic crisis and in the midst of that crisis, international claims start to arise,[3] credit can become scarcer and more expensive, and crisis management becomes more difficult for the government.[4]

Among the many types of disputes states face, investor-state disputes are not the most difficult to resolve. For example, investor-state disputes can still be prevented and managed on a case by case basis, due to the relatively low number of cases. On the contrary, social unrest, such as workers' unions' and consumers' protests, are much more difficult to identify, assess, prevent, and resolve than investor-state disputes. Social actors can have so many more different motivations than investors, such as political or personal interests or even corruption, and unrest may be evidence of a broader unease and dissatisfaction that can lead to violence.

The real problem occurs when popular unrest lies at the origin of state measures that trigger investment disputes. In such cases, states must explain to an arbitral tribunal, composed by foreign individuals, the profound nature and history of a specific social conflict and why the measures adopted to appease the angry crowd are

[3]Simões (2012), pp. 9–37.

[4]Franck (2011).

justified, even if they affect investments. This can be particularly hard to do.[5] In such cases state representatives will need to coordinate their actions, statements and strategies very carefully in order to avoid exposing internal conflicts before international arbitral tribunals. In other words, internal conflicts can exacerbate investor-state disputes.

Again, foreign investors' claims are much easier to identify and manage than internal conflicts. Engaging in a dialogue with a company bringing a dispute requires one phone call. There may be many foreign investors in each country, but not all of them have potential or pending disputes against the state. In order to better "manage" foreign investment, states could think about establishing records of foreign companies and other investors in their territories and follow up systematically and statistically. This will allow the state to efficiently identify potential conflicts that may escalate into international disputes in the near future.

Furthermore, dispute resolution mechanisms included in investment treaties, offer a valuable window of time for states, known as consultations or cooling-off periods that, if responsibly used, may avoid the initiation of an arbitration.[6] The consultations period is a "golden" opportunity for states to formally determine the settlement procedure in accordance to their own practice and timing preferences and do their best efforts to settle the dispute. It is a period of time, usually six months long, that is not regulated by the dispute resolution provision and during which disputing parties usually approach each other to jointly agree on the next steps to be taken to reach a solution. This approach often fails, for many reasons. But if the state has a previously organised strategy, offering the investor a pre-designed settlement protocol and schedule, the state may have the opportunity to have a better control over this period and the dispute, and resolve it at that stage.

2.2 The Risk Is Permanent

Democracy, entails that every citizen has the right to be considered for public office or post, irrespective of his or her political views, approach to private investment, sympathy or antipathy towards a determined group, profession, or minority, or even level of academic education. During the last few years, we have been able to observe how constituencies in different countries have supported leaders and representatives with protectionist views and preferences, promising voters to defend their industries and products against foreign industries and importers. This worldwide observed phenomenon keeps relations with foreign investors unstable; even where investor-state dispute settlement (ISDS) has made states internationally accountable for any mistreatment of foreign investors.

[5] *Bear Creek Mining v. Peru*, ICSID Case No. ARB/14/21, Award, 12 September 2017.

[6] Schreuer (2005); Sharma (2019), pp. 138–152.

Even though, states are permanently seeking to improve their relations with foreign investors by opening and promoting markets and/or by offering fiscal stimuli, among other investment-attraction policies, those relations still need to improve since they are always sensitive. The state should never assume that its actions and decision-making processes will improve any time soon (nor the investors'). States and investors' representatives are not being replaced by better prepared and more sophisticated ones. For that reason, it would be useful to implement a more institutionalised, permanent system to allow the state to consolidate its position and arguments, when an investment dispute arises.

As will be explained below in more detail, the Republic of Peru found it extremely useful to create a unit with the express mandate to represent the state in investor-state disputes and coordinate its participation and defence.[7] This unit is the judge of its own competence, it possesses exclusive representation powers, and it has the ability to determine the responsibility of those public officials and entities that generated the dispute and/or refused to cooperate for the defence of the state. This special unit provides the state with a strong capability to assess its relations with investors in different public and economic sectors and collaborate with the relevant officials in order to find creative ways to prevent and resolve potential disputes, by reacting efficiently in a timely manner and in a case-by-case scenario.

After a few years, the unit was able to identify numerous examples of public officials' behaviours creating significant risks for the state of not only being involved in international disputes but of also making disputes more costly and hard to defend. In particular:

1. Newly appointed political authorities often make decisions miscalculating their consequences, since they are often unaware of the existence of international investment agreements (IIAs) and the investor-state dispute resolution mechanisms contained in them.
2. Similarly, sometimes authorities exaggerate their confidence regarding their ability to resolve potential disputes. The problem arises when they become aware of their inability to solve the dispute and it may be too late to prevent the arbitration, since the arbitration initiation notice has already arrived.
3. Frequent renewal of public appointments also changes ministry priorities and creates potential miscommunications with investors and other stakeholders. It is also common that newly-appointed officials have no clarity over any agreement their predecessors were reaching with foreign investors or that they simply do not agree with its terms.
4. It is also frequent that high-ranking bureaucrats tend to avoid certain decisions, because they may entail personal responsibility, or even criminal liability, for any mistake incurred.
5. Many times, public officials are not aware that their internal communication exchanges could be used as evidence in an investor-state arbitration.

[7] See https://www.mef.gob.pe/es/obras-por-impuestos/documentos-importantes?id=377.

6. Most of the time, contracts are poorly drafted and their interpretation is even worse.
7. Occasionally, public officials endeavour to stamp their personal and political ideologies in their offices and positions, instead of acting neutrally in representation of the state.

Those are real situations that make state defence extremely difficult and expensive. It is important to remember that, when facing an international dispute, states not only confront the difficulties that the facts of the dispute represent but also, since bureaucratic processes are slow and involve several actions and actors, these processes can potentially create further risks.

For these reasons, states could seriously reflect on the possibility of creating a specialised unit centralising the internal coordination and representation related to investor-state disputes, in order to ensure sufficient flexibility and space to react in a timely manner and prevent potential disputes. The more practice and experience the unit and the state acquire, the most successful the prevention of disputes becomes. There are no spell books granting states the power to prevent disputes. All depends on their practice and experience.

2.3 The Landscape Is Permanently Changing

Investment protection is not a new phenomenon in the international sphere. In the early 1600s' trading monopolies were granted by sovereigns to a few companies owned by independent investors who, directly and even personally, assumed the risks of exploring, settling and developing successful mercantile activities overseas.[8] Four centuries later, after joining efforts in different ventures, including expeditions and wars, relations between sovereigns and their national private investors evolved into investor-state relations as we know them today; sovereigns signed treaties between them allowing their national investors to directly initiate disputes against those other sovereigns that breach certain agreed standards of protection.[9]

In the last few years, there has been an explosive growth of a new generation of companies in almost every sector of the world's economy.[10] From the rise of

[8]Brown (2010), p. 1.

[9]UNCTAD have registered 2,897 bilateral investment treaties and 390 treaties with investment provisions so far. See https://investmentpolicy.unctad.org/international-investment-agreements.

[10]Byanyima Winnie (2017) 8 Men Have the Same Wealth as 3.6 Billion of the World's Poorest People. We Must Rebalance this Unjust Economy", World Economic Forum https://www.weforum.org/agenda/2017/01/eight-men-have-the-same-wealth-as-3-6-billion-of-the-worlds-poorest-people-we-must-rebalance-this-unjust-economy/; Tavierne Randall (2018) How Private Companies Are Driving Growth, EY Building a Better Working World, https://www.ey.com/en_gl/growth/how-private-companies-are-driving-growth; OECD (2018) Multinational enterprises in the global economy heavily debated but hardly measured, https://www.oecd.org/industry/ind/MNEs-in-the-global-economy-policy-note.pdf; OECD (2002) Foreign direct investment for

internet giants, the growth of mining, pharmaceutical and infrastructure companies, to jet builders, airlines, mobile phones, and film producers. The value that these companies represent to their sovereigns in terms of jobs, tax collection and technological improvement appears to be critical for their national economies. For this reason, investment recipient states should ponder on these last few years' events and seriously consider that it is highly possible that sovereigns (home states) may be willing to protect their national investors and their investments abroad.

States find it increasingly difficult to control companies' mergers, or to adapt their tax systems to new realities;[11] corruption can affect governments' stability, and companies bring multi-billion claims against states before arbitral tribunals under the aegis of the International Centre for Settlement of Investment Disputes (ICSID).[12] These facts suggest that foreign investors' leverage vis-à-vis national and foreign governments is increasing too. It is important to notice that, through the agreed investor-state dispute resolution mechanisms, states have started to grant investors the right to initiate disputes against them on public international law grounds. ICSID awards are internationally binding;[13] if a state fails to comply with an ICSID award, then the investor's home state will be able to initiate countermeasures against the defaulter.

We can also identify other initiatives designed to balance international relations due to the new relevance of a company at the international level. The Organisation for Economic Co-operation and Development (OECD) is promoting a model convention to create an international taxation system,[14] looking forward to adjusting online companies' income tax collection to an effective territorial reality. The United

development maximising benefits, minimizing costs, https://www.oecd.org/industry/inv/investmentfordevelopment/1959815.pdf; UNCTAD (1998) Foreign direct investment on the rise, https://unctad.org/en/pages/PressReleaseArchive.aspx?ReferenceDocId=3173; United Kingdom, Department for International Development (2011) The engine of development: The private sector and prosperity for poor people, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/67490/Private-sector-approach-paper-May2011.pdf; Fortune, 100 Fastest-Growing Companies https://fortune.com/100-fastest-growing-companies/2019/momo/; Forbes, Most Innovative Growth Companies https://www.forbes.com/growth-companies/list/#tab:rank.

[11]The Economist (2019) France's digital tax riles the White House, https://www.economist.com/finance-and-economics/2019/07/11/frances-digital-tax-riles-the-white-house.

[12]Orta David, Allegations of Corruption in Investment Treaty Arbitration: The Need for Reform https://www.expertguides.com/articles/allegations-of-corruption-in-investment-treaty-arbitration-the-need-for-reform/arkesfdy.

[13]Article 54(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) provides: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State".

[14]See http://www.oecd.org/tax/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm.

States of America is actively prosecuting corruption outside its borders through the Foreign Corrupt Practices Act (FCPA).[15] In fact, most, if not all, of the corruption scandals of the last few years were uncovered by the application of this act.

In short, investors may have better leverage than they did a few years ago, and this may improve in the near future. States are urged to establish clear rules, relations, and commitments, or dealing with investors may become expensive in the future. It would be advisable for states to consider establishing a record of the foreign companies investing in their territories and to monitor their activities, engaging in a permanent open dialogue, in order to be capable to take the right measures at the right time to prevent disputes. Among some suggested measures, we could mention:

1. The creation of a special unit to be exclusively devoted to research, assessment and the drafting of concession contracts, including amendments. In other words, states could consider building a flexible concession contract model. This unit should be professionally prepared and have the capacity to act across all state entities, including central and local governments. Moreover, it should be in permanent dialogue with concessionaires, keeping contracts open to discussion for adjustments and improvements to the benefit of both parties.
2. The creation of a register of foreign privately-held companies entering their economies and following-up with them periodically, opening a window of dialogue with them (like customer service).
3. Periodically the state could assemble all public officials related to foreign investors and establish open discussions with them, assessing all the different problems they face, introducing mechanisms to allow collaboration with them in order to prevent disputes and possibly granting them the legal tools they need to successfully deal with investors.

2.4 ISDS in Light of Important Cultural and Practical Differences

It is important at this point to consider cultural differences when facing an international dispute. Different cultures and nations have different approaches to the concept of investment and the role of the state in relation to it; the same occurs with dispute resolution, and its particularities. In fact, the approach to private-public relations is different, even within the same regions. State officials must be aware of the fact that, when reaching arbitration, the dispute may be resolved under a totally different and strange environment for them, where not only cultural differences between the state and investors become clear but also differences between counsel, legal and procedural traditions, and arbitrators' backgrounds. Therefore, when making the decision to pursue an international arbitration, it may be better to be

[15]The United States Department Stares (2017) Foreign Corrupt Practices Act. https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

aware of the extra costs these variables involve. For these reasons, state representatives should be conscious of the fact that foreign investors are culturally different to them. In that sense, notices and communications should be kept as clear, direct and objective as possible, in order to avoid misrepresentations or future misunderstandings with investors, legal counsel and arbitrators.

An important reason to consider avoiding international investor-state disputes is the fact that the state will be navigating in strange waters, incapable of completely understanding the context where its dispute is being resolved. As a rule, arbitrators are not nationals of the disputing parties,[16] but can be of the same nationality as counsel and the experts retained by the parties, the latter representing a potential closer common understanding regarding several variables discussed in the dispute, including procedural customs. For example, international arbitration as an adversarial system is not the same as the civil law litigation inquisitorial system. It is particularly important for state representatives to consider these facts when assessing whether to pursue an international arbitration or to aim to settle the issue before it escalates into a full-blown dispute.

2.5 *States as Subjects of International Law*

A key issue to take into consideration is that investment arbitration may be the forum where states are the most vulnerable (apart from international courts). Under public international law, states' decisions, actions and public statements bind them legally.[17] In this forum, the state is not understood as the current government, where recently-appointed officials can blame their predecessors for their mistakes, faults or incompetence. In international arbitration, new governments will always need to defend the mistakes committed by their predecessors, as if they are their own. Relatedly, since states are usually divided in regions and provinces, and regional and provincial authorities also represent and internationally bind the state, permanent and close coordination with subnational governments is fundamental to avoid disputes and further international claims.

[16] Titi (2020), p. 43.

[17] Dumberry (2016).

3 Model and Practices Developed by the Republic of Peru during 2011–2015

3.1 Model

Like several other states, the Republic of Peru finds itself immersed in ISDS cases.[18] It has signed around 40 IIAs[19] and hundreds of contracts with foreign investors, granting protection to their investment and consenting to solve any related dispute in international arbitration. It is interesting to note that Peru grants access to international arbitration under ICSID and under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in most of its concession contracts, which, as I will explain later, is a very healthy policy for the prevention of disputes.[20]

In order to manage the defence of its interests in international arbitration, Peru established a coordination and response system called SICRECI (*Sistema de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión*) with the mandate to represent the state, from the reception of the investor's notice of dispute until the compliance with and enforcement of the final award terminating the dispute.[21] The system is aimed to carry out all the internal coordination efforts among all the entities that may have a direct or indirect role in the disputed facts and in the conduct of the defence strategy, in close coordination with the legal team that represents Peru before the international tribunal.[22]

Act 28933 of 2006, which established the SICRECI,[23] also created a Special Commission.[24] The coordination mechanism is quite simple. The Special Commission centralises the defence of the state by acting as its exclusive representative before the disputing investor and arbitral tribunal. As soon as the investor notifies the state of the initiation of the dispute, the Special Commission requests the relevant entities to submit their legal opinion about the dispute, with a detailed explanation of the facts, all the relevant documents and their institutional position in relation to the dispute.

With both elements at hand (the notice of dispute and the entity's opinion), the Special Commission decides on its own competence. If the dispute is considered to

[18]Peru's website of the Minister of Economy and Finance reveals a total of 16 cases that have been concluded by 2019. See https://www.mef.gob.pe/es/acerca-de-las-asociaciones-publico-privadas-apps/sicreci.

[19]See https://www.mef.gob.pe/es/obras-por-impuestos/estadisticas/197-inversion-privada/acuerdos-y-convenios-de-promocion-y-proteccion-rec/343-listado-de-acuerdos-y-convenios-de-promocion-de-inversiones.

[20]Valderrama (2018), p. 105.

[21]See https://www.mef.gob.pe/es/acerca-de-las-asociaciones-publico-privadas-apps/sicreci.

[22]Peru, Supreme Decree No. 002-2009-EF, 13 January 2013.

[23]Peru, Act No. 28933, 15 December 2006.

[24]Article 7 of Act N°28933, 15 December 2006.

be an investor-state dispute, then the Special Commission is competent to represent the state; on the contrary, if it is considered a commercial controversy, the entity directly involved in the dispute will be responsible for its own defence with its own means and budget.

Once the competence is decided by the permanent members of the Special Commission,[25] the Special Commission invites the relevant entities that are involved or have contributed to the escalation of the conflict to join it.[26] Immediately after that, it proceeds to invite the investors to an introductory session, allowing them to explain their concerns, points of view and claimed damages. After careful consideration, the Special Commission sends a written response, proposing the formal initiation of the settlement process or expressing the contrary position of the state, offering the claimant investor a chance to rebut the state's position. These actions indicate the initiation of the cooling-off period.[27]

If a formal invitation to initiate a negotiation process is sent, a signed one-page "Negotiation Protocol" is attached to the letter of invitation, containing the basic rules for the negotiation process. That document is to be signed and returned to the Special Commission in order to initiate the settlement. On the contrary, if the Special Commission decides that a settlement is not possible, it will communicate its decision to the investor. When appropriate, the Special Commission, as the exclusive representative of the state, withdraws the right of the state to continue with the cooling-off period and offers the investor the opportunity to immediately initiate the arbitration proceedings.

Depending on the nature of the dispute and the investor, the dialogue continues or is discontinued until the initiation of the arbitration. Often the cooling-off period is a very active stage of the process and sometimes it is very efficient to resolve the dispute. On other occasions, even though the dispute is not resolved, it is still very helpful to substantially reduce the damages claimed.

Once the dispute is initiated, a well-managed cooling-off period is the best method to prevent an arbitration. That is the reason of its mere existence: a reasonable period of time for both parties in a dispute to make their best efforts to settle their differences. It is key for the state to take advantage of this period and really endeavour to terminate the dispute and avoid the arbitration. Cooling-off periods typically last for six months, which is not a long period. Many times, when true efforts are made, parties find out that they may need more time to continue with the process and, assuming that both parties are engaged in trying to achieve a solution, they mutually consent to extend the cooling-off period until a solution is reached. The Special Commission is habilitated to seek an agreed solution with the investor and, once a reasonable solution is agreed, authorisation from the cabinet of ministers will be needed to sign the settlement agreement.

[25] Article 7.3 of Act No. 28933, 15 December 2006.

[26] Article 7.3 (f) of Act No. 28933, 15 December 2006; See Supreme Decree No. 125-2008-EF, 13 January 2013.

[27] Schreuer (2005); Sharma (2019), pp. 138–15.

A few other times, public officials admit their mistakes and, by making a sincere effort to better understand the investor's viewpoint, change their positions conceding the investor's request. Here the case is solved in the most efficient manner. In these cases, the Commission's work consists in approaching the parties in conflict and allowing them a space to calmly discuss. In any case, the great advantage of a disciplined handling of the cooling-off period is that, if an arbitration commences, the state is not taken by surprise but is on the contrary well-prepared to successfully respond before an international arbitral tribunal.

Act 28933 stipulates that the state's response system covers two levels of actions to be accomplished by the Special Commission:[28] (1) the *prevention of disputes* by centralising relevant information, establishing an alert mechanism and standardizing dispute resolution provisions in treaties and contracts, and (2) the *management of the defence* of the state's interests during the cooling-off period, and during the arbitration or conciliation. Efficient management of the defence is also key for the prevention of (other) disputes.

The centralisation of information is indeed very important. The state needs to have detailed knowledge of the content of the awards rendered in the arbitrations to which it is party. Tribunals' findings and interpretations that may be used against the state in the future are certainly very important to take into consideration. The same occurs with non-disputing parties' submissions, interpreting treaty provisions.[29] Records of settlement processes followed during the cooling-off period also help the state to learn from its mistakes and perfect its practice in order to avoid future disputes.

In addition, as a prevention practice, the Special Commission implemented a state-of-the-art online alert mechanism, with very simple and clear instructions, in order to raise the alarm of an incoming dispute. We also included a self-guided crash course on ISDS for the stakeholders concerned. Unfortunately, the system was never used and it now appears to have been removed from the government's website. It seemed that public officials were not convinced about using an online system that would create records of their actions, thus possibly protecting themselves against any presumption of responsibility for a dispute that may cost hundreds of millions of dollars to the state. Public officials may prefer to make phone calls, or visit offices, and discuss about potential disputes personally.

[28] Articles 7, 8 and 9 of Act No. 28933, 15 December 2006.

[29] State parties to a treaty that are not parties to the dispute may have a right under that treaty to make submissions on a question of application or interpretation of the treaty (see e.g. Article 1128 of the North American Free Trade Agreement (NAFTA). See also ICSID Arbitration Rule 37(2) on submissions by non-disputing party submissions. See further chapters by Rebecca E. Khan and Kendra Magraw, this volume.

3.2 Best Practices

Settling a dispute by mutual agreement is a right that parties to a contract have from the very beginning of their contractual relationship. Mutual agreement can entail mutually adapting to the other party's position resulting in the common understanding of the contract's telos and provisions. Even before the initiation of the cooling-off period—which prevents arbitration by encouraging the parties to seek a solution within the scope of the dispute settlement provision—, there is a useful practice that can help avoid initiating or aggravating a potential international dispute: empowering public officials.

As mentioned above, Peru's Special Commission has the capacity to decide on its own competence by assessing the nature of the dispute in question. The course of such an assessment is the perfect time to work closely with the relevant state entity and its representatives to find strategies to prevent the dispute. This is also true because this is the time when the officials involved in the dispute are more concerned about its consequences and therefore they are more open to cooperating.

Often the dispute is ignited by public servants' refusal to exercise their discretion. Whether they are placed before a contract amendment, dispute settlement or any kind of mutual concession with an investor, public officials may prefer not to sign any binding document in order to avoid any allegations of corruption or to avoid being prosecuted for any losses the state may suffer. In these cases, immediate action is required. The unit responsible for the defence of the state must be ready to officially communicate to the relevant officials its concerns about the risks such actions or ommissions represent for the state, the fact that the claimant may have a strong case and, if the dispute reaches the international stage, that the damage to the state will be high and public. Such communication must expressly stablish that the more efficient and less costly approach would be for direct and discrete negotiations to be initiated in order to reach a settlement between the entity and the investor. Finally, the unit should offer its assistance with the settlement process to the relevant public entity. This action is aimed to grant sufficient support to relevant officials to initiate the settlement negotiation procedures by creating a safe environment and a presumption against corruption. The goal for the unit should be to obtain an express statement from the investors formally withdrawing their international claims against the state, so that the dispute can be archived *per secula seculorum*.

Another interesting practice is that Peru, as previously mentioned, includes ICSID provisions in most of its concession contracts. Since such a forum is agreed in the contract, the provision can be applied both ways[30] and the IIAs' umbrella clause becomes irrelevant.[31] But the most interesting fact about being able to bring a claim against an investor before ICSID is that the system offers immediate

[30]E.g. see *Peru v. Caravelí Cotaruse Transmisora de Energía SAC*, ICSID Case No. ARB 13/24.

[31]Sasson (2017), pp. 199–242.

recognition and ultimately enforcement of its awards in 160 national jurisdictions, increasing the state's possibility of claiming against an investor far beyond its borders.

4 Fundamental Considerations and Recommendations for the Prevention of Disputes

Prevention turned to be a big part of the daily work of our unit. In our experience, once our unit became known across the country, it was almost permanently requested to provide advise on many different matters, from the drafting of contract provisions to complex or failing negotiation procedures. It was also asked to offer training courses and to give lectures to authorities, colleagues and teams about the risks of investment disputes and how to prevent them.

4.1 Some Further Considerations

States could take a few variables into consideration when planning a strategy to prevent or arbitrate investment disputes. Prevention occurs in two key areas, which will now be considered in turn.

4.1.1 In the Context of ISDS More Generally

When the state uses the ISDS regime to solve disputes with foreign investors, it may be prudent to develop a comprehensive plan for the overall defence of the state in this forum, considering a few wide-ranging actions that, in the mid- or long-term, would allow the state to prevent disputes easily. It would be useful to periodically remind public servants about the risks their statements and decisions represent for the state. As mentioned above, there is no guarantee that (elected) public representatives fully understand the entire consequences of their acts. Therefore, the special unit responsible of the defence of the state should be *permanently "touring" the different state entities and address their members* about investment dispute mechanisms and their risks.

It is very important for the state to assume a *strong and assertive defence* in investment cases, when prevention is not possible, and to confidently face investors. It is important that the investors' community perceives the state as strong and hard to prevail against, in the case of a dispute. The state should remind investors that ISDS is also of high risk for them too. This stance should be intended to discourage investors with frivolous or not-so-strong claims from initiating arbitrations against the state.

The state would like to develop a uniform position regarding investment arbitration and be consistent with it. It may not be wise to be a party to investment arbitration procedures and criticise the mechanism in other fora, since this may create contradictions and bad relations with tribunals. If the state actively uses the mechanism, it would be wise to focus its efforts on fully understanding it and obtaining the best possible results. If, on contrary, the state rejects the mechanism, then it should do its best not to be challenged before it, and withdraw from every provision that ties it to its tribunals, or in any case amend such provisions in a manner that may satisfy its needs. But if it is not consistent with its position and statements in different fora can be perceived by tribunals as contradictory, this may weaken the state's defences in its disputes. It is also key to always comply with awards and enforce them when appropriate. A good reputation has no price before a tribunal. That tribunals are able to recognise that a particular disputing state party is fair and respectful may influence on how they decide the dispute.

4.1.2 In the Context of a Particular Dispute

As already mentioned, it is of the utmost importance to pay immediate attention to the threat of initiation of a dispute and react without delay. Many disputes can be avoided with simple acts at the appropriate time. When the dispute is at its early stages, the defence team can cooperate within the state in order to enhance its ability to achieve a negotiated solution to the dispute that would prevent future international responsibility of the state. The same is true with respect to the cooling-off period, since a well-managed consultations period may avoid the initiation of an arbitration or improve the outcome of the arbitration.

It is also key for the state to establish its position in relation to the dispute, facts and the investor's claims and arguments and organise its defensive strategy accordingly. Otherwise it would be difficult to organise an effective defence. The three following facts should be kept in mind: first, the claimant always has a position in relation to the dispute; not having a position, puts the state at a serious disadvantage when negotiating or organising its defence; second, the decision on the state's position should never be delegated to the lawyers; on the contrary, the lawyers must defend the position of the state, or the proceeding will become too expensive; third, initially the position may be erroneous and, if so, it can be corrected; on contrary if there is no position, there will be nothing to correct or improve.

4.2 Recommendations

This chapter will close with some recommendations on how to build an efficient dispute prevention mechanism. Such a mechanism should have the following characteristics:

1. The system and its organs (coordination & response unit) should be created by law to avoid political criticism regarding its outcomes. Creating a system of defence supported by a thoroughly discussed law, issued by the legislative power, should reduce the risks of political challenge to the defence arguments and strategies, avoiding internal conflicts that may weaken or challenge the position of the state before investment tribunals.
2. A flexible defence structure capable of deciding its own competence. This is what allows the specialised unit to act autonomously and, by doing so, to provide assistance to other public entities. As previously mentioned, Peru's Special Commission's capacity to determine its own competence offered the state the opportunity to empower public officials and help them to prevent investment disputes.
3. Exclusive representation of the state vis-a-vis the investor and the dispute with the express ability to negotiate on behalf of the state. The unit responsible for the representation of the state should be allowed to react rapidly and to act autonomously as the exclusive representative of the state. If the unit is subject to bureaucratic procedures, then the system turns out to be useless.
4. Ability to control and unify public statements related to the dispute.
5. Ability to determine responsibility for causing the dispute and for lack of cooperation for the state's defence, and ability to request information, advice and cooperation from all public entities and officials. In the case of Peru's Special Commission, this served to persuade public officials that, contrary to their beliefs, they would become seriously liable for not settling the dispute immediately and avoiding international arbitration.
6. Ability to approve funds and hire professionals for the defence.
7. Finally, it is important to include arbitration provisions in concession contracts. These allow the state to internationally pursue damages from investors who breach the contract. This requires the decision from the state to use ISDS to its benefit which could turn out to be the best development for a state in the field of investor-state arbitration.

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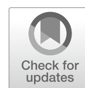
The Role of Sub-Regional Systems in Shaping International Investment Law-Making: The Case of the Visegrád Group



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Contents

1 Sub-regional Systems in Europe: The Case of the Visegrád Group and Its Role in International Investment Law-Making 136
2 Economic Cooperation in the V4: An Overview 137
3 The V4 Countries and V4 Group's Approach to FDI 140
3.1 A Focus on the Question of Termination of Intra-EU BITs 142
3.2 Forms of Economic Cooperation with Non-EU Countries: The Case of East Asia . 148
4 Concluding Remarks 151
References 152

Abstract The present chapter focuses on the role of the Visegrád group (or V4, comprising Slovakia, Hungary, Poland and the Czech Republic) in international investment law-making. The chapter starts with a brief overview of the V4 group as a sub-regional system in Europe, including its modus operandi and main achievements in the field of economic cooperation. Subsequently, it turns to the regulation of foreign direct investment (FDI), both at the level of each V4 state and at EU level—with particular regard to the implication of the EU's exclusive competence on FDI. Special attention is paid to the approach of the V4 countries towards the question of termination of intra-EU bilateral investment treaties (BITs)—including an overview of the related objections to jurisdiction that the four countries have raised over the years in investor-state arbitrations based on intra-EU BITs—and to the relationship of the V4 group with non-EU countries—especially with (selected) East Asian

The author is grateful to the organisers of the *Colloquium* on Actors in International Investment Law: Beyond Claimants, Respondents and Arbitrators (University Paris II Panthéon-Assas, 26–27 September 2019, Paris, France) and to all participants for their useful comments on the presentation of the chapter. Special thanks are also due to Peter Lysina—for the very fruitful discussion on the previous version of the chapter—and to Joanna Gomula, Daniele Butturini, Gustavo Prieto and Katarína Burdová for invaluable comments and suggestions on previous drafts of this chapter. Responsibility for any errors in the resulting work remains my own.

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countries. The main question is whether—and to what extent—the V4 group as a sub-regional system has a role to play in international investment law-making. The chapter highlights the proactive and advocacy role that the V4 group has traditionally played in manifold subject-matters, including the promotion and protection of FDI, and supports the positive "soft power" the V4 may exercise in this respect.

1 Sub-regional Systems in Europe: The Case of the Visegrád Group and Its Role in International Investment Law-Making

Sub-regional formations among states geographically close to each other and with similar political, social, economic, cultural, and historical experiences have become more common since the late 1980s.[1] Within the European context, a number of sub-regional groupings of states exist, such as Benelux,[2] the Nordic Council,[3] the Central European Initiative[4] and the Baltic cooperation,[5] to name just a few.[6] Especially in Central and Eastern Europe, almost every country is involved in at least one sub-regional grouping; one of the most significant examples in this respect is the Visegrád group (or V4, among the Czech Republic, Slovakia, Hungary and Poland).[7]

This chapter focuses on the role of the V4 in the context of international investment law-making. The relevance of this topic is twofold: on the one hand, the four Visegrád countries attract foreign investments from around the world and, accordingly, it is important to understand how they shape their relationship with the home countries of their foreign investors; on the other hand, the four countries are also members of the European Union. Since the Treaty of Lisbon has included foreign direct investment (FDI) within the exclusive competence of the EU and the latter can now conclude international investment-related agreements with third

[1]Gebhard (2013), p. 26.

[2]The Benelux Union includes Belgium, The Netherlands and Luxembourg. See the official website at https://gouvernement.lu/en/dossiers/2018/benelux.html.

[3]It includes 87 members, from Denmark, Finland, Iceland, Norway, Sweden, the Faroe Islands, Greenland and Åland. See the official website at https://www.norden.org/en/nordic-council.

[4]It is a regional organisation made up of 15 members: Albania, Austria, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Hungary, Italy, North Macedonia, Poland, Romania, Slovakia, Slovenia and Ukraine. See the official website at https://www.cei.int.

[5]It includes Estonia, Latvia, and Lithuania. For more information, see https://vm.ee/en/baltic-cooperation.

[6]Rudka (1997), pp. 196–197.

[7]Gebhard (2013), p. 26.

countries,[8] it is worth questioning whether the V4, as a sub-regional formation, may have—and to what extent—a role to play in this respect. Interestingly enough, while the V4 group tends to speak with one voice when promoting FDI from non-EU countries in the region, the four countries seem to adopt a member-specific approach on issues related to intra-EU FDI—as in the case of the question of the termination of intra-EU bilateral investment agreements (BITs).

The following paragraphs start with a brief overview of the modus operandi of the V4, which has a long-lasting tradition of cooperation in manifold topics, and examine its approach to economic cooperation (Sect. 2) and investment promotion and protection (Sect. 3) both within the EU (Sect. 3.1) and in the relations of V4 members with third countries (Sect. 3.2). Finally, the chapter offers some concluding remarks (Sect. 4).

2 Economic Cooperation in the V4: An Overview

On 15 February 1991, the heads of government of Czechoslovakia (now the Czech Republic and Slovakia), Hungary and Poland signed the Declaration of Visegrád, which marked the establishment of the Visegrád group as a forum for sub-regional cooperation.[9] One of the first aims of the V4 was "full involvement in the European political and economic system".[10] The V4 is not institutionalised[11] but works according to the principle of cooperation through high-level political summits, expert and diplomatic meetings, activities of non-governmental associations in the region, think-tanks and research bodies.[12] Each V4 country holds the presidency for one year and prepares a one-year plan of action.[13]

[8]Article 206 of the Treaty on the Functioning of the European Union (TFEU). In this respect, it should be recalled that, as specified by the Court of Justice of the European Union (CJEU) in Opinion 2/15 of 16 May 2017, the EU and its member states share competences in concluding international investment agreements (IIAs) with non-EU countries, when they include provisions on portfolio foreign investment, investor-state dispute settlement and state-to-state dispute settlement relating to provisions regarding portfolio investment. See CJEU, Opinion 2/15, Opinion pursuant to Article 218(11) TFEU—Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376, para. 305; for a comment, see the study commissioned by the European Parliament, EU investment protection after Opinion 2/15: Questions of competence and coherence. PE 603.476 (March 2019) at http://www.europarl.europa.eu/thinktank.

[9]Wołek (2013), p. 88.

[10]Visegrád declaration, 15 February 1991, http://www.visegradgroup.eu/documents/visegrad-declarations/visegrad-declaration-110412.

[11]The only organisation within the V4 platform is the International Visegrád Fund, which was established in 2000 with the aim to promote regional cooperation through grants, scholarships and artist residencies. See the official website at https://www.visegradfund.org.

[12]For information on the work and activities of the V4 group, see the official website http://www.visegradgroup.eu.

[13]See Aims and structure, Visegrád group, http://www.visegradgroup.eu/about/aims-and-structure.

V4 meetings may also take the form of the V4+ formula, when the V4 countries meet with representatives from other EU states and/or EU institutions,[14] as well as from non-EU states.[15] Moreover, the V4 cooperates with other sub-regional bodies, such as Benelux and the Nordic Council.[16] The outcomes of these meetings can be political documents including remarks and reflections on EU legislative acts and proposals, joint declarations or other political statements[17]—like the common positions of the V4 on the issue of the Western Balkans[18] or the Eastern Partnership.[19] Worth recalling are also the joint declarations of the ministers of V4 countries on European Commission communications,[20] EU proposals for regulations,[21] or EU directives.[22] The V4 has also addressed letters to the European Commission.[23] The topics covered during meetings may range from agriculture and renewable energy, to migration, financial and labour issues, to name a few.[24]

In the field of economic cooperation at the sub-regional level, it is worth recalling that the V4 countries signed the Central European Free Trade Agreement (CEFTA) on 21 December 1991, which came into force on 1 March 1993.[25] CEFTA aimed to create a free trade area in the region and to prepare the countries for their accession to the EU.[26] The EU has generally adopted a positive approach to this form of

[14]See most recently the Summit of the V4 Prime Ministers and German Chancellor that took place in Bratislava on 7 February 2019. See the outcome declaration at http://www.visegradgroup.eu/documents/official-statements/declaration-of-the-190208.

[15]E.g. the meetings on the Cohesion Policy. All the meetings and relevant outcomes, as well as all the documents of the V4 that are referred to in this chapter are available at http://www.visegradgroup.eu/calendar.

[16]See the relevant meetings listed on http://www.visegradgroup.eu/calendar.

[17]They all can be accessed (in English) here http://www.visegradgroup.eu/documents/official-statements.

[18]E.g. Joint Statement on the Western Balkans of 29 November 2016, issued at the annual meeting of the Ministers of Foreign Affairs of the Visegrád Group and the Western Balkans. The meeting was also attended by the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission Federica Mogherini and by representatives from Bulgaria, Croatia, Italy, Romania, and Slovenia.

[19]E.g. Joint statement on the 10th anniversary of the Eastern Partnership, 6 May 2019.

[20]E.g. Joint declaration of the Ministers of agriculture of the Visegrád group and Croatia on the Commission Communication on the future of food and farming, 25 January 2018.

[21]E.g. Joint declaration of the Ministers of the interior on the proposal for a Regulation on the European border and coast guard, 16 October 2018.

[22]E.g. Joint declaration of the agricultural Ministers of Visegrád group, Bulgaria and Romania on the renewable energy Directive after 2020, 21 September 2017.

[23]E.g. Joint statement and Joint letter to EC prepared during the Summit of 22 June 2012; Joint Letter to High Representative Ashton and Commissioner Füle of 5 March 2013.

[24]Strážay (2019), p. 67.

[25]Central European Free Trade Agreement, signed on 21 December 1992, http://www.worldtradelaw.net/fta/agreements/cefta.pdf.download; amended in 2006, http://cefta.int/legal-documents/#1463498231136-8f9d234f-15f9.

[26]Preamble of CEFTA (1992). See Rhodes (1998), p. 179 and Gizicki et al. (2014), p. 7.

economic sub-regional integration: indeed, good relations among neighbouring countries are a positive precondition to accession.[27] CEFTA has also served as a model of economic cooperation at the sub-regional level in order to prepare other states for accession to the EU;[28] after 1991, other Southeastern European countries acceded to the Agreement.[29] Upon accession to the EU on 1 May 2004, the V4 countries, along with Slovenia, withdrew from CEFTA, followed by Bulgaria and Romania (2007) and by Croatia (2013), when the latter acceded to the EU—and became bound to the EU common commercial policy.[30]

At the international level, the V4 countries interact with other countries in international fora and have acceded to international economic organisations and treaties, like the Organisation for Economic Co-operation and Development (OECD),[31] the International Monetary Fund (IMF),[32] the World Bank[33] and the World Trade Organization (WTO)[34] and are all parties to the Energy Charter Treaty,[35] the Multilateral Investment Guarantee Agency,[36] and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[37] while all V4 countries, with the exception of Poland, are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[38]

[27] See Balazs (1997), p. 92. The EU has had different approaches to sub-regional formations in the region; for a general account, see Zelenická (2010).

[28] It should be noted that consensus has never been reached on a possible enlargement of the V4 group, since it would have “complicate[d] the process of decision-making, simply because there would be more opinions and interests to be taken into account. [. . .] The so-called V4+ formula has been used in order to intensify cooperation with other countries or groupings in selected areas of joint interest”. Strážay T (2011) Visegrád - arrival, survival, revival. Selected V4 Bibliography. Visegrád group, http://www.visegradgroup.eu/documents/bibliography/visegradarrival-survival-120628. See also Wieclawski (2016), p. 16 and Rhodes (1998).

[29] Slovenia (1996), Romania (1997), Bulgaria (1998), Croatia (2003), the former Yugoslav Republic of North Macedonia in 2006, and Bosnia and Herzegovina, Serbia, Montenegro, United Nations Interim Administration Mission in Kosovo (UNMIK) on behalf of Kosovo, Albania and Moldova (2007). See the official website of CEFTA, http://cefta.int.

[30] Article 51 of CEFTA. See Stiblar (2013), p. 50.

[31] See https://www.oecd.org/about/members-and-partners.

[32] See https://www.imf.org/external/np/sec/memdir/memdate.htm.

[33] See https://www.worldbank.org/en/about/leadership/members.

[34] See https://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm.

[35] See https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty.

[36] See https://www.miga.org/member-countries.

[37] See http://www.newyorkconvention.org/countries.

[38] See https://icsid.worldbank.org/Pages/PageNotFoundError.aspx?requestUrl=https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.bak.aspx.

3 The V4 Countries and V4 Group's Approach to FDI

The V4 countries attract foreign investments worldwide According to Ernst & Young's 2018 European attractiveness survey, Central and Eastern Europe is perceived as the second most attractive region for foreign investors worldwide, right after Western Europe.[39] The V4 countries have concluded manifold international investment-related agreements (almost the 18% of the international investment-related agreements that are currently in force worldwide) and are often involved in investor-state dispute settlement (almost 12% of the currently known treaty-based investor-state arbitrations have involved either Slovakia, Hungary, Poland or the Czech Republic as respondents).[40]

Nevertheless, V4 countries cannot be considered as a homogenous group in terms of their economic environment and attractiveness for FDI. There are still considerable differences among them. Suffice it to recall, for example, that Slovakia introduced the euro in 2009 and has been a member of the euro zone since then, while the three remaining V4 countries are still outside the euro zone.[41]

As already recalled, the introduction of the exclusive competence of the EU over FDI has reduced the leading and exclusive role of member states in this respect. Still, V4 countries play an active role, both at the national and at the sub-regional level: first, at the national level, each and every one of the V4 countries has its own national regulation of FDI;[42] moreover, there have been actions to terminate intra-EU BITs, as detailed in the next paragraph, while there are still many BITs with non-EU third countries in force;[43] at the sub-regional level, the V4 group has issued political statements on FDI.

At the national level, each V4 country has developed its own investment promotion policy and the four countries appear quite diverse in this respect; the only common feature seems the willingness to attract FDI. Indeed, in recent years, the four countries have adopted policies aimed at increasing FDI in the region: Slovakia adopted the Act on Regional Investment Aid in 2018, providing new aids and incentives to investors;[44] the Czech Republic introduced in 2015 a new amendment

[39]Ernst & Young (2018) European attractiveness survey, https://www.ey.com/en_gl/attractiveness.

[40]For all the data see http://investmentpolicyhub.unctad.org.

[41]UNCTAD (2019), p. 152, Pawlas (2018), p. 99 and Yurchyshyn and Markevych (2015), p. 130.

[42]See Su et al. (2018), p. 1959 and Yurchyshyn and Markevych (2015), pp. 117–137. A list of the most relevent national policy measures is available at https://investmentpolicy.unctad.org/country-navigator.

[43]Slovakia has currently 41 BITs in force with non-EU third countries; Czech Republic, 69; Poland, 40 and Hungary, 41. For a general overview see Sandor (2019), pp. 457–493.

[44]Slovakia adopted new law in the field of investment aid. UNCTAD Investment Policy Monitor, 1 April 2018, https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3272/slovakia-slovakia-adopted-new-law-in-the-field-of-investment-aid.

law on investment incentives;[45] Poland adopted a new law on the promotion of investment in 2018;[46] while in 2014 Hungary established an institutional triangle—comprising the Hungarian Investment Promotion Agency, the Hungarian Export Promotion Agency and EXIM Bank—in order to support the foreign trade-focused policy of the Hungarian Government, covering the fields of investment promotion, trade development and export financing.[47] Furthermore, Poland and the Czech Republic have created state-owned special economic zones, which are customs-free and offer fiscal incentives to foreign investors;[48] in 2018, Poland adopted a new law on the promotion of investment that extended the fiscal incentives of the special economic zones to its entire territory.[49] Both Poland and Hungary had also adopted FDI national review mechanisms[50] before the introduction at EU level in 2019 of

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[45]The Czech Republic adopted Act No. 84/2015, which entered into force on 1 May 2015, amending Act No. 72/2000 Coll. (Act on Investment Incentives). See Amendments to the Investment Incentives Act. UNCTAD Investment Policy Monitor, 1 May 2015, https://investmentpolicy.unctad.org/investment-policy-monitor/measures/2829/czechia-amendments-to-the-investment-incentives-act.

[46]Poland adopted new law on the promotion of investments. UNCTAD Investment Policy Monitor, 10 May 2018, https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3244/poland-poland-adopted-new-law-on-the-promotion-of-investments.

[47]For the relevant information see the report prepared by the Hungarian Investment Promotion Agency, Invest in Hungary. Hungarian Investment Promotion Agency, 2018, https://hipa.hu/images/publications/hipa-invest-in-hungary_2018_09_20.pdf. At the same time, it quite interesting that Hungary in 2012 introduced a permanent ban on foreign ownership of farmland. See Hungary extends ban on foreign farmland ownership. UNCTAD Investment Policy Monitor, 12 December 2012, https://investmentpolicy.unctad.org/investment-policy-monitor/measures/2334/hungary-extends-ban-on-foreign-farmland-ownership-. Most recently, the CJEU found—in its Judgment of 21 May 219 in *European Commission v. Hungary*, Case C-235/17—that this legislation was in breach of the EU Charter of Fundamental Rights. See Charlotin D, EU's top Court declines to award compensation to intra-EU investors in Greek bonds, but finds Hungarian legislation aimed at foreign investors to be in violation of EU charter. IA Reporter, 3 June 2019, https://www.iareporter.com/articles/european-unions-top-court-declines-to-award-compensation-to-intra-eu-investors-in-greek-bonds-but-finds-hungarian-legislation-aimed-at-foreign-investors-to-be-in-violation-of-eu-charter.

[48]UNCTAD (2019), pp. 153–154.

[49]See Poland adopted new law on the promotion of investments. UNCTAD Investment Policy Monitor, 10 May 2018, https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3244/poland-poland-adopted-new-law-on-the-promotion-of-investments.

[50]Poland adopted the Act of 24 July 2015 on the control of certain investments. See Parliament adopts legislation concerning the control of investments in strategic sectors. UNCTAD Investment Policy Monitor, 24 July 2015, https://investmentpolicy.unctad.org/investment-policy-monitor/measures/2740/poland-parliament-adopts-legislation-concerning-the-control-of-investments-in-strategic-sectors. Hungary adopted the Law on the control of investments detrimental to the interests of Hungarian national security on 11 October 2018. See Hungary introduces national security review of foreign investments. UNCTAD Investment Policy Monitor, 11 October 2018, https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3303/hungary-hungary-introduces-national-security-review-of-foreign-investments.

Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union.[51]

Turning to the role of the V4 group, it should be noted that, in general, the V4 has always supported the promotion and protection of FDI in the region, as testified by relevant references in V4 Presidency programmes.[52] There is also an official record of meetings that have been held at V4 level on the need for cooperation to exchange data on foreign investments[53] and to attract foreign investors in the region.[54] Some V4 Presidency programmes have also emphasised the need to present a common position with regard to negotiations of international investment agreements at EU level and at the bilateral level (among V4 countries) with non-EU third countries.[55] Finally, it is worth noting the advocacy role of the V4+ meetings in relation to non-EU third countries, aimed at, among others, reinforcing cooperation in trade and the promotion of investment. The following sections investigate in more detail the approach of the V4 countries to the question of termination of intra-EU BITs and their relationship with non-EU countries, in particular with (some selected) East Asian countries.

3.1 A Focus on the Question of Termination of Intra-EU BITs

In the aftermath of the introduction of the exclusive competence over FDI for the EU with the Lisbon Treaty, one of the debates has concerned the question of termination of BITs between member states (intra-EU BITs).[56] While it is beyond the scope of this chapter to enter into the details of the debate, it is worth recalling the milestone judgment that the Court of Justice of the European Union (CJEU) issued on 6 March 2018 in the *Achmea* case,[57] where the Court found that “the arbitration clause in the [intra-EU The Netherlands-Slovakia] BIT has an adverse effect on the autonomy of

[51]Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

[52]E.g. Slovak Presidency programme 2018/2019, Czech Presidency programme 2011–2012 and Polish Presidency programme 2008/2009.

[53]E.g. Joint declaration of the Ministers of economic affairs on the future of economic cooperation, 19 April 2018.

[54]E.g. Memorandum of understanding for regional cooperation in the areas of innovation and startups, 12 October 2015 and Bratislava declaration on the occasion of the 20th anniversary of the Visegrád group, 15 February 2011.

[55]E.g. Czech Presidency programme 2015/2016 and Slovak Presidency programme 2014/2015.

[56]For a general overview, see Dimopoulos (2011), pp. 63–93, Kokott and Sobotta (2016), pp. 3–19 and István Nagy (2018).

[57]CJEU, *Slovakia v. Achmea*, Case C-284/16, Judgment, 6 March 2018.

EU law, and is therefore incompatible with EU law".[58] This judgement was followed by Declarations of EU member states in January 2019.[59] All V4 countries signed the above mentioned Declarations and started to take actions in order to terminate their intra-EU BITs, even before the Declarations, also pushing for the conclusion of a multilateral agreement on the termination of intra-EU BITs.[60] In Hungary, the Prime Minister adopted a decision in December 2018 authorising the conclusion of an agreement to terminate intra-EU BITs;[61] Poland also started to terminate its intra-EU BITs in April 2018;[62] Slovakia supported the conclusion of a multilateral termination agreement in the immediate aftermath of the Declaration of January 2019,[63]

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[58]CJEU, Press Release No 26/18, 6 March 2018, https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/Achmea-ruling-ECJ.pdf.

[59]Declaration of the representatives of the governments of the member states on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union, 15 January 2019, https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf (which was signed by 22 EU member states; Hungary signed a separate Declaration on 16 January 2019, like Finland, Luxembourg, Malta, Slovenia and Sweden.

[60]Slovakia, the Czech Republic and Poland signed the Declaration on 15 January 2019, while Hungary signed a separate Declaration on 16 January 2019. Though Hungary committed to terminate all its intra-EU BITs (like the other member states that had signed the Declaration on 15 January 2019), it had taken a different position on the consequences of investor-state arbitration claims under the Energy Charter Treaty: "Hungary declares that in its view, the Achmea judgment concerns only the intra-EU bilateral investment treaties. The Achmea judgment is silent on the investor-state arbitration clause in the Energy Charter Treaty (hereinafter 'ECT') [. . .] Hungary [. . .] considers that is inappropriate for a Member State to express its view as regards the compatibility with Union law of the intra/EU application of the ECT [. . .]". Declaration of Hungary on the legal consequences of the Achmea judgment and on investment protection in the European Union, 16 January 2019, https://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf, points 8–9. Instead, the Declaration of 15 January 2019 stated that "international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied [. . .]". The same position was also uphold by the European Commission in its Communication of 19 July 2018, Protection of intra-EU investment, COM/2018/547 final.

[61]As reported in Korom V, Sándor L, Hungary Gives the Green Light for the Conclusion of a Termination Agreement for Intra-EU BITs. Kluwer Arbitration Blog, 14 January 2019, http://arbitrationblog.kluwerarbitration.com/2019/01/14/hungary-gives-the-green-light-for-the-conclusion-of-a-termination-agreement-for-intra-eu-bits.

[62]As reported in Orecki M, Foreign Investments in Poland in Light of the Achmea Case and "Reform" of Polish Judicial System. Catch 22 Situation?. Kluwer Arbitration Blog, 22 April 2018, http://arbitrationblog.kluwerarbitration.com/2018/04/22/foreign-investments-poland-light-achmea-case-reform-polish-judicial-system-catch-22-situation.

[63]In the aftermath of the above mentioned 2019 Declaration, the Ministry of Finance of Slovakia stated that "[m]ember States are currently negotiating a multilateral Agreement on termination of intra-EU BITs and it should be signed by the end of this year. [. . .] In addition, in order to push forward implementation of the judgement, the Slovak Republic [. . .] initiated necessary steps for the bilateral termination of its intra-EU BITs". See Declaration on the legal consequences of the

while the Czech Republic had already started to request of its EU member state investment treaty partners to terminate their BITs since 2009.[64]

However, the V4 countries have not had the same approach to the question of the termination of intra-EU BITs. And indeed, while we can find an official record of meetings that were held at V4 level on the issue,[65] no official declaration has been issued at the V4 group level so far.

Confronting the objections to jurisdiction that the V4 countries have raised during the years in investment arbitration proceedings based on intra-EU BITs, it is possible to have a general idea of their approach to this issue. The Czech Republic, Poland and Slovakia[66] had questioned several times the validity of intra-EU BITs. In particular—and in some cases also before the *Achmea* judgment was issued—, objections to the jurisdiction of investment arbitral tribunals were raised not by virtue of the new exclusive competence of the EU on FDI after the entry into force of the Lisbon Treaty; rather, the argument had been that intra-EU BITs should be considered no more in existence after the countries' accession to the EU in 2004. Even though arbitral tribunals have always rejected such kind of objections to their jurisdiction, it is worth recalling the main arguments that the Czech Republic, Poland and Slovakia—as respondent states in the relevant investment arbitral proceedings—had made before arbitral tribunals.

The claims were generally grounded on the application of the Vienna Convention on the Law of Treaties (VCLT), on the one hand, and on the Treaty on the Functioning of the European Union (TFEU), on the other. More particularly, the respondent states objected to the jurisdiction of arbitral tribunals on the ground that: (1) the relevant intra-EU BIT had been implicitly terminated according to Article 59 of the VCLT[67]—according to which the Accession Treaty to the EU had

judgment of the Court of Justice in Achmea. Ministry of Finance of the Slovak Republic, Press Department, 17 January 2019, https://www.finance.gov.sk/en/press/declaration-on-legal-consequences-judgment-court-justice-achmea.html.

[64]As reported in Peterson LE, Denmark and Czech Rep to terminate BIT; but not all EU members agree with Czech view that intra-EU BITs are unnecessary. IA Reporter, 17 July 2009, https://www.iareporter.com/articles/denmark-and-czech-rep-to-terminate-bit-but-not-all-eu-members-agree-with-czech-view-that-intra-eu-bits-are-unnecessary.

[65]E.g. Report of the Slovak Presidency 2014/2015.

[66]On 18 June 2015, the Commission started infringement proceedings against five member states to terminate intra-EU BITs (Austria, Romania, Sweden, The Netherlands and Slovakia). See European Commission, Press release, 18 June 2015, http://europa.eu/rapid/press-release_IP-15-5198_en.htm. As regards Slovakia, it is reported that it had always claimed the non-validity of intra-EU BITs, including during bilateral meetings with the European Commission [interview of the author with a Legal Advisor of the Slovak Republic, Bratislava, 27 August 2019], and had raised objections to jurisdictions to investment arbitral tribunals, as illustrated in the chapter.

[67]Article 59 of the VCLT provides: "1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. 2. The earlier treaty shall be considered as

superseded earlier BITs; and/or (2) the relevant intra-EU BITs have become incompatible with EU law—given that several provisions included in the EU Treaties have the same subject-matter as those of the relevant BITs—and, accordingly, they were no longer applicable under Article 30(3) of the VCLT;[68] and/or (3) according to Article 344 of the TFEU, the European judiciary has exclusive authority to adjudicate the disputes concerning the interpretation or application of EU law;[69] and Article 18 of the TFEU prohibits any form of discrimination between nationals of member states based on their nationality[70]—and indeed, the relevant BITs would provide the right to arbitration only to investors from a particular member state, but not from other member states.

Before the entry into force of the Lisbon Treaty, these objections were raised by the Czech Republic in *Eastern Sugar v. Czech Republic*—commenced in 2004 on the basis of the Czech Republic-Netherlands BIT—and in *Binder v. Czech Republic*—commenced in 2005 on the basis of the Czech Republic-Germany BIT;[71] by Poland in *PL Holdings v. Poland*—commenced in 2014 on the basis of the Belgium-Luxembourg Economic Union (BLEU)-Poland BIT;[72] and by Slovakia in *Oostergetel v. Slovakia*—commenced in 2006 on the basis of the Netherlands-Slovakia BIT;[73] in *Achmea v. Slovakia*—commenced in 2008 on the basis of the Netherlands-Slovakia BIT,[74] and in *EURAM Bank v. Slovakia*—commenced in 2009 on the basis of the Austria-Slovakia BIT.[75]

After the entry into force of the Lisbon Treaty, the same objections were raised by the Czech Republic in *WNC v. Czech Republic*[76] and *A11Y v. Czech*

only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties".

[68] Article 30(3) of the VCLT provides: "3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

[69] Article 344 of the TFEU provides: "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".

[70] Article 18 of the TFEU provides: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

[71] *Binder v. Czech Republic*, UNCITRAL Case, Award on Jurisdiction, 6 June 2007, paras 7–20.

[72] *PL Holdings v. Poland*, SCC Case No. 2014/163, Partial Award, 28 June 2017, paras 301–304.

[73] *Oostergetel v. Slovakia*, UNCITRAL Case, Decision on Jurisdiction, 30 April 2010, paras 63–64, 82 and 103.

[74] *Achmea v. Slovakia*, PCA Case No. 2008-13, Award, 7 December 2012, paras 57–59, 86–94.

[75] *EURAM Bank v. Slovakia*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, paras 55–105.

[76] *WNC v. Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017, paras 64–68 and 294–300. The tribunal rejected the Czech Republic's objection; however, it acknowledged that "EU law was modified by the Treaty of Lisbon, and the EC has been developing its views of the legal questions involved with intra-EU investment treaties; [. . .] The Tribunal recognizes that a different

Republic[77]—both commenced in 2014 on the basis of the Czech Republic-United Kingdom BIT. As regards Hungary, it is interesting to note that, while before *Achmea* it had not contested the validity or application of intra-EU BITs in investor-state arbitral proceedings in which it appeared as respondent, after the *Achmea* judgment, it started to invoke the non-applicability of arbitration clauses included in intra-EU BITs as an objection to the jurisdiction of the investment arbitral tribunals.[78]

After the *Achmea* judgment, parties to intra-EU BITs started to respond to invitations for submission by arbitral tribunals regarding the relevance of the *Achmea* case in the proceedings at stake. V4 countries had a similar approach in claiming that the *Achmea* judgment was applicable; accordingly, they requested the arbitral tribunals to declare that they lacked jurisdiction or, at least, that they should decline to exercise jurisdiction in the cases at hand.[79]

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view may eventually prevail". See Hepburn J, Czech Republic defeats UK BIT claims over alleged failings in 2008 privatisation process; Griffith/Volterra/Crawford consider umbrella clause and MFN arguments. IA Reporter, 2 March 2017, https://www.iareporter.com/articles/czech-republic-defeats-uk-bit-claims-over-alleged-failings-in-2008-privatisation-process-griffithvolterracrawford-consider-umbrella-clause-and-mfn-arguments.

[77]*A11Y v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, 9 February 2017, paras 153–163. See Hepburn J, Bohmer L, Newly-surfaced A11Y v. Czech Republic decisions reveal fortier-chaired tribunal's reasoning on unusual umbrella clause, cooling-off periods and veil-piercing—as well as tribunal disagreements on application of MFN and objective criteria for investment. IA Reporter, 26 July 2018, https://www.iareporter.com/articles/newly-surfaced-decisions-reveal-fortier-chaired-tribunals-reasoning-on-unusual-umbrella-clause-cooling-off-periods-and-veil-piercing-as-well-as-tribunal-disagreements-on-application-of-mfn-and-ob.

[78]See Korom V, Sándor L, Hungary Gives the Green Light for the Conclusion of a Termination Agreement for Intra-EU BITs. Kluwer Arbitration Blog, 14 January 2019, http://arbitrationblog.kluwerarbitration.com/2019/01/14/hungary-gives-the-greenlight-for-the-conclusion-of-a-termination-agreement-for-intra-eu-bits.

[79]See *UP and CD Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, paras 207–279. Poland raised the same argument before the Swedish Supreme Court challenging the Final Award of 28 August 2017 in *PL Holdings Sàrl v. Poland*, SCC Case No. V 2014/163 (on 12 December 2019, the Swedish Supreme Court decided to request a preliminary ruling from the CJEU) and it is likely that Slovakia too will raise a similar argument in the ongoing *Spółdzielnia Pracy Muszynianka v. Slovakia*, UNCITRAL Case. See also the set of awards, which were all issued on 15 May 2019: *ICW Europe investments Ltd v. Czech Republic*, *Photovoltaic Knopf Betriebs GMBH v. Czech Republic*, *Voltaic Network GMBH (Voltaic) v. Czech Republic* and *WA Investments Europa Nova Ltd v. Czech Republic*. These UNCITRAL cases based on the Energy Charter Treaty and different intra-EU BITs, namely the Cyprus-Czech Republic BIT, Czech Republic-United Kingdom BIT and Czech Republic-Germany BIT, have been structured in the very same way as regards the relevant part on the question of jurisdiction. Indeed, in each one of them, the arbitral tribunal (which had the same composition in all the cases) invited the parties to submit detailed arguments on different aspects of the intra-EU jurisdictional objection, which was raised by the Czech Republic after the *Achmea* judgment. However, in all the awards, the tribunal did not directly address the intra-EU objection, considering that the Czech Republic had waived its right to submit the objection under the applicable Swiss procedural law (which was the law of the seat for all the above arbitrations). See *ICW Europe Investments Limited v. Czech Republic*, PCA Case No. 2014-22, Award. 15 May 2019, paras 396–418, *Photovoltaic Knopf Betriebs GMBH*

Most recently, an investment arbitrator has upheld—for the first time—the intra-EU jurisdictional objection in his dissenting opinion[80] attached to the jurisdictional decision in the *Adamakopoulos et al. v. Cyprus* case,[81] disagreeing with the majority's conclusion that EU law and the BITs did not have the same subject-matter; he recalled the *Achmea* judgment, reaffirming that intra-EU BITs are incompatible with EU law and finding unconvincing the conclusions reached by other arbitral tribunals—in the *Wirtgen et al. v. Czech Republic*[82] or *Magyar et al. v. Hungary*[83] cases—according to which BITs are more favourable than EU law and, in any case, they are not conflicting with each other.[84]

However, the situation is now set to change. On 5 May 2020, 23 EU member states, including all V4 countries, signed an agreement for the termination of intra-EU bilateral investment treaties.[85] V4 countries are still respondents in a number of

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v. Czech Republic, PCA Case No. 2014-21, Award, 15 May 2019, paras. 337–359, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019, paras. 438–460 and *WA Investments Europa Nova Ltd v. Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, paras 438–460.

[80]Statement of Dissent of Professor Marcelo G. Kohen in *Adamakopoulos and others v. Cyprus*, ICSID Case No. ARB/15/49, 3 February 2020, para. 68.

[81]*Adamakopoulos and others v. Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020, para. 342.

[82]*Wirtgen et al. v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017.

[83]*Magyar et al. v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019.

[84]For a comment, see For the first time, an arbitrator declines jurisdiction under an intra-EU BIT—but majority disagrees. IA Reporter, 14 February 2020, https://www.iareporter.com/articles/analysis-intra-eu-nature-of-claims-should-have-led-tribunal-to-decline-jurisdiction-in-adamakopoulos-v-cyprus-according-to-dissenting-arbitrator-marcelo-kohen.

[85]Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020, https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en. This Agreement is based on the previous Statement: EU Member States agree on a plurilateral treaty to terminate bilateral investment treaties, 24 October 2019, https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en. The draft treaty text was circulated among member states on 10 October 2019 (See Revealed: Previously-unseen draft text of EU termination treaty reveals how intra-EU Bits—and sunset clauses—are to be terminated; Treaty also creates EU law-focused facilitation process designed to settle pending bit claims. IA Reporter, 4 November 2019, https://www.iareporter.com/articles/revealed-previously-unseen-draft-text-of-eu-termination-treaty-reveals-how-intra-eu-bits-and-sunset-clauses-are-to-be-terminated-treaty-also-creates-eu-law-focused-facilitation-p. However, member states still do not agree on the question of the compatibility with the EU law of the intra-EU application of the Energy Charter Treaty—and the Preamble of the Agreement of 5 May 2020 expressly states that "[. . .] this Agreement [. . .] does not cover intra-EU proceedings on the basis of [. . .] of the Energy Charter Treaty. The European Union and its Member States will deal with this matter at a later stage". See Most EU member states agree on a plurilateral treaty to terminate intra-EU bilateral investment treaties, but differences still remain with respect to intra-EU applicability of Energy Charter Treaty. IA Reporter, 27 October 2019, https://www.iareporter.com/articles/most-eu-member-states-agree-on-a-plurilateral-treaty-to-terminate-intra-eu-bilateral-investment-treaties-but-differences-still-remain-with-respect-to-intra-eu-applicability-of-energy-charter-treaty.

pending investment arbitral proceedings.[86] It would be very interesting to follow their development also in light of the *Achmea* judgment and the multilateral agreement for the termination of intra-EU BITs.

3.2 Forms of Economic Cooperation with Non-EU Countries: The Case of East Asia

Over the years, the V4 group has developed significant relationships with non-EU countries.[87] The forms of cooperation of the V4 group with East Asia are particularly interesting, taking into account that the V4 region has hosted East Asian investment since the 1990s, e.g. the Japanese Suzuki in Hungary,[88] and have been shaped through the above mentioned V4+ meeting formula, as in the case of Japan and South Korea, or the 16+1 cooperation formula with China.[89]

The V4+Japan meetings have covered various issues including security, development assistance for third countries, climate change and new energy, science and innovation, culture, and tourism. Top-level meetings of the leaders of the V4 countries and Japan were held, together with regular meetings at the level of Ministers of Foreign Affairs and Political Directors, working groups were constituted and seminars took place in selected areas of cooperation.[90] As regards South Korea, the V4+ South Korea meetings have increased more recently,[91] with regular contacts especially at the level of Political Directors. They have also covered a wide range of issues, such as the North Korean nuclear programme and human rights situation, security issues, cybersecurity, development assistance for third countries, research and innovation, science and technology.[92]

As regards economic cooperation, in some cases, the outcomes of the V4+ meetings have called for further promotion of the economic relationship with the EU, as in the case of the V4+ Japan Joint Statement of 2013, where

[86]See most recently, the UNCITRAL case *Spółdzielnia Pracy Muszynianka v. Slovakia*, arising out of the Poland-Slovakia BIT. See Peterson LE, After ECJ ruling in Achmea case, a Kaufmann-Kohler chaired tribunal rejects a belated bifurcation bid in Spoldzielnia Pracy "Muszynianka" v. Slovakia case. IA Reporter, 10 May 2018, https://www.iareporter.com/articles/after-ecj-ruling-in-achmea-case-a-kaufmann-kohler-chaired-tribunal-rejects-a-belated-bifurcation-bid (31 October 2019).

[87]Dubravčíková (2019), p. 21.

[88]Economic relationships and FDI flows from East Asian countries have intensified in the last decades. See Éltető and Szunomár (2015).

[89]Dubravčíková (2019), p. 22.

[90]For a full list of these meetings, see the table in Dubravčíková (2019), p. 26.

[91]Dubravčíková (2019), p. 27.

[92]For a comprehensive list of V4+Korea meetings, see Dubravčíková (2019), p. 30. See also Grešš (2015), p. 12.

> [t]he V4 and Japan reaffirmed that a comprehensive Japan-EU Economic Partnership Agreement (EPA) / Free Trade Agreement (FTA) would improve access to markets for Japanese and V4's companies and thus strengthen economic relations between both sides.[93]

In other cases, the V4+ has served as an opportunity to define the best conditions for implementing existing EU international trade agreements, as in the case of the Joint Statement during the First Summit with South Korea of 2015, according to which

> The V4 and the ROK acknowledged the economic effects of the EU–Korea Free Trade Agreement (FTA) and affirmed their readiness to create favorable conditions for the economic development under the framework of the EU–Korea FTA.[94]

In the East Asian context, it is also worth mentioning the relationship of the V4 group with China, which has not been developed through the V4+ formula but has been mainstreamed within the framework of the 16+1 cooperation and China's Belt and Road Initiative (BRI) project. Indeed, China has developed a strong economic relationship with Central and European Countries (CEE).[95] In the aftermath of the global financial crisis, China put in place the so-called 16+1 cooperation format,[96] with the first Economic and Trade Forum between China and CEE countries held in Budapest in 2011. Since then, the 16+1 cooperation developed through several economic projects and major investments from China in CEE countries. The 16+1 cooperation developed according to the Budapest Guidelines for Cooperation between China and Central and Eastern European countries of 28 November 2017[97] and the

[93]Visegrád Group Plus Japan Joint Statement of 16 June 2013. The EU and Japan's Economic Partnership Agreement entered into force on 1 February 2019. See European Commission, EU-Japan Economic Partnership Agreement. In focus, 7 October 2019, http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement.

[94]Joint Statement on the occasion of the first summit with the President of the Republic of Korea of 3 December 2015.

[95]This has also raised some political concerns among EU institutions and Western EU member states. See Matura T, China and CEE: 16+1 is here to stay. Emerging Union – Opinion, 7 May 2019, https://emerging-europe.com/voices/china-and-cee-161-is-here-to-stay and Matura (2019), pp. 388–407. During the 7th summit of Central and Eastern European countries and China that took place in Sofia from 29 June to 7 July 2018, the Bulgarian Prime Minister Boyko Borisov affirmed that "[t]he 16+1 initiative is not a geopolitical platform but a win-win cooperation based on the market laws", while the Chinese Prime Minister re-stated that "[s]ome say that such a cooperation might divide the EU but it is not true", as reported in Almássy F, China – Central Europe: an intensified rapprochement through the 16+1 initiative. Visegrád Post, 29 July 2018.

[96]The 16 countries are Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Croatia, Romania, Bulgaria, Montenegro, Bosnia and Herzegovina, Albania, North Macedonia, Serbia. For an overview, Xin and Zhigao (2018) and Turcsanyi et al. (2014), pp. 127–141.

[97]Budapest Guidelines for Cooperation between China and Central and Eastern European countries, 28 November 2017, https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1514534.shtml.

subsequent Sofia Guidelines of 9 July 2018,[98] which reiterated the willingness of participant states to develop a "cross-regional cooperation platform".

Moreover, in 2013 China put in place the so-called BRI project, which is aimed to connect 71 countries in Asia, Africa and Europe. The BRI is expected to cost more than $1tn and it has raised a number of concerns as regards both the economic and political implications.[99] The BRI includes infrastructure projects (e.g. railways, energy pipelines or highways), as well as the establishment of commercial courts—in Shenzhen and Xi'an—that would deal with commercial disputes related to the BRI—ideally based on the model of the Dubai International Financial Centre Courts and the International Commercial Court in Singapore.[100]

China has encouraged strong economic relationships with V4 countries,[101] including by sending so-called "investment promotion delegations" to V4 countries and inviting officials in charge of foreign investment in V4 to China for exchanges and training.[102] In March 2018, during a meeting with vice foreign ministers of the V4 countries in China, the Chinese State Councillor restated that "Visegrád countries are representatives of European emerging market countries and the most dynamic force within the EU".[103] It is worth noting that, according to some scholars, this kind of cooperation between China and sub-regional groups could be regarded as a "testing ground" for further cooperation between China and the EU.[104]

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[98]Sofia Guidelines for Cooperation between China and Central and Eastern European countries, 9 July 2018, https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1577455.shtml.

[99]The chapter does not go into detail on this particular topic, as it is outside its scope. In general, see Kuo L, Kommenda N, What is China's Belt and Road initiative?. The Guardian, 30 July 2018 https://www.theguardian.com/cities/nginteractive/2018/jul/30/what-china-belt-road-initiative-silk-road-explainer and Chatzky A, McBride J, China's Massive Belt and Road initiative. Council on Foreign Relations, Backgrounder, 21 May 2019, https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative.

[100]Kuo L, Kommenda N, What is China's Belt and Road initiative? The Guardian, 30 July 2018 https://www.theguardian.com/cities/ng-interactive/2018/jul/30/what-china-belt-road-initiative-silk-road-explainer and Chatzky A, McBride J, China's Massive Belt and Road initiative. Council on Foreign Relations, Backgrounder, 21 May 2019, https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative.

[101]At EU level, it is worth recalling that the Council authorised the Commission to initiate negotiations for a comprehensive EU-China investment agreement on 18 October 2013. The most recent round of negotiations took place in Beijing in the week of 10 June 2019, as reported in the factsheet European Commission, Overview of FTA and other trade negotiations, July 2019, http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf. See also Liang Y, Challenges for the EU-China BIT negotiations. Columbia FDI Perspectives No 257, 29 July 2019, http://ccsi.columbia.edu/publications/columbia-fdi-perspectives.

[102]Zuokui (2014), p. 31.

[103]Reported in Blanchard B, China hosts Visegrád group, calls them 'dynamic force' in EU. Reuters—World News, 23 March 2018, https://www.reuters.com/article/us-china-easteurope/china-hosts-visegrad-group-calls-them-dynamic-force-in-eu-idUSKBN1GZ0A9.

[104]As discussed in Vetrovcova (2017), p. 74.

4 Concluding Remarks

As members of the EU, and thus subject to the EU common commercial policy, V4 countries have had to face several challenges in the management of investment regulation, with special regard to the question of the termination of intra-EU BITs—in relation to which each V4 country seemed to have had its own approach, at least until the *Achmea* judgment—and the regulation of economic interests with non-EU countries, where instead the V4 group more often acts as a "solo" actor in promoting economic cooperation with third economic partners, as in the case of Japan, Korea and China. The V4 documents that have been examined in this chapter show that the V4 countries have a deep interest in FDI promotion and protection. And indeed, the V4 has played a proactive role in this regard, serving as a platform that has enabled the countries to cooperate[105] and also to express their concerns. In this respect, the V4 can act as an amplifier in reinforcing national positions at EU level. Today, the V4 has become a "recognised" voice in international fora: the Slovak Prime Minister Robert Fico in 2012 highlighted that the V4 had "become a *trademark* known in Europe, North Atlantic and beyond".[106] Also EU institutions tend to mention increasingly the V4 countries in press releases that report some of their meetings.[107] The ability to talk with one voice through the V4 platform has been labelled the "soft power" of the V4;[108] also in the field of FDI regulation, the V4 may use its soft power to advocate sub-regional interests at EU level, as well as at the international level, in order to influence future international investment law-making in a way that takes (increasingly) into account (also) national concerns.

[105]See also the 2004 Guidelines on the Future Areas of Visegrád Cooperation, according to which "future cooperation will be developed particularly: [...] Creating new possibilities and forms of economic co-operation within the European Economic Area". Guidelines on the Future Areas of Visegrád Cooperation. Visegrád Group, 12 May 2004, http://www.visegradgroup.eu/cooperation/guidelines-on-the-future-110412.

[106]Statement by H.E. Robert Fico Prime Minister of the Slovak Republic at GLOBSEC 2012, Bratislava Global Security Forum, 12 April 2012, https://www.vlada.gov.sk//prejav-predsedu-vlady-sr-roberta-fica-na-fore-globsec-v-anglickom-jazyku, emphasis added.

[107]See e.g. the following press releases of the European Commission: Future of cohesion policy: Commissioner Hübner to address Visegrád group in Sopot, Poland. European Commission, Press releases database, 1 July 2009, https://europa.eu/rapid/press-release_IP-09-1067_en.htm and Commissioner Hahn in Bratislava in the run-up to the Eastern Partnership 10th Anniversary. European Commission, Press releases database, 3 May 2019, https://europa.eu/rapid/press-release_MEX-19-2390_en.htm.

[108]Strážay T (2011) Visegrád - arrival, survival, revival. Selected V4 Bibliography. Visegrád Group, http://www.visegradgroup.eu/documents/bibliography/visegradarrival-survival-120628.

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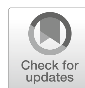
The Implications of Political Risk Insurance in the Governance of Energy Projects: The Case of Japan's Public Insurance Agencies



Thomas-Nektarios Papanastasiou

Contents

1 Introduction 156
2 The Complexity of Energy Projects 157
3 The PRI Industry 160
3.1 Main Types of Risks and Mitigation Instruments 160
3.2 The PRI Market 161
3.3 Japan's PRI-Agencies: NEXI in Cooperation with JBIC 163
4 PRI Policy Implications 166
4.1 In General 166
4.2 Operational Implications: NEXI's PRI Instruments 168
4.3 PRI Policy Implications and Responsible Investments 172
5 Conclusion 175
References 176

Abstract By purchasing political risk insurance (PRI), investors can successfully strengthen their position in the host state, allocating the burden of political risk to third parties (insurance agencies). PRI is provided by international organisations, such as the Multilateral Investment Guarantee Agency (MIGA) and state-sponsored insurance agencies, known as export credit agencies (ECAs) or public insurance agencies. This chapter focuses on the insurance schemes of NEXI, Japan's officially sponsored ECA, which plays a dominant role in providing PRI to Japanese nationals. The benefits of insurance agencies providing PRI schemes go beyond cash indemnification. PRI mechanisms include various policy requirements, operational conditions, and performance standards that not only influence the engagement of the insured investors, but also shape the regulatory authority of host governments and affect local communities. PRI plays a particularly crucial role in the governance of energy projects due to the complexity of this sector and its importance to states and local communities. However, there are policy and operational implications of PRI provision in the governance of energy projects with an adverse effect on local communities. In response, most insurance agencies like NEXI, have taken measures

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for socially and environmentally responsible investments, requiring their insured clients to comply with various social and environmental standards and establishing surveillance mechanisms and in-house grievance facilities. Even if these practices are moving in the right direction, their true functionality and effectiveness have not yet been proved.

1 Introduction

Political risk insurance (PRI) typically provides coverage to foreign investments against a host state's harmful acts (political risks), such as currency inconvertibility, expropriation, and political violence.[1] PRI is provided by international organisations, such as the World Bank's Multilateral Investment Guarantee Agency (MIGA) and state-sponsored insurance agencies, known as export credit agencies (ECAs) or public insurance agencies.[2] All major capital-exporting states support their investors through ECAs or public insurance agencies. The largest state-sponsored insurance agencies are the United States' Overseas Private Investment Corporation (OPIC), Germany's PwC Deutsche Revision, and Japan's Nippon Export and Investment Insurance (NEXI).[3]

The benefits of insurance agencies providing PRI schemes go beyond cash indemnification. ECAs are known as the "prominent victims" due to their function of assuming political risks and deterring harmful host governments' behaviour, so that their insured clients can invest in risky markets.[4] Moreover, it is not only the insurance/guarantees that mitigate political risks (direct impact), but also the insurance agencies' market-leverage (indirect impact) that influence the governance of investment projects. PRI mechanisms include various policy requirements, operational conditions, and performance standards that not only influence the engagement of the insured investors, but also shape the regulatory authority of host governments and affect local communities. PRI plays a particularly crucial role in the governance of energy projects due to the complexity of this sector and its importance to states and local communities.

However, there are general and specific implications of PRI provision in the governance of energy projects. In general, international and national insurance agencies may become indirect regulators of host states' public policy, influencing

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[1]Rowat (1992), pp. 103, 122.

[2]For an analysis of the various insurance schemes provided by international and national PRI providers, see Rubins et al. (2020), chapter 3; Papanastasiou (2015), chapter 6; Salacuse (2013), pp. 246–273; Ziegler and Gratton (2008), pp. 524–548.

[3]It is estimated that together these agencies represent over 80% of all outstanding national political risk coverage, Rowat (1992), p. 119.

[4]Markwick (1998), p. 54; see also Shanks (1998), pp. 96–98.

policyholders' decisions on sensitive issues that are related to local communities' concerns about the environment, human rights, local culture and domestic laws. In specific, there are implications in the operation of PRI providers that are related to the coverage of investment projects and the criteria that define the covered political risks, the insured events and the check points for claim ascertainment.

Finally, in response to criticisms of certain PRI policies' adverse effect on local communities, almost all major insurance agencies have incorporated specific policies for socially and environmentally responsible investments, requiring their insured clients to comply with various social and environmental standards and establishing surveillance mechanisms and in-house grievance facilities.

This Chapter focuses on the insurance schemes of Japan's sponsored insurance agencies, (primarily NEXI and secondary the Japan Bank for International Cooperation—JBIC). First, it explains their role in supporting Japanese investments overseas through the provision of PRI mechanisms with emphasis on energy projects. After presenting the intense need to mitigate political risks in the energy sector and the structure of the PRI industry and market, the specific instruments provided by NEXI and how they address policy and operational implications of PRI provision are analysed, especially in relation to responsible investment considerations.[5]

2 The Complexity of Energy Projects

Aside from addressing the implications of PRI policies in general, this chapter focuses on the governance of energy projects, asserting that there is an intense need to manage political risk in infrastructure and especially in the energy sector. Political risks are more likely to occur in the energy sector than any other industry.[6] The energy sector, by its nature, requires a high level of government involvement and co-operation with the private sector, and, as a result, whenever intervention causes problems for investors or their co-operation fails, the possibility of political risks materialising significantly increases. Specifically, the high possibility of political risk occurrence can be explained due to several peculiarities that are related to the nature of the energy industry and the complexity of private sector participation in energy investments.

[5]This chapter used sources and findings from Chapter 6 of the author's book titled "The Legal Protection of Foreign Investments against Political Risks. Japanese Business in the Asian Energy Sector" (Quid Pro Books, New Orleans, 2015). The purpose of this chapter is to consider NEXI as only an illustrative example of how most major public insurers incorporate specific standards and mechanisms for dealing with environmental and social concerns. The findings of the chapter could be addressed to all major insurance agencies which seem to adopt similar policies and practices with NEXI.

[6]Energy investors rank political risk as the most challenging factor that affects their business. See Van de Putte et al. (2012), pp. 284–299.

The opening of infrastructure sectors to foreign investment has happened much slower than in other industries.[7] Although there is a variation in the degree of openness, most developed or transitioning countries have now, for the most part, introduced foreign entities into their infrastructure industries. However, infrastructure, and particularly the energy sector, is still characterised as the most restrictive sector.[8] Access to energy resources for foreign investors is either restricted or severely limited, as most countries reserve them for their state-owned or domestic corporations.[9]

Private investment in the energy sector differs from investments in any other industry or services for various reasons. Firstly, the energy sector is characterised as socially and politically "sensitive".[10] Issues such as the price of oil or electricity, accessibility and quality of services, are always at the core of public interest and politics. Any increase in prices or deterioration of services would be noticed immediately by local communities and could result in social unrest. The operation and provision of energy services can become an even more "delicate" situation when foreign investors are involved, raising nationalistic concerns among the local societies.[11] Resource nationalism is a big factor of political risk uncertainty for foreign investors. It was named as the phenomenon according to which states confiscate or nationalise international companies in the petroleum and extracting industry, and this phenomenon is becoming more intense with resource scarcity, increasing energy prices and geopolitical tensions.[12]

The energy sector is also regarded as "strategic".[13] It not only plays an indispensable role in the economic growth and economic development of countries, but it is also related to national security and public interest concerns,[14] which is highly significant in determining whether an expropriation is legitimate or not.[15] Both western and eastern economies consider energy as one of the most strategic sectors (e.g. China,[16] the Russian Federation,[17] USA[18]). In addition, corporations operating

[7]The opening up started in the early 1990s, compared to other industries like the manufacturing sector that started much earlier in the WWII period. UNCTAD (2008), pp. 152–153.

[8]Golub (2003) pp. 87, 100.

[9]Van de Putte et al. (2012), p. 284, Figure 6.

[10]The social dimension of infrastructure is stronger in sectors like water and energy services, see UNCTAD (2008), pp. 161–162.

[11]Gomez-Ibanez (2007); see also Kessides (2004).

[12]Maniruzzaman (2009-2010), pp. 79–107.

[13]UNCTAD (2008), p. 155.

[14]UNCTAD (2008).

[15]One of the requirements for an expropriation to be lawful is the fulfilment of a "public purpose".

[16]According to Chinese foreign investment policy, power generation and electricity distribution are critical to the national economy. UNCTAD (2008), p. 155.

[17]The Russian Federation defines all natural monopolies as strategic sectors, UNCTAD (2008).

[18]The US Foreign Investment and National Security Act of 2007 requires "investigation of any transaction by a company controlled by foreign government, especially when it concerns critical infrastructure", UNCTAD (2008).

in the hydrocarbons sector are well aware that geopolitics play a major role in this business. Energy projects are particularly vulnerable to geopolitics.[19] There is great competition among western powers that are supporting their energy corporations politically and financially to win bids for energy projects and obtain access to hydrocarbons reserves, hence securing reliable natural resources for their economies. This competition is even more complex with the involvement of China and other new, large competitors from Asia.[20] Political risks in energy projects increase even more when natural resources are located in "weak governance zones" which are territories highly disputed by neighbouring states or areas where the rule of law cannot be enforced due to weak governance, political violence, civil wars and corrupt local governments, or when the energy projects raise important environmental and human rights concerns.[21]

Another factor of energy projects' complexity is the involvement of various private actors. The private sector is increasingly needed for upstream and downstream projects, improvement, maintenance, and expansion of energy services. Most countries, both developed and developing, either need private capital to bypass public finance constraints, or look for private managerial skills in order to improve efficiency and modernise their infrastructure services. On many occasions, multinational corporations (MNCs) have proved successful at providing efficient and affordable services to both developed and emerging economies.[22]

Moreover, the role of the state as the main actor in providing energy services has changed and, to a great extent, governments' activities have been replaced by the private sector. It is quite often found that market mechanisms successfully provide solutions to problematic public infrastructure services that were previously, traditionally and solely, operated by the state.[23] One of the most popular forms of private participation in energy projects is project finance. Especially in relation to hydrocarbon exploration and exploitation, or power plant construction, there are usually a variety of parties that are directly or indirectly involved with a particular investment project.[24]

Some of the main parties are the sponsors of the project—usually construction companies (contractors), financiers (such as big investment banks-lenders), suppliers of machinery and equipment important for the project, operating-companies (operators), and many other subcontractors.[25] The abovementioned companies are usually

[19]Hancock and Allison (2018).

[20]Sachs (2007), p. 82.

[21]MIGA (2007) Political Risk in the Extractive Industries: Voluntary Tools for Risk Mitigation http://www.pricenter.com/documents/perspectivesmena.pdf, p. 1; Webb (2012), p. 395.

[22]ADB, Developing Best Practices for Promoting Private Sector Investment in Infrastructure (Asian Development Bank, Manila, 2000).

[23]Multiple roles of government in infrastructure as: sponsor/investor, consumer/customer, rule-maker/regulator and mediator/moderator, see Doh and Ramamutri (2003), pp. 337–353.

[24]Esty and Sesia (2010–2011).

[25]Babbar and Schuster (1998), pp. 23–32.

private companies and each of them is responsible for undertaking a certain risk that is connected to the nature of their contribution to the project. For instance, the banks bear the financial risks, the contractors the construction risk, the suppliers the supply risk. This follows the basic principle of project finance that “risks should be allocated to the party that is best able to control the risk or influence its outcome”.[26] Nevertheless, in an energy project, financing risks are eventually allocated according to the will of the parties, as expressed in the contractual agreement. In developing countries, the state party [government or state-owned enterprise (SOE) purchaser] usually assumes more risks, including some types of risk that they are not in the position to control. In more developed countries where the investment climate is less uncertain, host governments assume less risk.[27] The empirical evidence for this has been strongly supported by the “neo-liberal” and globalisation movements advocating more liberalisation and privatisation of economic activities that are controlled by governments, such as infrastructure industries.[28]

3 The PRI Industry

3.1 Main Types of Risks and Mitigation Instruments

Given the special nature of foreign investment projects, and particularly of those related to the public infrastructure such as the energy sector, states and multilateral investment-guarantee agencies have developed a mix of risk-mitigation instruments that cover three broad types of risk: political risk, credit risk, and exchange-rate risk (currency-devaluation risk).[29] From a general point of view, only the first category is related to the mitigation of political risk. However, what a political risk is, is not always well defined. There are cases of non-commercial risks that can be also covered by political risk mitigation instruments.[30]

Multilateral institutions and state-sponsored insurance agencies increasingly focus on the mitigation of political risk in relation to the facilitation of infrastructure project financing. The instruments that are used to mitigate political risk are typically “termed partial risk guarantees” (PRGs), such as the guarantees provided by the World Bank Group (WB Group) or PRI mechanisms used mainly by ECAs such as NEXI. These political risk instruments mainly cover expropriation risks (“indirect”

[26]Hoffman (2008), p. 28.

[27]Babbar and Schuster (1998), p. 20.

[28]Classical economic theory has influenced and, to some extent, shaped international economic law, supported by the “North”, the capital exporting countries. It has emphasised the free movement of capital and the protection of investments through better standards of treatment and neutral arbitration tribunals for the resolution of investment disputes, Sornarajah (2004), pp. 51–57 and pp. 293–294.

[29]UNCTAD (2008), p. 171.

[30]Matsukawa and Habeck (2007), pp. 1–5.

or "creeping" expropriation was not usually covered),[31] currency inconvertibility, restriction on transfers of funds, war and civil disturbance risks.[32]

However, there has been an expansion in PRI coverage, which has come to include breach of contract, arbitration award default, and various risks related to project-specific undertakings. It is a significant shift from the traditional coverage of political risk, moving towards the coverage of specific governmental obligations that are contractually undertaken between the host state and the foreign promoter of an infrastructure investment. Nevertheless, the borders between political and commercial risks have become more blurred and, as has been said, "[o]ne may argue that some of these risks fall in between traditional commercial risks and traditional political risks".[33]

3.2 The PRI Market

3.2.1 Historical Background

One of the first PRI investment programmes was initiated by the US Government with the Marshall Plan in 1948. Its purpose was to encourage US investments overseas under the reconstruction policy in post-war Europe. Thus, it was not until the 1990s that the demand for PRI business increased significantly. After the fall of the Soviet Union, and especially as a result of the open-market policy, globalisation and liberalisation movements launched by the capital-exporting countries, unforeseen business opportunities opened up for foreign investments in many developing countries, especially in the areas of natural resources and energy. This increased the demand for PRI tools.[34] However, the 11 September 2001 terrorist attack in the United States, the Argentine financial crisis,[35] and the global financial crisis that was induced by the Lehman Brothers' bankruptcy and the US subprime mortgage crisis in 2008 affected the PRI industry significantly, changing the way investors and insurers assume political risks. The possibility of suffering extreme losses due to terrorism, but also the rising uncertainty of the global financial crisis with its potential sovereign and corporate defaults, reinforced the debate as to whether, with such unpredictable situations, the PRI market should be allowed to

[31]"Creeping expropriation" or "indirect expropriation" are also replaced by the term "de facto expropriation". Creeping expropriation means that the host state has taken a series of measures with a cumulative expropriatory effect, while indirectly emphasising the fact that the investor's formal or nominal title to the asset was not actually affected, see Shanks (1986), pp. 417 and 424.

[32]MIGA (2011), p. 56.

[33]Matsukawa and Habeck (2007), p. 5.

[34]MIGA (2010), pp. 54–55.

[35]*Standard & Poor's (2002)* The Argentine Crisis: A Chronology of Events after the Sovereign Default http://www.standardandpoors.com/europe/francais/Fr_news/Argentine-Chronology-of-Events_12-04-02.html.

continue on the same scale, or whether it should alter its policy on political risk coverage.

To date, the PRI market, or political risk guarantee market,[36] consists of two broad categories: guarantees for export or trade credit and investment insurance. This chapter, referring to the coverage of political risk in relation to overseas investment projects, focuses solely on the role of investment insurance.[37] However, potential protection of a foreign investment could also be offered by combining guarantees for political risk provided by export credit or trade tools. There are certain instruments that cover losses to exporters or lenders financing projects tied to the export of goods and services (trade coverage). For example, regarding investments in infrastructure, the export credit guarantees can cover losses due to political risk for services that are connected to engineering, procurement and construction (EPC) contracts. In addition, sovereign and corporate debt risk can be covered regardless of whether the reason for the default is commercial or political.[38]

3.2.2 PRI Providers

As mentioned above, the PRI market consists of multilateral and public (national) insurers and a significant number of private enterprises. The multilateral agencies that provide risk mitigation instruments are mainly multilateral development banks (MDBs) such as the World Bank Group, the Asia Development Bank (ADB), the Inter-American Development Bank (IrADB) and the European Bank for Reconstruction and Development (EBRD). Additionally, there are some multilateral agencies that specialise in providing political risk guarantees, such as the African Trade Insurance Agency, the Inter-Arab Investment Guarantee Corporation, the Islamic Corporation for the Insurance of Investment and Export Credit, and the most important, MIGA, which belongs to the WB Group.[39]

As far as the public or national agencies are concerned, they are generally bilateral development agencies and ECAs. ECAs are the most important type of PRI provider, existing in almost all of the big capital-exporting countries, as well as in the recently transitioning economies, such as Brazil, Russia, India, China and South Africa (BRICS), and in some other less powerful economies. ECAs can be considered a large category of national agencies including export-import banks, export credit guarantee agencies and investment insurance agencies.[40] Their

[36]As mentioned before, they are the same but their names change depending on the provider: 'PRI' is used by NEXI and 'political risk guarantees' is used by MIGA.

[37]However, the area between traditional investment and export credit insurance has become blurred, see Stephens (1998), pp. 148–168.

[38]Matsukawa and Habeck (2007), p. 4.

[39]MIGA (2011), p. 55.

[40]Matsukawa and Habeck (2007), p. 9. For a list of the major bilateral agencies and their risk mitigation instruments, MIGA (2011), appendix B2, pp. 50–84.

organisational structures vary depending on their particular country's policies. For example, in the United Kingdom it is part of the government, in Germany and France they are private entities, and in Japan and the United States, ECAs are considered to be autonomous public agencies and thus not absolutely independent from public administration. ECAs are subject to international regulation by the Organisation for Economic Co-operation and Development (OECD) and the World Trade Organisation (WTO). Most of the ECAs provide guarantees for both political and commercial risks, though it has been questioned whether their role allows them to provide long-term commercial risk insurance for infrastructure project-financing.[41] Finally, even if the objectives of bilateral agencies differ from those of multinational organisations (they pursue more nationalistic purposes),[42] their activities are often complementary in providing guarantees for many transactions related to energy project financing.[43]

3.3 Japan's PRI-Agencies: NEXI in Cooperation with JBIC

3.3.1 NEXI: Background

One of the largest state-sponsored insurance agencies internationally is NEXI,[44] which, along with the lending and guarantee function of JBIC, is Japan's export credit agency and public insurer, furnishing a variety of investment-related services for Japanese investors. Japan's investment insurance system was established in 1950 to support Japanese exports by providing guarantees against political risks such as war, currency controls and expropriation. The system was managed by the predecessor of NEXI, the Export-Import Insurance Division (EID) that was incorporated into the Ministry of Economy, Trade and Industry (METI). In April 2001, NEXI was established as an incorporated administrative agency, taking over the ministry-managed service and acquiring administrative and operational autonomy. On 1 April 2017, NEXI was transferred to a 100% government-owned special stock company, strengthening its ties with the government, so as to better support public policy in NEXI's business.[45] Thus, NEXI continues to function under the auspices of METI, which provides NEXI with its capital and reinsures insurance agreements underwritten by NEXI. As of 1 April 2019, NEXI's capital budget is JPY169.4 billion (100% state-owned) and 195 officers are employed there.[46]

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[41]Short (2001), p. 1371.

[42]ECAs usually serve their countries' national interests whereas MDBs do not tie their programmes to the nationality of exporters or investors, see Hoffman (2008), p. 295.

[43], p. 73 and see also Matsukawa and Habeck (2007), p. 10; Moran (1998), p. 140.

[44]NEXI website https://www.nexi.go.jp/en/index.html.

[45]NEXI (2017) Annual Report FY 2016, p. 7.

[46]See NEXI's Profile https://www.nexi.go.jp/en/corporate/profile.html.

Since May 1970, NEXI has been a member of the Berne Union (the International Union of Credit and Investment Insurers), which is a forum where ECAs from various countries exchange information on common issues of export credit and investment insurance. The Berne Union announced in October 2008 a new set of Guiding Principles that mandate member-agencies to adopt a uniform policy about how to conduct investment insurance in general. NEXI is also a member of the Paris Club, an informal international group that provides solutions to sovereign debt problems between debtor and creditor countries. Finally, NEXI is a member of the OECD's working party on Export Credits and Credit Guarantees, signing the Agreement on Officially Supported Export Credits called the OECD Consensus.[47] The OECD working party issues recommendations in an effort to shape ECAs' behaviour towards export credit and investment insurance as well as issues related to fair competition,[48] bribery, corruption, and environmental protection.[49]

NEXI's mission is to facilitate the promotion of Japanese trade and investment by mitigating political and commercial risks in export and overseas investments through PRI provision.[50] NEXI provides insurance for investments and exports in both developing and developed countries. NEXI often operates in conjunction with other programmes, provided by JBIC,[51] or development programmes offered by the Japan Investment and Cooperation Agency (JICA). NEXI is especially active in providing insurance for large investment projects in several countries' public infrastructure, such as for megaprojects in the energy sector sponsored by Japanese private entities. As it is stated in the medium-term business plan (FY2019–FY2021), the promotion of infrastructure exports by Japanese companies and the support to businesses that are related to infrastructure development programmes overseas are primary objectives of NEXI in contributing to Japan's efforts to implement its national policies.[52]

NEXI has played a crucial role in protecting overseas investments against political risk. Until today, the majority of large Japanese corporations have not been willing to invest abroad without using NEXI's PRI mechanisms. When it comes to

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[47]Hoffman (2008), p. 296.

[48]Each of the member countries in the OECD Consensus has to limit export credit to no more than 85% of the contract value in order to protect competition from distortion, Hoffman (2008).

[49]Hoffman (2008). However, with regards to project financing, the OECD Consensus was amended in 1998, allowing member-countries' ECAs to support projects financed on a limited recourse basis without any limitation. This exception is very important for foreign investments in the power sector, as most of the project-financing mechanisms are related to infrastructure projects.

[50]Article 4 of Japan's Trade and Investment Insurance Act of March 1950 (No. 67/1950) and the Amendment Act of December 1999.

[51]JBIC also provides some political risk guarantees, but it mainly functions as a creditor of Japanese investments with NEXI being the main insurer providing PRI for loans and equity for overseas investment.

[52]NEXI (2018) Annual Report FY 2017, p. 60.

the protection of overseas investments against political risk, the reliance of Japanese corporations on NEXI is such, that it is conceived as a "last resort" mechanism.[53]

3.3.2 JBIC: Background

JBIC is Japan's bilateral agency that provides debt financing to Japanese investors. It was organised in 1999 as a financial institution of the Japanese Government, but it has existed much longer, since 1950, when its predecessor, the Export-Import Bank of Japan, was established.[54] On 1 October 2008, JBIC became the international wing of the Japan Finance Corporation (JFC), continuing to use its name for its international finance operations and, on 1 April 2012, JBIC was established in accordance with the Japan Bank for International Cooperation Act (JBIC Act), wholly owned by the Japanese Government.[55] One of JBIC's missions, similarly to NEXI, is the promotion of Japanese investors' "overseas development and acquisition of strategically important natural resources to Japan", as well as "maintaining and improving the international competitiveness of Japanese industries".[56]

JBIC is the main financing arm of Japan's public borrowing. Its principal operation is to provide financial assistance including loans, bonds, and concessionary long-term and low-interest funds. JBIC offers limited guarantees that cover loans and bonds but not equity like NEXI does. It mainly functions as a creditor of Japanese investments and not as an insurer, in order to avoid "operation-overlapping" with NEXI. Actually, JBIC's main role is lending operations. It can provide up to 60% of the total lending that is needed in each case. The remaining 40% is covered by commercial banks (co-financiers) for which political risk is insured by NEXI. Consequently, the practical contribution of agencies such as JBIC and NEXI is that private investors can achieve much better terms in borrowing funds from commercial markets. Without the guarantees of JBIC and NEXI, the maturity of loans offered by the markets cannot exceed a period of five, or maximum seven, years, which is very short considering that most energy-financing cases have a project-life of a period between ten to fifteen years. With JBIC-NEXI guarantees, the maturity of loans can be extended to at least ten years and, if required, to a longer period. JBIC provides financing tools such as overseas investment loans (OIL), overseas untied loans (OUL) and buyer's credit (BC),[57] whose political risks are covered by NEXI's overseas investment insurance (OII), overseas untied loan

[53] NEXI (2018) Annual Report FY 2017.

[54] Japan's Export Import Bank Law of 1950.

[55] JBIC, Annual Report FY 2018 (Japan Bank for International Cooperation, 2019), p. 3.

[56] JBIC, Annual Report FY 2018 (Japan Bank for International Cooperation, 2019), p. 101. When projects contribute to these national policies, JBIC may even apply special interest rates on borrowings. See also, JBIC Profile, Role and Function https://www.jbic.go.jp/ja/about/role-function/images/jbic-brochure-english.pdf, pp. 2–3.

[57] See JBIC Profile, Role and Function https://www.jbic.go.jp/ja/about/role-function/images/jbic-brochure-english.pdf.

insurance (OULI), and buyer's credit insurance (BCI) respectively. Therefore, NEXI is the main insurer of Japanese investors with JBIC only playing a supplementary role by providing some limited political risk guarantees and focusing mainly on lending operations.

4 PRI Policy Implications

4.1 In General

Examining the overall function of PRI mechanisms, there is a "grey-zone" about the political risk notion and how the PRI international or national agencies perceive it. First, the distinction between political and commercial risks is blurred, mainly because it is difficult to determine political risk. For example, it is not easy to distinguish whether a default in the payment by a government-operated energy utility, or a failure to deliver services, is due to political or commercial reasons.[58]

In addition, political risks emanate from the unpredictable behaviour (action or inaction) of host governments interfering with a foreign investor's business and negatively influencing its profit.[59] Such uncertainty arising from the host government's change of behaviour is exactly what political risk is all about.[60] However, this definition is problematic. Change of governmental behaviour towards private investments may often be justified as an exercise of regulatory authority, a legitimate intervention in pursuit of public policies or to protect local communities' interests.

Nevertheless, as Professor Celine Tan indicates, most PRI providers are more concerned with the financial impact of a governmental intervention than with its reasons; PRI agencies are less concerned about why a host government changes its behaviour towards a foreign investment, than with how such change "affects the financial viability of the project in question".[61] In particular, there is no solid evidence that PRI agencies properly investigate the insured investor's behaviour with respect to allegations of collusion with the host government, or the effect of an insured project on local communities' concerns about the environment, the local

[58] On commercial risk and commercial risk management, see Boyce (2003).

[59] Rubins et al. (2020), paras 1.01–1.07.

[60] Most international investment agreements are driven by the needs of the capital exporting countries which impose on their counter-parties (host states) rules and conditions of free entry into specific sectors and require host states to refrain from intervening in the operation of foreign investors, thus enhancing regulatory certainty. This phenomenon has been described as the "political economy of certainty", see Schneiderman (2008), pp. 205–206.

[61] Tan (2015), pp. 179–180.

culture, labour rights, human rights, and violation of domestic laws.[62] On the contrary, most PRI policies refer to the protection of the insured investors or projects against general acts of ill governance by host governments, without distinguishing whether these acts are taken in favour of local communities' interests that compete with the insured investor's interests.[63]

In general, PRI policies play a major role in determining both host governments' and foreign investors' behaviour. PRI providers, especially international agencies like MIGA,[64] or national credit and insurance providers such as JBIC and NEXI from big capital-exporting countries like Japan, are important actors for the successful implementation of megaprojects in the energy sector. These projects often need diplomatic support from the investor's home country to secure agreements with host states, but also credit and investment insurance in order to minimise risks and secure better terms of financing from international financial institutions and private banks. Such support is usually given when a well-established PRI provider is involved in the project through an insurance contract with the foreign investor. For this reason, foreign investors are ready to accept all required conditions imposed by public insurers' operational policies, contractual terms and underwriting criteria. In that sense, insurers may not only affect the design of the investment project, but also the relationships between the insured investor and the host government. National PRI providers, exercising the leverage of their home state's economic diplomacy, may often indirectly influence host governments to secure better terms and treatment for their insured investors.[65] Public insurers may become "covert regulators" that have an impact on the wider public policy of the host government's policyholders, through their monitoring mechanisms of the contractual agreement and by framing the risks and responsibilities between the parties.[66]

In particular, subrogation clauses and the PRI due diligence framework influence the host states' behaviour towards the insured investor, even if they are third parties to PRI contracts. PRI providers require the insured investor to take into consideration social and environmental criteria in order to cover the investment project. But at the same time, PRI policies determine the allocation of risks and responsibilities between the insured investor and the host state. As explained below, what PRI

[62]For example, it was reported by the World Bank's Compliance Advisor and Ombudsman (CAO) in its audit relating to MIGA's involvement in the Dilukushi copper and silver mine in Congo, that MIGA used its social and environmental due diligence framework to inspect the likelihood of future claims by the insured client, rather than to assess the possibility of the insured project's adverse impact on local communities, see CAO (2005), CAO Audit of MIGA's Due Diligence of the Dikulushi Copper-Silver Mining Project in the Democratic. Republic of the Congo: Final Report, pp. i–ii. 7–8).

[63]Moody (2005), pp. 6–7.

[64]For a description of the organisation's role, its rules and insurance schemes, see Protopsaltis (2014).

[65]Heimer (2002), pp. 117–129.

[66]Heimer (2002), p. 119.

providers require from the insured investor is closely related to the host state's regulatory authority.

Capital exporting states tend to insert a subrogation clause into their international investment agreements.[67] According to the subrogation clause, the foreign investor's home state has the right to take over claims of its own investor that is compensated through a PRI arrangement.[68] For example, after indemnifying the investor, NEXI substitutes the investor in all its legal rights and claims against the host government through subrogation. For this reason, before compensation is paid, NEXI requires an assignment to itself of all the investor's rights, titles, and interests. If the host state has not obtained a bilateral investment treaty with Japan, there is a theoretical possibility that the host state will not recognise NEXI's subrogation right, though such possibility is considered as a rare case scenario. Nevertheless, some bilateral ECAs and multilateral agencies offer insurance only to those investments that are sited in countries that have obtained investment treaties with the investors' home countries.

In conclusion, the possibility of the home state (through its public insurer) taking over its own investor's rights could potentially prevent host states from taking any regulatory or administrative measures.[69] When host states are not willing to make any administrative intervention or regulatory change that may affect an insured energy investment (even when such change would serve public interests), this has an adverse impact on host states' regulatory sovereignty, resulting in regulatory chill.

4.2 Operational Implications: NEXI's PRI Instruments

4.2.1 In General

In order to better understand how a PRI policy is implemented and its implications in the governance of energy projects, it is best to examine NEXI's PRI instruments and how they are used in NEXI's operations. NEXI offers insurance for loans, equity investments, assets and rights, and any other investment structure that is subject to long-term exposure to political risk. As mentioned above, NEXI's coverage is related to trade and investment and is provided for protection against both political and commercial risks.

Among the various PRI instruments that NEXI offers, the most important insurance type suitable for investment in energy projects is OII and its specification, the Investment and Loan Insurance for Natural Resources and Energy. NEXI offers this

[67]Similarly, Japan has included a subrogation clause in most of its economic partnership agreements (EPAs), see Papanastasiou (2015), Chapter 5.

[68]Konrad (2013), pp. 31–32. See also Rubins et al. (2020), para. 3.134.

[69]Tan (2015), pp. 184–190.

type of insurance as a hedge against both political and commercial risks. It covers overseas investment for capital subscription or equity, for acquisition of business rights and titles (real property, equipment, mining rights, licences, concession etc.) and it even protects reinvestments in a third country. This last function of insurance for reinvestment via an investment recipient is a unique type of investment insurance provided by NEXI. It increases the protection provided to the Japanese subsidiary in a host country by expanding the insurance to investments made in a third country (the Japanese subsidiary performs direct business without establishing its own subsidiary in the third country), and guarantees against losses suffered due to political risk not only in the host country, but also in the third country. NEXI provides supplementary contracts to address these risks, subject to special agreement.[70] However, there are some operational implications that affect the governance of energy projects. These implications are related to the clarification of political risks covered by NEXI, the events that are required by the agency's criteria to trigger political risk insurance and the list of check-points for claim ascertainment.

4.2.2 Covered Political Risks

Political risks covered by NEXI's OII include expropriation and infringement of rights, war, political violence or civil disturbance, currency inconvertibility and non-transfer of funds, as well as natural disasters (*force majeure* risk).[71] In addition to these risks, OII covers some commercial risks such as insolvency of debtor and breach of contract by the other party which, under certain conditions, could be considered to be political risks as well.[72]

In particular, with regard to an expropriation case, OII makes NEXI liable to indemnify for losses suffered by the insured investor that result from expropriation (direct and indirect) of stocks and equities caused by the host government's interference, actions, or inaction, of central or local public entities, or any similar entity such as an SOE or public utilities, e.g. an electric utility.[73] Thus, in case a host government claims that its actions are legitimate regulations, NEXI cannot compensate for the damage that the insured suffered unless an arbitration award has been issued. Similarly, in the case of an infringement of rights, investors are protected from deprivation of important rights and assets such as titles of real estate, licences, or any other right that is important in carrying out operations, e.g. power purchase

[70]NEXI (2009) NEXI Business Guide, Overseas Investment Insurance section, p. 8.

[71]Article 2 (16) item 1 of the Trade and Investment Insurance Act No. 67 of 1950.

[72]For example, if the other party to the investment contract is the host government (central or local, public agencies or SOEs), which is usually the case in energy investments, any indemnity for losses suffered due to the government's breach of contract or due to insolvency caused by the government's political interference could be considered to be a PRI tool, provided that a supplementary contract between NEXI and the insured investor is signed.

[73]NEXI, Policy Conditions for Overseas Investment Insurance, Partial Amendment of 14 March 2007, Chapter 2, Article 2, p. 1.

agreement in the supply of electricity (expropriation of rights) and equipment, or raw materials, etc. (expropriation of mobile assets).[74] Therefore, NEXI will not insure against losses due to an infringement of rights when a government's acts are in accordance with domestic or international law. Finally, the change of law or regulation risk is also mitigated by OII, which covers losses that result from the imposition of new laws. In this case, the new law or regulation should be unfair and discriminatory or against an international treaty and cause losses.

Under these conditions, NEXI's PRI instruments require a governmental measure to be discriminatory in order to cover losses suffered by the insured investor. This exclusion of non-discriminatory measures of general application from insurance coverage is followed by most international and national insurers' policy.[75] However, in the case of energy investments it is quite difficult to distinguish between a non-discriminatory governmental measure and an indirect or creeping expropriation. First, because the host state's regulatory measures usually apply to all companies involved in the industry. For example, a governmental decision about an electricity tariff adjustment or energy prices affects all market participants.[76] Second, it may be impossible to determine whether a government's measure constitutes discrimination, as energy services are, for most states, a regulated monopoly. In such a case, the foreign investor may be the only actor operating in one sector (usually that is the case for electricity or gas networks, where a single transmission or electricity utility provides services), so there is no other actor in the industry against whom to compare the treatment of the alleged measure. Therefore, with no comparison it is difficult to prove whether an act or omission by the host government that has an adverse effect on foreign investment constitutes an indirect expropriation or a non-discriminatory measure of general regulatory application.[77]

4.2.3 Insured Events

According to NEXI's policy, in order for the abovementioned political risks to be covered, there are certain events which need to occur. These events are in some cases ambiguous. For example, NEXI requires, among others, the investor's inability to operate as a result of political risk materialisation (e.g. breach of contract, infringement of rights, war risk, etc.). Thus, the suspension of operation cannot be partial, but rather there needs to be a full halt in operation. This may cause uncertainty in

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[74]NEXI, Policy Conditions, p. 2.

[75]Kantor (2015), p. 179.

[76]For example, that was the case in the *CMS v. Argentina* and *LG&E v. Argentina* arbitrations, where the tribunals concluded that Argentina's conduct was non-discriminatory because it applied an across-the-board regulatory change (currency obligations and tariff adjustments) to all corporations in the gas transmission industry, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, paras 468–469 (12 May 2005). *LG&E Energy Corp et al v. Argentina,* ICSID Case No ARB/02/01, Decision on Liability, paras 146–148 (3 October 2006).

[77]Kantor (2015), pp. 179–180.

cases of complicated projects such as energy investments which consist of various kinds of operations (e.g. power plant operation, fuel supply operation, transmission through the grid, etc.) and it raises questions about whether a claim for insurance is valid when a partial halt of one kind of operation causes substantial damage. In this case, the insured investor will not be able to satisfy any claim for insurance of losses suffered due to breach of contract, and NEXI will not indemnify the losses if the insured company continues the operation even partially. According to NEXI's policy, the covered event can only be "bankruptcy", full "inability to operate", or full suspension of operation for more than three months.[78]

4.2.4 Claim Ascertainment

Even when the covered events occur, that does not mean that NEXI will automatically satisfy the insured client's claims. Another implication of almost all ECAs' operations is related to "check points for claim ascertainment". NEXI has developed a list of check-points for claim ascertainment in order to examine whether the insured's claim in each case of the covered political risks is valid or not. ECAs need evidence of the impact on the investment's economic interests and operation caused by the insured event, requiring a causal analysis between the event and the damage suffered. However, the foreign investor is not always in a position to prove the causality of damages when the events (e.g. government actions or inaction) are indirectly connected with its damage, such as in the case of creeping expropriation or when the overall result of the government's actions only becomes apparent much later. Several causes may coexist at the same time, for example a slump in electricity sales (commercial market risk) and the host government's unilateral increase of the agreed fuel price supplied to the investor's power company (breach of contract risk or regulatory risk). Both of these causes have an adverse effect on the company's operation, but only the second can be an insured political risk covered by NEXI's insurance.

As regards expropriation, NEXI will only indemnify the insured for the losses that are related to its equity share or for the seizure of its specific right when the investment company is a joint venture among many shareholders. As for investments in the energy sector, project-financing is the standard form of investment. For example, power project finance is implemented through a special purpose vehicle (SPV), a joint-venture company consisting of a multi-level group of shareholders, such as sponsors, lenders, operators, EPC contractors, suppliers, and many others. In such a complicated mix of shareholders, NEXI needs to identify the extent of the insured's right to the equity or assets of the particular investment, something that is not an easy task.

[78]NEXI (2009) *NEXI Introduction Brochure*, p. 16.

4.3 PRI Policy Implications and Responsible Investments

Following criticisms about PRI approaches to environmental protection, human rights, and concerns about the violation of domestic laws, and in response to allegations of the adverse effect of insured projects on local communities, most international and public insurers have addressed policies for responsible investments. The term responsible investment implies an effort by the international community to integrate into international investment law policies that take into consideration non-investment related factors, such as protection of the environment and human rights concerns. In this vein, some recent international investment treaties require responsible business conduct, including safeguards for the promotion of sustainable development, the protection of labour rights and the environment, the provision of anti-corruption policies and corporate social responsibility.[79]

According to these policies, PRI providers require their prospective clients to comply with various social and environmental standards in order to insure their investment against political risks. For example, MIGA was the first insurance provider to adopt performance standards in eight areas of business practice,[80] following up from national providers, most notably OPIC.[81] Similarly, NEXI has issued the Guidelines on Environmental and Social Considerations in Trade Insurance (Guidelines), which allow it to examine whether the potential insured project takes into account the environmental and social considerations required by the Guidelines.[82] Energy investment projects are likely to have a significant adverse environmental and social impact and, therefore, they are classified into Category A in NEXI's screening process, which means that the project-sponsor needs to comply with stricter standards.

In addition, the majority of national PRI agencies have incorporated monitoring instruments in order to assess the insured projects' performance and to verify

[79]Cotula L, 'Raising the Bar on Responsible Investment: What Role for Investment Treaties?', *IIED Briefing* (March 2018), https://pubs.iied.org/pdfs/17454IIED.pdf. See also Webb (2012) pp. 394–415.

[80]The first performance standard is named as "assessment and management of environmental and social risks and impacts", see MIGA (2013) Policy on Environmental and Social Sustainability www.miga.org/documents/Policy_Environmental_Social_Sustainability.pdf, cited in Tan (2015), p. 187.

[81]OPIC (2010) OPIC: Environmental and Social Policy Statement www.opic.gov/sites/default/files/consolidated_esps.pdf, cited in Tan (2015), p. 187.

[82]NEXI's Guidelines are identical with JBIC's Guidelines (see JBIC Guidelines for Confirmation of Environmental and Social Considerations https://www.jbic.go.jp/en/business-areas/environment/confirm.html); NEXI's Guidelines were established taking into account the Common Approaches at OECD Working Party on Export Credits and Credit Guarantees. In addition, NEXI also uses standards established by other international organisations, such as the World Bank Safeguard Policies or International Finance Corporation (IFC), which are similar to those used by MIGA. See NEXI (2017) Guidelines on Environmental and Social Considerations in Trade Insurance, p. 4 and Exhibit 1: Environmental and Social Considerations Required of Covered Projects https://www.nexi.go.jp/en/environment/pdf/ins_kankyou_gl-e.pdf, pp. 8–10.

investors' compliance with the agency's social and environmental standards throughout the life-cycle of the insured projects. Some PRI providers like MIGA, require their insured investors to establish consultative methods with local communities and all other concerned parties and to envisage the creation of grievance procedures in order to receive complaints from affected communities.[83]

NEXI confirms the appropriateness of environmental and social considerations in three stages: screening, social and environmental review, and assurance of environmental and social considerations (post-commitment). NEXI uses a screening process, according to which it implements a detailed review of each project. It reviews whether the potential insured client adopts appropriate environmental and social practices, "so as to prevent or mitigate potential impacts on environment" including "social issues such as involuntary resettlement and respect for the human rights of indigenous peoples".[84] NEXI includes the result of its assessment on the project's environmental and social considerations in its conclusion of an insurance contract, and encourages the project sponsors to take more measures in case there is a high risk of adverse impact on local communities and the environment.[85] If the measures taken are insufficient, NEXI may refuse to conclude the insurance contract.[86] In concluding its assessment process and issuing the insurance contract, NEXI also carries out project reviews requiring the insured client to submit an environmental and social monitoring report once a year[87] and the results of public consultations with all relevant parties.[88] Within the limits of commercial confidentiality, NEXI will disclose the project information in Japanese and English on NEXI's website and invite any third party that is adversely affected by the insured project to raise its objections.[89]

However, there are limitations on the monitoring of the insured investors' compliance with the social and environmental standards established by the insurance agencies. The most important weakness is the irregularity of the monitoring process that is observed in public insurers' practice. The mechanism for monitoring insured projects and their compliance with contractual obligations is inadequate. For example, NEXI's Guidelines do not make any reference to a specific monitoring mechanism. NEXI relies on information provided by the clients based on the monitoring

[83]See MIGA (2013) Policy on Environmental and Social Sustainability www.miga.org/documents/Policy_Environmental_Social_Sustainability.pdf, pp. v–vii, cited in Tan (2015), p. 187.

[84]NEXI (2017) Guidelines on Environmental and Social Considerations in Trade Insurance https://www.nexi.go.jp/en/environment/pdf/ins_kankyou_gl-e.pdf, p. 4 and pp. 8–10.

[85]NEXI (2017) Guidelines on Environmental and Social Considerations in Trade Insurance, NEXI's decisions are mainly based on the applicant's environmental and social impact assessment (ESIA) reports.

[86]NEXI (2017) Guidelines on Environmental and Social Considerations in Trade Insurance, p. 6.

[87]NEXI (2017) Guidelines on Environmental and Social Considerations in Trade Insurance, p. 6 and Exhibit 1: Environmental and Social Considerations Required of Covered Projects, pp. 8–10.

[88]NEXI (2017) Guidelines on Environmental and Social Considerations in Trade Insurance, pp. 9–10 and Exhibit 2.

[89]NEXI (2017) Guidelines on Environmental and Social Considerations in Trade Insurance, p. 7.

that they conduct themselves and mainly confirms the monitoring results through document reviews.[90] Moreover, there is no specific provision for on-site inspections of projects.

Finally, MIGA and some public insurers have created in-house public complaints facilities or an ombudsman, operating independently of the agency's direction.[91] Local communities, or any affected individual, may directly address its complaints to these facilities about the insured projects' adverse social and environmental impact. Similarly, NEXI has incorporated the Objection Procedures on Environmental Guidelines, according to which a third-party that is affected by the insured project can request from NEXI to investigate its complaints.[92] For the investigation of the complaints, NEXI appoints an ad hoc organ (up to two examiners) that is under the direct control of NEXI's chairman, but works independently from the section in charge of the underwriting business.[93]

Nevertheless, NEXI's objection procedures reveal that the examiners' case-by-case function does not constitute a permanent complaints facility similar to those established by the WB Group, which are in-house well-established offices with human and financial resources, operating independently of the agency's direction and vetted with more powers and additional functions, such as audits and mediation.[94]

In general, there are similar limitations where most national PRI providers are concerned. Moreover, all international and public insurers are only eligible to monitor the compliance of the insured projects with regards to the violation of their agency's internal rules, guidelines and standards, but they are not in a position to examine violations of international law which is more inclusive and protective for local communities.[95] However, their operation is considered far more adequate compared to new public insurers from emerging economies or private providers. It has been reported that private insurers do not include any structure of a compliance and grievance mechanism, considering such an approach as unappealing to

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[90]NEXI, What is the purpose of monitoring? How will you respond to the results of monitoring? https://www.nexi.go.jp/en/environment/faq/002406.html.

[91]For example, the Compliance Advisor/Ombudsman (CAO) is an independent facility established for the WB Group. It is responsible for evaluating IFC's and MIGA's compliance with social and environmental standards and for addressing complaints regarding any adverse impact of their operations. OPIC's Office of Accountability (OA) has a similar function, CAO (2014) CAO Operational Guidelines, p. 4. See also, OPIC (2014) Overseas Private Investment Corporation Office of Accountability: Operational Guidelines Handbook for Problem-Solving and Compliance Review Services, p. 3, section 3.1 cited in Tan (2015), p. 188.

[92]NEXI (2017) Objection Procedures on Environmental Guidelines https://www.nexi.go.jp/en/environment/pdf/08b_1.pdf.

[93]NEXI (2017) Objection Procedures on Environmental Guidelines https://www.nexi.go.jp/en/environment/pdf/08b_1.pdf, Articles 17–23.

[94]NEXI (2017) Objection Procedures on Environmental Guidelines https://www.nexi.go.jp/en/environment/pdf/08b_1.pdf, Article 21, which provides that the Examiner serves for a two-year term and may be re-appointed once.

[95]Tan (2015), p. 189.

investors, which prefer to avoid additional screening, and as a competitive advantage over public insurers.[96]

5 Conclusion

With regard to the high possibility of political risks occurring in the energy sector, national and multilateral agencies perform the most crucial task in the protection of energy investments through the provision of various PRI schemes. By purchasing PRI, investors can successfully strengthen their position in the host state by allocating the burden of political risk to third parties (ECAs) that play the role of "prominent victims".

In the case of Japanese energy investments, NEXI, Japan's officially sponsored ECA, plays a dominant role in providing PRI to Japanese nationals, while JBIC is the main public financier of Japanese investments. Similarly, MIGA of the WB Group has the most important role among multilateral agencies in guaranteeing foreign investments made in developing countries against political risks.

NEXI has a unique position in supporting Japanese energy investments by applying tailor-made criteria. NEXI (including JBIC's financing support) has in principle a "nation-based"[97] purpose of supporting the economic and industrial policy of the Japanese Government by promoting and securing Japanese investment projects overseas. Multilateral agencies like MIGA apply more general criteria in order to decide which projects are eligible to receive PRI.[98] As regards PRI schemes, both NEXI and MIGA have deployed a comprehensive set of instruments covering several contingencies of a government's default on its obligations towards its counterparty.

Due to several implications of PRI policies in the governance of energy investments, investors need to consider that signing an insurance contract does not mean eliminating all cases of political risk they may face during a long-term investment project in a foreign country. Especially in relation to energy project financing, a more tailor-made and commercialised approach is required by insurance agencies. Moreover, the effectiveness of PRI protection against political risk not only depends on the insurance policy, but also to a large extent, on the specific contractual arrangement between the investor and the host state or its agencies.

Moreover, subrogation clauses and surveillance instruments constitute an operational and regulatory framework of PRI providers that influences the behaviour of

[96]Gordon (2008), p. 104.

[97]A term borrowed from the non-political concept of "economic nationalism" which is based on the idea of countries supporting their national industries and products at any cost and protecting them against "open competition".

[98]Some of these criteria are related to host states' economic development, privatisation policies, open markets and non-distortion of competition.

host governments towards both the insured investor and their own people. In response, insurance agencies have taken measures for socially and environmentally responsible investments, requiring their insured clients to comply with various social and environmental standards. However, even if these practices are moving in the right direction, their true functionality and effectiveness have not yet been proved.

PRI schemes should represent more of a bottom-up approach to the responsibilisation of energy investments. PRI providers should take advantage of the demand for their services by energy corporations in order to secure better societal and environmental performance. The *sine qua non* condition of verifying the insured clients' compliance with the investment insurance standards is carried out through two indispensable processes, the creation of a regular and specialised monitoring mechanism and the incorporation of a fully independent and permanent public complaints facility. Moreover, if PRI providers manage to increase the local communities' involvement in the monitoring of the insured investor's compliance with various standards, they can reduce the risk of social or environmental damage and enhance the project's viability by creating a more stable investment environment.

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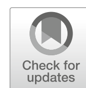
Screening of Foreign Direct Investment and the States' Security Interests in Light of the OECD, UNCTAD and Other International Guidelines



Pascale Accaoui Lorfing

Contents

1 Introduction 180
2 National Security Interest 180
2.1 Risk Identification 181
2.2 Risk Management 182
3 Limits to the National Security Interest 192
3.1 The OECD and Other Guidelines and Principles 192
3.2 Limits Set Out in IIAs 195
3.3 Customary International Law 196
4 Conclusion 198
References 198

Abstract This chapter analyses the concept of the "national security interest", which is widely recognised as allowing a state to determine which areas of its economy are restricted or prohibited to foreign investors. This chapter seeks to identify what constitutes a threat for a state and how that threat is managed both domestically and internationally. Despite the recognition of a state's right to take measures it considers essential to its security, there are limits. The rules established by the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) and other international instruments are non-binding but can serve as a guide for states in determining the limits of the national security approach. International investment agreements can restrict the right of states to take security-related measures. Finally, customary international law, in light of the good faith obligation, can serve as a basis for assessing measures taken by a state and pave the way for a better balance between the rights of a state and those of foreign investors.

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1 Introduction

States seek to protect their economy from foreign investment if the latter poses a threat to their national security. This mechanism takes the form of state measures regarding the access of foreign investment to certain categories of the national economy. Although not new, this mechanism seems to be gaining momentum since 2010. A recent report by the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) has documented the increase in national security measures and has predicted that the trend will continue.[1] Indeed, the liberalisation of the world economy in the 1980s led to an increase in foreign investment. As a result, foreign investment has flown in areas of vital interest to host states, particularly in areas such as energy and infrastructure. This has made recipient countries aware of the fact that such foreign investments can potentially endanger entire economic areas and jeopardise their independence. These foreign investments are therefore likely to be subject to control by the host country.

The term "foreign investment" may refer to private foreign investment, sovereign wealth funds (SWFs) or state-owned enterprises (SOEs),[2] the latter being new categories of institutional investors who are engaged in commercial activities. The difference between private foreign investors and SWFs or SOEs is that the latter are created, controlled and financed by the home state.[3]

National screening measures can have an impact on foreign investment as they can restrict or prohibit foreign investors from investing in strategic sectors. International investment agreements (IIAs) in general, including some of the most recent IIAs,[4] recognise national security concerns and the right of a state to take measures for the protection of its essential security interests. The issue then becomes one of determining what constitutes a legitimate national security interest and its limits. The chapter will consider these two issues in turn.

2 National Security Interest

In order to address legitimate national security interests, a state will identify the risks incurred in relation to the foreign investor (Sect. 2.1) and specify how it intends to manage that risk (Sect. 2.2).

[1] OECD and UNCTAD, Twenty-first Report on G20 Investment Measures, 24 June 2019 ("this development is set to continue in the near future, given firm announcements or plans for further changes in this area in a number of G20 economies", p. 2).

[2] For the differences between SOEs and SWFs, see Bassan (2011), pp. 21–23.

[3] Gilson and Milhaupt Curtis (2009), pp. 345–362; Bassan (2011), pp. 21–23; Sornarajah (2011), pp. 267–288.

[4] This is the case of the Comprehensive Economic and Trade Agreement (CETA) for instance.

2.1 Risk Identification

States identify risks as a threat to their integrity, whether economic or political. Risks may evolve as a host state's environment changes, i.e., as its geopolitical environment and security situation evolve. In the past, threats were related to espionage. Today, threats concern wider areas. They may be related to the military or natural resources. They may also come from control over the acquisition or ownership of certain sensitive assets, or from investments in critical infrastructure, such as electricity and distribution, railways and water supply.[5] Risk can generally be limited to certain vital sectors of a host state or it may relate to natural resources, such as energy. It may also concern transport, fisheries, broadcasting, technology and telecommunications, or other advanced technologies. The last area of risk is related to personal data and companies that control the data.[6]

The identification of a risk may vary from state to state. In Lithuania, for example, sectors considered key to national security are those related to energy, transport, information, technology and telecommunications, finance and credit, and military equipment.[7] In Australia, the sensitive sectors include mining and agricultural land.[8]

Specific risks, however, are associated with SWFs[9] and SOEs[10] and fall into two categories: political risks and economic risks.[11] The political risks stem from the fact that SWFs and SOEs may serve the policy of their home state, and not simply pursue a purely economic objective, leading to the adoption by the host state of specific

[5]For a list of issues or threats covered in selected national security plans, see OECD Study on Security-Related Terms in International Investment Law and in National Security Strategies, OECD 2009, p. 14, Table 2.

[6]Shima (2015), https://doi.org/10.1787/5js7svp0jkns-en.

[7]OECD, Investment Policy related to National Security. Notification by Lithuania, 23 October 2018, DAF/INV/RD (2018), p. 6. https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/INV/RD(2018)6&docLanguage=En.

[8]Australia, "Government Statement: Mining Interests in the Woomera Prohibited Area", Minister of Defence press release, 17 May 2010. "On 17 May 2010, the Minister of Defence (Australia) announced that any prospective mining investment proposals in the Woomera Prohibited Area, a weapon testing range, where foreign involvement is a factor, and requires Foreign Investment Review Board (FIRB) approval, applicants should first seek assessment from the Defence Department before making any application to the FIRB", OECD and UNCTAD, Third Report on G20 Investment Measures, 14 June 2010, Annex 1.

[9]Among many examples, let us mention that of the Kuwait Investment Authority (1982), the Korea Investment Corporation (2005) and the Norwegian Government Pension Fund (2005).

[10]OECD (2018), Ownership and Governance of State-Owned Enterprises: A Compendium of National Practice; OECD, Corporate Governance of SOEs: Guidance and Research, 2011–2017; OECD Corporate Governance Series; OECD (2016), State-Owned Enterprises as Global Competitor: A Challenge or an Opportunity; OECD (2015), OECD Guidelines on Corporate Governance of State-Owned Enterprises.

[11]OECD (2016), Risk Management by State-Owned Enterprises and their Ownership, October 2016.

requirements related to activities of such investors.[12] The economic risks are likely to result from the potential impact of SWFs and SOEs on the host state's, market, which may create financial instability. Foreign investors may become a significant shareholder or owner of a sector of a state's economy. Examples include the purchase of the port of Piraeus by the Chinese company COSCO under the Chinese Belt & Road Initiative (BRI)[13] or, even though less fortunate, if one may say so, the failed attempt by the China National Offshore Oil Corporation to acquire Unocal, a US oil company.[14]

2.2 *Risk Management*

Risks resulting from foreign investment in certain sectors of a host state's economy are therefore managed by the host state. Policies adopted by the host state to protect national interests may be taken at the national level (Sect. 2.2.1) or at the international level (Sect. 2.2.2).

2.2.1 Risk Management at the National Level

A recent OECD-UNCTAD study shows that state policies to "safeguard essential security include a broadening of the scope of transactions that are subject to review—in particular to include assets that provide the acquirer access to sensitive personal data and advanced technology—, an extension of the timeframe for the screening process and a lowering of trigger thresholds to also include smaller investments and stakes".[15] In a first step, this chapter will examine some general screening measures. In a second step, it will consider the recent impact of COVID-19 on screening measures.

[12]France, Décret n° 2019 – 1590 du 31 décembre 2019 relatif aux investissements étrangers en France, JORF, 2 January 2010.

[13]S. Eddi Stones & Mason Hayes, China's Acquisition of Piraeus Port in Greece, as in 2016 COSCO Group & China Shipping Group merged to create China COSCO Shipping, https://is.muni.cz/el/1421/podzim2018/KSCB163/piraeusportpresentation.pdf.

[14]Barboza, Chinese Company Ends Unocal Bid, Citing Political Hurdles, New York Times 2 August 2005. More examples are given by Carney (2018), p. 14.

[15]OECD and UNCTAD, Twenty-first Report on G20 Investment Measures, 24 June 2019. http://www.oecd.org/investment/investment-policy/21st-Report-on-G20-Investment-Measures.pdf.

2.2.1.1 General Screening Measures

A few examples illustrate risk management at the national level.[16] France is one of the states that have already modified their policies. In 2012, France drew a list of sectors requiring prior authorisation for foreign investors.[17] It modified its foreign investment screening mechanism in order to safeguard its essential security interests. In recent legislation, which entered into force on 1 January 2019,[18] France notably restricted access to foreign investors by identifying sectors that require authorisation for foreign investors and reserving the right to refuse a foreign investment.[19] For its part, the revised German Foreign Trade and Payments Ordinance, which entered into force on 29 December 2018, established a revised screening procedure requiring a lower voting threshold for acquisitions by non-European investors and changes to the review procedures in sensitive sectors, such as key infrastructure and defence-related industries.[20] In 2012, Italy set up a review mechanism for transactions in specific sectors (defence or national security, strategic activities in the field of energy, transport and communications)[21] and, in 2019, it extended the list of strategic assets requiring notification to the government of any contract related to the list.[22] Under Federal Law No. 155-FZ of 1 July 2017,[23] the Russian Federation

[16]UNCTAD Report on National Security-Related Screening Mechanisms for Foreign Investment, December 2019, Table 1, pp. 9 and 10. For a survey of country practices related to national security, see Wehrlé and Pohl (2016); For an analysis of EU framework for foreign direct investment control, see Bourgeois (2019); For a detailed analysis of the EU FDI regulatory regime, in particular the German scheme as well as concrete examples of the potential implementation of the screening mechanisms, see Garrod et al. (2020).

[17]France, Décret n°2012-691 du 7 mai 2012 relatif aux investissements étrangers soumis à autorisation préalable, Decree n°2012-691 du 7 mai 2012 relatif aux investissements étrangers soumis à autorisation préalable. OECD, UNCTAD and WTO, Eight Report on G20 Trade and Investment Measures (mid-May to mid-October 2012), 31 October 2012, http://www.oecd.org/daf/inv/8thG20report.pdf, p. 51.

[18]France, Décret n° 2018-1057 du 29 novembre 2018 relatif aux investissements étrangers soumis à autorisation préalable, JORF, 1 December 2018; OECD and UNCTAD, Twenty-first Report on G20 Investment Measures, 24 June 2019.

[19]France, Décret n° 2019 – 1590 du 31 décembre 2019 relatif aux investissements étrangers en France, JORF, 2 January 2010.

[20]Germany, "Investment policy related to national security", Notification by Germany to the OECD, 13 February 2019; Neunte Verordnung zur Änderung der Außenwirtschaftsverordnung, 14 July 2017, OECD and UNCTAD, Twenty-first Report on G20 Investment Measures, 24 June 2019.

[21]Italy, Law of 11 May 2012, n. 56, Gazzetta Ufficiale della Repubblica italiana No. 111, 14 May 2012, OECD and UNCTAD, Eighth Report on G20 Investment Measures, 31 October 2012.

[22]Italy, Law Decree No. 22/2019 of 25 March 2019, passed into law on 13 May 2019, OECD and UNCTAD, Twenty-first Report on G20 Investment Measures, 24 June 2019.

[23]Russian Federation, Federal Law No. 155-FZ of 1 July 2017 on amendments to Article 5 of the Federal Law on Privatization of State and Municipal Property and to the Federal Law on Procedures for Foreign Investment in Business Entities of Strategic Importance for National Defence and State Security, "Amendments to law on the privatisation of state property and on procedures for foreign

excluded certain foreign investors from participating in the privatisation of state and municipal property, while Canada's Guidelines on the National Security Review of Investments (2016) are related to national security and intend to provide greater clarity to existing policies.[24]

In 2008, Australia revised its 1975 Foreign Acquisitions and Takeover Act[25] to add foreign investment control tools and criteria. In 2010, Australia introduced restrictions on investment in the mining sector.[26] In February 2018, it clarified the review process for acquisitions in certain sectors, such as distribution and electricity transmission, and stated, for security reasons, that conditions and restrictions on foreign acquisitions and takeovers may be required on a case-by-case basis.[27] South Africa's Competition Amendment Act 2018 authorises the South African President to "constitute a national security review committee on foreign investments which will conduct mandatory reviews of inward foreign investment to safeguard South Africa's essential security interests. Sectors as well as critical infrastructure assets to which the review mechanism will apply are to be listed".[28]

In the European Union, the Regulation of the European Parliament and of the Council establishing a framework for the screening of foreign direct investment in the Union entered into force on 10 April 2019 and has been fully operational since 11 October 2020.[29] The regulation sets in place a mechanism for the exchange of information between member states enabling them to review a foreign investment for reasons of public order and security. The Regulation also allows the European Commission to give non-binding opinions where a foreign investment may pose a

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investment in business entities of strategic importance for national defence and state security", Presidential Executive Office, 1 July 2017. See also "Amendments to laws on foreign investment and procedure for investing in business entities of strategic importance for national defence", Presidential Executive Office, 19 July 2017. OECD and UNCTAD, Eighteen Report on G20 Investment Measures, 9 November 2017.

[24]Canada, "Guidelines on the National Security Review of Investments" and "Attracting global investments to develop world-class companies", Government of Canada news release, 19 December 2016. OECD and UNCTAD, Seventeenth Report on G20 Investment Measures, 30 June 2017.

[25]Bath (2012), p. 34.

[26]Australia, "Mining Interests in the Woomera Prohibited Area Government Statement", Minister of Defence press release, 17 May 2010; OECD and UNCTAD, Third Report on G20 Investment Measures, 14 June 2010, Annex 1.

[27]Australia, "New conditions on the sale of Australian electricity assets to foreign investors", joint media release, by the Treasurer, the Minister for Home Affairs and The Minister for Immigration and Border Protection, 1 February 2018. OECD and UNCTAD, Nineteenth Report on G20 Investment Measures, 4 July 2018.

[28]South Africa, Competition Amendment Act, 2018; OECD and UNCTAD, Twenty-first Report on G20 Investment Measures, 24 June 2019.

[29]European Union Foreign Investment Screening regulation enters into force, Brussels, 10 April 2019, http://trade.ec.europa.eu/doclib/press/index.cfm?id=2008; European Commission (2018), Screening of Foreign Direct Investment – An EU Framework, https://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157683.pdf. For a critical approach, Bismuth (2018), pp. 45–60. For an analysis of the European Union Policy on foreign investment prior to this Regulation, see Chaisse J (2012)

potential threat to essential security interests of more than one member state or the European Union as a whole.[30]

In August 2018, the US Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA), which expands the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) to review investments or acquisitions by foreign investors in US companies. It does so by including in its jurisdiction new categories of transactions involving foreign investors when matters of national interest are at stake, such as real estate transactions, changes in foreign investor rights and potential foreign control of a US business.[31]

CFIUS' filings related to "critical technologies and in certain industries" are also made mandatory, alongside the voluntary filing system for transactions involving foreign investors.[32] The terms are defined broadly to take account of any situation involving a foreign investment that may be detrimental to the national interest. The Final Regulations implementing FIRRMA came into force on 13 January 2020, as the Treasury Department issued two final regulations implementing changes to CFIUS' jurisdiction and process.[33] The first regulation consists of provisions pertaining to certain investments in the US by foreign persons.[34] The second regulation comprises provisions pertaining to certain transactions by foreign persons involving real estate in the United States.[35]

Moreover, as SOEs and/or SWFs can endanger strategic industries, states have introduced additional screening requirements.[36] In Australia, for example, SOEs are subject to extensive disclosure requirements and their investments subject to prior governmental consent.[37] In the Russian Federation, SOEs are subject to prior

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[30]European Union, Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, Official Journal of the European Union, 21 March 2019. See also European Parliament, Framework for screening of foreign direct investments into the European Union, OJ C 262, 25.7.2018, p. 94; European Parliament legislative resolution of 14 February 2019 on the proposal for a regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union (COM(2017)0487 – C8-0309/2017 – 2017/0224(COD)) OJ C 247, 13.7.2018, p. 28, OECD and UNCTAD, Twenty-first Report on G20 Investment Measures, 24 June 2019. See also Garrod et al. (2020), pp. 345–362.

[31]Larson et al. (2012), pp. 3–23.

[32]Zimmerman (2019), pp. 1267–1303.

[33]See https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius.

[34]Provisions Pertaining to Certain Investments in the United States by Foreign Persons (31 C.F.R. part 800), https://home.treasury.gov/system/files/206/Part-800-Final-Rule-Jan-17-2020.pdf.

[35]Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States (31 C.F.R. part 802), https://home.treasury.gov/system/files/206/Part-802-Final-Rule-Jan-17-2020.pdf.

[36]Lowery (2015), p. 413.

[37]UNCTAD World Investment Report (2018), Investment and new Industrial Policies, esp. pp. 177–179; UNCTAD, Investment Policy Monitor (IPM) Special Issue on National Security-Related Screening Mechanisms for Foreign Investment, December 2019, p. 11.

approval for transactions involving minority shareholdings in domestic enterprises and are prohibited from acquiring majority shareholdings.[38] Similarly, the latest revision of the French legislation on foreign investment requires investors to disclose their links with a foreign state or public body.[39]

2.2.1.2 Recent Impact of COVID-19 on Screening Measures

The COVID-19 outbreak in early 2020 created a public health emergency with social and economic repercussions that caused a major economic shock. The pandemic introduced a potential risk to strategic industries which has led to new considerations related to the protection of citizens at EU level and at national level.[40]

The European Commission recalled the importance of protecting EU citizens, industry and economy by preserving production and value chains, by ensuring the necessary supplies to health systems, jobs and liquidity, and by protecting EU citizens from "predatory buying" of strategic assets by foreign investors.[41] In this context, the European Commission invited EU member states to adopt measures to protect their citizens and industries by providing guidance concerning foreign direct investment flows.[42] Accordingly, the Commission stated that EU member states "*need to be vigilant and use all tools available at Union and national level to avoid that the current crisis leads to a loss of critical assets and technology.* This includes tools like national security screening and other security related instruments. The Commission will guide Member States ahead of the application of the Foreign Direct Investment Screening Regulation".[43]

[38] UNCTAD Investment Policy Monitor (IPM) Special Issue on National Security-Related Screening Mechanisms for Foreign Investment, December 2019, p. 11.

[39] France, Décret n° 2019 – 1590 du 31 décembre 2019 relatif aux investissements étrangers en France, JORF, 2 January 2010.

[40] This is the case in Australia, Italy and Spain, OECD Investment Policy Response to COVID-19, OECD Tackling Coronavirus (COVID-19) Contributing to a Global Effort, 17 April 2020, https://read.oecd-ilibrary.org/view/?ref=129_129922-gkr56na1v7&title=OECD-Investment-Policy-Responses-to-COVID-19, pp. 4–5.

[41] European Commission Communication, Coordinated economic response to the COVID-19 Outbreak, COM (2020) 112 final (13 March 2020) https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf.

[42] European Commission, Communication, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) – 25/3/2020 C (2020) 1981 final https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf.

[43] European Commission, Communication, Coordinated economic response to the COVID-19 Outbreak, COM (2020) 112 final (13 March 2020) https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf, emphasis in original.

At the national level, the Commission encouraged EU member states to use their existing FDI screening mechanisms to counter potential risks related to health infrastructure, supply, and "other critical sectors as envisaged in the EU legal framework".[44] EU member states should also adopt measures to restrict capital movements as needed to protect strategic assets from foreign investors' "predatory buying" pursuant to Article 65(1)(b) of the Treaty on the Functioning of the European Union (TFEU) that establishes the right of member states "to take measures which are justified on grounds of public policy or public security".[45] For state members that do not yet have a screening mechanism[46] and those with a screening mechanism that does not take into account these specific risks, the Commission argues in favour of the creation of "a full-fledged screening mechanism and in the meantime to use all other available options to address cases".[47] The screening mechanism may result either in the prohibition of foreign investment in certain industries or in limiting it, such as by imposing compulsory licences.[48]

India too has introduced restrictions on FDI policy to protect the country from takeovers and/or acquisitions of Indian companies during the COVID-19 pandemic. In this regard, the Government has issued a Press Note setting out restrictions and requiring prior government approval for any investment to be made within Indian territory and prohibiting investment in certain areas (defence, space, atomic energy, . . .).[49]

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[44]European Commission, Communication, Coordinated economic response to the COVID-19 Outbreak, COM (2020) 112 final (13 March 2020), https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf.

[45]Article 65(1)(b) of the TFEU provides: "The provisions of Article 63 shall be without prejudice to the right of Member States [. . .] to take all requisite measures to prevent infringements of national law and regulations [. . .] or *to take measures which are justified on grounds of public policy or public security*", emphasis added.

[46]Sweden and Denmark are among the countries that do not have an FDI screening mechanism.

[47]European Commission, Communication, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) – 25/3/2020 C (2020) 1981 final https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf.

[48]As stated in the Annex to the Guidance, p. 2. European Commission, Communication, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) – 25/3/2020 C (2020) 1981 final https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf.

[49]Press Note 3 (2010 series) dated 17 April 2020 "Press Note: Review of Foreign Direct Investment (FDI) policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic". It amended paragraph 3.1.1 of the 2017 FDI Policy. It establishes restrictions on entities from a country that shares a land border with India, in addition to restrictions imposed on citizens of Pakistan or entities incorporated in Pakistan. Restrictions also apply to the "beneficial owner" of an investment in India who is, however, located in or is a citizen of one of the countries affected by the new measures. Paragraph 3.1.1(a) in its revised version states: "A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities

The link between COVID-19 and the change in approach to FDI is obvious. The new policy aims to protect the state from FDI that may endanger domestic industries, which the state considers to be in its national interest to protect. The tool to be deployed is the screening mechanism. This approach is based on the need to take into account considerations other than economic interests, such as the protection of public health, states' awareness of the threat and the urgency of the measures to be taken in the national interest.

2.2.2 Risk Management at the International Level

The management of the risk of a threat to national security interests is also present at the international level, where two aspects can be taken into account. The first aspect concerns the diverse formulations of what constitutes a threat to a host state as incorporated in IIAs. The second aspect is the variety of approaches adopted by IIAs to address the issue.

2.2.2.1 Various Formulations of "Threat" in IIAs

IIAs refer to a threat to the national security interests of a host state in several ways.[50] Some IIAs, such as the bilateral investment treaty (BIT) between Hungary and the Russian Federation (1995) use the term "national security".[51] Other IIAs, such as the Indian-Singapore Economic Cooperation Agreement (2005) use instead the term "essential security interests".[52] Alternatively, other IIAs use the term "public order"[53] which can also be combined with the term "essential security interests" to point to a threat to national security. This is the choice made by the Recommendation of the OECD Council on "Member country measures concerning National

which are prohibited. However, an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment".

[50]For a very interesting analysis and illustration, see OECD, Study on Security-Related Terms in International Investment Law and in National Security Strategies, 2009. See also Yannaca-Small (2007), p. 98 and Titi (2014), p. 76.

[51]According to Article 2(3) of the Hungary-Russia BIT (1995), the "Agreement shall not preclude the application of either Contracting Party measures, necessary for the maintenance of defence, national security and public order, protection of the environment, morality and public health".

[52]According to Article 6.12(1) of the Indian-Singapore Economic Cooperation Agreement (2005), "[n]othing in this Chapter shall be construed [. . .] to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests".

[53]For the highly complex and varied use of the term "public order", see OECD, Security-Related Terms in International Investment Law and in National Security Strategies, 2009, pp. 8–10.

Treatment of foreign-controlled enterprises in OECD member countries and based on considerations of public order and essential security interests".[54] The German Model BIT (2009) also uses this wording. It provides that "[m]easures that have to be taken for reasons of public security and order, shall not be deemed treatment less favourable within the meaning of this Article".[55] This is also the approach adopted in the Estonia-United States BIT (1994) which states: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests".[56]

2.2.2.2 Variety of IIA Approaches to the Protection of National Interests

In contrast with older generation BITs that do not generally include essential security interests exceptions, recent IIAs tend to do so.[57] The following paragraphs will focus on recent IIAs that provide for the protection of the states' national interests. Two approaches seem to emerge: a broad and a narrow approach.

Host states may adopt a broad approach in the drafting of the provision on national security inserted in an IIA, allowing for a wide range of measures to be covered. For instance, the exception may allow the host state to take measures "for its national interests" without qualifying the policy fields concerned. An example is given by Article 18 on "Essential Security" of the US Model BIT (2012) which states that:

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[54]The recommendation was adopted by the OECD Council on July 16, 1986 at its 646th meeting.

[55]Article 3 of the German Model Treaty (2009) on "National and most-favoured nation treatment" states:

> (a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of Article 3 (2): the management, maintenance, use, enjoyment and disposal of an investment. The following shall, in particular, be deemed "treatment less favourable" within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 3.

[56]Article IX(1) of the Estonia-United States BIT. The same approach was adopted, for example, in Article IX of the Latvia-USA BIT; Article IX of the Poland-USA BIT, Article XII (Reservations of Rights) of the Romania-Egypt BIT; Article 2 of the Russia-Hungary BIT. See Yannaca-Small (2007), p. 116.

[57]On essential security interests exceptions, see Titi (2014), pp. 76 et seq. See also Yannaca-Small (2007), p. 98.

> Nothing in this Treaty shall be construed:
>
> 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
> 2. to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

A broad approach may also provide for the right of a state to take measures for the protection of its national interest in specific fields but in general terms. Article 2 (3) of the BIT between Russia and Hungary, which entered into force in 1996, recognises the right of a state to take measures "necessary for the maintenance of defence, national security and public order, protection of the environment, morality and public health".

Finally, the broad approach is even more evident in cases where security measures are excluded from the scope of the dispute settlement provision. Article 19 of the Austria-Mexico BIT on "Exclusions", gives the following example:

> The dispute settlement provisions of this Part shall not apply to the resolutions adopted by a Contracting party which, for national security reasons, prohibit or restrict the acquisition of an investment in its territory, owned or controlled by its nationals, by investors of the other Contracting party, according to the legislation of each Contracting Party.

This provision establishes in very clear terms that measures adopted by the state in its national interest *and* related to the specific policy decisions are excluded from the scope of the dispute settlement clause. The provision deprives therefore the tribunal of jurisdiction in the circumstances listed. The extraordinary measure taken on grounds of national security which excludes the jurisdiction of the tribunal should be expressly worded to be taken into account.[58]

When the essential security interests provision establishes that the state may take the measures "that it considers necessary" the broad approach gives the state a discretion to determine what is related to its national interest and the exception is deemed to be of self-judging character.[59] The broad wording of a self-judging "national interest" clause raises the question of whether the state has complete discretion in interpreting it. This question has been the subject of debate in the case law and in legal scholarship.[60] Normally, the national security measure will be open to scrutiny by the tribunal according to the test of proportionality, i.e. the

[58] *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 370. *Contra*: Burke-White and von Staden (2008), pp. 381 et seq.

[59] *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 366 ("the State adopting the measures in question is the sole arbiter of the scope and application of that rule, or whether the invocation of necessity, emergency or other essential security interests is subject to some form of judicial review").

[60] As this issue is not developed further in this chapter, we invite the reader to refer for further analysis to Titi (2014), p. 190 et seq.; Schill and Briese (2009), p. 69; Muchlinski (2009), pp. 59 et seq.

reasonableness of the measure in its context,[61] and it will remain subject to a limited good faith review.[62]

Alternatively, host states may take a narrow approach to formulating IIA provisions on the protection of their national security interests. The narrow approach covers exceptions for measures a state takes to protect its "essential security interests" in one or more specific policy fields or sectors. The narrow approach may also define the precise conditions under which the "vital interest" of a state may be invoked, whether, for example, in the military sector or in a specific industry.

An example is provided by Article 18(4)(b) on "General Exceptions" of the Canadian Model BIT (2014) which reads as follows:

> This Agreement does not
>
> (a) prevent a Party from taking an action that it considers necessary to protect its essential security interests:
>
> (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,
> (ii) taken in time of war or other emergency in international relations, or
> (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; [. . .].

The Canadian provision is limited in scope as it identifies areas in relation to which the state may take measures to protect its essential security interests (arms trafficking, during wartime, or nuclear non-proliferation). This provision is of a self-judging character as the state will determine what "it considers necessary" in the enumerated areas. The same approach is taken in Article 2102 of the North American Free Trade Agreement (NAFTA) on "National Security"[63] in Chapter XXI on

[61] Titi (2014), p. 196; Schill and Briese (2009), p. 109.

[62] *LG & E Energy Corp., LG & E Capital Corp., and LG & E International, Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 214 ("Were the Tribunal to conclude that the provision is self-judging, Argentina's determination would be subject to a good faith review anyway"); *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 182 ("If Article XI [of the US-Argentina BIT] granted unfettered discretion to a party to invoke it," this discretion would be subject to "good faith," while preventing a Tribunal "from entering further into the merits"); *Enron Corporation and Ponderosa Assets, LP v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 339 (stating "that Article XI is not self-judging and that judicial review in its respect is not limited to an examination of whether its invocation, or the measures adopted, were taken in good faith").

[63] The same approach is that of Article 2102 of NAFTA on "National Security", which provides: "1. Subject to Articles 607 (Energy – National Security Measures) and 1018 (Government Procurement Exceptions), nothing in this Agreement shall be construed: [. . .] (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment, (ii) taken in time of war or other emergency in international relations, or (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices".

“Exceptions”. Other instruments adopt the same approach such as the General Agreement on Trade in Services (GATS) in Article XIV (bis).[64]

3 Limits to the National Security Interest

Irrespective of the approach chosen, the right of a state to take security-related measures is subject to certain limits. Limits on a state’s power to invoke the national security interest may include those set by the OECD and other guidelines and principles (Sect. 3.1), IIAs (Sect. 3.2) and customary international law (Sect. 3.3).

3.1 The OECD and Other Guidelines and Principles

The OECD has issued a number of instruments with the aim of recommending tools that states can use when they adopt concrete measures based on considerations of public order and essential security interests. The OECD Codes of Liberalisation of Capital Movements (2019) and Liberalisation of Current Invisible Operations[65] expressly recognise the right of each OECD member state to take measures which it considers necessary for the protection of its essential security interests.[66]

Adopted on 21 June 1976, revised periodically and last updated in 2011, the OECD Declaration on International Investment and Multinational Enterprises recalls the importance of multinational enterprises in the field of international investment. The OECD Declaration stresses the need for international cooperation between a host state and multinational enterprises. The principles of transparency, national treatment and consultation must be respected in order to minimise or avoid occasions when host states impose conflicting requirements on multinational enterprises.

Adopted on 16 July 1986, the OECD Recommendation on Member Country Measures concerning National Treatment of Foreign-Controlled Enterprises in OECD Member Countries and based on Consideration of Public Order and Essential Security Interests, recommends transparency of such measures when they are notified to the OECD.[67] This OECD recommendation invites adhering countries to limit the use of national treatment measures for foreign-controlled enterprises to areas

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[64] Article XIV (bis) of the General Agreement on Trade in Services (GATS) states that “[n]othing in this Agreement shall be construed [. . .] to prevent any Member from taking action which it considers necessary for the protection of its essential security interests”.

[65] Article 3 of the OECD Code of Liberalisation of Current Invisible Operations (2019).

[66] Article 3 of the OECD Codes of Liberalisation of Capital Movements (2019).

[67] The OECD Recommendation of the Council on Member Country Measures concerning National Treatment of Foreign-Controlled Enterprises in OECD Member Countries and Based on Considerations of Public Order and Essential Security Interest, OECD/LEGAL/0226 http://legalinstruments.oecd.org.

where public policy and essential security interests are at stake. The Recommendation also invites adhering countries to narrow the scope of these measures by adopting alternative regulations that would allow foreign-controlled enterprises to operate in the host state.

The OECD Recommendation on the National Treatment Instrument also encourages host states to ensure that foreign-controlled enterprises operating in their territory are treated no less favourably than domestic enterprises.[68] Where a host state considers that the foreign investment constitutes a threat to its national security interests, the Recommendation establishes the procedure consisting of (1) a declaration of principle by adhering countries, (2) notification of their exception to the OECD and (3) a monitoring procedure to deal with such an exception within the OECD. Although the National Treatment Instrument is a non-binding voluntary commitment by both adhering and non-adhering countries to the OECD, its purpose is to treat measures taken by a host state in its national interest as an exception. This exception is limited in nature and scope.

In the same vein, the OECD Guidelines for Recipient Country Investment Policies relating to National Security (2009) establish non-binding principles.[69] Their purpose is to set out the exceptional nature of the measure taken in the national interest. The Guidelines also aim to avoid protectionism that may result from the introduction by a state of national policies aimed to safeguard national security interests. The Guidelines, such as the principles of non-discrimination, transparency and predictability, proportionality of measures and accountability of implementing authorities, are intended to guide states in adopting measures in the national interest.[70] The requirement of non-discrimination means that the measures taken must be of "general application" treating "similarly situated investors in a similar fashion" and they must be "taken with respect to individual investments based on specific circumstances of the individual investment which pose a risk to a national security".[71] The requirements of transparency and predictability imply that the measures taken must be made public by all means, whether in a public register[72] or on the internet, with an assessment of the criteria made available to the public. This

[68]The National Treatment's instrument is a non-binding and voluntary undertaking by adhering and non-adhering OECD countries https://www.oecd.org/daf/inv/investment-policy/nationaltreatmentinstrument.htm.

[69]Guidelines for Recipient Country Investment Policies Relating to National Security, Recommendation adopted by the OECD Council on 25 May 2009, and the same text is found in the OECD, Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security, OECD/LEGAL/0372.

[70]OECD, Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security, OECD/LEGAL/0372.

[71]Annex on Guidelines for Recipient Country Investment Policies Relating to National Security, in OECD, Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security, OECD/LEGAL/0372.

[72]As stated in the Annex "*Codification and publication*. Primary and subordinate laws should be codified and made available to the public in a convenient form (e.g. in a public register; on internet). In particular, evaluation criteria used in reviews should be made available to the public".

includes prior notification to the interested party of proposed changes to investment policies, consultation with the other parties, and, at the procedural level, the establishment of strict time limits for the review of foreign investment screening procedures and the protection of commercially sensitive information of foreign investors. Furthermore, disclosure of investment policy measures should be made through press releases, annual reports and/or reports to parliament, bearing in mind the obligation to protect sensitive and classified information.[73]

The requirement of regulatory proportionality means that national security measures must link investment restrictions and risks to national security. It also means that particular attention must be paid to how the national interest exception is drafted and interpreted. As noted above, the broad approach to the provision on security interests gives the state greater flexibility in determining what is necessary to protect its national security. The proportionality requirement is therefore useful as it sets limits and provides guidance that a state should take into account.[74] Finally, a state is accountable to its citizens. The state is also required to adopt international accountability mechanisms and grant foreign investors the possibility of a recourse against it.[75]

In the same vein, the G20 Guiding Principles for Global Investment Policymaking (2016) establish non-binding principles of transparency and coherence, among others, to guide investment policymaking. These instruments recognise the importance for a state to take measures for its national security. As recommendations, they can serve as a guide to states when taking measures to safeguard national security interests in order to limit their impact on investment flows.

Finally, with regard to SWFs, the Santiago Guidelines, also known as Generally Accepted Principles and Practices (GAPP), adopted on 11 October 2008, are a voluntary set of 24 best practice guidelines for SWF operations.[76] Their objective is to maintain (1) a stable global financial system, (2) adequate risk control and (3) a regulatory structure. They are seen as common international standards of transparency, independence and governance that all SWFs can follow.

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[73]OECD, Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security, OECD/LEGAL/0372.

[74]OECD, Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security, OECD/LEGAL/0372.

[75]As stated in the Annex on Guidelines for Recipient Country Investment Policies relating to National Security, in OECD, Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security, OECD/LEGAL/0372: “All countries share a collective interest in maintaining international investment policies that are open, legitimate and fair. Through various international standards, governments recognise this collective interest and agree to participate in related international accountability mechanisms (e.g. the OECD notification and peer review obligations in relation to restrictive investment policies). In particular, these help constrain domestic political pressures for restrictive and discriminatory policies. Recipient governments should participate in and support these mechanisms”.

[76]OECD, Note on Current and Emerging Trends on “Acquisition – and Ownership – Related Policies to Safeguard Essential Security Interests. New Policies to Manage New Threats”, 12 March 2019.

3.2 Limits Set Out in IIAs

Limits to the state's national security interests also derive from the limits set out in international investment agreements. The right of a state to adopt security-related measures is likely to be limited by IIAs. This is particularly true in the absence of a provision on "security interests" in the IIA (Sect. 3.2.1), where the security related provision is narrowly drafted (Sect. 3.2.2) or where state parties exclude certain areas from the provision on "security interests" (Sect. 3.2.3).

3.2.1 The Absence of a Provision on "Security Interests" in IIAs

According to a 2009 UNCTAD study, only a few BITs include a national security interests' exception.[77] The absence of any provision on "security interests" in BITs limits the right of a state to take security-related measures. Accordingly, the impact of the state measure taken for reasons of public interest will be assessed by an arbitral tribunal in the light of the investor protection provisions of the applicable BIT. In other words, the absence of a provision on "security interests" in BITs or free trade agreements (FTAs) with an investment chapter allows the investor to be better protected against state action related to essential security interests.

3.2.2 The Restrictive Wording of the Provision on "Security Interests"

A state's right to adopt security measures is also limited when the security-related exception is drafted in a restrictive manner, such as in the case of the previously-discussed Canadian Model BIT, which limits what may constitute a security interest to trafficking in arms, munitions and war material, and the non-proliferation of nuclear weapons.[78] If a related claim is brought before an arbitral tribunal, the latter will then assess the state measure in light of the wording of the provision of the BIT. Any security-related state measure that is outside the scope of the provision on "essential security interests" will be assessed in light of the standards of protection in IIAs and is likely to lead to state responsibility.

3.2.3 The Limited Application of "Essential Security Interests" to Specific Provisions

A state's right to take security-related measures is ultimately limited by the scope of the treaty's exceptions. For instance, this will be the case when only "expropriation or nationalization or similar measures" are covered by the scope of the treaty's

[77] UNCTAD (2009), p. 72.

[78] Article 18(4)(b) of the Canadian Model BIT (2014).

exceptions, provided that other conditions specified in the clause are met.[79] For example, the China-Philippines BIT states:

> 1. Either Contracting Party may for reasons of national security and public interest, expropriate, nationalize or take similar measures (hereinafter referred to as "expropriation") against investments of investors of the other Contracting party, but the following conditions shall be met:
>
> (1) under domestic procedure;
> (2) without discrimination
> (3) upon payment of fair and reasonable compensation.[80]

Where the state undertakes, in a BIT or FTA, to limit its right to adopt security-related measures to a specific provision, such as that relating to expropriation, it can no longer adopt measures outside the scope of the specific clause without incurring liability.

3.3 Customary International Law

Limitations on a state's adoption of security-related measures also arise under customary international law. Customary international law may play an important role in assessing a state's security-related measures, even in the presence of an essential security interests exception. We will consider the example of the World Trade Organization (WTO) panel report in *Russia – Measures concerning traffic in transit* of 5 April 2019 in the context of a dispute between Russia and Ukraine.[81] The questions dealt with allow for an analogy with the subject of our chapter. The WTO Panel addressed the interpretation of Article XXI(b)(iii) of the 1994 General Agreement on Tariffs and Trade (GATT) on "Security Exceptions",[82] the measures at issue and their existence,[83] whether the measures were "taken in time of war or other emergency in international relations", and whether the conditions of the introductory part[84] of Article XXI(b) of the GATT were satisfied.[85]

With regard to the facts and very briefly, in its dispute with Ukraine, the Russian Federation invoked the national security exception in Article XXI of the GATT concerning restrictions on road and rail transit traffic through the territory of the

[79] See also Article 4 of the Belgian-Luxembourg Economic Union (BLEU)-China BIT (2005).

[80] Article 4 of the China-Philippines BIT (1992).

[81] WTO Panel Report, *Russia – Measures concerning traffic in transit*, 5 April 2019. The Panel was composed of Georges Abi-Saab (Chairperson), Ichiro Araki and Mohammad Saeed (members). As the Panel was composed of eminent members, its reasoning makes it a reference in this matter.

[82] WTO Panel Report, *Russia – Measures concerning traffic in transit*, 5 April 2019, para. 7.5.3.1.

[83] WTO Panel Report, *Russia – Measures concerning traffic in transit*, 5 April 2019, para. 7.5.4.

[84] WTO Panel Report, *Russia – Measures concerning traffic in transit*, 5 April 2019, para. 7.5.3.1.1.

[85] WTO Panel Report, *Russia – Measures concerning traffic in transit*, 5 April 2019, para. 7.5.6.

Russian Federation.[86] The Russian Federation justified the national security exception as being necessary for the protection of its essential security interests. The Panel analysed Article XXI of the GATT in light of the principle of good faith as codified in the Vienna Convention on the Law of Treaties.[87] In the Panel's view, Article XXI of the GATT provides for "essential security interests" in a strict sense, understood as being limited to the "quintessential functions of the state".[88] The Panel further recognises the right of "every member to define what it considers to be its essential security interests".[89] However, the state is not free to raise any concerns as "essential security interests". This right is limited by the principle of good faith[90] which applies, on the one hand, to the interpretation of what constitutes an essential security interest and, on the other hand, to the assessment of the link between the measure and the conditions set out in the provision.[91] Therefore, the obligation of good faith requires that WTO members should not use the exceptions in Article XXI of the GATT as a means of circumventing their obligations.[92] In addition, "the Member invoking the Exception should articulate the essential security interest said [...] sufficiently enough to demonstrate their veracity".[93]

As the Panel's analysis shows, the self-judging security exception is assessed according to the principle of good faith. This implies that the right of a state to invoke the exception can only be admitted in exceptional circumstances. The state must

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[86] Article XXI of the GATT provides:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
  (i) relating to fissionable materials or the materials from which they are derived;
  (ii) relating to traffic in arms, ammunition and implement of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
  (iii) taken in time of war or other emergency in international relations; or
(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

[87] Article 32(1) of the Vienna Convention on the Law of Treaties states 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 the light of its object and purpose".

[88] WTO Panel Report, *Russia – Measures concerning traffic in transit*, 5 April 2019, para. 7.130, p. 56.

[89] WTO Panel Report, *Russia – Measures concerning traffic in transit*, 5 April 2019, para. 7.131, p. 56.

[90] WTO Panel Report, *Russia – Measures concerning traffic in transit*, 5 April 2019, para. 7.132.

[91] WTO Panel Report, *Russia – Measures concerning traffic in transit*, 5 April 2019, para. 7.138.

[92] WTO Panel Report, *Russia – Measures concerning traffic in transit*, 5 April 2019, para. 7.133.

[93] WTO Panel Report, *Russia – Measures concerning traffic in transit*, 5 April 2019, para. 7.134.

ensure there is a link between the measure taken and the conditions set out in the exception. The principle of good faith plays an important role in limiting the manner in which the state may invoke the national security interests exception. As in WTO law, so in investment law, good faith could pave the way for an arbitral tribunal to assess the manner in which a self-judging essential security interests provision is implemented by a state.

4 Conclusion

The foreign direct investment screening mechanism is a national instrument that a state may create to protect what it considers to be a national security interest. This mechanism takes the form of state measures targeting foreign investment relating to certain categories of the national economy by restricting or prohibiting FDI from entering its territory. This mechanism has evolved over the last decade. In the context of the COVID-19 pandemic, the trend became even more pronounced. The right of states to take measures to safeguard their national interests is, however, limited at the international level by IIAs and customary international law because of its possible impact on investors' rights. A narrow drafting of the national interest exception and restrictive review in the light of the principle of good faith could ensure both respect for the exercise of state sovereignty and investor protection and thus pave the way for a better balance between the rights of states and investors.

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